# TRAINING WHEELS NEEDED: BALANCING THE PARENTAL PRESUMPTION, THE BEST INTEREST STANDARD, AND THE NEED TO PROTECT CHILDREN

## Comment

*Lauren Valastro*[*]

## I. NO FAIRY TALE

In June 2010, Dr. Anthony White and his wife Claudia, an elementary school teacher, attempted to gain conservatorship of Meredith, a six-month-old baby girl.[1] When Lesley Jones, Meredith's biological mother, first decided to put Meredith up for adoption, she chose the Whites to become her daughter's new parents. Dr. and Mrs. White were, by any standards, upstanding people, and Ms. Jones later testified that she chose them over other couples because they would provide her daughter with the kind of life, education, and opportunities that she could not provide. Upon Meredith's birth, Ms. Jones allowed the White family to take Meredith, and, as a result, Meredith had lived with the White family her entire life. During the time in which Meredith lived with them, the Whites gave Meredith a secure and nurturing home, and their young daughter, who was a few years older than Meredith, formed a close bond with her new "baby sister."

As they began completing the final steps in Meredith's adoption process, the adoption agency informed the Whites that the agency had committed a procedural error.[2] Due to the adoption agency's error, the adoption failed, and Ms. Jones retained sole managing conservatorship over Meredith. Meredith's

---

* B.A. Political Science; B.A. Spanish, *summa cum laude*, Texas Tech University, 2008; J.D. Candidate, Texas Tech University School of Law, 2012. My thanks go to Shadi Morieras for his unconditional love, support, and encouragement. Thanks also go to Claudia Valastro for her unceasing willingness to discuss even the most minute details, to Grant Miller for giving me the idea for this Comment, and to Kate Cross because a little encouragement at the right time can go a long way.

1. The author has changed the names to protect the privacy of the parties involved.

2. Because Ms. Jones did not name her baby before she gave the baby to the Whites, Meredith, the name given by the Whites, was not the baby's legal name at the time of the petition for custody. The baby had no legal name. During the custody proceedings, the parties referred to her as "Baby Jones" or "Meredith."

biological father, Derek Smith, had previously shown no interest in, nor provided any support for, his daughter. Yet, he did not want Ms. Jones to have conservatorship of Meredith. Although he admitted to drug abuse and was unemployed, Mr. Smith filed suit for conservatorship over Meredith. A three-way conservatorship suit ensued in which the Whites and Mr. Smith sought conservatorship while Ms. Jones sought for the court to place her daughter with the White family or with her.[3]

Because the Texas state district judge decided that Ms. Jones was the better suited of the two natural parents, he then faced a difficult decision. Should he place Meredith with the Whites, the only parents she knew and the people who had cared for her and who undoubtedly would provide for her by giving her a stable, nurturing home, or should he place Meredith with Ms. Jones, who believed that her daughter would be better off with the White family? No clear answer existed in the law.

Texas courts and scholars are presently split regarding whether courts may grant conservatorship of a child to a nonparent without proving that *both* biological parents would be harmful to the child.[4] Several cases support each side, and while the legislature slightly modified the applicable family code provision since the last time the Texas Supreme Court ruled on the issue, the answer remains unclear.[5]

This Comment will explore the present state of joint parent and nonparent conservatorship in Texas. First, Part II.A-B surveys the history of the parental presumption and the best interest standard, both of which are fundamental to Texas family law and the issue in question. Accordingly, this Comment discusses the codification of the parental presumption in former Texas Family Code statute § 14.01 and its interpretations by various courts. Part II.C then addresses how the best interest standard has transformed from a test designed to aid courts in determining the best possible outcome for a child into a lopsided balancing test comprised of the factors used to identify the best outcome for a child and the parental presumption. Part III.A-C discusses the recodification of § 14.01 into § 153.131 and compares the recodified § 153.131 with the language set forth by the Texas Supreme Court's model statute for expanding the application of the parental presumption. Part III.D traces the subsequent split among appellate courts, as well as practitioners and scholars, in interpreting the new statute. Part IV.A, therefore, evaluates possible solutions, including adopting a "psychological parenthood" statute and reaffirming the Texas Supreme Court's interpretation of § 14.01 in *Brook v. Brook*.[6] Although

---

3. Ms. Jones alternatively sought conservatorship of Meredith because she did not want Mr. Smith to have conservatorship.

4. *See infra* Part III.D.1-2.

5. *See infra* Part III.

6. Brook v. Brook, 881 S.W.2d 297 (Tex. 1994), *superseded by statute*, TEX. FAM. CODE ANN. § 153.131(a)-(b) (West 2008), *as recognized in* Critz v. Critz, 297 S.W.3d 464, 471-72 (Tex. App.—Fort Worth 2009, no pet.).

it remains uncertain whether trial courts may grant conservatorship to a parent and a nonparent to circumvent the longstanding presumption that any nonharmful biological parent should have conservatorship of a child, implementing a psychological parent statute would not only supersede the dispute, but it would also give guidance to trial courts seeking to achieve the elusive aim of protecting a child's best interest. Part IV.B discusses present situations in which Texas law, as well as the laws of other states and countries, recognizes concepts similar to psychological parenthood. Part V analyzes common arguments against psychological parenthood and explains why those arguments fail. Finally, Part VI advocates two possible remedies: the reaffirmation of *Brook v. Brook*, the leading case allowing nonparent managing conservatorship without proof that both of a child's parents are harmful, and the codification of a psychological parent statute in Texas.

## II. BALANCE IS KEY: THE HISTORY OF THE PARENTAL PRESUMPTION AND THE "BEST INTEREST" STANDARD IN TEXAS

### *A. The Parental Presumption*

For over a century, Texas law has presumed that a child's best interest is served by placing the child with at least one of the child's biological parents.[7] Courts base this parental presumption on the existence of a "natural affection" between a parent and a child.[8] This presumption requires that a nonparent seeking conservatorship of a child prove by a preponderance of the evidence that the child would suffer significant physical or emotional impairment upon the appointment of a parent as managing conservator.[9] Merely presenting evidence that a nonparent would be a better custodian than a biological parent is insufficient to overcome the parental presumption.[10] Similarly, presenting evidence that a parent would harm the child in a slight or inconsequential manner does not satisfy the significant impairment requirement.[11] To overcome the parental presumption, a nonparent must prove that the child would suffer

---

7. *See* Lewelling v. Lewelling, 796 S.W.2d 164, 166 (Tex. 1990); *see also* Legate v. Legate, 28 S.W. 281, 282 (Tex. 1894) ("Ordinarily, the law presumes that the best interest of the child will be subserved by allowing it to remain in the custody of the parents, no matter how poor and humble they may be, though wealth and worldly advancement may be offered in the home of another.").

8. Taylor v. Meek, 276 S.W.2d 787, 790 (Tex. 1955). *See generally* LINDA ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 1:2 (2010), *available at* Westlaw CCPP (stating that "Anglo-American law has always favored parental custody").

9. *See Lewelling*, 796 S.W.2d at 167; *In re* M.W., 959 S.W.2d 661, 666 (Tex. App.—Tyler 1997, writ denied); *see also* Thomas v. Thomas, 852 S.W.2d 31, 35-36 (Tex. App.—Waco 1993, no writ) (specifying that evidence of "physical abuse, severe neglect, abandonment, drug or alcohol abuse, or very immoral behavior" constitute typical physical or emotional impairment).

10. *See* TEX. FAM. CODE ANN. § 153.131(a) (West 2008); Taylor v. Taylor, 254 S.W.3d 527, 536 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

11. *See* § 153.131(a); *Taylor*, 254 S.W.3d at 536.

physical or emotional harm if the court granted conservatorship to the parent.[12] To meet this burden, the nonparent must point to specific acts or omissions of the parent that support the conclusion that the parent would seriously harm the child, either physically or emotionally.[13] In brief, a nonparent may not simply prove that he or she would better care for a child; the nonparent must also prove that the parent's actions would affirmatively harm the child.[14] In 1973, the Texas Legislature first codified this parental presumption in Texas Family Code § 14.01(a)-(b).[15]

### *B. Texas Family Code § 14.01(a)-(b): The Parental Presumption Codified*

In former Texas Family Code § 14.01(a)-(b), the legislature codified the presumption that placing a child with the child's biological parents serves the child's best interest.[16] Section 14.01(a)-(b), which was later revised in 1995 and recodified into Texas Family Code § 153.131, permitted joint conservatorship between a parent and a nonparent.[17] But, when a nonparent sought sole managing conservatorship, or when two nonparents sought joint managing conservatorship to the exclusion of the biological parents, the nonparents had to prove that the appointment of a child's biological parent would significantly harm the child's health or development.[18] In *Connors v. Connors*, the Second Court of Appeals first enunciated the rule that the higher

---

12. *See* § 153.131(a); *Taylor*, 254 S.W.3d at 536; *In re* C.A.M.M., 243 S.W.3d 211, 215 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). The United States Supreme Court has similarly held that "[e]ven if it were shown, for example, that a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*." Reno v. Flores, 507 U.S. 292, 304 (1993) (citing Quilloin v. Walcott, 434 U.S. 246, 255 (1978)).

13. *See* § 153.131(a); Whitworth v. Whitworth, 222 S.W.3d 616, 649-50 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

14. *See* § 153.131(a); *Whitworth*, 222 S.W.3d at 649-50.

15. *See* TEX. FAM. CODE ANN. § 14.01(a)-(b) (West 1990) (amended 1995) (current version at TEX. FAM. CODE ANN. § 153.131) (West 2008)); Jenkins v. Jenkins, 16 S.W.3d 473, 478 (Tex. App.—El Paso 2000, no pet.).

16. § 14.01(a)-(b).

> **Court Appointment of Managing Conservator**
>
> (a) In any suit affecting the parent-child relationship, the court may appoint a sole managing conservator or may appoint joint managing conservators, and shall order reasonable terms and conditions for the implementation of the managing conservatorship. A managing conservator must be a suitable, competent adult, or a parent, or an authorized agency. If the court finds that the parents are or will be separated, the court shall appoint at least one joint or sole managing conservator.
>
> (b) A parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child unless:
>
> (1) 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 . . . .

*Id.* § 14.01(a)-(b)(1).

17. § 153.131.

18. *See infra* Part II.B.1.

standard did not apply when one or more nonparents sought only joint managing conservatorship with a parent.[19] In cases in which a nonparent sought joint managing conservatorship in addition to a parent, the nonparent only needed to prove that it was in the child's best interest for the court to name the nonparent conservator—showing probable harm by a parent was unnecessary.[20]

### *1. Appellate Interpretations of § 14.01(a)-(b)*

In 1990, the Second Court of Appeals in Fort Worth determined that the requirements of § 14.01 may be met when a parent and a nonparent are joint managing conservators.[21] In *Connors*, the appellant argued that § 14.01(b) required a significant impairment finding regarding one parent; the Second Court of Appeals, however, disagreed.[22] The court concluded that § 14.01 "provides that a managing conservator must be a competent adult *or* parent—that if the parents are to be separated, at least one must be appointed *joint* or sole managing conservator."[23] The court continued by explaining that the statutory provisions clearly "authorize the appointment of a competent adult, along with a parent, as joint managing conservators."[24] In addition, the *Connors* court discussed the Texas Legislature's intent in drafting and passing § 14.01; it concluded that the legislature intended to give trial courts discretion to grant nonparents conservatorship when doing so was in the child's best interest.[25] "[T]he expressed intent of the legislature[,]" the court explained, was for trial courts to have "the power and authority to appoint non-parents as joint managing conservators" with parents.[26]

According to the *Connors* court, § 14.01(b) gave "guidance to the trial court as to which parent should be appointed sole managing conservator, or whether both parents should be appointed joint managing conservators[,]" but it mandated nothing more.[27] That is, nothing in the statute's language required that when both parents were deemed nonharmful that they each were entitled to joint managing conservatorship; as long as the court appointed one parent joint managing conservator, it could then name a nonparent joint managing conservator as well.[28] The Second Court of Appeals additionally evaluated the

---

19. *See* Connors v. Connors, 796 S.W.2d 233, 238 (Tex. App.—Fort Worth 1990, writ denied).

20. *See, e.g.*, *id.* ("Appellant argues that section 14.01(b) requires that a finding be made that appointment of one parent would significantly impair the child's physical health or emotional development before that parent can be eliminated as a sole or joint managing conservator. We disagree.")

21. *Id.*

22. *Id.* For a significant impairment finding, the court must find that conservatorship by either or both of the parents would "significantly impair the child's physical health or emotional development." *Id.*

23. *Id.*

24. *Id.*

25. *See id.*

26. *Id.*

27. *Id.*

28. *See id.*

use of the word "shall" in § 14.01(b) and determined that this instruction was "directory and not mandatory and [that it did] not preclude the appointment of a parent to serve jointly with a non-parent without the statutory finding [because] the main thrust of that section [was] to require the finding only if appointment [was] to be denied to both parents."[29]

In sum, because district courts have the power to determine the terms of conservatorship, including the duration, type, and frequency of visitation, they could ostensibly grant conservatorship to a parent while giving primary conservatorship to a nonparent.[30] *Connors*, therefore, established that courts could circumvent the heightened standard facing nonparents by nominally granting conservatorship to a parent, while granting the bulk of conservatorship to a nonparent.[31] Four years later, in *Brook v. Brook*, the Texas Supreme Court would not only affirm the Second Court of Appeals's decision in *Connors*, but it would also set forth the wording required to give § 14.01 a narrower interpretation.[32]

### *2.* Brook v. Brook*: The Texas Supreme Court's Interpretation of § 14.01(a)-(b)*

In *Brook v. Brook*, the Texas Supreme Court affirmed the Second Court of Appeals's ruling in *Connors*.[33] The court held that each parent did not have the right to be managing conservator, even in the absence of a significant impairment finding.[34] That is, a court satisfied § 14.01(a)-(b)'s requirement by merely naming one parent joint managing conservator.[35] To arrive at this conclusion, the supreme court reasoned that "'a parent' is intended to refer to the opposite of 'no parent' and does not serve to grant to each parent a right to be appointed absent a 'significant impairment' finding."[36] *Brook*, therefore, required a higher standard only in cases in which no parent had joint managing conservatorship.[37] Moreover, the court in *Brook* detailed exactly how the statute should be worded for it to require both parents to have managing

29. *Id.* at 239.

30. *See* Green v. Green, 850 S.W.2d 809, 812-13 (Tex. App.—El Paso 1993, no writ); *see also* Hill v. Hill, 404 S.W.2d 641, 643 (Tex. Civ. App.—Houston 1966, no writ) (holding that the determination of a divorced parent's visitation rights is distinctly within the court's discretion).

31. *See supra* notes 19-29 and accompanying text; *see also* TEX. FAM. CODE ANN. § 153.135 (West 2008) ("Joint managing conservatorship does not require the award of equal or nearly equal periods of physical possession of and access to the child to each of the joint conservators.").

32. *See* Brook v. Brook, 881 S.W.2d 297, 298-99 (Tex. 1994), *superseded by statute*, TEX. FAM. CODE ANN. § 153.131(a)-(b) (West 2008), *as recognized in* Critz v. Critz, 297 S.W.3d 464, 471-72 (Tex. App.—Fort Worth 2009, no pet.).

33. *Id.* at 300.

34. *See id.* at 299-300.

35. *See id.* at 300.

36. *Id.* at 299 n.2.

37. *See id.* at 299-300.

conservatorship in the absence of a significant impairment finding.[38] Delivering the opinion of the court, Justice Doggett carefully explained that while various interpretations could reasonably be set forth regarding § 14.01(b)(1), a narrower interpretation would require the interpolation of the following words into the statute:

> A parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child unless:
>
> 1) the court finds that appointment of **[either]** parent **[as sole managing conservator]** or **[both]** parents **[as joint managing conservators]** would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development.[39]

When statutes are ambiguous or silent on a subject, the court may interpolate words when interpolation is necessary to derive clarity or intent.[40] Justice Doggett cautioned, however, that such interpolation should not occur when inserting words would modify the original intent behind the statute.[41] When a statute's meaning is clear, no justification exists for interpolating words the legislature did not include in the statute.[42] The Texas Supreme Court found that *Brook* was such a case in which interpolation was unnecessary because the insertion of additional language would have contradicted the legislature's intended application of § 14.01.[43] Unfortunately, while the court set forth a viable interpretation of § 14.01 in *Brook*, no court in Texas—or in any other United States jurisdiction—has succeeded in formulating a prevailing definition of the "best interest" standard.[44]

### *C. Deciphering the Best Interest Standard in Texas*

Texas law has long held that when a court determines conservatorship or possession, its primary consideration must always be the best interest of the child.[45] Nineteenth century Texas courts established this standard, but the increasing recognition of parents' fundamental child-rearing rights and the constant enlargement of the parental presumption have chiseled it away over the twentieth century.[46] As such, in Texas, "in the best interest of the child"

---

38. *Id.* at 299 n.2.
39. *Id.* (alterations in original).
40. *Id.* (citing Mauzy v. Legis. Redistricting Bd., 471 S.W.2d 570, 573 (Tex. 1971)).
41. *See id.*
42. *See id.*
43. *See id.*
44. *See infra* notes 51-63 and accompanying text.
45. TEX. FAM. CODE ANN. § 153.002 (West 2008) ("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."); *see In re* M.S., 115 S.W.3d 534, 547 (Tex. 2003).
46. *See* Legate v. Legate, 28 S.W. 281, 282 (Tex. 1894).

does not necessarily equate to what a court deems wholly best for a child.[47] The best interest standard has digressed from its original meaning of that which is wholly best for a child to a murky standard that relies less on what a court deems best for a child than on what the court believes is less offensive to the parents' child-rearing rights.[48] This inconsistency arose from the unnecessary —and conflicting—merger of the best interest standard with the courts' desire to protect parents' child-rearing rights.[49] As a result of this merger, the best interest test in Texas now consists of a two-pronged test comprised of the best interest factors and the parental presumption.[50]

Appellate rulings have established the factors courts may weigh in determining what is in a child's best interest.[51] Some of the most common factors are the following: (1) a child's desires; (2) a child's current and future emotional and physical needs; (3) the possibility that a child may presently or in the future suffer emotional or physical harm; (4) the parental abilities of the person or people seeking primary possession of the child; (5) the assistance available to aid those seeking possession of the child to promote the child's well-being; (6) the plans those seeking possession of the child have in regard to the child; (7) the stability of the respective home those seeking possession of the child would provide; (8) any acts or omissions of the parent that indicate impropriety in the existing parent–child relationship; (9) any justification or excuse for those acts or omissions; (10) the child's need for stability; and (11) the importance of preventing incessant litigation over the conservatorship of the child.[52] Additional factors courts use to determine a child's best interest are "a parent's long-term employment and financial stability" as well as any alcohol or substance abuse on the part of the child's parents.[53] Lastly, courts may also consider a parent's failure to visit the child.[54]

Again, while these factors focus entirely on what would provide the best possible situation for the child whose conservatorship is in dispute, they do not

---

47. *See* Taylor v. Taylor, 254 S.W.3d 527, 536 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

48. *See, e.g.*, *id.*

49. *See, e.g.*, *id.*

50. *See, e.g.*, *id.* at 534-37.

51. *See In re* Vogel, 261 S.W.3d 917, 923-24 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *In re* C.A.M.M., 243 S.W.3d 211, 221 (Tex. App.—Houston [14th Dist.] 2007, pet. denied)); *see also In re* M.P.B., 257 S.W.3d 804, 813-14 (Tex. App.—Dallas 2008, no pet.) (listing factors used to determine the best interest of a child).

52. *In re Vogel*, 261 S.W.3d at 923-24.

53. *Id.* at 925 (citing Thomas v. Thomas, 852 S.W.2d 31, 35 (Tex. App.—Waco 1993, no writ)); *see In re* Walters, 39 S.W.3d 280, 289 (Tex. App.—Texarkana 2001, no pet.). Consideration of a child's best interest may include whether a parent has a dependence on drugs or alcohol. *See In re Walters*, 39 S.W.3d at 289. Courts in other states often consider other factors they determine to be relevant. *See, e.g.*, Ross v. Hoffman, 372 A.2d 582, 593 (Md. 1977). For example, the Court of Appeals of Maryland weighs factors such as the following: "the age of the child when care was assumed by the third party, . . . the intensity and genuineness of the parent's desire to have the child, [and] the stability and certainty as to the child's future in the custody of the parent." *Id.*

54. *In re Vogel*, 261 S.W.3d at 925.

constitute the entire calculus for determining the best interest of a child.[55] The best interest factors comprise only one part of a lopsided, two-pronged test that Texas courts apply in conservatorship determinations.[56] The second prong, which at times is arguably given greater weight than the first prong, is the parental presumption previously discussed in Part II.A-B of this Comment. In sum, under Texas family law, "even when legal parents' decisions are inarguably damaging to their child's psyche and emotional well-being, the decision may nevertheless be labeled [as being in] the child's 'best interest'" because the best interest standard no longer represents what is actually best for a child; instead, it often represents what is best for the child's parent.[57] Notably, in other situations, such as modification hearings, the legislature requires courts to disregard parental rights and focus solely on the child's best interest.[58]

### *D. Applications of the Parental Presumption and the Best Interest Standard at Initial Conservatorship Hearings and Modification Hearings*

Although the parental presumption applies during the initial conservatorship hearing, it does not apply in subsequent proceedings.[59] In fact, different interpretations of the best interest standard exist at various steps in child conservatorship disputes.[60] According to the Texas Supreme Court, Chapters 153 and 156 of the family code are different "statutory schemes" that do not touch upon the same issues; they therefore employ different standards.[61] At the initial hearing, or the Chapter 156 hearing, a nonparent must prove that the appointment of the child's parent or parents would significantly impair the child's health or development before the court may appoint the nonparent as sole managing conservator or two nonparents as joint managing conservators.[62] Parents, however, no longer benefit from the parental presumption after the fact-finder makes the initial child conservatorship decision because the legislature "did not [intend] to apply the [parental] presumption in Chapter 156 modification suits."[63] Policy considerations prohibit courts from applying the parental presumption in Chapter 156 suits.[64] Policy prevents courts from

---

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

56. *See id.*

57. Nicole M. Onorato, Student Article, *The Right to Be Heard: Incorporating the Needs and Interests of Children of Nonmarital Families into the Visitation Rights Dialogue*, 4 WHITTIER J. CHILD & FAM. ADVOC. 491, 505 (2005).

58. *See infra* notes 63-78 and accompanying text.

59. *See In re* V.L.K., 24 S.W.3d 338, 343 (Tex. 2000); David F. Johnson, In re V.L.K. v. Troxel*: Is the "Best Interest" Standard in a Motion to Modify the Sole Managing Conservator Subject to a Due Process or Due Course Challenge?*, 34 ST. MARY'S L.J. 623, 629 (2003).

60. *See In re V.L.K.*, 24 S.W.3d at 343.

61. *See id.*

62. *See id.* at 339-41.

63. *Id.* at 339-40, 343.

64. *See id.*

transferring conservatorship after a child has become accustomed to a certain conservator or living situation.[65] Modification suits are also different from Chapter 153 suits in that they "raise additional policy concerns such as stability for the child and the need to prevent constant litigation in child custody cases."[66]

As the parental presumption loses its weight in modification proceedings, the importance of the best interest factors looms larger.[67] The emphasis the legislature places on the best interest standard in Chapter 156 suits aligns with the longstanding requirement of placing the child's best interest as the primary consideration in conservatorship determinations.[68] Furthermore, this indicates that the legislature did not intend for the courts to expand the parental presumption to its present, overarching state.[69] Had the legislature intended for the parental presumption to supersede the child's best interest as courts' primary consideration in conservatorship determinations, it would not have completely barred the parental presumption from modification suits. Instead, it presumably would have employed the same standard in both initial and modification conservatorship determinations.

In sum, both Texas case law and the Texas Family Code have held that the child's best interest must be the courts' main consideration in conservatorship determinations, while they have also increasingly—and inconsistently, as in the case of the distinction between Chapter 153 and Chapter 156 suits—expanded the parental presumption.[70] This expansion of the parental presumption mires the best interest standard so that it no longer consists of the factors courts use to determine the best possible situation for a child.[71] The lopsided best interest balancing test places greater emphasis on the parental presumption and lesser emphasis on the actual best interest of the child whose conservatorship is in dispute.[72] Following the trend of expanding the parental presumption, courts seized the nonsubstantive recodification of the twenty-two-year-old family code as an opportunity to give the parental presumption an almost irrefutable application.[73] In doing so, they would ignore longstanding Texas Supreme Court precedent.[74]

---

65. *See id.*
66. *Id.*
67. *See id*.
68. *See* sources cited *supra* note 45.
69. *See* TEX. FAM. CODE ANN. § 153.002 (West 2008).
70. *See In re* C.A.M.M., 243 S.W.3d 211, 216 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).
71. *See* Taylor v. Taylor, 254 S.W.3d 527, 536 (Tex. App.—Houston [1st Dist.] 2008, no pet.).
72. *See supra* notes 51-63 and accompanying text.
73. *See infra* notes 119-29 and accompanying text.
74. *See infra* Part III.B-D.

## III. GROWING PAINS: RECODIFICATION OF THE FAMILY CODE

### *A. § 14.01 Becomes § 153.131*

By 1995, the Texas Family Code had undergone so many revisions, amendments, and additions that it had become "erratic" and illogically organized.[75] Accordingly, the legislature performed a massive reorganization of the code.[76] Through this "*nonsubstantive recodification*," § 14.01 became § 153.131.[77] Under § 153.131, a court should appoint a parent as sole managing conservator or both parents as joint managing conservators as long as the appointment of the parent or parents would be in the best interest of the child.[78] In a recent interview, newly appointed Texas Supreme Court Justice and author of the *Texas Annotated Family Code*, Debra Lehrmann, described the recodification of § 14.01 as a result of legislative and judicial mentalities evolving over the past several decades.[79] She said that "the law has progressed" past the mentality that allowed § 14.01 to exist.[80] In addition, she labeled these changes as "positive for society," and, referring to the United States Supreme Court's decision in *Troxel v. Granville*, she explained that as long as both parents are adequate, they should retain conservatorship of their children.[81] In support of her view, Justice Lehrmann cited reduced litigation, children's emotional well-being, and the principle that courts should not determine who the better parent is because such determinations are damaging to all parties involved in litigation.[82]

The question, however, is how much did the legislature intend to change through its "nonsubstantive recodification"?[83] Comparing the language set

---

75. BRANDON D. QUARLES & MATTHEW C. CORDON, LEGAL RESEARCH FOR THE TEXAS PRACTITIONER 218 (2003).

76. *Id.*; *see* TEX. FAM. CODE ANN. § 153.131(a) (West 2008).

77. House Comm. on Juvenile Justice & Family Issues, Bill Analysis, Tex. H.B. 655, 74th Leg., R.S. 1 (1995) (emphasis added); *see* TEX. FAM. CODE ANN. § 14.01 (West 1990) (amended 1995) (current version at TEX. FAM. CODE ANN. § 153.131 (West 2008)); § 153.131(a).

**Presumption That Parent to be Appointed Managing Conservator**

> (a) Subject to the prohibition in Section 153.004, unless 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.
>
> (b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection.

§ 153.131(a)-(b).

78. §§ 153.131(a), .193.

79. Telephone Interview with Justice Debra Lehrmann, Justice, Sup. Ct. of Tex. (Sept. 28, 2010).

80. *Id.*

81. *Id.*; *see* Troxel v. Granville, 530 U.S. 57, 75 (2000).

82. Telephone Interview with Justice Debra Lehrmann, *supra* note 79.

83. House Comm. on Juvenile Justice & Family Issues, Bill Analysis, Tex. H.B. 655, 74th Leg., R.S. 1 (1995); *see* § 153.131(a).

forth in *Brook v. Brook* only a few months before the recodification with the actual recodified statute and determining the application of the word "shall" are vital to understanding how much the legislature intended to change when it recodified § 14.01 into § 153.131.[84]

### *B. Comparing Recodified § 153.131 with the Texas Supreme Court's Model*

According to the Texas Supreme Court in *Brook*, § 14.01 did not require a court to grant both parents conservatorship of a child as long as the court named one parent conservator.[85] In other words, a nonparent did not have to meet the heavy burden the court placed on third parties as long as the nonparent shared conservatorship with a parent.[86] In *Brook*, Justice Doggett outlined what a statute would have to say in order to require that both parents be named conservators:

> A parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child unless:
>
> 1) the court finds that appointment of **[either]** parent **[as sole managing conservator]** or **[both]** parents **[as joint managing conservators]** would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development.[87]

Comparing the model statute with the statute the legislature recodified only one year later shows that the legislature did not intend to significantly alter the original meaning of § 14.01.[88] If the legislature had intended to achieve a different meaning, it only had to insert the language set forth in *Brook*.[89] The legislature, however, did not adopt the Texas Supreme Court's language.[90] Instead, it did little more than rearrange the order of the original § 14.01(a).[91] Section 153.131(a) now states the following:

> Subject to the prohibition in Section 153.004, unless 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

---

84. *See infra* Part III.B-C.

85. Brook v. Brook, 881 S.W.2d 297, 298, 299 n.2 (Tex. 1994).

86. *See id.*

87. *Id.* (alterations in original).

88. *See* § 153.131(a); *Brook*, 881 S.W.2d at 298-99.

89. *See Brook*, 881 S.W.2d at 298, 299 n.2.

90. *Compare* § 153.131(b) (using general terms to describe parental appointment as conservators), *with Brook*, 881 S.W.2d at 298 (using more specific terms to distinguish between one parent as a sole managing conservator or both parents as joint managing conservators).

91. *Compare* § 153.131(b) (generally describing that parents may be conservators), *with* TEX. FAM. CODE § 14.01(a)-(b) (West 1990) (amended 1995) (current version at TEX. FAM. CODE ANN. § 153.131 (West 2008)) (providing an exception for when it would not be in the child's best interest).

> conservator or both parents shall be appointed as joint managing conservators of the child.[92]

The relevant phrase, as set out by Justice Doggett, is: "[T]he court finds that appointment of **[either]** parent **[as sole managing conservator]** or **[both]** parents **[as joint managing conservators]** would not be in the best interest of the child," compared to the actual wording of § 153.131, which is: "[T]he court finds that appointment of the parent or parents would not be in the best interest of the child."[93] The legislature left the critical phrase unaltered; it did not insert the necessary language to achieve an alternative meaning.[94] Instead, it added § 153.131(b), which states: "[I]t is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection."[95] That the legislature intended to require courts to grant both parents conservatorship of a child by adding § 153.131(b) is dubious.[96] If lawmakers had intended such an outcome, they would have likely adopted the language set forth by the Texas Supreme Court only a few months prior to recodification.[97] Considering the lack of legislative history indicating a purpose to modify the statute's meaning and the fact that the recodification was labeled nonsubstantive, the legislature's intent in enacting § 153.131 was likely none other than to restructure an erratic and poorly organized code.[98] Understanding the meaning of the word "shall" further bolsters the conclusion that the legislature did not intend to undermine *Brook*'s precedence.[99]

### *C. What Does "Shall" Really Mean?: Interpreting "Shall"*

"Shall" does not necessarily mean "must."[100] When courts determine statutory issues containing the word "shall," precedent requires them to interpret the legislature's intent.[101] The courts must consequently distinguish whether the word is "mandatory" or "directory."[102] Moreover, no absolute standard exists to aid in determining the legislature's intended application of

---

92. § 153.131(a).
93. *Id.*; *Brook*, 881 S.W.2d at 298, 299 n.2.
94. *See* § 153.131(a).
95. § 153.131(b); *see* House Comm. on Juvenile Justice & Family Issues, Bill Analysis, Tex. H.B. 655, 74th Leg., R.S. 1 (1995).
96. *See infra* notes 133-39 and accompanying text.
97. *See Brook*, 881 S.W.2d at 298-99.
98. *See* § 153.131(a); House Comm. on Juvenile Justice & Family Issues, Bill Analysis, Tex. H.B. 655, 74th Leg., R.S. 1 (1995).
99. *See infra* notes 106-08 and accompanying text.
100. *See* Chisholm v. Bewley Mills, 287 S.W.2d 943, 945 (Tex. 1956).
101. *See id.*
102. *See id.*

the word.[103] In its 1956 decision in *Chisholm v. Bewley Mills*, the Texas Supreme Court set forth the most frequently referenced guidelines for interpreting "shall."[104] In *Chisholm*, the court ruled that no absolute test existed which could aid courts in determining whether a statutory provision was directory or mandatory.[105] Instead, the court explained that "[t]he fundamental rule is to ascertain and give effect to the legislative intent."[106] While the word "shall" is often construed to be mandatory in nature, the court recognized that it is also frequently directory in nature.[107] To determine whether the legislature intended the word "shall" to be directory or mandatory, courts should consider "the entire act, its nature and object, and the consequences that would follow from each construction."[108] Finally, when a provision is "not of the essence of the thing to be done," but is instead included merely with the intention of promoting the proper and orderly application of the statute, then that provision is generally directory in nature.[109]

Following these guidelines, the Second Court of Appeals in *Connors v. Connors* determined that the use of "shall" in § 14.01(b) was directory and not mandatory.[110] The *Connors* court concluded that that use of "shall" did not prohibit the appointment of a nonparent and a parent as joint managing conservators, even without a significant impairment finding.[111] Accordingly, when its history is accounted for and these guidelines are applied to § 153.131, the use of "shall" appears to be directory in nature.[112] In addition, considering the legislature's decision not to adopt the language set out by the Texas Supreme Court to require both parents to have managing conservatorship in the absence of a significant impairment finding, the usage of "shall" in both § 14.01 and § 153.131 is likely no more than suggestive.[113] While ascertaining the proper interpretation of "shall" poses some difficulty, attempting to interpret the entire statute—and the legislature's intent behind recodification—has polarized courts, scholars, and practitioners across Texas.[114]

---

103. *See id.*
104. *See id.*
105. *See id.*
106. *Id.*
107. *See id.*
108. *Id.*
109. *Id.*
110. Connors v. Connors, 796 S.W.2d 233, 239 (Tex. App.—Fort Worth 1990, writ denied).
111. *See id.*
112. *See id.*
113. *See supra* notes 89-112 and accompanying text.
114. *See infra* Part III.D.1-2.

### *D. The Split: Interpretations of § 153.131*

#### *1. Appellate Interpretations*

Although the Texas Supreme Court has not ruled on the meaning of recodified § 153.131, several appellate courts have opined on the statute.[115] In 2009, the Fort Worth Court of Appeals ruled that both parents should be appointed joint managing conservators unless they would be harmful to the child.[116] Yet, the court acknowledged that it could find no legislative intent to modify or overrule *Brook v. Brook*.[117] In fact, in writing the *Critz v. Critz* opinion, Chief Justice John Cayce explained that the court had "found no legislative history beyond the changes made to the current statute after section 14.01 was repealed that expressly indicate[d] that the legislature intended to overrule or nullify *Brook* when it repealed section 14.01."[118] But, the *Critz* court ignored the fact that the newly recodified § 153.131 was almost identical to the previous statute, and it focused almost entirely on the addition of subsection (b), which states that it is "a rebuttable presumption that the appointment of *the parents* of a child as joint managing conservators is in the best interest of the child."[119]

While it remains unclear whether subsection (b) is precedent-overruling—and Justice Livingston, in her dissent, indicated that no specific authority or legislative history supported the proposition that subsection (b) did in fact overrule *Brook*—what is clear is that the *Critz* court misinterpreted the plain language of the statute.[120] Even if it did intend to modify *Brook* to require the appointment of both parents as joint managing conservators, the legislature still abstained from including any language indicating that the appointment of both parents as joint managing conservators must be to the exclusion of all other parties.[121] Hence, even under the broadest interpretation, the recodification of the family code does nothing more than require courts to appoint both parents as joint managing conservators with the nonparent.[122]

In 1999, Justice Ann McClure, a leading expert on Texas family law, wrote an opinion for the Eighth Court of Appeals holding that when a parent and nonparent are appointed joint managing conservators, the parent shall have primary possession unless there is a significant impairment finding.[123] Justice

115. *See* Critz v. Critz, 297 S.W.3d 464, 471 (Tex. App.—Fort Worth 2009, no pet.); Gardner v. Gardner, 229 S.W.3d 747, 752 (Tex. App.—San Antonio 2007, no pet.); *In re* De La Pena, 999 S.W.2d 521, 534-35 (Tex. App.—El Paso 1999, no pet.).

116. *See Critz*, 297 S.W.3d at 471.

117. *See id.* at 471 n.21.

118. *Id.*

119. *Id.* at 471 n.22 (emphasis added); TEX. FAM. CODE ANN. § 153.131(b) (West 2008).

120. *See Critz*, 297 S.W.3d at 479-81.

121. *See id.*

122. *See id.*

123. *See In re* De La Pena, 999 S.W.2d 521, 534-35 (Tex. App.—El Paso 1999, no pet.).

McClure took a harsh stance against the supreme court's decision in *Brook*, arguing that *Brook* "eviscerate[d] the purpose of the statute" and resulted in nothing more than a natural parent's nominal, "paper title" conservatorship.[124] The Eighth Court of Appeals, citing no authority other than § 153.131 itself, then interpreted the statute to require courts to award the parent primary possession when granting joint managing conservatorship to a nonparent and parent.[125] But, in spite of reading in an additional—and perhaps unsupported—requirement, the court nevertheless applied *Brook*.[126]

The Fourth Court of Appeals in San Antonio declined to adopt the Eighth Court of Appeals's interpretation in *De La Pena*.[127] In *Gardner v. Gardner*, the court not only held that *Brook* was applicable law, but it also disagreed with *De La Pena* and held that the parental presumption does not apply to determining primary possession between parent and nonparent joint managing conservators.[128] Furthermore, the *Gardner* court ruled that § 153.131(b) only applies to disputes involving two legal parents—not to disputes between nonparents and parents.[129] In other words, § 153.131 applies when two legal parents are disputing conservatorship between themselves without the involvement of nonparents; in such situations, the court should not decline to grant a nonharmful parent conservatorship.[130] But, following the Texas Supreme Court's precedent in *Brook*, a court may appoint one legal parent and a nonparent as joint managing conservators when two legal parents and a nonparent dispute conservatorship.[131] As such, courts may grant conservatorship of a child to a nonparent without a showing that *both* biological parents would be harmful to the child.[132]

Numerous recent cases have also relied on the Texas Supreme Court's decision in *Brook*, which implies that many appellate courts still regard *Brook* as the controlling law regarding the parental presumption.[133] Moreover, in an unpublished opinion, the Fourteenth Court of Appeals recently explained that the "standard outlined in *Brooks* [sic] [under the former § 14.07] is essentially the current parental presumption under the new section 153.131(a)."[134] Courts

---

124. *Id.* at 535.

125. *See id.* at 534-35.

126. *See id.*

127. Gardner v. Gardner, 229 S.W.3d 747, 752 (Tex. App.—San Antonio 2007, no pet.) ("Accordingly, we decline to adopt the interpretation of section 153.131 . . . followed by the court in *De La Pena.*"). The Seventh Court of Appeals has also seemingly rejected *De La Pena*. *See In re* S.S.G., 208 S.W.3d 1, 4 (Tex. App.—Amarillo 2006, pet. denied).

128. *See Gardner*, 229 S.W.3d at 752.

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *See In re* J.M.W., No. 09-08-00295-CV, 2009 WL 6031287, at *3 (Tex. Mar. 11, 2010) (mem. op.); Whitworth v. Whitworth, 222 S.W.3d 616, 623 (Tex. App.—Houston [1st Dist.] 2007, no pet.); Sotelo v. Gonzales, 170 S.W.3d 783, 788 (Tex. App—El Paso 2005, no pet.).

134. Heiskell v. Kendrick, No. 14-06-00972-CV, 2007 WL 3072002, at *5 (Tex. App.—Houston [14th Dist.] Oct. 23, 2007) (mem. op., not designated for publication).

are not alone in disputing the proper interpretation of the recodified statute.[135] As the *Critz* court interpreted § 153.131 to require "the appointment of *both* parents as joint managing conservators is in the child's best interest," and the *Gardner* court ruled that the *Brook* precedent still applies, Texas legal scholars also disagreed on § 153.131's proper meaning.[136]

### *2. Scholarly Interpretations*

According to the *O'Connors Family Code Plus*, the Texas Supreme Court's ruling in *Brook* remains the controlling law on the application of the parental presumption in conservatorship disputes between parents and nonparents.[137] Similarly, the *Baker's Texas Family Code Handbook* states that recodification did not supersede *Brook*'s precedent.[138] In addition, Judge Koons, the author of the *Handbook of Texas Family Law: A Quick Reference Guide To The Family Code*, states that the parental presumption applies in conservatorship disputes between a parent and a nonparent only when a nonparent seeks sole managing conservatorship to the exclusion of the parent.[139] On the other hand, when a parent and a nonparent both seek joint managing conservatorship, § 153.131 does not require the nonparent to show that the parent would significantly impair the child's health or development.[140] "Such a showing," Judge Koons explains, "is only required in situations in which the non-parent seeks custody in lieu of the natural parent."[141] The parental preference applies when:

> (1) a non-parent seeks to be named sole managing conservator against a parent; or (2) two non-parents seek joint managing conservatorship against a parent, and in either case a higher standard must be satisfied requiring proof that the appointment of the parent or parents would significantly impair the child's health or development. However, the parental preference DOES NOT apply when a parent and non-parent seek to be named as joint managing conservators.[142]

---

135. *See infra* notes 143-45 and accompanying text.

136. *See* Critz v. Critz, 297 S.W.3d 464, 471 (Tex. App.—Fort Worth 2009, no pet.); *Gardner*, 229 S.W.3d at 752; *infra* notes 143-45 and accompanying text.

137. *See* JOAN FOOTE JENKINS & RANDALL B. WILHITE, O'CONNOR'S FAMILY CODE PLUS 412 (2008-2009).

138. LANG BAKER, BAKER'S TEXAS FAMILY CODE HANDBOOK 387 (2010).

139. JUDGE DON KOONS, HANDBOOK OF TEXAS FAMILY LAW: A QUICK REFERENCE GUIDE TO THE FAMILY CODE § 15:5 (2010-2011).

140. *Id.*

141. *Id.*

142. *Id.*

Conversely, other authors, including Justice Lehrmann, follow *Critz* and *De La Pena*.[143] They consequently state that courts should appoint both natural parents as joint managing conservators and that they should award primary possession to the natural parents in cases involving joint managing conservatorships between nonparents and parents.[144] While the correct interpretation of § 153.131 continues to elude courts, scholars, and practitioners, two simple solutions could help to pinpoint the proper interpretation and achieve the legislature's ultimate goal of serving children's best interests.[145]

## IV. AVOIDING BUMPS AND BRUISES: HOW TO ACHIEVE THE BEST INTEREST OF THE CHILD

Although Texas courts have declared the fundamental importance of parental rights, the courts have also established that protecting children's best interests is of the highest importance because children are naturally unable to protect themselves.[146] The United States Supreme Court described "the interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests" that the Court has recognized.[147] Yet, public policy requires Texas courts "to resolve conservatorship disputes in a manner that provides a safe, stable, and nonviolent environment for the child," even if doing so infringes upon the parent's liberty interests.[148] Thus, when a parent's interest in child-rearing competes with the child's need for stability, "the child's interest in stability prevails over the parent's right to primary possession."[149]

As discussed in Part III.D, some Texas courts interpret the parental presumption to allow the courts to nominally grant joint conservatorship to a parent, or both parents, while actually granting primary conservatorship to a nonparent.[150] Yet, under a best interest standard that favors parental rights, courts may not limit parents' possession beyond what is necessary to protect the child's best interest.[151] These contradictory rules hinder courts' conservatorship

143. Telephone Interview with Justice Debra Lehrmann, *supra* note 79. *See generally* LINDA L. ADDISON, TEXAS PRACTICE GUIDE: EVIDENCE § 3:110 (2010) (stating that both natural parents having custody is presumably in the child's best interest); DEBRA LEHRMANN ET AL., TEXAS ANNOTATED FAMILY CODE 869-70 (2010) (citing the *De La Pena* court, which stated that "the parental presumption must apply here").

144. *See generally* LEHRMANN ET AL., *supra* note 143, at 869-70.

145. *See infra* Part VI.

146. *See In re* C.A.M.M., 243 S.W.3d 211, 216 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

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

148. *In re C.A.M.M.*, 243 S.W.3d at 216 (emphasis omitted) (citing TEX. FAM. CODE ANN. § 153.001(a)(2) (West 2002)).

149. *Id.*

150. *See, e.g.*, Critz v. Critz, 297 S.W.3d 464, 471 (Tex. App.—Fort Worth 2009, no pet.).

151. *See* Green v. Green, 850 S.W.2d 809, 812 (Tex. App.—El Paso 1993, no writ); Hill v. Hill, 404 S.W.2d 641, 643 (Tex. Civ. App.—Houston 1966, no writ).

determinations and can result in substandard situations for children.[152] Regardless of which interpretation of § 151.131 eventually prevails, what is clear is that a nonparent seeking conservatorship of a child faces a difficult challenge, despite the nature of the relationship between the nonparent and the child.[153] Under the current best interest standard, courts must focus almost solely on the parental presumption while ignoring the affirmative beneficial actions of nonparents.[154] Similarly, under the *Critz* interpretation of § 153.131, the court must focus on the *negative* actions or omissions of the biological parents while disregarding even a strong parent-like relationship between a nonparent and a child.[155]

Although this conundrum may have multiple possible solutions, brevity and relevance considerations behoove this Comment to consider the two most plausible solutions, both of which it supports in conjunction with one another and individually.[156] The Texas Supreme Court should reaffirm *Brook*'s precedent in light of the recodification of the statute, and the legislature should enact a statute fully recognizing the role that nonparents, like the Whites, often play in children's lives.[157]

### *A. Are You My Mother? In a Way, Yes*

The answer to this relatively new problem has existed for over half a century.[158] Psychological parenthood is one of the most widely embraced methods of accounting for and protecting children's emotional well-being.[159] In fact, "[w]ithin the past [fifteen] years, there has been a slight shift away from total parental autonomy with respect to allowing visitation by nonparents when the child would benefit from the visitation."[160] While statutes affecting grandparents' visitation rights have been enacted in all states, a number of states also allow nonparents who are not biologically related to children, but "who have had some significant relationship with the child," standing to seek

---

152. *See* Taylor v. Taylor, 254 S.W.3d 527, 536 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

153. *See id.*

154. *See supra* notes 51-63 and accompanying text.

155. *See supra* notes 119-22 and accompanying text.

156. *See infra* Part VI.

157. *See infra* Part VI.

158. *See* Lindsy J. Rohlf, Comment, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define "Parent"?*, 94 IOWA L. REV. 691, 699 n.37 (2009) (discussing the 1963 *Yale Law Journal* Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, which was the first legal commentary discussing the psychological parent concept).

159. *See infra* notes 224-25 and accompanying text.

160. ELROD, *supra* note 8, § 7:2. The implementation of the Adoption and Safe Families Act (ASFA) marked a new era in the United States centered on emphasizing the importance of children's rights. *See* Katharine Q. Seelye, *Clinton to Approve Sweeping Shift in Adoption*, N.Y. TIMES (Nov. 17, 1997), http://nytimes.com/ (search "Clinton to Approve Sweeping Shift in Adoption"). Upon the ASFA's enactment, Rhode Island Senator John H. Chafee declared that children's best interests will be prioritized and that "[the United States] will not continue the current system of always putting the needs and rights of the biological parents first." *Id.*

conservatorship.[161] In some situations, such as when a child lives in "familial circumstances" with a nonparent, the nonparent may achieve the status of a "psychological parent" to the child.[162] In order to attain psychological parent status, the child and the nonparent must have a "parent–child bond."[163] Once achieved, only courts can terminate the psychological parent status; in fact, "[w]hen there is a conflict over custody and visitation between the legal parent and a psychological parent, the legal paradigm is that of two legal parents."[164]

### *1. The Psychological Parent*

Psychological parenthood derives from the principle of attachment theory, which was first proposed by psychiatrist John Bowlby in the 1950s.[165] The basic theory stems from the principle that healthy children rely on their caregivers' support in order to develop, and that for such attachments to exist, children must enjoy a stable, consistent, and close relationship with their caregivers.[166] Developmental psychologists have consequently concluded that children who undergo a separation from a primary caregiver are "inevitably and deeply harmed."[167] Moreover, children of all ages—not only young children—suffer psychological damage when separated from their caregivers.[168] "[R]emoving the context of security and uninterrupted support" makes developmental initiatives uncomfortable for children; hence, each separation impairs a child's ability to accomplish age-appropriate developmental tasks.[169] Such disruptions can also increase the risk of poor academic performance, inability to adjust to new situations, low self-esteem, antisocial behavior, and self-isolation.[170]

Further, the gender-indiscriminate emotional and psychological harms that result from separating children from their caregivers can last throughout the children's lives, well past minority and the formative years.[171] For example, children separated from their psychological parents are inadequately equipped, emotionally and psychologically, to handle stressful situations that arise during adulthood.[172] As a result, these children often grow into hostile, depressed, and

---

161. *See* ELROD, *supra* note 8, § 1:2.

162. *Id.* § 7:15 (quoting V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000)).

163. *Id.*

164. *Id.*

165. Onorato, *supra* note 57, at 491, 494; *see* Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 350 (1996).

166. *See* Onorato, *supra* note 57, at 495. While Onorato focuses her work primarily on what she terms "co-parents," this sub-category of psychological parents fits squarely into this Comment's usage of the term psychological or de facto parent. *See id.* at 492.

167. Davis, *supra* note 165, at 347.

168. *See id.* at 353.

169. *Id.* at 352.

170. *See* Onorato, *supra* note 57, at 496.

171. *See id.* at 497.

172. *See id.*

anxious adults.[173] Whether the caregivers are biological or adopted parents does not affect how well they are able to support the children they care for; what matters is that they provide a stable and nurturing relationship that the children realize they can rely on.[174] Thus, developmental psychologists and psychological parent theorists argue that when a child suffers the effects of family disruption, the best interest of the child demands giving "legal recognition and permanence" to the child's psychological parent, or "the adult who, in the immediately preceding period, was most responsible for the child's day to day care and supervision."[175] Doing so not only provides children with the needed stability and continuity but also recognizes their fundamental right to maintain caretaker–child relationships.[176]

In 1995, the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.* set forth a four-part test defining when a nonparent achieves psychological parent status.[177] Other states have adopted this test, but Texas has commonly disregarded it.[178] The Texas Legislature should enact a statue recognizing and protecting the role that a psychological parent may play in a child's life.[179] The legislature should adopt the *In re Custody of H.S.H.-K.* four-part test, which includes the following elements: (1) the legal parent consented to, and fostered, the establishment of a "parent-like" relationship between the nonparent and the child; (2) that the nonparent lived in the same household with the child; (3) that the nonparent undertook parental obligations, assumed a "significant responsibility" for the "care, education and development" of the child, and contributed toward the child's support without expectation of financial repayment; and (4) that the nonparent has assumed a parental role for a sufficiently long period of time to have established a "bonded, dependent relationship parental in nature" with the child.[180]

By enacting psychological parenthood statutes such as the one set forth in *In re Custody of H.S.H.-K.*, lawmakers enable courts to serve children's best interests.[181] In addition, such statutes do not allow any nonparent to achieve psychological parent status.[182] As a safeguard to parental rights, courts generally consider neighbors, caretakers, babysitters, nannies, au pairs, relatives, and family friends ineligible for psychological parent status unless

---

173. *See id.*

174. *See id.* at 494-97.

175. Davis, *supra* note 165, at 354.

176. *See* Onorato, *supra* note 57, at 497.

177. *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995).

178. *See* ELROD, *supra* note 8, § 1:2 (noting other states' treatment of psychological parenthood). *See generally* TEX. FAM. CODE ANN. § 160.201 (West 2011) (enumerating the ways in which the parent–child relationship may be established in Texas).

179. *See generally* Onorato, *supra* note 57, at 497 (describing how separations from caretakers can lead to emotional turmoil in children and how the need for child–caretaker relationships is important to consider).

180. *In re H.S.H.-K.*, 533 N.W.2d at 421.

181. *See supra* notes 167-76 and accompanying text.

182. *See* ELROD, *supra* note 8, § 7:15.

they are literally serving "as one of the child's de facto parents."[183] For example, a nonparent who works as a paid caretaker is ineligible under the third element of *In re Custody of H.S.H.-K.* for receiving compensation, while a relative is generally ineligible under the fourth element for having a familial, but not parental, relationship with the child.[184]

While "family law recognizes a limited scope of caretaker-child relationships," children are not equally discriminate between biologically related and nonrelated caretakers.[185] In other words, children recognize those who care and provide for them without distinguishing whether their caretakers have legal or biological connections to them.[186] Children do not consider the nature of their relationships with others and do not categorize those relationships as legal, biological, or adoptive.[187] They merely respond to and recognize the people upon whom they depend to provide support, care, and nurturing relationships.[188] The heart of the psychological parent doctrine is simply recognizing that situations arise in which a child's best interest lies in maintaining those relationships "that connect them to adults who love and provide for them."[189] Much like psychological parenthood, "de facto parenthood" shares the core concepts embraced by the psychological parent doctrine and enables courts to protect parent-like relationships when doing so is in a child's best interest.[190]

### *2. The De Facto Parent*

"De facto parent" statutes are similar both in elements and in time of origination to psychological parent statutes.[191] Courts in jurisdictions recognizing de facto parent status generally employ three of the four elements used to define psychological parenthood.[192] De facto parenthood requires the "parent-like" relationship fostered by the child's legal parent, the cohabitation of the nonparent and child, and the undertaking of a parental role by the nonparent for a sufficient period of time to form a "bonded, dependent relationship parental in nature" with the child.[193] The third element, however, differs slightly because the de facto element is less stringent.[194] Whereas a psychological parent must undertake parental obligations, assume a "significant responsibility" for the "care, education and development" of the child, and

183. *Id.* § 1:2.
184. *See id.*
185. Onorato, *supra* note 57, at 499.
186. *See id.*
187. *See id.*
188. *See id.*
189. ELROD, *supra* note 8, § 7:15.
190. *See infra* notes 191-204 and accompanying text.
191. *See* Rohlf, *supra* note 158, at 699.
192. *See* ELROD, *supra* note 8, § 7:15.
193. *See In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995).
194. *See generally supra* note 180 and accompanying text.

contribute toward the child's support without expectation of financial repayment, the de facto standard is defined more generally as assuming "parental obligations without expectation of financial compensation."[195] Factors that a court may consider in determining whether a nonparent has achieved de facto parent status include: (1) the legal parent's wishes; (2) the child's wishes as to his or her conservator; (3) the relationship and interaction between the child and parent as well as siblings and other third parties who significantly affect the child; (4) the manner in which the child has adjusted to his or her environment, home, school, and community; (5) the mental and physical health of all parties involved in the litigation; (6) any incidence of domestic violence; (7) the nature of the care and support the de facto parent provides the child; (8) the legal parent's intent regarding the de facto parent; and (9) the circumstances under which the parent-like relationship formed, such as whether the legal parent had previously sought conservatorship and whether the court had prevented the legal parent from seeking conservatorship.[196]

Notably, the American Law Institute (ALI), in its *Principles of the Law of Family Dissolution* publication, expanded the definition of "parent" to include de facto parents.[197] While the majority of states have not adopted the entire set of ALI *Principles*, courts across the country still refer to the *Principles*' treatment of de facto parenthood.[198] Under ALI *Principles* § 2.18, courts should apply the same standard to both legal parents and de facto parents when allocating conservatorship.[199] The *Principles* state that courts should not, however, grant a majority of conservatorship to a de facto parent when a legal parent objects to the allocation and "is fit and willing to assume the majority of custodial responsibilit[ies]," unless the legal parent has not adequately performed an appropriate share of parental responsibilities or the child would be harmed.[200] If either of these two situations arise, which is highly likely in cases in which a nonparent assumes parental responsibilities, a court may then allocate a majority of conservatorship to the de facto parent over the legal parent.[201]

---

195. ELROD, *supra* note 8, § 4:6.

196. *See id.* § 7:2.

197. *See id.* § 4:6. Elrod provides an alternative definition of de facto parenthood:

> A *de facto* parent is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, 1. lived with the child, and 2. for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions . . . regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

*Id.*

198. *See id.*

199. *See id.*

200. *Id.*

201. *See id.*

Again, little difference exists between psychological parenthood and de facto parenthood.[202] "A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support," while a de facto parent is a person who assumes, on a daily basis, "the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care."[203] Accordingly, for the purposes of this Comment's analysis, the term "psychological parent" will be used to embrace the overarching concept of a psychological or de facto parent; this Comment expresses no preference for one concept over the other and, instead, equally encourages the enactment of either type of statute. Not only do psychologists and psychiatrists widely support psychological and de facto parenthood statutes, regardless of nomenclature, but Texas lawmakers and courts have also embraced these concepts through various and widely accepted means.[204]

### *B. A Movement Toward Psychological Parenthood*

For children whose parents do not provide them with dependable, caring interactions, the psychological parent–child relationship is often "essential to healthy emotional and psychological development."[205] Relationships with psychological parents enable children to develop healthy social and intimate relationships through adolescence and into adulthood in spite of the substandard circumstances in which they grow up.[206] Even though Texas has not followed other states' lead and enacted psychological parenthood statutes, it has recognized at least two variations of psychological parenthood in the form of stepparent exceptions and equitable adoption.[207]

#### *1. Stepparent Exceptions: Psychological Parenthood Before Psychological Parenthood Statutes*

Half a century ago, the idea of allowing a man who was not a child's father to have the same legal status as the child's living biological father was not common or accepted.[208] The increase in divorce and remarriage rates in the twentieth century forced states to adapt to citizens' changing needs; thus, lawmakers created "stepparent exceptions."[209] Stepparent exceptions allow a

202. *See id.*
203. *Id.* § 7:2.
204. *See infra* notes 208-25 and accompanying text.
205. Onorato, *supra* note 57, at 498.
206. *See id*.
207. *See infra* notes 208-25 and accompanying text.
208. *See* Vanessa A. Lavely, Comment, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 264 (2007).
209. *See id.*

stepparent to become a child's legal parent without requiring both biological parents to relinquish existing parental rights.[210]

The only difference between the stepparent who nurtures and cares for a child on a daily basis and the psychological parent who may perform an identical role regarding the child is that the stepparent is legally married to one of the child's biological parents while the psychological parent may merely live with the biological parent, possibly for years, without a marriage certificate.[211] Ignoring children's rights in this manner is nothing more than "the state's fervor to reward only those family structures it deems acceptable."[212] Furthermore, under this paradigm, the state arguably punishes children for their parents' and caretakers' nontraditional living arrangements.[213] States that refuse to recognize psychological parenthood are effectively penalizing children for their parents' lifestyle choices.[214] In other words, if a child's mother or father chooses to marry the person with whom he or she lives, then the law protects and upholds the parent–child relationship that exists between the nonparent and the child; but, if the child's parent chooses not to marry, or is restricted from marrying the person with whom he or she lives, the parent-like relationship has no standing under Texas law.[215] Like family code stepparent exceptions, the Texas Probate Code recognizes the almost identical concepts of equitable adoption and adoption by estoppel.[216]

### *2. Equitable Adoption Under the Texas Probate Code*

Psychological parenthood is not a concept foreign to all Texas courts.[217] In fact, the Texas Probate Code and a long line of Texas probate cases have recognized and codified rights issuing from a parent-like relationship between a nonparent and a child.[218] Under the concepts of equitable adoption and adoption by estoppel, when a person undertakes a parental role toward a child and forms a parent-like relationship with the child, the intestacy law will consider that person as the child's parent.[219] Accordingly, a child with no biological or legal adoptive relationship with a nonparent may inherit property from the nonparent.[220] In *Luna v. Estate of Rodriguez*, the Third Court of Appeals in Austin held that a valid equitable adoption occurs when a nonparent

---

210. *See id*.
211. *See id*.; ELROD, *supra* note 8, § 4:6.
212. Onorato, *supra* note 57, at 510.
213. *See id.*
214. *See id.*
215. *See id.*
216. *See infra* notes 217-24 and accompanying text.
217. *See* TEX. PROB. CODE ANN. § 3(b) (West Supp. 2010) (recognizing the concept of adoption by estoppel); Heien v. Crabtree, 369 S.W.2d 28, 28-29 (Tex. 1963).
218. *See* § 3(b); *Heien*, 369 S.W.2d at 28-29.
219. *See* § 3(b); *Heien*, 369 S.W.2d at 28-29.
220. *See* § 3(b). *But see* Trevino v. Garcia, 627 S.W.2d 147, 148-49 (Tex. 1982) (holding that a person may not be awarded managing conservatorship of a child under a theory of equitable adoption).

intends to adopt the child and the child confers affection or like feelings to the nonparent.[221]

If the State of Texas recognizes equitable adoption upon the nonparent's or child's death, how can it refuse to recognize the concept during their lives? The legislature's continued allowance of such an inconsistency is equivalent to declaring that in Texas, property interests outweigh children's best interests. Notably, the United States Supreme Court has already declared that parental rights are "far more precious than any property right."[222] What remains unclear is whether the Texas Legislature also considers children's rights to be more precious than property rights or parental rights. Though Texas only recognizes psychological parenthood through stepparent exceptions and equitable adoption, other states have gone much further in protecting the best interests of children.[223]

### *3. A Statewide Survey*

At least twenty-one states have recognized psychological or de facto parenthood.[224] For example, California, New York, New Mexico, and Oklahoma have adopted psychological parenthood statutes mirroring the elements set forth in *In re Custody of H.S.H.-K*.[225] Hawaii, Illinois, and North Carolina have abolished any preference for biological or legal parents in child conservatorship placements.[226] As a result, those states show no preference for fit biological or legal parents over psychological parents.[227] Much like psychological parenthood statutes, Connecticut, Iowa, New Hampshire, and Vermont have enacted legislation granting gays and lesbians who have no biological ties to children, but who have bonded with the children by

---

221. Luna v. Estate of Rodriguez, 906 S.W.2d 576, 581 (Tex. App.—Austin 1995, no writ).

222. Santosky v. Kramer, 455 U.S. 745, 758-59 (1982).

223. *See infra* notes 224-29 and accompanying text.

224. *See* L.M.S. v. C.M.G., No. CN04-08601, 2006 WL 5668820, at *22 (Del. Fam. Ct. June 27, 2006) (unpublished op.), *rev'd on other grounds*, 2007 WL 5158172 (Del. Fam. Ct. Mar. 30, 2007). Delaware, North Carolina, South Carolina, West Virginia, Oregon, Wisconsin, Kentucky, Michigan, Colorado, Indiana, Maine, Ohio, Pennsylvania, New Jersey, Massachusetts, Alaska, and Rhode Island have recognized some form of psychological parenthood. *See* KY. REV. STAT. ANN. § 403.270 (West 2004); OR. REV. STAT. ANN. § 109.119 (West 2003); *In re* E.L.M.C., 100 P.3d 546, 553 (Colo. App. 2004); King v. S.B., 837 N.E.2d 965, 967 (Ind. 2005); C.E.W. v. D.E.W., 845 A.2d 1146, 1149 (Me. 2004); E.N.O. v. L.M.M., 711 N.E.2d 886, 891-93 (Mass. 1999); V.C. v. M.J.B., 748 A.2d 539, 549 (N.J. 2000); *In re* Mullen, 953 N.E.2d 302 (Ohio 2011); T.B. v. L.R.M., 786 A.2d 913, 917-19 (Pa. 2001); Rubano v. DiCenzo, 759 A.2d 959, 975-76 (R.I. 2000) (recognizing psychological or de facto parenthood). Some states use terminology such as "equitable parent" or "parent by estoppel," but the legal effects are generally equivalent to psychological or de facto parenthood. *See* ELROD, *supra* note 8, §§ 4:6, 7:15.

225. *See* Uniform Parentage Act, N.M. STAT. ANN. §§ 7-703 to -704 (West 2011); Erika K. v. Brett D., 75 Cal. Rptr. 3d 152, 156-57 (Cal. Ct. App. 2008); *In re* Adoption of J.J.B., 894 P.2d 994, 1003 (N.M. 1995); *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995).

226. *See* ELROD, *supra* note 8, §§ 4:6, 7:15; *In re* T.W., 851 N.E. 2d 881, 882-83, 889 (Ill. Ct. App. 2006) (applying Illinois statute granting standing to a third party to seek custody of child where child is not in the physical custody of either of her parents); Mason v. Dwinnell, 660 S.E.2d 58, 65 (N.C. Ct. App. 2008).

227. *See supra* note 226.

undertaking parental roles, standing to file conservatorship suits.[228] While these states' courts and legislatures may not always use the label "psychological parent," they effectively allow nonparents to achieve legal parent status if they qualify under the concept of psychological parenthood.[229] Even though Texas has not joined the movement in protecting children's best interests by recognizing psychological parent relationships, various other countries have acknowledged that the traditional parent concept may not always best encompass and safeguard children's needs.[230]

### *4. A Global Perspective*

Multiple common law and civil law countries have adopted psychological parent statutes.[231] Though many of these issues exist beyond the scope of this Comment, a brief survey illustrates the rapidly and radically changing international interpretations of parenthood.[232] For example, Great Britain now recognizes psychological parenthood, as do Canada, Australia, and New Zealand.[233] These common law countries have determined that some situations arise in which children's best interests cannot be adequately protected only through adoptive and biological parents–child relationships.[234] Even more European Union and Asian countries have also adopted some variation of psychological parenthood or recognition of alternative legal parent statutes, which likely will result in the recognition of psychological parenthood.[235] These changes frequently accompany the expansion of the rights of people who choose nontraditional lifestyles, including surrogates, sperm donors, and gays and lesbians.[236] As nations confront the challenges caused by new familial structures—and the changes caused by artificial forms of conception and nontraditional lifestyles—they must also adapt the concept of parenthood to better fit children's realities.[237]

Many governments in the United States and throughout the world have adapted their traditional concepts of family because they value protecting

---

228. *See* ELROD, *supra* note 8, § 7:15; Fish v. Fish, 939 A.2d 1040, 1047-53, 1078-79 (Conn. 2008); *In re* Knell, 537 N.W.2d 778, 783 (Iowa 1995).

229. *See L.M.S.*, 2006 WL 5668820, at *22; *supra* note 224.

230. *See infra* notes 233-38 and accompanying text.

231. *See* Elizabeth Marquardt, *The Revolution in Parenthood: The Emerging Global Clash Between Adult Rights and Children's Needs*, INST. FOR AM. VALUES, 10-11 (2006), http://www.americanvalues.org/pdfs/parenthood.pdf.

232. *See infra* notes 233-38 and accompanying text.

233. *See* Marquardt, *supra* note 231, at 22-24.

234. *See id.* at 24.

235. *See id.* at 11-12. Ireland, Denmark, and Spain are among the European countries that have adopted legislation broadening the concept of parent. *See id.*

236. *See id.*

237. *See id.* at 22-25 (describing the changing family realities). *But cf. id.* at 31-33 (warning against the far-reaching consequences of the new forms of parenthood and advocating in favor of traditional concepts of marriage and parenthood).

children more than clinging to concepts that no longer encompass all children's realities.[238] Other states, such as Texas, refuse to accept some children's realities and the need to adequately serve those children's best interests.[239] Those states' legislatures and courts often veil their complacency by adulating parental rights or the importance of preserving the archetypal family unit.[240]

## V. "BECAUSE WE SAID SO" DOESN'T CUT IT: WHY ARGUMENTS AGAINST PSYCHOLOGICAL PARENTHOOD AND *BROOK V. BROOK* FAIL

The fear of diminishing parents' fundamental rights to raise their children spurs the strongest opposition against affirming *Brook* and enacting psychological parenthood statutes.[241] Opponents attempt to discredit psychological parenthood by clinging to *Troxel*, the flagship case for parents' fundamental rights, which generally upheld fit parents' rights to control their children's upbringing.[242] Psychological parenthood's adversaries construe *Troxel* to bar legislatures from implementing such statutes.[243] They also attempt to use *Troxel* to bar the type of shared conservatorship by parents and nonparents allowed under *Brook*.[244] In addition, they argue that psychological parenthood statutes and shared conservatorship by parents and nonparents may corrupt the traditional family unit.[245]

### *A. Argument 1:* Troxel v. Granville *Prevents State Interference in Adequate Parents' Child-Rearing Decisions*

In *Troxel*, the Supreme Court held that a Washington court could not compel visitation between children and their grandparents against the will of the children's mother.[246] Such a compulsion, the Court found, violated the mother's due process right to raise her children as she saw fit.[247] The Court concluded that "so 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."[248] Opponents of psychological parenthood and reaffirming *Brook* construe this ruling as an absolute declaration that the state must never interfere in a fit

238. *See supra* notes 234-37 and accompanying text.
239. *See* ELROD, *supra* note 8, § 1:2; *supra* notes 178-79 and accompanying text.
240. *See infra* notes 241-56 and accompanying text.
241. *See infra* notes 246-50 and accompanying text.
242. *See infra* notes 248-53 and accompanying text.
243. *See infra* notes 247-48 and accompanying text.
244. *See infra* notes 248-53 and accompanying text.
245. *See infra* notes 254-62 and accompanying text.
246. *See* Troxel v. Granville, 530 U.S. 57, 68-69 (2000).
247. *Id.*
248. *Id.*

parent's child-rearing decisions.[249] As such, they claim that *Troxel* bars not only the reaffirmation of *Brook*, but also the implementation of psychological parenthood statutes.[250] Adversaries of these measures do not rely on *Troxel* alone; they also claim that such measures should be prohibited because of their potentially corrosive effects on the traditional family unit.[251]

### *B. Argument 2: Corruption of the Already Deteriorating Family Unit*

Opponents of shared conservatorship by parents and nonparents argue that such measures corrupt the family unit.[252] Adversaries point to the typical family unit's radical transformation during the twentieth century, and they claim that shared conservatorship by parents and nonparents could increase the disintegration of the family unit.[253] They contend that shared conservatorship by parents and nonparents discourages the maintenance of the "one biological mother, one biological father" family and that it promotes situations in which children may have three—or even four—parents.[254] Thus, they claim that the possibility that a child may have more than one mother or more than one father offends nature.[255] Furthermore, some adversaries argue that psychological parenthood destroys the family unit and undermines traditional values by aiding gays and lesbians in the adoption process.[256]

Though opponents place great emphasis on *Troxel v. Granville*, analyzing the Supreme Court's plurality decision—and the standard the Court refused to adopt—proves their dependence is misplaced.[257] Similarly, little evidence supports the contention that psychological parenthood causes the deterioration of the family unit.[258] Lawmakers cloak these arguments' lack of substance in their legislative authority, echoing parents' banality of "because I said so."[259]

### *C. Effect of* Troxel v. Granville *on the Psychological Parent Status*

Opponents of psychological parenthood rely too heavily on *Troxel v. Granville* for support of almost unconditional, unmitigated parental rights.[260] While the Court ruled that the State would "normally" have no reason to intervene in the realm of adequate parents caring for their children, it did not

---

249. *See* Johnson, *supra* note 59, at 626-28, 644-46 (citing with approval a Texas court of appeals as holding that the courts may not interfere with the parents' fundamental right of child-rearing).

250. *See id.* at 644-45.

251. *See infra* notes 252-60 and accompanying text.

252. *See* Marquardt, *supra* note 231, at 33.

253. *See id.*

254. *See id.*

255. *See id.*

256. *See id.*

257. *See infra* notes 260-90 and accompanying text.

258. *See supra* notes 165-76 and accompanying text.

259. *See supra* notes 241-45 and accompanying text.

260. *See supra* notes 246-51 and accompanying text.

state that "there will be no reason" or "there will never be a reason" for the State to question even adequate parents' ability to raise their children.[261] The Court declared that "there will *normally* be no reason" for the state to do so.[262] The inclusion of the word "normally" indicates that the Court foresaw situations in which the state should inject itself into the realm in which even fit or adequate parents care for their children.[263]

Admittedly, eight Justices stressed the importance of parents' fundamental rights in raising their children, but at least seven Justices' opinions contain a strong undertone of willingness to recognize nonparents' claims that are more compelling than the grandparents' claims in *Troxel*.[264] In addition, not only did the Court decline to define the parameters of parental rights, but it also placed little import on those rights.[265] Justice O'Connor, writing for the plurality of four, stated only that "at least some special weight" should be given to the mother's parental rights.[266] By giving only "some special weight" to parental rights, the Court effectively refused to place a great weight or emphasis on those rights.[267] Four Justices even reflected an openness to nonparent visitation schemes that would considerably intrude on parents' right to control their children's upbringing.[268]

Moreover, every Justice, with the exception of Justice Thomas, declined to "afford[] parents any significant protection from state intervention."[269] In fact, the Supreme Court had the opportunity to adopt the "harm requirement" standard, similar to the one set out in *Critz v. Critz*, which would require a nonparent to prove that the parent would affirmatively harm the child in order for the nonparent to have standing to seek conservatorship of the child.[270] This standard would have made it difficult for states to intervene in parents' control over their children's upbringing.[271] The Court declined to adopt this standard.[272] Instead, when the Court ruled that parents enjoy the primary authority to decide with whom their children may associate, it also set forth an exception to this general rule.[273] If a nonparent proves the existence of extraordinary circumstances and a substantial relationship with the child that would make visitation in the best interest of the child or would, if terminated, harm the child, then parents no longer have the primary authority to control

---

261. *See* Troxel v. Granville, 530 U.S. 57, 68-69 (2000).
262. *Id.* at 68 (emphasis added).
263. *See id.*
264. Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v Granville, 2000 SUP. CT. REV. 279, 283 (2000).
265. *Troxel*, 530 U.S. at 73.
266. *See id.* at 70; Buss, *supra* note 264, at 283.
267. *Troxel*, 530 U.S. at 70; *see* Buss, *supra* note 264, at 283.
268. *See Troxel*, 530 U.S. at 70; Buss, *supra* note 264, at 283.
269. Buss, *supra* note 264, at 284.
270. *See id.* at 282.
271. *See id.*
272. *See id.* at 282-84.
273. *See* ELROD, *supra* note 8, § 7:2.

their children's upbringing.[274] Had the Court chosen to require proof of harm before parents could lose authority to control their children's upbringing, it would have created a high barrier for nonparents seeking standing to file conservatorship suits.[275] Similarly, the Court could have achieved the same result had it chosen to set forth a different but equally strenuous standard.[276] As it was, the Court declined to create a new standard or adopt the harm requirement standard, and in doing so, it reaffirmed the principle that children's best interests trump a parents' right to control their children's upbringing.[277] Reaffirming the superiority of children's best interests over parental rights constitutes a silent disapproval of the convoluted Texas best interest standard, which, as explained in Part II.C, arguably considers the parents' child-rearing rights as much or more than what is best for the child's well-being.[278]

Again, *Troxel* does not bar psychological parenthood.[279] *Troxel*'s support for parental rights distinguishes it from the proposed psychological parenthood statutes because the Washington statute was extremely broad, granting "any person" standing "at any time" to seek visitation.[280] Psychological parenthood statutes only promote standing for nonparents who have significant parent-like relationships with children.[281] Parent–child relationships do not form between just "any person" and a child; parent–child relationships take time and only form under special circumstances like those in which the nonparent lives with and raises the child.[282] The Court's willingness to allow more compelling nonparent claims under narrower statutes implies that it may look favorably on protecting the rights of nonparents who have parent-like relationships with children.[283]

Finally, in states that recognize psychological parenthood, a court determination that a nonparent is a psychological parent precludes a biological parent's assertion of his or her child-rearing right.[284] In order to satisfy the first element and thereby attain psychological parent status, a legal parent must at some point allow or encourage the psychological parent's relationship with the child.[285] Therefore, the nonparent precludes the parent from asserting a breach of rights by proving the parent's intent to allow the relationship between the nonparent and the child.[286] In other words, parents' child-rearing rights apply

---

274. *See id.*
275. *See* Buss, *supra* note 264, at 283.
276. *See id.*
277. *See* Troxel v. Granville, 530 U.S. 57, 70 (2000); *In re* C.A.M.M., 243 S.W.3d 211, 216 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); Buss, *supra* note 264, at 283.
278. *See supra* Part II.C.
279. *See Troxel*, 530 U.S. at 67.
280. *Id.* (emphasis omitted).
281. *See supra* note 180 and accompanying text.
282. *See supra* notes 180-83 and accompanying text.
283. *See* Buss, *supra* note 264, at 283.
284. *See* ELROD, *supra* note 8, § 7:13.
285. *See id*.
286. *See* Estroff v. Chatterjee, 660 S.E.2d 73, 78 (N.C. Ct. App. 2008).

until the point at which they would harm the child.[287] Parents may prevent psychological parent–child relationships from forming between their children and nonparents, but in cases in which they choose to allow those relationships to form, they cannot at a later time unilaterally terminate those relationships to the children's detriment.[288] Like the *Troxel* argument, the contention that psychological parenthood corrodes the family unit is both unsupported and unpersuasive.[289]

### *D. Preservation and Resuscitation of the Deteriorating Family Unit*

Affirming *Brook v. Brook* and enacting psychological parent statutes will not diminish parents' child-rearing rights or corrupt the family unit.[290] On the contrary, shared conservatorship by parents and nonparents and psychological parenthood statutes enable courts to promote and maintain the family unit while also protecting the best interest of the child.[291] For example, under *Brook*, a child whose psychological parents are not his or her biological parents could benefit from having both biological parents and psychological parents who provide for different, yet equally important, needs.[292] In addition, reaffirming *Brook*'s precedent and recognizing psychological parenthood would encourage gay and lesbian couples to establish and maintain family units.[293] While the one-mother, one-father concept might not apply, children raised by gays and lesbians would no longer effectively lose a parent when the child's parent splits from the partner who has undertaken the role of the child's other parent.[294] Justice Brennan cautioned in *Michael H. v. Gerald D.* that states should not attempt to compel only one traditional definition of "parent" or "family" because some children's circumstances do not correspond with those definitions.[295] He explained his argument as follows:

> We are not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncrasies. Even if we can agree, therefore, that "family" and "parenthood" are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do.[296]

---

287. *See id.*
288. *See id.*
289. *See id.*
290. *See infra* notes 291-98 and accompanying text.
291. *See infra* notes 295-98 and accompanying text.
292. *See supra* notes 38-44 and accompanying text.
293. *See* Onorato, *supra* note 57, at 509-10.
294. *See id.* at 510.
295. *See* Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).
296. *Id.*

Texas courts should heed Justice Brennan's words and protect what little semblance of family some children enjoy—the comfort provided by a loving, nurturing psychological parent who has undertaken the role of a parent.[297] Lawmakers should therefore implement a more expansive interpretation of parenthood to account for the extraordinary circumstances that are many children's realities.[298]

## VI. REMOVING THE TRAINING WHEELS: TIME FOR TEXAS TO RECOGNIZE PSYCHOLOGICAL PARENTHOOD AND REAFFIRM *BROOK V. BROOK*

Prodigious numbers of children in the United States grow up in nontraditional family structures in which they are not cared for by both of their legal or biological parents.[299] In fact, four out of every ten children do not live in a household with their biological mothers and fathers—they live with single parents, with their parents' cohabitants, and with gay and lesbian couples.[300] Although parents and their children generally have a strong natural bond and affection for each other, human experience also indicates that some situations occur in which a person who is not the child's biological parent better cares for the child, and as a result, the child grows to rely on that nonparent's care and affection. Children who benefit from such relationships are fortunate; they are more likely to develop into happy and emotionally healthy adults.[301] Moreover, as these statistics indicate that children are often born into nontraditional situations in which they are not cared for by both of their legal or biological parents, they are presumably more likely than children residing with both parents to establish psychological parent–child relationships.[302]

As such, lawmakers should implement a statutory scheme that is "flexible enough to encompass children's rights to maintain relationships with [psychological parents]" because in children's hearts and minds, their psychological parents stand in parity with their legal parents.[303] Children see the people performing the role of parent as their parents, and Texas law should be capable of subsuming children's realities.[304] The different standards applicable in Chapter 153 modification suits and initial conservatorship proceedings, the stepparent exceptions, and the principle of equitable adoption under the probate code exemplify the Texas Legislature's picking and choosing

297. *See id.*

298. *See infra* Part VI.

299. *See The Decline of Marriage and Rise of New Families*, PEW RESEARCH CTR., 62-64 (Nov. 18, 2010), http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/ (follow hyperlink to view pdf).

300. *Id.* at 62-64.

301. *See* Onorato, *supra* note 57, at 494-97.

302. *See id.*

303. *Id.* at 499.

304. *See id.*

when to acknowledge children's relationships with psychological parents.[305] Lawmakers should end this selectivity and embrace a psychological parenthood statute, such as the one set forth in *In re Custody of H.S.H.-K.*, which firmly protects those relationships.[306]

According to Chief Justice McKeithen of the Ninth District Court of Appeals, nothing in the Texas Family Code prohibits the statutory inclusion of a psychological parent.[307] In fact, no statutory language "excludes a person who shares the role of a parent with the biological parent from having standing as a person with 'actual care, control, and possession' of the child."[308] Only weak and distorted arguments and a "because we said so" mentality prevent the legislature from implementing psychological parenthood statutes.[309] In sum, not only should the Texas Supreme Court reaffirm its ruling in *Brook*, but the Texas Legislature should also enact psychological parenthood statutes recognizing the important role that a psychological parent may play in a child's life. Parents' child-rearing rights are admittedly an important consideration in the conservatorship decision-making matrix, but children's rights to enjoy and benefit from relationships with their psychological parents are vastly more important.[310]

## VII. CONCLUSION

When faced with the decision between placing Meredith with the Whites, the people who had been caring for her, or with Ms. Jones, who believed that her daughter would be better off with the Whites, the judge did what both he and Ms. Jones believed to be in Meredith's best interest. He granted primary managing conservatorship to the Whites, the people who had become Meredith's psychological parents, and joint managing conservatorship to Ms. Jones, her biological mother. By reaffirming *Brook* or enacting a psychological parenthood statute, the Texas Supreme Court or Texas Legislature would allow every child in a similar situation the same opportunity Meredith was given—the opportunity to be raised by all of the people who could best care for her.

---

305. *See supra* Part II.D.

306. *See supra* notes 182-85 and accompanying text.

307. *See In re* K.K.C., 292 S.W.3d 788, 794-95 (Tex. App.—Beaumont 2009, no pet.) (McKeithen, J., dissenting).

308. *Id.*

309. *See supra* Part II.

310. *See supra* notes 149-52 and accompanying text.