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## A Solution to the Murkiness of Nonparent Visitation Rights in Texas

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# A SOLUTION TO THE MURKINESS OF NONPARENT VISITATION RIGHTS IN TEXAS

*Morgan Tauscher\**

## ABSTRACT

*To protect parental rights, Texas law presumes that a child’s parent or parents are in the position to make decisions regarding the best interest of their child. However, Texas courts favor granting nonparent visitation rights, even over parents’ objections, if there is sufficient evidence presented by the nonparent to overcome the presumption. Although Texas law is well-established when considering sufficient evidence to overcome the presumption in nonparent child custody cases, courts are inconsistent about the standards and tests involved in nonparent child visitation cases. There are differences between child custody disputes and visitation disputes, such as the level of parental intrusion and the duties required of the nonparent. Thus, Texas courts should consider certain factors when evaluating a nonparent’s evidence for court-ordered visitation, which differs from the evidence necessary in child custody disputes.*

*This Comment seeks to explore the gaps in Texas law regarding nonparent visitation and resolve, through a factor test, what qualifies as sufficient evidence to overcome the parental presumption in visitation cases. It does so by proposing the same standard of evidence in visitation and child custody disputes to safeguard the fundamental right of parental autonomy. Further, this Comment analyzes the specific factors Texas should consider in creating a factor test that other state legislatures and supreme courts deem relevant in visitation disputes. Implementing a factor test increases the predictability of visitation outcomes, allowing litigants to understand the evidence courts will consider, while still providing flexibility for the courts to analyze each situation involving a nonparent and child on a case-by-case basis.*

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## I. INTRODUCTION

The United States has long recognized that the regulation of certain areas of relationships, including family matters, rests almost exclusively within the jurisdiction of the states. Texas lawmakers created a nonparental child custody framework that gives deference to the decisions of the child's fit parent or parents; however, the law determining whether a nonparent has presented sufficient evidence for visitation time remains unresolved. Although many states address this issue through their legislatures and court systems, no singular framework is acknowledged as most accurately capturing the best interest of the child.

This Comment argues that the “significant impairment” test used by Texas courts to determine whether a nonparent is granted custody of another’s child should also apply in nonparent visitation cases. Even though visitation suits invade less into parental rights than do custody suits, the same standard of evidence should be required to overcome the parental presumption in Texas. Further, to determine whether a nonparent’s evidence overcomes the presumption that the parent acts in the best interest of the child in visitation disputes, the Texas legislature or Texas courts can establish a factor test to provide guidance to lower courts and avoid inconsistencies in rulings. In addition to the *Holley* best-interest factors, specific factors to consider are: (1) the length and quality of the prior relationship between the child and nonparent seeking visitation rights; (2) the specific requests by the nonparent for visitation, such as the quantity of time requested and the distance between the nonparent and child’s homes; as well as (3) the effect that the nonparent’s visitation has in furthering other important relationships in the child’s life, such as the child’s bonds with siblings and other relatives.

This Comment will explore the present state of nonparent visitation rights when a parent or parents are deemed “fit.” First, Part I discusses the history of the parental presumption and the best-interest standard, both of which are critical components in all child custody and visitation cases in Texas. This Comment will address the parental presumption as described within the Texas Family Code, general interpretations by Texas courts for expansion of the presumption, and how the best-interest factors are relevant in child disputes. Part II explains the Texas law regarding nonparent standing and the recent Texas court decisions expanding the parental presumption to specific nonparent dispute situations. Finally, Part III analyzes the evidence required to overcome the presumption that fit parents’ decisions are in the best interest of a child when a nonparent, who acts as a parent, seeks visitation. To evaluate the degree of evidence necessary, this Comment will look at specific factors other state legislatures and supreme courts deem relevant in visitation disputes that Texas would benefit from considering.

## II. THE HISTORY OF TEXAS CHILD CUSTODY AND VISITATION DISPUTES

### A. PARENTAL PRESUMPTION

Historically, Texas law presumed that the best-interest-of-the-child standard is served by awarding custody to at least one of the child’s biological parents.<sup>1</sup> The U.S. Supreme Court first recognized the constitutionally-protected right of parents to raise their children in 1923 in *Meyer v. Nebraska*,<sup>2</sup> and more recently stated that this right is “perhaps the old-

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

2. *See* 262 U.S. 390, 401 (1923).

est of the fundamental liberty interests recognized by this Court.”<sup>3</sup> Under common law, a parent or parents could allow nonparent visitation with their child; however, many courts declined to award visitation rights against the parents’ wishes because nonparent and parent conflict was contrary to the well-being of the child.<sup>4</sup> More recently, Texas courts have favored granting nonparent visitation rights—even over parents’ objections—if the nonparent presents sufficient evidence to overcome the presumption that the child’s parent or parents are able to make decisions in the best interest of their child.<sup>5</sup>

### 1. *The Creation of Standing for Nonparents in Child Disputes*

The Texas Legislature established standing for a nonparent in a parent-like role in a provision the Texas Family Code,<sup>6</sup> the constitutionality of which was later upheld by the Texas Supreme Court.<sup>7</sup> This provision allows nonparents to bring original or modification suits regarding child custody and visitation matters.<sup>8</sup> In interpreting the Texas Family Code statute, the Texas Supreme Court held that standing for a nonparent in a parent-like role is established if, for the requisite six-month period, “the nonparent served in a parent-like role by (1) sharing a principal residence with the child, (2) providing for the child’s daily physical and psychological needs, and (3) exercising guidance, governance, and direction similar to that typically exercised on a day-to-day basis by parents with their children.”<sup>9</sup> The court further explained that the “relationship that develops over time between a child and a person who serves in a parent-like role . . . justifies allowing that person to seek to preserve involvement in the child’s life.”<sup>10</sup>

### 2. *Parental Presumption in Original Custody and Visitation Suits*

In *Troxel v. Granville*, the U.S. Supreme Court emphasized that the Constitution, specifically the Due Process Clause of the Fourteenth Amendment, protects “the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”<sup>11</sup> To protect that right, a plurality in *Troxel* applied “a presumption that fit parents act in the best interests of their children,”<sup>12</sup> and thus, the pre-

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3. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).

4. Lorri Ann Romesberg, Note, *Common Law Adoption: An Argument for Statutory Recognition of Non-Parent Caregiver Visitation*, 33 SUFFOLK U. L. REV. 163, 166–67 (1999) (first citing *Veazey v. Stewart*, 472 S.W.2d 102, 103 (Ark. 1971); then citing *Odell v. Lutz*, 177 P.2d 628, 629 (Cal. Dist. Ct. App. 1947); and then citing *In re Marriage of Freel*, 448 N.W.2d 26, 27–28 (Iowa 1989)).

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

6. *Id.* at 155–56, 160 (citing TEX. FAM. CODE ANN. §§ 102.003(a)).

7. *Id.* at 161–63.

8. FAM. §§ 102.003(a)(9), 156.002(b).

9. *In re H.S.*, 550 S.W.3d at 160; accord FAM. § 102.003(a)(9).

10. *In re H.S.*, 550 S.W.3d at 159.

11. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion).

12. *Id.* at 68.

sumption is served “by awarding” the child to the parent.<sup>13</sup> Additionally, the Court held that:

[S]o long as a parent adequately cares for his or her children (*i.e.*, [the parent] is [deemed] 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.<sup>14</sup>

The Court explained that “the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”<sup>15</sup>

A statutory provision in the Texas Family Code creates a presumption that the parents should be managing conservators or that one parent should be a sole managing conservator of the child.<sup>16</sup> Managing conservatorships give the conservator the right to make decisions regarding the child, including residential and educational decisions.<sup>17</sup> However, no presumption exists that one fit parent is favored over another fit parent.<sup>18</sup> The test to determine the evidence required to overcome the presumption is similar for both the nonparent standing statute in original managing conservatorship disputes,<sup>19</sup> as well as the narrower grandparent standing statute in possessory conservatorship disputes.<sup>20</sup> Possessory conservatorship gives the person court-ordered possession of or access to the child, often referred to as visitation.<sup>21</sup> In Chapter 153 of the Texas Family Code, governing original child disputes, a nonparent seeking managing conservatorship of the child must demonstrate that the appointment of the child’s parents or parent would not be in the best interest of the child, because the appointment “would significantly impair the child’s physical health or emotional development.”<sup>22</sup> Likewise, a court may award a grandparent possession of or access to a child over a parent’s objection only if the grandparent overcomes the presumption that a parent acts in the child’s best interest by proving that the denial of possession of or access to the child would significantly impair the child’s physical health or emotional well-being.<sup>23</sup> Even if the nonparent is unable to overcome the parental presumption to establish managing conservatorship, the court may still name the nonparent as a possessory conservator, entitling the

13. *In re C.J.C.*, 603 S.W.3d 804, 812 (Tex. 2020) (quoting *Taylor v. Meek*, 276 S.W.2d 787, 790 (Tex. 1955)).

14. *Troxel*, 530 U.S. at 68–69.

15. *Id.* at 65–66.

16. TEX. FAM. CODE ANN. § 153.131(a).

17. *Id.* § 153.132(1), (7); *see also id.* § 101.016 (defining “joint managing conservatorship”).

18. *See id.* § 153.131.

19. *Id.* § 102.003(a)(9).

20. *Id.* § 153.433(a)(2).

21. *See id.* §§ 152.102(16), 153.006.

22. *Id.* § 153.131(a); *M.A.R.G. v. Tex. Dep’t of Fam. & Protective Servs.*, No. 03-20-00413-CV, 2020 WL 7294610, at \*6 (Tex. App.—Austin Dec. 11, 2020, no pet.) (mem. op.).

23. FAM. § 153.433(a)(2).

nonparent to court-ordered visitation with the child.<sup>24</sup>

The plain language of Texas Family Code under section 153.131(a) “does not necessarily require proof of a parent’s blameworthy conduct as a prerequisite to appointment of a nonparent as managing conservator.”<sup>25</sup> The evidence must “support the logical inference that [the parent’s] specific identifiable behavior or conduct . . . will probably cause that harm” based on recent or past conduct.<sup>26</sup> Further, the evidence must do more than “merely raise a suspicion or speculation of possible harm” to the child.<sup>27</sup> Presenting evidence that a nonparent would be a better custodian than a biological parent is insufficient to overcome the parental presumption in child disputes.<sup>28</sup> In addition, evidence that a parent may harm the child in a slight manner also does not satisfy the requirements for overcoming the parental presumption.<sup>29</sup> Thus, “the non-parent must offer evidence of specific acts or omissions of the parent that demonstrate [that] award[ing] . . . custody to the parent would result in physical or emotional harm to the child” to overcome the presumption.<sup>30</sup> Although the most common way nonparents overcome the parental presumption is by proving the unfitness of the parent, courts give other examples of ways nonparents can overcome this presumption, such as if the parent abandons or deserts the child or displays behavior “so immoral as to be detrimental to the child.”<sup>31</sup>

### 3. Parental Presumption in Modification Custody and Visitation Suits

Although the Texas legislature has seen fit to include an express parental presumption in Chapter 153 of the Texas Family Code to govern original proceedings, there is no express parental presumption in Chapter 156, which governs modification suits.<sup>32</sup> The Texas Supreme Court concluded in *In re V.L.K.* that because the state legislature did not express its intent to apply the presumption in Chapter 156 modification suits, the presumption does not apply.<sup>33</sup> The court noted that original and modification proceedings are governed by separate statutory schemes and involve different issues, so varying standards and burdens of proof should ap-

24. *Shook v. Gray*, 381 S.W.3d 540, 543 (Tex. 2012) (per curiam).

25. *In re R.T.K.*, 324 S.W.3d 896, 902 (Tex. App.—Houston [14th Dist.] 2010, pet. denied); see also *In re G.R.W.*, 191 S.W.3d 896, 900 (Tex. App.—Texarkana 2006, no pet.) (“[E]ven without evidence establishing any blameworthiness of the parent, the parental presumption can be rebutted by other evidence establishing the statutorily required negative effect of the child.”).

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

27. *In re B.B.M.*, 291 S.W.3d 463, 467 (Tex. App.—Dallas 2009, pet. denied).

28. *Taylor*, 254 S.W.3d at 536 (citing *Whitworth v. Whitworth*, 222 S.W.3d 616, 623 (Tex. App.—Houston [1st Dist.] 2007, no pet.)).

29. *Id.*

30. *Id.*

31. *Neely v. Welch*, 2014-CA-01022-COA (¶ 20), 194 So. 3d 149, 156 (Miss. Ct. App. 2015).

32. *In re V.L.K.*, 24 S.W.3d 338, 341–42 (Tex. 2000) (citing TEX. FAM. CODE ANN. §§ 156.101(a)).

33. *Id.* at 343.

ply.<sup>34</sup> Without an express provision, the court found that the legislature did not intend to extend the presumption; thus, parents no longer enjoyed the benefit of the parental presumption applying in modification disputes.<sup>35</sup> Further, the court justified limiting the presumption to original suits because extending the presumption would raise policy concerns.<sup>36</sup> Specifically, extending the presumption might cause instability and hinder efficiency with increased, constant litigation in the court system.<sup>37</sup>

However, in 2020, the Texas Supreme Court found that the parental presumption applies in *any* proceeding where, over the child's fit parent's objection, a nonparent seeks conservatorship or access to the child.<sup>38</sup> The court determined that the trial court's relegation of the fit parent's desire from presumption to mere factor in determining the best interest of the child was "exactly the opposite of the parental presumption" established in *Troxel*.<sup>39</sup> Moreover, the trial court placed the burden on the fit parent to disprove that visitation would be in the best interests of the child, which was incorrect according to the Texas Supreme Court.<sup>40</sup> Although the high court found that the presumption exists in any proceeding, the nonparent did not alternatively argue that his evidence overcame the presumption.<sup>41</sup> Thus, the court had no basis to evaluate the question.<sup>42</sup> Acknowledging that the parental "presumption is a pivotal part of the best-interest analysis" when determining child custody and visitation "even in the absence of a specific statutory standard," the concurring opinion stated that the presumption "is not absolute."<sup>43</sup> By providing three principles to guide courts in determining the constitutionality of a third-party visitation statute, the *Troxel* Court declined to hold that third-party visitation statutes are *per se* unconstitutional.<sup>44</sup> This, therefore, suggests that there can be instances when it is constitutional for the fit parent's right of care, custody, and control of the parent's child to be intruded upon and for visitation to be ordered against the parent's wishes.<sup>45</sup>

## B. BEST INTEREST STANDARD OVERVIEW

Texas law establishes that when a court determines conservatorship or possession, its primary consideration must always be the best interest of

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34. *Id.*

35. *Id.* at 342–43.

36. *Id.* at 343.

37. *Id.*; see also FAM. §§ 153.134(b)(5), 156.101.

38. *In re C.J.C.*, 603 S.W.3d 804, 817 (Tex. 2020).

39. *Id.* at 814–16 (quoting *Troxel v. Granville*, 530 U.S. 57, 69 (2000)).

40. *Id.* at 816.

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

42. *Id.*

43. *Id.* at 823.

44. *SooHoo v. Johnson*, 731 N.W.2d 815, 820–21 (Minn. 2007) (citing *Troxel*, 530 U.S. at 69–70, 73).

45. *See id.*

the child.<sup>46</sup> Further, courts recognize that the parent–child relationship deserves primacy and will only award visitation or custody to a nonparent upon proof that the award would serve the best interests of the child.<sup>47</sup> When determining the child’s best interest, courts have wide discretion.<sup>48</sup> Although Texas courts give deference to the best-interest factors, this alone does not determine the outcome in a suit for conservatorship of the child or access to the child.<sup>49</sup> Under a two-part test, courts take into consideration the best-interest factors and the parental presumption to make decisions regarding child custody and visitation.<sup>50</sup>

In *Holley v. Adams*, the Texas Supreme Court established best-interest factors for courts consider in child conservatorship cases.<sup>51</sup> The factors include:

(A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals . . . ; (F) the plans for the child by these individuals . . . ; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent.<sup>52</sup>

Proof of the best interest of the child is not limited to these factors set out in *Holley*, nor do all factors always apply in every case.<sup>53</sup> For example, courts may consider additional factors depending on the facts of a case to determine a child’s best interest, including parental drug abuse,<sup>54</sup> a parent’s long-term employment and financial stability, and a parent’s failure to visit the child.<sup>55</sup> The best-interest factors apply when a visitation or child custody dispute is between parents or between a parent and nonparent, as the Texas Family Code expressly states that a court’s primary consideration in *all* conservatorship cases is always the best interest of the child.<sup>56</sup> Thus, the *Holley* factors are considered in every conservatorship case—managing or possessory.<sup>57</sup> Moreover, the court must give

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46. TEX. FAM. CODE ANN. § 153.002 (“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.”).

47. See *In re H.S.*, 550 S.W.3d 151, 161–62 (Tex. 2018).

48. *In re Ryan*, No. 12-16-00284-CV, 2016 WL 6996639, at \*2 (Tex. App.—Tyler Nov. 30, 2016, no pet.) (mem. op.) (citing *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982)).

49. See *In re Marriage of Mitchell*, 585 S.W.3d 38, 47–51 (Tex. App.—Texarkana 2019, no pet.).

50. See *id.*

51. *Holley v. Adams*, 544 S.W.2d 367, 371–72 (Tex. 1976).

52. *Id.* at 372 (footnotes omitted).

53. *In re C.H.*, 89 S.W.3d 17, 27 (Tex. 2002).

54. *In re M.R.*, 243 S.W.3d 807, 820 (Tex. App.—Fort Worth 2007, no pet.); *In re Walters*, 39 S.W.3d 280, 288–89 (Tex. App.—Texarkana 2001, no pet.).

55. *In re Vogel*, 261 S.W.3d 917, 925 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

56. TEX. FAM. CODE ANN. § 153.002.

57. See *id.*

weight to more than one relevant factor in the best-interest inquiry, as “no single [*Holley* consideration] is controlling.”<sup>58</sup>

However, given the expansion of the parental presumption,<sup>59</sup> what a court determines to be completely and thoroughly best for the child does not always match the outcome based on the best-interest-of-the-child standard.<sup>60</sup> For example, experts disagree as to whether court-mandated visitation, after a nonparent overcomes the parental presumption, actually serves the child’s best interest.<sup>61</sup> It is argued by experts that in situations where the “legal parents’ decisions are inarguably damaging to their child’s psyche and emotional well-being, the decision may nevertheless be labeled the child’s ‘best interest’” because the best-interest standard now considers the child’s parents’ interests as well.<sup>62</sup> Thus, the best-interest standard may be understood as serving the best interests of the parents but not necessarily their children.<sup>63</sup> Nonetheless, the Texas legislature and Texas courts still reason that this analysis determines the best interest of the child because considering a parent’s well-being and stability has the child’s best interest in mind when determining conservatorship cases.<sup>64</sup>

In conclusion, Texas case law and the Texas Family Code highlight a long-standing recognition that the child’s best interest is the courts’ main consideration and have expanded the parental presumption to apply in both original and modification suits. This balance between the best interest of the child and the parental presumption may emphasize the parents’ best interests, which disregards the traditional precedent placing the importance on the child’s best interest.<sup>65</sup> Nevertheless, both considerations are imperative in resolving child disputes in Texas.

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58. *A.S. v. Tex. Dep’t of Fam. & Protective Servs.*, 394 S.W.3d 703, 714 (Tex. App.—El Paso 2012, no pet.) (“Undisputed evidence of a single factor may be sufficient to support a finding that termination is in the best interest a child.”).

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

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

61. Compare *Simpson v. Simpson*, 586 S.W.2d 33, 39 (Ky. 1979) (Stephenson, J., dissenting) (noting that visitation with nonparent should only occur with consent of the parent), and JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 37–38 (1973) (opposing mandated visitation by the court because it may result in the child feeling insecure about the custodial parent’s role), with *Maxwell v. LeBlanc*, 434 So. 2d 375, 379 (La. 1983) (finding that a denial of visitation to a nonparent can lead to feelings of rejection and confusion by the child).

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

63. *Id.*

64. *In re C.J.C.*, 603 S.W.3d 804, 812–13, 818–19 (Tex. 2020).

65. Valastro, *supra* note 60, at 510–11.

### III. THE TEXAS STANDARD: OVERCOMING THE PARENTAL PRESUMPTION IN CHILD DISPUTES

The U.S. Supreme Court in *Troxel* concluded that a court “‘must accord at least some special weight’ to a fit parent’s best-interest determination,” but declined to define the scope of the parental rights in visitation or “consider whether a ‘showing of harm or potential harm to the child [is] a condition precedent to granting visitation.’”<sup>66</sup> By refusing to establish a uniform standard in nonparental visitation cases, the Court implies that each state can adopt its own standard as long as the standard recognizes the constitutional right to give some “weight to the parent’s own determination.”<sup>67</sup> This ruling defers to the states to evaluate child disputes on a case-by-case basis.<sup>68</sup> Thus, it remains unclear post-*Troxel* when a court may award visitation “to a nonparent over a fit parent’s objection, notwithstanding the special weight that [is] accorded [to] the parent’s decision” under the parental presumption.<sup>69</sup>

#### A. BRIEF OVERVIEW OF CURRENT NONPARENT CHILD DISPUTES IN TEXAS

While “[p]arental rights are fundamental, . . . neither the Texas Family Code nor the [Texas] Constitution treats [these rights] as plenary or unchecked.”<sup>70</sup> Instead, under Texas Family Code section 102.003(a)(9), Texas recognizes nonparents’ parent-like actions to try to preserve their relationship with the child.<sup>71</sup> According to the Texas Family Code, the court determines whether to appoint a nonparent or parent as possessory conservator by considering whether it is in the child’s best interest under section 102.003(a)(9)’s standing requirements.<sup>72</sup> Some critics, including a dissenting Texas Supreme Court justice, argue that the upshot of this provision is that nearly anyone who has “played an unusual and significant parent-like role in a child’s life” may sue for visitation despite the parents’ objections.<sup>73</sup> In addition, some experts agree that the court should avoid burdening a parent’s “right to raise their children as they see fit” as a matter of public policy.<sup>74</sup> However, a majority of the Texas Supreme Court addressed this statute in *In re H.S.* and held that the statute is limited to nonparents “who have exercised ‘actual care, control, and possession’ of a child for at least six months.”<sup>75</sup> Thus, the nonparent standing threshold in Texas is constitutional, as it is “much higher and narrower

66. *In re C.J.C.*, 603 S.W.3d at 821 (Lehrmann, J., concurring) (alteration in original) (quoting *Troxel v. Granville*, 530 U.S. 57, 70, 73 (2000)).

67. *Troxel*, 530 U.S. at 70, 73.

68. *Id.* at 73.

69. *In re C.J.C.*, 603 S.W.3d at 821.

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

71. *Id.*

72. See TEX. FAM. CODE ANN. § 153.002.

73. *In re H.S.*, 550 S.W.3d at 166 (Blacklock, J., dissenting).

74. See, e.g., *id.*

75. *Id.* at 161–62 (majority opinion).

than the one rejected in *Troxel*.<sup>76</sup> To additionally support its rationale in *In re H.S.*, the Texas Supreme Court determined that the Court in *Troxel* did not hold that *no* nonparents could have standing in a custody dispute, but rather that standing to *any* nonparent is not narrowly tailored enough to withstand review.<sup>77</sup>

A Texas court of appeals in *In re C.J.C.* later commented on the Texas Supreme Court's analysis, reinforcing the high court's decision in the case.<sup>78</sup> Although the Texas statutes place no express burden on the nonparent to overcome the presumption for possessory conservator cases, the *In re C.J.C.* court found it must be read into "*any* best-interest determination," including when a "court weighs a fit parent's rights against a claim of conservatorship or access by a nonparent."<sup>79</sup> A Texas appellate court noted that when a nonparent requests conservatorship or possession of a child, "the child's best interest is embedded with the presumption that it is the fit parent—not a court—who makes the determination whether to allow that request."<sup>80</sup> To put it another way, "to have properly exercised its discretion in ordering visitation over [the parent's] objection, there must have been sufficient evidence presented to the trial court to overcome the presumption that [the parent] acts in his [or her] children's best interest."<sup>81</sup> "[E]ven when a nonparent with standing . . . seeks possessory conservatorship or access rather than . . . managing conservatorship, the best-interest determination necessarily encompasses the constitutionally required deference to a fit parent's decisions."<sup>82</sup>

The Texas Family Code fails to state the evidence necessary to overcome the presumption in a modification suit, like the one at issue in *In re C.J.C.*, regarding a nonparent who acts in a parent-like role.<sup>83</sup> The Code also fails to address awards of possession or access to a nonparent acting in a parent-like role.<sup>84</sup> Instead, the Code only offers guidance in certain situations, such as in original suits affecting a parent-child relationship and grandparent visitation rights, both of which use a test of whether the change would "significantly impair the child's physical health or emotional development."<sup>85</sup> For original suits affecting the parent-child relationship, the parents are appointed managing conservators or a parent is appointed sole managing conservator "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

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76. *Id.* at 162.

77. *Id.* at 161.

78. *In re S.K.*, No. 13-19-00213-CV, 2020 WL 4812633, at \*5 (Tex. App.—Corpus Christi–Edinburg Aug. 13, 2020, pet. denied) (mem. op.).

79. *Id.* (quoting *In re C.J.C.*, 603 S.W.3d 804, 818–19 (Tex. 2020) (emphasis added)).

80. *Id.* (quoting *In re C.J.C.*, 603 S.W.3d at 820).

81. *Id.* (citing *In re C.J.C.*, 603 S.W.3d at 820).

82. *In re C.J.C.*, 603 S.W.3d at 822 (Lehrmann, J., concurring).

83. *Id.* at 821–22.

84. *Id.*

85. *Id.*

physical health or emotional development.”<sup>86</sup> Likewise, a court may award a grandparent possession of or access to a child over a parent’s objection only if, among other things, the grandparent “overcomes the presumption that a parent acts in the best interest of the parent’s child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child’s physical health or emotional well-being.”<sup>87</sup>

B. UNANSWERED: WHAT EVIDENCE IS SUFFICIENT TO OVERCOME THE PARENTAL PRESUMPTION IN VISITATION DISPUTES

While Texas law is relatively well-developed regarding child custody disputes and the best-interest factors to take into consideration for those situations, Texas law is not as detailed in situations where a nonparent requests visitation over a parent’s objection, and it would do well by establishing a standard of evidence necessary to overcome the parental presumption.

Although the Texas Supreme Court has recognized that a court can award possessory conservatorship or access to a nonparent if in the child’s best interest, Texas has not “evaluated the propriety of such an award in light of the fit-parent presumption.”<sup>88</sup> The Texas Supreme Court has not received the opportunity “to review the merits of an award of possession or access to a nonparent whose standing is premised on the parent-like role” since the decision of *Troxel*.<sup>89</sup> On the other hand, state supreme courts have expressed that *Troxel* merely shows a situation when parental decisions are questioned—when a parent is unfit—but that this is not “the *only* . . . instance” on which the presumption can be overcome.<sup>90</sup> For example, it is not essential to show abandonment or parental unfitness to overcome a biological parent’s right.<sup>91</sup> Instead, these courts award custody or visitation if the best interest of the child requires the custody or visitation.<sup>92</sup>

The question of the degree of evidence necessary to overcome the presumption that a fit parent’s decisions are in the best interest of the child when a nonparent who acted in a parent-like role seeks visitation remains unanswered.<sup>93</sup> By leaving this question open, lower level courts will continue to display inconsistencies in rationales and analyses to evaluate certain situations involving custody and visitation rights. Thus, Texas needs to employ a factor test, following guidance from other state legislatures and courts, to evaluate whether the nonparent has evidence to overcome

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86. TEX. FAM. CODE ANN. § 153.131(a).

87. *Id.* § 153.433(a)(2).

88. *In re C.J.C.*, 603 S.W.3d at 823 (Lehrmann, J., concurring).

89. *Id.* at 822.

90. *See, e.g.*, *Hernandez v. Hernandez*, 265 P.3d 495, 500 (Idaho 2011) (emphasis added).

91. *See, e.g., id.*

92. *See, e.g., id.*

93. *In re C.J.C.*, 603 S.W.3d at 823 (Lehrmann, J., concurring).

the parental presumption to ensure a just result for the benefit of the child in visitation suits.

#### IV. HOW A NONPARENT CAN OVERCOME THE PARENTAL PRESUMPTION IN VISITATION

The degree of evidence necessary to overcome the presumption that a fit parent's decisions are in the best interest of the child when a nonparent who acted in a parent-like role seeks visitation is a difficult and fact-specific issue that remains unanswered in Texas law. First, the proper test to determine whether evidence overcomes the presumption in a visitation dispute should be the same test used to address whether a nonparent overcomes the same parental presumption in the custody context—the “significant impairment” test.<sup>94</sup> Further, given that the question of evidence sufficient to overcome the parental presumption will significantly vary depending on the facts in a case, the best solution is to employ a factor test. A factor test allows the court to emphasize the factors relevant to the visitation case at hand. Adopting this approach will improve flexibility, clarity, and predictability for all litigants and lower courts.

##### A. RECONCILING CUSTODY AND VISITATION STANDARDS IN TEXAS

###### 1. *Why Preponderance of Evidence Is the Proper Burden of Proof in Child Modification Disputes*

The burden of proof for nonparent modification child custody and visitation suits is unclear in Texas.<sup>95</sup> In original suits, the nonparent must overcome the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that appointment of the parent as a managing conservator would significantly impair the child, either physically or emotionally.<sup>96</sup> The Texas Family Code also specifies that if the case involves parental termination in addition to the modification by a nonparent, then this heightens the burden to clear and convincing evidence.<sup>97</sup> Some states employ a heightened burden of proof, requiring nonparents to prove their visitation is in the child's best interest with clear and convincing evidence.<sup>98</sup> Other states maintain the preponderance of the evidence standard in nonparent modification suits.<sup>99</sup> Additionally, some states have a mixed approach, deter-

94. TEX. FAM. CODE ANN. § 153.131(a); *see also In re S.T.*, 508 S.W.3d 482, 491–93 (Tex. App.—Fort Worth 2015, no pet.) (discussing factors courts consider as to whether a parent's acts or omissions constitute “significant impairment”).

95. *In re C.J.C.*, 603 S.W.3d at 821–22 (Lehrmann, J., concurring).

96. TEX. FAM. CODE ANN. §§ 105.005, 153.131(a); *see also In re J.A.J.*, 243 S.W.3d 611, 616 (Tex. 2007).

97. *Id.* § 161.001(b).

98. *SooHoo v. Johnson*, 731 N.W.2d 815, 823 (Minn. 2007); *Neely v. Welch*, 2014-CA-01022-COA (¶ 34), 194 So. 3d 149, 160 (Miss. Ct. App. 2015); *Evans v. McTaggart*, 88 P.3d 1078, 1085 (Alaska 2004); *Chalmers v. Hirschkop*, 152 Cal. Rptr. 3d 361, 371 (Cal. Ct. App. 2013); *In re C.T.C.*, 2014 MT 306, ¶ 19, 339 P.3d 54, 58 (Mont. 2014).

99. *S.M. v. R.M.*, 92 A.3d 1128, 1136–37 (D.C. 2014); *Lovlace v. Copley*, 418 S.W.3d 1, 23 (Tenn. 2013); *Schaffer v. Schaffer*, 884 N.E.2d 423, 429 (Ind. Ct. App. 2008).

mining that preponderance of the evidence can apply in some modification suits, while other modification suits require a heightened burden of clear and convincing evidence.<sup>100</sup>

The same preponderance of the evidence standard for the evidence needed to overcome the presumption in nonparent original suits should also apply to nonparent modification suits. In *In re C.J.C.*, the court extended the fit parent presumption to custody modification suits because “[s]uch a presumption is consistent with the child’s own interest in the ‘familial relationship,’ which ‘stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promoting a way of life’ through the instruction of children.’”<sup>101</sup> Given the importance the presumption plays in custody modification suits, the same burden of proof for evidence to overcome the presumption should carry over to extend to visitation modifications as well.

Further, a few Texas appellate courts recently discussed the burden of proof required for modifications. In a nonparent case, the Austin court of appeals held that “[t]he party seeking modification has the burden to establish these elements by a preponderance of the evidence” to overcome the parental presumption.<sup>102</sup> Thus, for consistency, Texas courts should employ preponderance of the evidence in evaluating child modification disputes to match the burden of proof in other statutory provisions within the Texas Family Code.

## 2. *The Same Standard to Overcome Parental Presumption Must Apply to Custody and Visitation Disputes*

The standing statute for conservatorship or visitation rights in the Texas Family Code only addresses who can file a suit, not the evidence necessary to obtain the relief sought.<sup>103</sup> Thus, courts are left to resolve the gap since the legislature does not specify the requirements to overcome the parental presumption. While states seem to agree that the same test is proper to determine whether the nonparent overcomes the parental presumption in custody and visitation cases alike, disagreements arise

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100. *In re B.R.D.*, 2012 COA 63, ¶ 35, 280 P.3d 78, 85 (Colo. App. 2012) (noting that “a consensual abdication of parental rights . . . does not rise to the level of a formal and permanent relinquishment or equate to a termination of the parent-child relationship” to give rise to the clear and convincing evidence standard) (citing *L.L. v. People*, 10 P.3d 1271, 1277–78 (Colo. 2000)). *But see In re B.J.*, 242 P.3d 1128, 1134–35 (Colo. 2010) (noting that in order to accord due process to parents, as it does in the parental rights termination context, the clear and convincing evidence standard is required in situations where decisions are granting a nonparent parental responsibilities over the objection of a parent who has custody of a child) (first citing *Troxel v. Granville*, 530 U.S. 57, 68 (2000); and then citing *In re Adoption of C.A.*, 137 P.3d 318, 322 (Colo. 2006)).

101. *In re C.J.C.*, 603 S.W.3d 804, 819 (Tex. 2020) (quoting *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 844 (1977)).

102. *S.C. v. Tex. Dep’t of Fam. & Protective Servs.*, No. 03-20-00179-CV, 2020 WL 4929790, at \*1–2 (Tex. App.—Austin Aug. 21, 2020, no pet.) (mem. op.); *see also Sotelo v. Gonzales*, 170 S.W.3d 783, 788 (Tex. App.—El Paso 2005, no pet.) (“[T]he non-parent must prove by a preponderance of credible evidence that appointing the parent as a managing conservator would result in serious physical or emotional harm to the child.”).

103. *In re H.S.*, 550 S.W.3d 151, 162 (Tex. 2018).

about the use of different standards when evaluating the test.<sup>104</sup> Courts have found that “[t]he right of visitation derives from the right of custody and is controlled by the same legal principles.”<sup>105</sup> Moreover, states that tackle this issue seem to all agree that the grant or modification of visitation rights for a nonparent “involves a lesser degree of intrusion on the fundamental right to parent than the assignment of custody.”<sup>106</sup> However, viewpoints differ regarding how much this difference of degree of intrusion should change the analysis of overcoming the parental presumption.<sup>107</sup>

To be sure, some have highlighted differences in custody and visitation cases to argue for divergent standards. Some state courts have argued that a nonparent seeking possessory conservatorship is not nearly as invasive of parental rights as a nonparent seeking custody, so the custody standard should require more solidified evidence to overcome the presumption in managing conservator cases.<sup>108</sup> Given that the nonparent, by asking for visitation, is not trying to assert control or determine the residence of the child but instead is requesting a simpler arrangement, some argue visitation intrudes less than custody disputes.<sup>109</sup> For example, the North Dakota Supreme Court held that a court “can grant decisionmaking . . . and primary residential responsibility to a [nonparent] ‘to prevent serious harm or detriment to the child.’”<sup>110</sup> The court qualified this statement, however, noting that finding that a child is not at risk of serious

104. David W. Lannetti, *A Nonparent’s Ability to Infringe on the Fundamental Right of Parenting: Reconciling Virginia’s Nonparental Child Custody and Visitation Standards*, 30 REGENT U. L. REV. 203, 204–05 (2017).

105. *Clough v. Nez*, 2008 SD 125, ¶ 15, 759 N.W.2d 297, 304 (alteration in original) (quoting *Cooper v. Merkel*, 470 N.W.2d 253, 255 (S.D. 1991)).

106. *Koshko v. Haining*, 921 A.2d 171, 186 (Md. 2007).

107. *Compare id.* at 192–93 (applying the same “threshold showing of either parental unfitness or exceptional circumstances indicating that the lack of [nonparent] visitation has a significant deleterious effect upon the children” in both custody and visitation suits), *with Fish v. Fish*, 939 A.2d 1040, 1053–55, 1059–60 (Conn. 2008) (applying a higher standard in custody suits than in visitation suits).

108. *McAllister v. McAllister*, 2010 ND 40, ¶ 22, 779 N.W.2d 652, 660; *In re Marriage of Friedman & Roels*, 418 P.3d 884, 892 (Ariz. 2018) (citing *Downs v. Scheffler*, 80 P.3d 775, 781 n.5 (Ariz. Ct. App. 2003)) (recognizing that the demand for visitation in *Troxel* “presumably involved a less intrusive demand upon a fit parent’s constitutional right than would a grandparent’s demand for custody”); *Egan v. Fridlund-Horne*, 221 P.3d 1213, 1225 (Ariz. Ct. App. 2009) (“The legislature intended that courts treat custody and visitation petitions in a different manner, presumably because ‘granting visitation is a far lesser intrusion, or assertion of control, than is an award of custody, and thus not nearly as invasive of parents’ rights.” (first quoting *Graville v. Dodge*, 985 P.2d 604, 610 (Ariz. Ct. App. 1999); and then citing *Downs*, 80 P.3d at 781 n.5)); *Krieg v. Glassburn*, 419 N.E.2d 1015, 1019 (Ind. Ct. App. 1981), *superseded by* IND. CODE § 31-1-11.7-1 to -8 (repealed); *Roberts v. Ward*, 493 A.2d 478, 482 (N.H. 1985) (quoting *Krieg*, 419 N.E.2d at 1019); *T.B. v. L.R.M.*, 2000 PA Super 168, ¶ 41, 753 A.2d 873, 889 (“As the amount of time requested moves the visit further from a visit and closer to custody, the reasons offered in support of the request must become correspondingly more convincing.” (quoting *Commonwealth ex rel. Williams v. Miller*, 385 A.2d 992, 994 (Pa. Super. Ct. 1978))).

109. *See, e.g., Roberts*, 493 A.2d at 482 (first quoting *Krieg*, 419 N.E.2d at 1019; and then citing *Locke*, 399 A.2d at 965).

110. *McAllister*, 2010 ND 40, ¶ 22, 779 N.W.2d at 660 (quoting *In re D.P.O.*, 2003 ND 127, ¶ 6, 667 N.W.2d 590, 593).

harm or detriment does not preclude the court from granting reasonable visitation.<sup>111</sup> To reconcile the North Dakota test of “preventing serious harm or detriment” in visitation and custody situations, the court held:

It is not inconsistent . . . to recognize that it is not necessary to award primary residential responsibility to [the nonparent rather than the parent] to prevent serious harm or detriment . . . and to also recognize that it is necessary to award reasonable visitation [to a nonparent] to prevent serious harm or detriment to [the child].<sup>112</sup>

Thus, the court found that it is not required to make the same showing of serious harm or detriment in a visitation suit because visitation intrudes less on the constitutional rights of the parent.<sup>113</sup> As another state supreme court put it, “[s]ince visitation is correlative to custody a similar test should apply when a third party seeks visitation, although the burden on the third party should not be so heavy, for an order granting visitation is a far lesser intrusion, or assertion of control, than is an award for custody.”<sup>114</sup> While the test remains the same, the standard is less because the nonparent must only convince the court in a visitation case “that it is in the child’s best interest to give some time to the third party.”<sup>115</sup> In custody disputes, on the other hand, nonparents must convince the court that it is in the child’s best interest to remove custody from a parent for the benefit of the nonparent.<sup>116</sup>

Yet other state courts disagree.<sup>117</sup> Although Maryland courts agree that there is a difference in the degree of intrusion between visitation and custody, the Maryland Court of Appeals holds there is not a difference in “constitutional magnitude,” as an intrusion on parental rights is still an intrusion.<sup>118</sup> The court emphasized that “[v]isitation, like custody, intrudes upon the fundamental right of parents to direct the ‘care, custody, and control’ of their children.”<sup>119</sup> While the visitation privileges “tread more lightly into the protected grove of parental rights,” the court found that such privileges “tread nonetheless,” and “[t]he sentiment . . . that visitation matters deserve less scrutiny than custody matters is . . . incorrect.”<sup>120</sup> Given that both nonparent visitation and custody infringe on the same fundamental right of parental autonomy, some states conclude that the same standard should apply to overcome the parental presumption in visitation and custody disputes.<sup>121</sup> Although it may seem harsh, the courts in these states still find for parallel standards in nonparent visitation and

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111. *Id.* ¶ 23.

112. *Id.*

113. *Id.*

114. *Krieg*, 419 N.E.2d at 1019 (quoting *Commonwealth ex rel. Williams v. Miller*, 385 A.2d 992, 994 (Pa. Super. Ct. 1978)).

115. *Id.* (quoting *Williams*, 385 A.2d at 994).

116. *Id.* (quoting *Williams*, 385 A.2d at 994).

117. *See, e.g., Koshko v. Haining*, 921 A.2d 171, 186 (Md. 2007).

118. *Id.*

119. *Id.*

120. *Id.* at 186, 189.

121. *See Lannetti, supra* note 104, at 246–47.

custody cases since “[v]isitation is ‘a limited form of custody during the time the visitation rights are being exercised.’”<sup>122</sup>

Policy considerations also favor the application of the same standard to both visitation and custody disputes. For example, a higher standard in both custody and visitation disputes limits the number of disputes coming before the court and precludes overcrowding of the court system. The higher standard may allow courts to focus on considering issues involving managing conservatorships instead of visitation rights. This is a benefit to the court system, as visitation disputes are not deemed as important as disputes over decision-making and primary residential responsibilities of the child.<sup>123</sup> Further, the same standard allows for an easier and more consistent interpretation by the court for the litigant to understand the test in both situations.<sup>124</sup> Employing the same standard for visitation and custody disputes improves clarity by “ensur[ing] consistent application of standards by the courts[ ] [and] . . . provid[ing] a certain level of predictability to litigating parties.”<sup>125</sup>

Given the policy considerations and rationales offered by other state courts such as Maryland, Texas should adopt the same custody dispute standard for visitation disputes when determining whether the “significant impairment” test is satisfied to overcome the parental presumption. States that have fixed on a lower standard visitation cases use a clear and convincing standard of proof initially to evaluate overcoming the parental presumption.<sup>126</sup> The clear and convincing standard is a higher standard to begin with, whereas Texas uses a preponderance of the evidence standard for original child custody disputes and grandparent visitation, as specified in the Texas Family Code.<sup>127</sup> Thus, since Texas already requires a lower burden of proof, the courts should not enable an even lower standard for other situations of nonparent visitation. This would impede further on parental rights and make it even easier for nonparents to overcome the presumption and gain visitation rights.

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122. *Roth v. Weston*, 789 A.2d 431, 447 n.13 (Conn. 2002) (quoting *In re Marriage of Gayden*, 280 Cal. Rptr. 862, 865 (Cal. Ct. App. 1991)) (“We recognize that the burden of harm that the statute imposes may be deemed unusually harsh in light of the fact that visitation, as opposed to custody, is at issue. We draw no distinction, however, for purposes of this discussion.”).

123. *McAllister v. McAllister*, 2010 ND 40, ¶ 22, 779 N.W.2d 652, 660.

124. *Lannetti*, *supra* note 104, at 256–57.

125. *Id.* at 256.

126. *See SooHoo v. Johnson*, 731 N.W.2d 815, 823 (Minn. 2007); *Neely v. Welch*, 2014-CA-01022-COA (¶ 34), 194 So. 3d 149, 160 (Miss. Ct. App. 2015); *Evans v. McTaggart*, 88 P.3d 1078, 1089 (Alaska 2004); *Chalmers v. Hirschkop*, 152 Cal. Rptr. 3d 361, 371, 374–75 (Cal. Ct. App. 2013); *In re C.T.C.*, 2014 MT 306, ¶ 19, 377 Mont. 106, 111, 339 P.3d 54, 58.

127. TEX. FAM. CODE ANN. §§ 105.005, 153.131, 153.433(a)(2).

B. THE NEED FOR TEXAS LAW TO ESTABLISH A FACTOR TEST TO  
DETERMINE WHETHER NONPARENT EVIDENCE OVERCOMES  
THE PARENTAL PRESUMPTION

1. *Through Texas Congressional Legislation*

In at least five states, courts refused to create a test to overcome the parental presumption in recognition of certain nonparent custody and visitation rights, opting instead to wait for legislative guidance.<sup>128</sup> One state court, whose ruling has since been overruled by statute, avoided awarding visitation to a nonparent, reasoning that:

By deferring to the Legislature in matters involving complex social and policy ramifications far beyond the facts of the particular case, we are not telling the parties that the issues they raise are unworthy of legal recognition. . . . [W]e intend only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue.<sup>129</sup>

The decisions of these state courts, although superseded by state statutory provisions granting visitation,<sup>130</sup> reflected the belief that the legislature—not the court—is better equipped to “gather broad public input and distill public preferences for handling the hard choices and complex issues involved” in determining how to solve nonparent visitation disputes.<sup>131</sup>

While state legislatures specify the factors for courts to consider in rebutting the parental presumption in visitation disputes, there are minor differences between the factor tests created by each state. However, each state legislature provides the factor test as guidance for courts to make the proper determination of the best interest of the child. The factors that several state legislatures deem as most important for its state courts to consider are provided below.

The Illinois legislature created relevant factors for state courts to use in determining custody or visitation issues.<sup>132</sup> In determining whether to grant visitation, Illinois courts are expressly directed to consider: (1) the wishes of the child; (2) the mental and physical health of the child; (3) the

128. *O'Dell v. O'Dell*, 629 So. 2d 891, 891–92 (Fla. Dist. Ct. App. 1993); *Petition of Ash*, 507 N.W.2d 400, 402–03 (Iowa 1993); *In re Hood*, 847 P.2d 1300, 1303 (Kan. 1993) (“The legislature must decide if and when intrusion into the protected family unit, in the form of third party visitation, is justified by a legitimate state interest.”); *In re J.M.*, 750 A.2d 442, 444 (Vt. 2000); *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 214–16, 219 (Cal. Ct. App. 1991).

129. *Nancy S.*, 279 Cal. Rptr. at 219.

130. FLA. STAT. ANN. § 752.011 (West 2015); IOWA CODE ANN. § 600C.1 (West 2011); KAN. STAT. ANN. § 23-3301 (West 2012), *partially invalidated by T.N.Y. ex rel. Z.H. v. E.Y.*, 360 P.3d 433, 439–42 (Kan. Ct. App. 2015) (striking “In an action under article 27 of chapter 23 of the Kansas Statutes Annotated, and amendments thereto” from the statute because “limiting grandparent visitation to dissolution of marriage proceedings . . . violates the equal protection rights of children whose parents never married”); KAN. STAT. ANN. § 23-3302 (West 2012); VT. STAT. ANN. tit. 15, § 1012 (West 2021); CAL. FAM. CODE §§ 3040–3041, 3100–3105 (West 2020).

131. *McAllister v. McAllister*, 2010 ND 40, ¶ 35, 779 N.W.2d 652, 666 (Crothers, J., concurring).

132. 750 ILL. COMP. STAT. ANN. 5/602.9(b)(5), 46/802(a) (West 2019).

mental and physical health of the nonparent; (4) the length and quality of the prior relationship between the child and nonparent; (5) the good faith of the party filing the petition; (6) the good faith of the person denying visitation; (7) the quantity of visitation time requested and potential adverse impact of that visitation on the child's customary activities; (8) any other fact that is likely to unduly harm the child's mental, physical, or emotional health; and (9) whether visitation is structured in a way to minimize the child's exposure to conflicts between the parent and nonparent.<sup>133</sup>

The Ohio legislature lays out certain factors for courts to consider in determining whether to grant companionship or visitation rights to a grandparent, relative, or other specific nonparent.<sup>134</sup> Some of the factors included in the statute are: (1) the location and distance between the homes of the nonparent and the child's home; (2) whether either person lives out of state; (3) the availability of the child and nonparent depending on each parent's work schedule, the child's school schedule, and the parent's and child's holiday and vacation schedule; (4) the child's age; (5) the child's adjustment to home, school, and the community; (6) the child's wishes, if the court interviewed the child in chambers; (7) the child's health and safety; (8) how much time the child can spend with siblings; (9) the physical and mental health of all parties; (10) whether the nonparent was previously convicted of or plead guilty to criminal offense involving a child; and (11) any other factors in the best interest of the child.<sup>135</sup> Ohio courts have determined that they must give deference to the parental presumption first.<sup>136</sup> Then, a court can weigh the child's best interest regarding nonparent visitation through the statutory factors against the parent's wishes under the presumption.<sup>137</sup> The court must give the wishes and concerns of the parent special weight through the parental presumption before evaluating whether or not the best interests of the child outweigh that presumption, as mandated in *Troxel*.<sup>138</sup>

In Nevada, to rebut the parental presumption, the nonparent must show that visitation by the nonparent is in the child's best interest.<sup>139</sup> To determine whether the nonparent has rebutted such a presumption, the trial court must consider the factors in the Nevada statute, section

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133. *Id.* 5/602.9(b)(5).

134. OHIO REV. CODE ANN. § 3109.051(D) (West 2021), *partially invalidated* by *Frazier v. Frazier*, No. 02CA8, 2003 WL 931296, 2003-Ohio-1087, ¶ 27 (Ohio Ct. App. Feb. 11, 2003) (“[A]lthough the ‘language of the statute’ does not elevate any one of the factors above the others, *Troxel* makes it clear that factor 15 of R.C. 3109.051(D), the wishes and concerns of the parent, are to be accorded ‘special weight.’” (citing *Troxel v. Granville*, 530 U.S. 57, 69–70 (2000))).

135. *Id.*

136. *Harrold v. Collier*, 107 Ohio St. 3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶¶ 42–44; *Frazier*, 2003-Ohio-1087, ¶¶ 23, 27.

137. *Harrold*, 2005-Ohio-5334, ¶¶ 43–44; *Frazier*, 2003-Ohio-1087, ¶¶ 23, 27.

138. *Harrold*, 2005-Ohio-5334, ¶¶ 42–44.

139. NEV. REV. STAT. ANN. § 125C.050(4) (West 2001).

125C.050(6), for governing child disputes.<sup>140</sup> The factors listed in section 125C.050(6) for the court's consideration include: (1) the love, affection, and other emotional ties existing between the child and nonparent; (2) the capacity and disposition of the nonparent to give the child love and affection, provide the child with food and clothing during visits, and provide the child with health care or alternative care; (3) the prior relationship between child and nonparent; (4) the moral fitness of the nonparent; (5) the mental and physical health of the nonparent; (6) the reasonable preference of the child; (7) the willingness and ability of the nonparent to facilitate and encourage a close relationship between the child and parent or parents; (8) the medical and other needs of the child as affected by the visitation; (9) the support provided by the nonparent; and (10) any other factor in the situation that proves relevant to granting a right to visitation.<sup>141</sup> Additionally, the court "must consider that 'custodial stability is . . . of significant concern' when [determining] a child's best interest."<sup>142</sup>

Utah provides seven requirements necessary to rebut the parental presumption before custodial or visitation rights to a person other than a parent are granted.<sup>143</sup> The first six factors require an examination into the nature and quality of the relationship between the child and the nonparent, including whether: (1) the nonparent intentionally assumed the role and obligations of a parent; (2) the nonparent and child have formed an emotional bond and created a parent-child type relationship; (3) the nonparent contributed emotionally or financially to child's well-being; (4) the assumption of the parental role is not the result of a financially compensated surrogate care arrangement; (5) the continuation of the relationship between the person and the child is in the child's best interests; and (6) the loss or cessation of the relationship between the person and the child is detrimental to the child.<sup>144</sup> The seventh factor concerns "the status of the child's current legal parent."<sup>145</sup> To satisfy this factor, the petitioner must demonstrate that the legal parent either: (a) is absent, or (b) is found by the court to have abused or neglected the child.<sup>146</sup> Once the petitioner demonstrates all seven factors, then the court may award the petitioner custodial visitation rights.<sup>147</sup>

Virginia courts use a "harmful or detrimental to the welfare of the child" test to determine whether to grant visitation to a nonparent in contravention of a fit parent's objection.<sup>148</sup> The court in *Stadter v. Siperko*

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140. Kahl v. Williams, No. 75049-COA, 2019 WL 912630, at \*1 (Nev. Ct. App. Feb. 20, 2019).

141. § 125C.050(6).

142. Rennels v. Rennels, 257 P.3d 396, 403 (Nev. 2011) (alteration in original) (quoting Ellis v. Carucci, 161 P.3d 239, 243 (Nev. 2007)).

143. UTAH CODE ANN. § 30-5a-103(2) (West 2021).

144. *Id.* § 30-5a-103(2)(a)-(f).

145. O'Hearon v. Hansen, 2017 UT App 214, ¶ 13, 409 P.3d 85, 90 (citing D.A. v. D.H., 2014 UT App 138, ¶ 14, 329 P.3d 828).

146. § 30-5a-103(2)(g).

147. O'Hearon, 2017 UT App 214, ¶ 13, 409 P.3d at 90.

148. Stadter v. Siperko, 661 S.E.2d 494, 498 (Va. Ct. App. 2008) (first quoting Williams v. Williams, 485 S.E.2d 651, 654 (Va. Ct. App. 1997); and then citing Denise v. Tencer, 617

held that to rebut the presumption in favor of the parent, evidence through the statutory best-interest factors<sup>149</sup> “must establish more than the obvious observation that the child would benefit from the continuing . . . attachment with the non-parent.”<sup>150</sup> In Virginia, the courts consider the same best-interest-of-the-child factors for determining both custody and visitation disputes.<sup>151</sup> The best-interest factors within the statutory provision in Virginia include: (1) the age and physical and mental condition of the child; (2) the age and physical and mental condition of each parent; (3) the relationship existing between each parent and each child; (4) the needs of the child, including other important relationships such as siblings, peers, and extended family members; (5) the role each parent has played and will play in the future; (6) the propensity of each parent to actively support the child’s contact and relationship with the other parent; (7) the relative willingness and ability of each parent to maintain a close relationship with the child; (8) the reasonable preference of the child; (9) history of family abuse, sexual abuse, child abuse, or acts of violence; and (10) other factors the court deems necessary and proper on case-by-case basis.<sup>152</sup> The court in Virginia determined that a nonparent with a “legitimate interest” is granted visitation rights “upon a showing by clear and convincing evidence that the best interests of the child would be served [by visitation].”<sup>153</sup> The court stated the nonparent must present evidence “sufficient to overcome the constitutional concerns in the . . . *Troxel* presumption” through the state statutory best-interest analysis.<sup>154</sup> This signals that the same best-interest factors are used to evaluate visitation disputes as between a parent and nonparent and as between two parents.<sup>155</sup>

## 2. *Through Court Intervention Without Legislative Action*

### a. Texas Court Analysis After *In re C.J.C.* Regarding Visitation and Overcoming The Parental Presumption

Although an appeals court in Texas has evaluated a nonparent’s visitation dispute since the decision of *In re C.J.C.*, the court found no evidence to overcome the parental presumption and failed to provide much guidance on the factors considered.<sup>156</sup> The court found that the children would be impaired if the children had no access to the nonparent; however, because no evidence indicated that the father planned to put a stop

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S.E.2d 413, 420 (Va. Ct. App. 2005)); *see also* VA. CODE ANN. §§ 20-124.2(B), 20-124.3 (West 2020).

149. *See* § 20-124.3.

150. *Stadter*, 661 S.E.2d at 500.

151. *See* § 20-124.3.

152. *Id.*

153. *Stadter*, 661 S.E.2d at 498 (alteration in original) (citing § 20-124.2(B)).

154. *Id.* (first citing *Williams v. Williams*, 485 S.E.2d 651, 654 (Va. Ct. App. 1997); and then citing *Denise v. Tencer*, 617 S.E.2d 413, 420 (Va. Ct. App. 2005)).

155. *See id.*

156. *See In re S.K.*, No. 13-19-00213-CV, 2020 WL 4812633, at \*5 (Tex. App.—Corpus Christi—Edinburg Aug. 13, 2020, pet. denied) (mem. op.).

to the relationship between the child and the nonparent, “there was no evidence that [the parent’s] decisions would impair the children’s emotional well-being.”<sup>157</sup> The only consideration expressed by the court was whether the parent intended to prevent a continuing, meaningful relationship between the children and the nonparent.<sup>158</sup> Thus, the court failed to acknowledge any of the other factors the Texas Supreme Court mandated for consideration in all child disputes in *Holley*. Given the ruling in *In re C.J.C.*, a factor test would significantly help guide Texas courts when considering evidence to overcome the parental presumption in all child disputes, specifically visitation suits.

b. Other State Courts’ Analyses to Rebut Parental Presumption in Visitation

The Texas Constitution requires the separation of powers of the state government’s three branches, prohibiting any of the three branches from exercising any power attributed to another.<sup>159</sup> The legislature is expressly directed to make law and the judiciary to interpret and apply the law.<sup>160</sup> A “department may constitutionally exercise any power whatever its essential nature, which has, by the constitution, been delegated to it.”<sup>161</sup> As commentators note, “the practical necessities of efficient government have prevented [the prohibited blending of the powers in the Texas Constitution’s] complete application.”<sup>162</sup> The Texas judiciary’s role is to apply the law, and in order to apply the “significant impairment” test, the creation of a factor test falls within the court’s jurisdiction. This factor analysis will allow lower courts to establish what and how much evidence is needed to satisfy the rebuttal of the parental presumption, which was created by the legislature.

Most state legislatures have rapidly expanded nonparent rights in the last fifty years, enacting statutory provisions that grant nonparents child visitation rights in certain situations.<sup>163</sup> However, some state courts decided to opt in to a case-by-case evaluation to help parties resolve visitation issues when there is a lack of state legislative action.<sup>164</sup> Justice Lehrmann’s concurrence in *In re C.J.C.* implied that the Texas Supreme Court would consider creating a factor test to determine the evidence sufficient to overcome the parental presumption for visitation.<sup>165</sup> By stating that the nonparent failed to make a claim to give the court the “op-

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157. *Id.*

158. *Id.*

159. TEX. CONST. art. II, § 1.

160. TEX. CONST. art. II, § 1 interp. commentary (West 2007).

161. *Id.*

162. *Joslin v. State*, 722 S.W.2d 725, 733 (Tex. App.—Dallas 1986) (quoting TEX. CONST. art. II, § 1 interp. commentary (Vernon 1984)), *vacated*, 761 S.W.2d 376 (Tex. Crim. App. 1988).

163. See Lannetti, *supra* note 104, at 208.

164. See, e.g., *McAllister v. McAllister*, 2010 ND 40, ¶¶ 31–37, 779 N.W.2d 652, 662–66 (Crothers, J., concurring).

165. See *In re C.J.C.*, 603 S.W.3d 804, 822–23 (Tex. 2020) (Lehrmann, J., concurring).

portunity to do so” in the case at hand, this suggests the Texas Supreme Court, if given the right opportunity, will not wait for the legislature to get involved.<sup>166</sup>

Cases from other state supreme courts “demonstrate that . . . courts may afford the requisite deference to a fit parent’s decisions concerning [the] child while still giving due consideration to the effect on the child’s well-being of severing, or significantly curtailing, contact with a [nonparent].”<sup>167</sup> Terminating contact between a nonparent viewed as a parent and a child might create a “dramatic, and even traumatic, effect upon the child’s well-being,” which the court should consider in its decision regarding the child’s visitation.<sup>168</sup> As one court pointed out, “studies [have] confirm[ed] that the loss of—or sudden, long-term separation from—an attachment figure [like a nonparent in a parent-like role] creates significant psychological harm in children and can ‘seriously injure and fragment an individual’s sense of self.’”<sup>169</sup> Thus, nonparent presence proves essential in certain situations for the child to avoid suffering significant physical or emotional impairments.

One Pennsylvania court found that the distinguishing factors between visitation and custody include: (1) “the length, frequency, and place of visits”; (2) “who has effective control of the child during the visits”; and (3) whether the custodial parent has the option of accompanying the child on the visits.<sup>170</sup> The court considers these factors in addition to the best-interest factors in all child cases for Pennsylvania.<sup>171</sup>

In North Dakota, the supreme court determined that awarding custody to a nonparent is only granted in “exceptional circumstances” that will further the best interest of the child.<sup>172</sup> The court agreed to extend the same test to award visitation to a nonparent.<sup>173</sup> The factors the court considered in the North Dakota case of *McAllister v. McAllister* included: (1) the length of time the nonparent was involved in the child’s life; (2) the child’s reference to nonparent as a parent through verbally calling him “dad”; (3) that the continuation of visitation with nonparent also fostered a bond with step-siblings; and (4) the custody investigator’s testimony regarding the best interest of the child, her lack of concern over the nonparent’s ability to maintain a strong bond with the child, and the importance for the child to maintain regular contact with the nonparent because the child considered him family.<sup>174</sup>

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166. *See id.* at 822–23.

167. *Id.* at 823 (citing *Rideout v. Riendeau*, 2000 ME 198, ¶¶ 23–26, 761 A.2d 291, 301).

168. *Rideout*, 2000 ME 198, ¶ 26, 761 A.2d at 301.

169. *In re C.J.C.*, 603 S.W.3d at 823 n.4 (Lehrmann, J., concurring) (quoting Rebecca L. Scharf, *Psychological Parentage, Troxel, and the Best Interests of the Child*, 13 GEO. J. GENDER & L. 615, 634 (2012)).

170. *Bucci v. Bucci*, 506 A.2d 438, 443 (Pa. Super. Ct. 1986).

171. *See id.* at 439.

172. *McAllister v. McAllister*, 2010 ND 40, ¶ 21, 779 N.W.2d 652, 660 (quoting *Quirk v. Swanson*, 368 N.W.2d 557, 560 (N.D. 1985)).

173. *Id.*

174. *See id.* ¶¶ 4, 6, 8, 779 N.W.2d at 655–56.

New York courts acknowledge that even when the presumption is strong that a fit parent's decisions are in the best interest of the child, the court can determine otherwise.<sup>175</sup> In *E.S. v. P.D.*, the court considered: (1) the law guardian's assessment; (2) the nonparent's extraordinarily close relationship with the child while living with the nonparent; (3) the nonparent's appreciation and respect for the separate roles the nonparent and parent play in the child's life; (4) the child's wishes for whether the relationship with the nonparent continued; and (5) the nonparent's dedication and willingness to improve the relationship between the nonparent and parent for the sake of the child.<sup>176</sup> Thus, the court granted regular visitation to the nonparent.<sup>177</sup>

Lastly, South Dakota courts hold that “[i]n order to grant a nonparent visitation rights with a minor child over the objections of a parent, a clear showing of gross misconduct, unfitness, or other extraordinary circumstances affecting the welfare of the child is required.”<sup>178</sup> South Dakota statutes provide examples of “extraordinary circumstances” that might defeat a visitation claim.<sup>179</sup> In *Clough v. Nez*, the court emphasized that the extraordinary circumstances supporting nonparent visitation rights with a child “denote[ ] more than a simple showing that visitation would be in the child's best interest.”<sup>180</sup> In determining that the situation constituted an extraordinary circumstance, the court considered factors, such as: (1) the child referring to the nonparent as “dad”; (2) the strength of the relationship between the child and nonparent; and (3) the testimony of witnesses, including the nonparent and the parent admitting that forbidding visitation of the nonparent would put the child through mental stress.<sup>181</sup>

If the Texas Legislature remains silent on this issue, the Texas Supreme Court should step in and create a factor test to determine whether evidence overcomes the parental presumption in visitation cases to avoid inconsistencies in lower courts. Determining how to analyze evidence in compliance with the state legislature's “significant impairment” test will also avoid the hesitation of lower courts in addressing the gap. Since nonparent visitation rights still result in a degree of intrusion on parental rights, Texas can address this issue to prevent further disruption into the lives of more children and their parents through a flexible factor test that is amendable to varying fact patterns.

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175. *E.S. v. P.D.*, 863 N.E.2d 100, 106 (N.Y. 2007).

176. *Id.* at 104.

177. *Id.* at 101.

178. *Clough v. Nez*, 2008 SD 125, ¶ 9, 759 N.W.2d 297, 302 (alteration in original) (quoting *D.G. v. D.M.K.*, 1996 SD 144, ¶ 46, 557 N.W.2d 235, 243))

179. S.D. CODIFIED LAWS § 25-5-29, 25-5-30 (2021).

180. *Clough*, ¶ 10, 759 N.W.2d at 302.

181. *Id.* ¶¶ 17–18, 759 N.W.2d at 305.

### 3. *The Visitation Factors Necessary in Considering the Best Interest of the Child*

The factors currently considered by some state supreme courts are similar to the factors also enacted in the statutory language of other states. Thus, a combination of factors by which other state courts and legislatures abide should influence the Texas factor test of whether the nonparent has presented sufficient evidence to overcome the parental presumption in visitation cases.

Overall, the main factors considered in nonparent visitation rights by the other state legislatures that the Texas legislature should implement are: (1) the length and quality of the prior relationship between the child and nonparent seeking visitation rights;<sup>182</sup> (2) the specific details of the nonparent's visitation request, such as the quantity of time and the distance in between the nonparent and child's homes;<sup>183</sup> as well as (3) the effect that the nonparent's visitation will have in developing other important relationships in the child's life.<sup>184</sup> These specific factors, in addition to the *Holley* factors considered in the best-interest analysis for every case involving a child, would increase the predictability of visitation decisions in Texas for litigants and prevent confusion by providing guidance for court analysis.

First, the length and quality of the prior relationship between child and nonparent is an important factor in the consideration of nonparent visitation suits. This factor gives further context to whether the child is "significantly impaired" by denying visitation with the nonparent. Although it may be difficult to draw a dividing line between whether this factor goes in favor or against the nonparent, the specific circumstances in each case can provide context for the direction this factor goes in. Further, the nature, frequency, and duration of contact between the child and nonparent prior to the visitation dispute may significantly impact the child negatively once that contact with the nonparent ceases to exist. For example, if the nonparent, prior to the visitation dispute, spent time with the child for ten years every day for multiple hours, the bond between the child and nonparent can be strong enough that separation of the relationship may significantly impair the child.

Additionally, the quantity of time requested and distance between the nonparent and child's homes is also a factor courts should consider in the child's best-interest analysis for visitation cases. If the nonparent and the parent disagree over the frequency and duration of the visitation-related mandate, this conflict between the nonparent and parent may impair both

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182. VA. CODE ANN. § 20-124.3(1) (West 2020); UTAH CODE ANN. § 30-5a-103(2)(b) (West 2021); NEV. REV. STAT. ANN. § 125C.050(6)(c) (West 2021); 750 ILL. COMP. STAT. ANN. 5/602.9(b)(5)(D) (West 2019).

183. 750 ILL. COMP. STAT. ANN. 5/602.9(b)(5)(G) (West 2021); OHIO REV. CODE ANN. § 3109.051(D)(2), (10) (West 2014).

184. OHIO REV. CODE ANN. § 3109.051(D)(1), (8) (West 2021); VA. CODE ANN. § 20-124.3(4) (West 2021);

the nonparent and parent's relationship with the child.<sup>185</sup> The tension may also cause the child to feel uneasy or uncomfortable around both parties. When a nonparent requests more visitation time, there is more intrusion on parental rights to make decisions and to assert control over the child, as the parent loses time with the child.<sup>186</sup> Further, before determining whether to grant nonparent visitation rights, another consideration is the distance between the nonparent and child's primary residence. The court will likely find that traveling too long and far is burdensome on the child and may negatively affect the child through significant expenses, exhaustion, and isolation from friends and family.<sup>187</sup> Difficult travel that may occur in locations with heavy snowfall and harsh winters can weigh against visitation.<sup>188</sup> However, if visitation is in the best interest of the child, the court can consider whether the nonparent can find a temporary residence close to the child's residence during periods of visitation,<sup>189</sup> or whether structuring the visitation time in blocks to accommodate farther distances between the parent and nonparent's homes is possible.<sup>190</sup>

Lastly, the legislature should consider whether the nonparent's visitation will improve or further other relationships for the child, by either: (1) the nonparent providing a good faith effort in facilitating a close relationship between the child and parent and conducting visitation in a way to minimize the child's exposure to conflict between the nonparent and the parent,<sup>191</sup> or (2) the availability to spend time around siblings, peers, and extended family members during the nonparent's visitation period.<sup>192</sup> Courts hold "that it is ordinarily in the best interest of a child to be raised with his or her siblings."<sup>193</sup> Thus, "it follows that remaining together [with siblings] in visitation will probably also serve [the child's best interests], especially where the children are so close in age."<sup>194</sup> The nonparent's effort to support the child's relationships with siblings or other extended family members fosters strong familial bonds with relatives that the child may not have had the opportunity to maintain otherwise. A court found that this involvement with the child promotes the child's best interest.<sup>195</sup>

185. Romesberg, *supra* note 4, at 168–69.

186. *See* T.B. v. L.R.M., 2000 PA Super 168, ¶ 41, 753 A.2d 873, 889; McAllister v. McAllister, 2010 ND 40, ¶ 22, 779 N.W.2d at 660.

187. *See, e.g., In re F.D.*, No. 23358, 2009 WL 2915618, at \*6, 2009-Ohio-4788, ¶ 37 (Ohio Ct. App. Sept. 11, 2009).

188. *Id.*

189. *See In re Marriage of Friedman & Roels*, 418 P.3d 884, 894 (Ariz. 2018).

190. *Merritt v. Gray*, No. 2003-03-4, 2004 WL 1959352, at \*4–5 (Va. Ct. App. Sept. 7, 2004).

191. NEV. REV. STAT. ANN. § 125C.050(6)(g) (West 2021); OHIO REV. CODE ANN. § 3109.051(D)(13) (West 2014); 750 ILL. COMP. STAT. ANN. 5/602.9(b)(5)(I) (West 2019).

192. VA. CODE ANN. § 20-124.3(4) (West 2020); OHIO REV. CODE ANN. § 3109.051(D)(1), (8) (West 2014).

193. *Janice M. v. Margaret K.*, 948 A.2d 73, 93 (Md. 2008); *see also Hughes v. Gentry*, 443 S.E.2d 448, 451–52 (Va. Ct. App. 1994) (“[T]he effect of the separation of siblings must be and should be considered . . .” (first citing *Hepler v. Hepler*, 79 S.E.2d 652, 659 (Va. 1954); and then citing *Smith v. Pond*, 360 S.E.2d 885, 887–88 (Va. Ct. App. 1987))).

194. *Quinn v. Mouw-Quinn*, 1996 SD 103, ¶ 15, 552 N.W.2d 843, 847.

195. *Id.* ¶¶ 16–17.

The U.S. Supreme Court, since *Meyer* and *Pierce*,<sup>196</sup> has held that “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”<sup>197</sup> Providing the opportunity for a child to keep close ties with the child’s family may instill culture, morals, and other customs that the family deems important to pass down through generations.

#### 4. *A Factor Test Creates Clarity and Predictability in Clouded Area of Law*

Implementing the factor test in family law cases, specifically child disputes, furthers significant policy rationales. Factors provide flexibility for the court to use its discretion in emphasizing specific factors and applying the test on a case-by-case basis to ensure that a just and proper result takes place. Additionally, factors lay out certain objectives to consider, which can avoid extreme inconsistencies among lower courts use standards and eliminate a significant degree of unfairness. This makes parties in litigation aware of the factors the court considers so that they can prepare for the court’s analysis and understand the possible outcomes before expenses are incurred.<sup>198</sup>

At the same time, factor tests may give judges more room to insert their personal opinions with the ability to emphasize certain factors and de-emphasize others when determining the best interests of a child. However, judges may make better decisions than a jury in tricky situations, given their familiarity with the contours of family law. Moreover, a judge’s job is to apply the law—not to create it.<sup>199</sup> Thus, judges should avoid inserting their discretion and simply apply the facts of the case to the legislature’s direction.

Additionally, the factor test in the best-interest analysis may consist of a list that is considered extremely difficult to overcome in order to protect the fundamental rights of parental autonomy. For example, another state court held that allowing nonparents to overcome the parental presumption with little evidence “would promote family discord and would discourage parents from seeking assistance from grandparents [and other nonparents] to ensure that the children have adequate care during times of difficulty.”<sup>200</sup> This situation scares parents into thinking that courts may grant nonparents visitation rights of their children when help is necessary during times of need.<sup>201</sup> While it is imperative to “adequately safeguard the fundamental . . . nature of the parental liberty interest” instilled in our Constitution, it is also important to balance the best interest of the

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196. *See generally* *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

197. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

198. *See* Lannetti, *supra* note 104, at 256.

199. TEX. CONST. art. II, § 1 interp. commentary (West 2007).

200. *Hembree v. Hembree*, 660 So. 2d 1342, 1345 (Ala. Civ. App. 1995).

201. *See id.*

child when determining visitation rights.<sup>202</sup> The additional factors proposed will strengthen the best-interest analysis in child visitation disputes.

## V. CONCLUSION

Texas jurisprudence, or lack thereof, in the area of nonparental visitation leaves courts and parties in litigation uncertain about the standard required and unsure about the evidence sufficient in light of the parental presumption. This Comment urges the state legislature or the Texas Supreme Court to create a factor test that leaves the court flexibility in applying the factors on a case-by-case basis but also gives guidance to lower courts on the proper evaluation of the factors. This factor test for visitation suits balances various considerations necessary to make a fair decision regarding a child's best interest in light of the parental presumption. State legislatures and courts in other areas of the country clarify the proper standard to apply when evaluating evidence to overcome the parental presumption, while also using a factor test in analyzing whether the standard is met. This factor test may provide litigants an opportunity to predict outcomes and may reduce the proportion of meritless claims, allowing the court system to spend its resources determining the "close call" cases. Instead of continuing to apply inconsistencies at the lower court level, Texas should create a test to make an already clouded area of family law clearer, like other states have recognized and done in the past decade.

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202. *See* *Hunter v. Hunter*, 771 N.W.2d 694, 703 (Mich. 2009).