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The “Best Interest of the Child” Standard: Texas and Beyond

Key Points

- The “best interest of the child” is a legal standard applied in nearly every court action involving children.
- Despite its importance, there is no standard definition or consistent guidance on how the best interest standard is applied.
- In the absence of such guidance, Texas statutory and case law have combined to create a confusing patchwork of factors for courts to apply in best interest decisions.
- Ambiguity in the best interest of the child standard jeopardizes the fundamental right parents and children are guaranteed in their relationship with one another.

Executive Summary

[Section 153.002](#), Texas Family Code, declares that “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.” Despite the standard’s importance, the Texas code does not provide a clear definition of best interest and contains little guidance to courts on how to apply it. This phenomenon is not unique to Texas, as legal scholars have long noted the ambiguity of the term and the need for a clear, consistent definition ([Appell & Boyer, 1995, p. 66](#); [Duncan, 2005, pp. 1254–1255](#); [Funderburk, 2013, pp. 231–234](#)). This research paper will analyze how Texas and other states approach the best interest standard and propose legislative reforms to provide greater clarity and consistency in its application rooted in the fundamental constitutional rights of parents and children.

Introduction

In family law, few standards are as important as the “best interest of the child” standard. Every state requires courts to place the child’s best interest at the center of their decision making in cases involving children, but the factors used in determining what is in a child’s best interest vary widely ([Child Welfare Information Gateway, 2020](#)). As of June 2020, more than half of all states, not including Texas, have language in code emphasizing “the importance of family integrity and preference for avoiding removal of the child from his/her home” ([p. 2](#)). Approximately 22 states and Washington, D.C., have statutes listing specific factors for courts to consider in determining what is in a child’s best interest. Among those jurisdictions, only 8 states and D.C. require courts to consider all factors listed in the statute. In the other 14 states, courts must consider all relevant factors, not just those listed in statute. Three states—Connecticut, Delaware, and Idaho—list factors their courts may not consider when making a best interest decision, such as a caregiver’s or birth parent’s sex, socioeconomic status, or disability. In the context of marital and domestic relations, [Section 25-403](#), Arizona Revised Statutes, enumerates 11 factors courts must consider when determining what is in a child’s best interest and requires the court to make specific findings on the record concerning those factors and the reasons for the court’s determination.

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[Section 153.002](#), Texas Family Code, unequivocally states that a child’s best interest is a court’s *primary* consideration in all cases of conservatorship, possession, and access to a child. However, there is no overarching statutory definition of “the best interest of the child” in Texas ([Committee on Pattern Jury Charges, 2014, § 215.1](#)). Rather, courts interpret the standard by a series of factors scattered throughout the Family Code as well as from case law, resulting in inconsistent and subjective rulings. While every case is unique, and a certain amount of subjectivity will always be present when dealing with complex family dynamics, greater clarity is needed to ensure consistency and predictability in the application of the best interest standard. Consistency and predictability are especially important considering the constitutional dimensions of the rights of families.

The Constitutional Rights of Families

Both the United States Constitution and the Texas Constitution recognize that parents have a fundamental constitutional right to direct the “custody, care and nurture” of their children, which the state may not interfere with or hinder absent a compelling state interest ([Prince v. Massachusetts, 1944, p. 166](#); [Stanley v. Illinois, 1972, p. 651](#); [Wiley v. Spratlan, 1976, p. 352](#); [Troxel v. Granville, 2000, p. 65](#); [In re C.J.C., 2020, p. 807](#)). This parental right is inherently connected with a child’s fundamental right to maintain the “emotional attachments that derive from the intimacy of daily association” with their family members ([Smith v. Organization of Foster Families for Equality & Reform, 1977, p. 431](#)). These corresponding rights are encompassed by the right of families to stay together without the “coercive interference of the awesome power of the state” ([Duchesne v. Sugarman, 1977, p. 825](#)).

The fundamental nature of the parent–child relationship is rooted in the presumption that fit parents possess the “maturity, experience, and capacity for judgment required for making life’s difficult decisions” and will naturally act in their child’s best interest ([Parham v. J.R., 1979, p. 602](#); [Troxel v. Granville, 2000, pp. 68–69](#)). Accordingly, the state is generally prohibited from interfering with the parent–child relationship or substituting its judgment for that of a fit parent “simply because they have not been model parents” or because it “believes a ‘better’ decision could be made” ([Santosky v. Kramer, 1982, p. 753](#); [Troxel v. Granville, 2000, pp. 72–73](#); [In re Derzapf, 2007, p. 334](#)).

This principle has been “deeply embedded in Texas law” ([In re V.L.K., 2000, p. 341](#)) since well before the U.S. Supreme Court’s ruling in *Troxel*, with the Texas Supreme Court tracing its history back to the 1894 case of *Legate v. Legate*

([pp. 249, 252](#)). Since 1995, [Section 153.131](#), Texas Family Code, has required the appointment of a child’s parents as conservators during initial child custody suits, unless the child’s physical health or emotional development would be significantly impacted. The Texas Supreme Court’s landmark decision in *In re C.J.C.* (2020) clarified that when determining the best interest of a child in a particular case, “a court must apply the presumption that a fit parent—not the court—determines the best interest of the child” ([p. 817](#)). This ruling strengthened the application of the fit parent presumption in Texas law, obligating courts to apply the best interest standard from this starting point. Only once the presumption is overcome can the court proceed to the consideration of other factors.

Making a Best Interest Decision

In cases where the fit parent presumption is overcome, courts are given broad discretion to determine the best interest of a child based on “the entire record and ... all relevant circumstances” ([In re C.M., 2013, p. 2](#); [In re Herd, 1976, p. 952](#)). This discretion, while broad, is not unbridled. Some restrictions on the court’s discretion are specifically listed in code. For example, [Section 161.001\(c\)](#), Texas Family Code, prohibits termination based on a parent’s economic disadvantage or decisions the parent makes regarding medical care or homeschooling. Other restrictions are derived from case law. For example, a court may not find that termination of parental rights is in a child’s best interest based only on the fact that they might be better off living elsewhere ([In re C.E.K., 2006, pp. 498–499](#)). Termination also cannot be based solely on what the trial court determines is in the child’s best interest, there must be clear and convincing evidence that a parent committed at least one act or omission listed in [Section 161.001\(b\)](#), Texas Family Code ([Holley v. Adams, 1976, pp. 370–372](#)). However, a finding that a parent committed one of these enumerated acts or omissions does not necessarily mean that a court will find that termination is in the child’s best interest ([In re D.M., 2001, p. 814](#)). In those cases, other independent facts must support a finding that termination and removal of a child from their longtime home is in their best interest ([In re M.A.N.M., 2002, p. 79](#)).

Beyond these restrictions on a court’s discretion when applying the best interest standard, Texas statute and case law also outline factors for courts to consider under various circumstances. *Holley v. Adams* is the leading Texas case enumerating factors that judges should consider when determining best interest. In *Holley*, the Texas Supreme Court considered a suit filed by a father seeking to involuntarily terminate the parent–child relationship between his

former wife and their son (*Holley v. Adams*, 1976, p. 369). The father’s suit alleged that the child’s mother had failed to support the child and had “emotionally and actually abandoned the child.” The trial court granted the termination, finding that it was in the best interest of the child, and the decision was upheld by the court of appeals. Citing the constitutional dimensions of the parent–child relationship, the Texas Supreme Court reversed the lower courts and denied the father’s petition to terminate the mother’s parental rights (pp. 370, 373). In overturning the termination of the mother’s parental rights, the Texas Supreme Court outlined nine key factors for judges to consider when faced with best interest decisions. However, it is important to note that the Court itself cautioned that its list is not exhaustive, and each consideration may not apply in every case (pp. 371–372). The “*Holley* factors” are:

- (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 to promote the best interest of the child;
- (F) the plans for the child by these individuals or by the agency seeking custody;
- (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. (p. 372)

Since the *Holley* ruling, many Texas courts have looked to these factors to aid in deciphering and applying the best interest standard (*Dowd*, 2016; *Law Office of Bryan Fagan*, 2019; *In re C.H.*, 2002, p. 27). Although *Holley* dealt with termination of parental rights, some courts have expanded its application to ordinary child custody disputes, something Dowd cautions may be difficult in cases where “each parent is a suitable choice to have primary custody”

(*Dowd*, 2016, para. 4; *Patterson v. Brist*, 2006, p. 240). Other courts have pushed beyond the *Holley* framework, finding additional factors for consideration under specific circumstances. For example, some courts have given weight to a child’s chances for adoption in finding that termination is in that child’s best interest (*In re C.J.S.*, 2012, p. 694; *Jordan v. Dossey*, 2010, p. 731). The Texas Supreme Court has noted, however, that while “evidence about placement plans and adoption are, of course, relevant to best interest ... the lack of evidence about definitive plans for permanent placement and adoption cannot be the dispositive factor” (*In re C.H.*, 2002, p. 28).

In addition to the *Holley* factors, several others have been enshrined in statute by the Legislature. Many of these statutory factors are tied to specific categories of cases rather than broadly applicable. For example, in cases where a child has been removed from his or her parents and placed into foster care, *Section 263.307(b)*, Texas Family Code, lists 13 factors that courts should consider when weighing reunification and assessing whether the child’s parents are “willing and able to provide the child with a safe environment.” These factors include the child’s age, physical and mental vulnerabilities; the magnitude, frequency, and circumstances of the harm to the child; and any history of violence, abuse, or substance abuse by the child’s family or anyone who has access to the house.

Issues

A major issue with best interest decisions is that the Texas Family Code has different requirements depending on the type of case. There is no overarching statutory definition of “best interest of the child” (*Committee on Pattern Jury Charges*, 2014, § 215.1). As a result, unlike the states discussed above, Texas lacks a uniform set of factors to apply in all best interest decisions. Therefore, courts must apply the factors articulated in case law or identified in applicable sections of the Family Code, making it difficult for courts to reach consistency.

In most circumstances, a court is not required to explain how it determined what was in the child’s best interest, and parties are often subject to differing standards depending on the court they are in. For example, *Section 31.002*, Texas Family Code, requires a minor seeking emancipation to file a petition clearly stating why the removal of the disabilities of minority would be in their best interest. Yet when a party such as the Department of Family and Protective Services petitions for involuntary termination of parental rights under *Section 161.101*, Texas Family Code, that petition does not need to contain underlying facts, if it alleges “in

statutory language” the grounds for termination and that termination is in the child’s best interest. In practice, this relegates the best interest determination to a box-checking exercise where the court merely states that its order was found to be in the child’s best interest without any explanation or citation of evidence supporting the conclusion.

The lack of both clear parameters for applying the best interest standard and a requirement that courts make specific findings supporting a best interest outcome can lead to significant variations in practice throughout the state and arbitrary decisions, which undermine public faith in the judicial system. A key aspect of the rule of law is that laws are “applied predictably and uniformly” ([American Bar Association, n.d., para. 18](#)). The predictable application of the law is essential for liberty as it provides citizens with the knowledge they need to order their lives and exercise their liberty ([Waldron, 2012, p. 9](#)). By taking the simple step of better defining how the best interest standard should be applied in specific cases and requiring courts to issue specific findings on the application of best interest, the Legislature can provide greater clarity and predictability in some of the most important cases affecting Texas families.

Conclusion and Recommendations

The overly subjective nature of the best interest standard can and does lead to inequitable outcomes. It also creates a family-law system that is complex, difficult to navigate, and lacking in transparency. It should be acknowledged, however, that given the nature of family law and the variety of circumstances affecting individual families, a single, bright-line standard would be unworkable. In addressing the problems with the current best interest standard, the Texas Legislature should work to provide greater clarity on the factors courts must consider when applying the standard in various contexts. The following are just a few examples of measures that the Texas Legislature could implement to improve the best interest standard.

Codifying protections for the fundamental right of parents and children in their relationship with one another should be a primary focus of the Texas Legislature. Texas should join the other 28 states with statutory protections for family integrity and emphasize that removal of children from their families is a last resort that should be avoided unless absolutely necessary to protect the child from

immediate danger. In doing so, the Legislature should codify United States and Texas Supreme Courts’ holdings that Texas parents have the fundamental right to raise their children free from government interference and children have the right to maintain their relationships with their family ([Texas Public Policy Foundation, 2020](#)). In tandem with this, the Legislature should also codify the presumption that fit parents act in their children’s best interest. These actions would ensure courts make best interest decisions with a bias toward maintaining the parent–child relationship. They would also limit unnecessary interference in that relationship by placing a heavier burden on the government to show why that interference is necessary. Most importantly, strengthening protections for the parent–child relationship in this way will have wide-ranging positive impacts for more Texas children by promoting familial attachment and stability and allowing children to enjoy the associated benefits.

The Legislature should also consider legislation similar to the Arizona statute that clearly enumerates specific factors courts may and may not consider when making a best interest decision and requires courts to issue specific findings on the record concerning the factors applied and the reasons for the court’s decision. Such factors could include a codification of those laid out in *Holley v. Adams* and other Texas court cases. This would help eliminate the inconsistent and conflicting factors applied by courts across the Lone Star State. Such a statute would allow the courts to retain the subjective standard they have been applying for years while allowing for more transparency and consistency in applying the best interest of the child standard.

Texas parents have a constitutional right to raise their children as they see fit, and their children have a right to maintain a relationship with their parents free from outside interference. These rights are longstanding and, according to the U.S. Supreme Court, grounded in the history and culture of Western civilization ([Troxel v. Granville, 2000](#)). These rights are threatened by the inconsistent application of the best interest standard and a lack of transparency surrounding how courts ultimately reach their conclusion. To ensure courts treat all families fairly and uphold their rights, these issues must be addressed through a clearer and more consistent best interest statutory framework. ★

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