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THE TERMINATION OF PARENTAL RIGHTS IN TEXAS: THE LONG RUN CUT SHORT FOR PARENTS IN BEXAR COUNTY

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INTRODUCTION

Imagine being a parent to a child you could not see because you were incarcerated in prison.[1] As you serve a prison sentence, your little girl is bouncing from one home to another without permanency until she finally ages out of the foster care system.[2] Despite a lack of permanency, your child continues to maintain a close connection with you.[3] Throughout eight time-consuming years, comes a story of change and perseverance for a parent and his little girl.[4] Unfortunately, this is a story many individuals in the same situation would not experience.[5] In most

1. *See* Vivek Sankaran, *Termination of Parental Rights: What's The Rush?*, IMPRINT (Sept. 20, 2018, 6:11 AM), https://imprintnews.org/opinion/termination-of-parental-rights-whats-the-rush/32250 [https://perma.cc/DCX9-W95U] (illustrating an attorney's account of a client's successful rise as a parent after problematic choices led to a proceeding attempting to terminate his parental rights).

2. *See id.* (indicating there is a lack of stability within the foster care system).

3. *Id.*

4. *Id.*

5. *Id.*

jurisdictions, this story of perseverance would not have occurred as most courts would have terminated this father's parental rights.[6]

In this story, the father sold drugs, failed to care for his little girl, and was serving time in a jail cell while his daughter was growing up.[7] For many, this seems clear cut; there appears to be a good cause and case to terminate the father's parental rights.[8] However, this father did not have his parental rights terminated.[9] Instead, the father finished serving his time, continued to maintain the relationship with his daughter, helped finance her education, and, today, proudly and tearfully watches her walk the stage as she receives her J.D.[10] A joyous moment captivated by a long, enduring road this father may have been unable to experience if in a different jurisdiction.[11] This father's resilience is precisely what the termination of parental rights undermines and prevents when a parent's right to maintain a relationship with their child is legally terminated expeditiously.[12]

The implications of termination proceedings carry massive repercussions that forever alter the life and connection between a parent and child.[13] Once a parent's rights have been terminated, it is deemed final, irrevocable, and, for almost all other purposes than inheritance,

6. *See id.* (noting the expeditious correlation between our judicial proceedings and the termination of parental termination); *cf.* In re B.T.B., 2018 UT App 157, ¶¶ 20, 436 P.3d 206, at 221 ("[I]f there is a practical way to keep parents involved in their children's lives that is not contrary to the children's best interests, a court should seriously consider such an option.").

7. Sankaran, *supra* note 1 (showing how courts do not tend to preserve the parent-child relationship when they see evidence that a parent is unfit).

8. *Id.*

9. *See id.* (emphasizing a seemingly "unfit" parent can still turn things around and preserve his parental rights and maintain a good relationship with his child).

10. *Id.* (recognizing the importance of preserving the legal rights of a parental relationship while incarcerated); *Juris Doctor*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Doctor of law—the law degree most commonly conferred by an American law school. . . . Also termed *Doctor of Jurisprudence*; *Doctor of Law*; *law degree*.").

11. Sankaran, *supra* note 1 (describing the importance of advocating for the termination of parental rights only in extreme cases).

12. *See id.* (explaining the need to construct a statutory scheme that only terminates parental rights if absolutely essential).

13. *See* Stephanie N. Gwillim, Comment, *The Death Penalty of Civil Cases: The Need for Individualized Assessment & Judicial Education When Terminating Parental Rights of Mentally Ill Individuals*, 29 ST. LOUIS U. PUB. L. REV. 341, 344 (2009) ("Termination of Parental Rights (TPR) is the death penalty of civil cases. Once a parent's rights to his or her child are terminated, that parent's right to care for, visit, or make decisions for the child are gone forever . . . [and t]he child can immediately be put up for adoption and a biological parent may never see their child again.").

severs the parent-child relationship completely.[14] With no legal right to a continued relationship with the child, the adoption process can begin and end with a parent never seeing their child again.[15] Thus, the decision to terminate a parent's rights must meet what due process demands, the production of a sufficient measure of evidence to support the permanent severance of rights.[16] However, diligence in meeting the exacting standard of evidence in due process is not always given by some courts.[17]

Following the inception of the 1997 Adoption and Legal Guardianship Incentive Payments Program,[18] there has been a governmental push to incentivize states who finalize more adoptions of children in the foster care system.[19] As a result, Texas has seen a steady influx of annual adoptions that totaled 5,703 in 2016, roughly 3,455 more than the number of annual adoptions in Texas during 2002.[20] That begs the question, has the incentive-based program affected the way parental terminations are handled?[21] As it turns out, the incentive-based program may have a plausible connection to the approach Texas uses in its parental termination proceedings.[22] After all, the adoption process cannot take

14. TEX. FAM. CODE ANN. § 161.206; In re R.H., No. 04-98-00051-CV, 1998 WL 904355, at *2 (Tex. App.—San Antonio Dec. 30, 1998, no pet.) (not designated for publication); Gwillim, *supra* note 13, at 344.

15. Gwillim, *supra* note 13, at 344. *See generally* TEX. FAM. CODE ANN. § 162.001(b) (describing the qualifying requirements for a child to be considered for adoption in Texas).

16. *See* In re J.E.M.M., 532 S.W.3d 874, 891 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (emphasizing how Texas requires clear and convincing evidence to sever the parental relationship).

17. *See, e.g.*, In re J.E.H., 384 S.W.3d 864, 870 (Tex. App.—San Antonio 2012, no pet.) (expressing disapproval over the trial court's improper use of judicial notice to admit evidence that was otherwise inadmissible).

18. *Adoption*, CHILD.'S BUREAU: AN OFF. ADMIN. FOR CHILD. & FAM., https://www.acf.hhs.gov/cb/focus-areas/adoption [https://perma.cc/Y4WQ-YAEM] (last updated Oct. 1, 2020).

19. Christie Renick, *Bigger in Texas: Number of Adoptions, and Parents Who Lose Their Rights*, IMPRINT (May 24, 2018, 7:00 AM), https://imprintnews.org/featured/bigger-in-texas-adoptions-and-parents-who-lose-their-rights/30990 [https://perma.cc/SF2J-V5QB] (showing how a federal initiative rewarding states who finalize adoptions has led to short fuses in some states, such as Texas, and to an ever-increasing amount of parental terminations).

20. *Id.*

21. *See generally id.* (discussing the increase of Texas adoptions and parental terminations could be linked to the incentive-based program).

22. *See* David Crary, *Terminating Parental Rights: State Policies Vary Widely*, AP NEWS (Apr. 30, 2016), https://apnews.com/c9fec9ee24d64f4b9e56d1425179a50e [https://perma.cc/SN

place before the rights of a parent are permanently severed.[23]

Today, a problem directly affected by the Adoption and Legal Guardianship Incentive Payments Program involves the disproportionate amount of parents in Texas who are losing their rights on a basis providing little to no evidence under one of the highest evidentiary standards: clear and convincing evidence.[24] A basis some courts in Bexar County[25] have trouble understanding.[26] This comment will address the effects of the Adoption and Legal Guardianship Incentive Program on parental terminations, the use of evidence in Texas Courts when terminating parental rights, and the proper utilization of "clear and convincing evidence."[27]

In Part II, this comment will address the foundational viewpoints and the historical background of parental rights in the Constitution, as interpreted by the Supreme Court of the United States.[28] Part III will describe the process of parental termination in Texas and examine the complex approaches of other states when terminating the parent-child relationships.[29] Part IV will address the effects of the Adoption and Legal Guardianship Incentive Payments Program (ALGIP) in Texas.[30] Next, Part V will identify and address the improper use of evidence in

3U-BFUU] ("Critics of the Texas [family law] system say it is sometimes too quick to conclude that adoption is the best outcome for a child, and doesn't give biological parents an adequate chance to address problems so their child could stay with them.").

23. Renick, *supra* note 19.

24. *See* TEX. FAM. CODE ANN. § 101.007 ("'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.''); *see also* Santosky v. Kramer, 455 U.S. 745, 748 (1982) ("[D]ue process requires that the State support its allegations [in a parental termination proceeding] by at least clear and convincing evidence.").

25. A county within the vicinity of the San Antonio, Texas area.

26. *See* In re E.F., 591 S.W.3d 138, 149 (Tex. App.—San Antonio 2019) (Chapa, J., dissenting) (relying on facts not in evidence violates the role of judicial notice by impairing the truth-seeking function of the court and denying parents of their due process rights); *see also* In re G.M., No. 04-19-0080-CV, WL 3432088, at *5 (Tex. App.—San Antonio July 31, 2019) (Martinez, J., dissenting) (admonishing the trial court for allowing evidence not admitted at trial to support the court's parental termination order).

27. TEX. FAM. CODE ANN. § 101.007; Santosky v. Kramer, 455 U.S. at 747–48.

28. *See infra* Part II.

29. *See infra* Part III.

30. *See infra* Part IV. *See generally* 42 U.S.C. § 673b (2018) (identifying criteria an incentive eligible state must be in compliance with and describing the incentive-based funds an incentive eligible state can receive).

Texas courtrooms with an emphasis on Bexar County.[31] Finally, Part VI will suggest recommendations to properly terminate parental rights in Bexar County.[32]

I. THE HISTORICAL PERSPECTIVE OF PARENTAL RIGHTS

A. Parents and Their Constitutional Rights

1. Philosophical Views and the Foundational Eras of Parental Rights

Early theoretical viewpoints on parental rights can find their origins in philosophy.[33] Throughout the late seventeenth and eighteenth century, philosophers John Locke and William Blackstone each shared an innovative common belief about the parent-child relationship.[34] Both philosophers believed a parent did not necessarily have rights in regard to parenthood, but rather occupied a set of responsibilities meant to ensure the safe upbringing and well-being of the child.[35] These responsibilities were deemed to be finite in duration and would conclude when the child became of age, meaning the parents were obligated to ensure the child's development until they reached the age of twenty-one.[36]

Furthermore, if a parent failed to uphold their responsibilities, there was a strong belief that the state would stand ready to enforce the rights of the child.[37] Therefore, it was the philosophical viewpoint the natural rights of a parent would be subjected and subordinate to the power of

31. *See infra* Part V.

32. *See infra* Part VI; *see also* In re C.H., 89 S.W.3d 17, 25 (Tex. 2002) (explaining how a parent's constitutional interest during a termination proceeding requires due process to justify the termination of a parent-child relationship).

33. JEFFREY SHULMAN, THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD 20 (Yale Univ. Press 2014) (comparing philosopher's theories on the "rights enabl[ing] social beings to carry out their social duties.").

34. *Id.* at 23.

35. *Id.*

36. *See id.* at 21 ("Parents . . . are duty-bound to bring children to the state of reason that is every child's birthright. . . . [They have an obligation] to take care of their [o]ff-spring, during the imperfect state of [c]hildhood."); *see also* WILLIAM BLACKSTONE & THOMAS COOLEY, COMMENTARIES ON THE LAWS OF ENGLAND 453 (Chicago, Callaghan and Co., Detroit Free Press 3d rev. ed. 1884) ("[P]ower of a father [over his child] . . . ceases at the age of twenty-one.").

37. SHULMAN, *supra* note 33, at 23 ("[T]he state stands ready to enforce these rights if the parent fails to do his duty.").

states.[38] As a result, the philosophical mindset was not that parents had an absolute right or power to their child, but rather a conditional privilege.[39] However, this philosophical view was not always the prevalent mindset.[40]

In the colonial era,[41] children were seen as economic producers in the labor-hungry colonies.[42] Thus, a child in this era did not have rights and instead was a commodity on the open market subject to the control of their father, who could at any time decide it was time to part with his child.[43] Similarly to property, children were under the possession and control of their father.[44] Unlike the philosophical perspective coined by John Locke, a mother in the colonial era did not have an equal share in authority or power over her child.[45]

The colonial era followed common law and held on to the belief a father had a natural right to the child the mother did not possess.[46] Despite having a significant role in the child's infancy, mothers faced the harsh reality knowing they were not equal to fathers under the law.[47] Compared to fathers, mothers had very few enforceable rights and responsibilities to a child.[48] Fathers, on the other hand, were responsible

38. *See id.* (explaining the state laws act as a fail-safe enforcement mechanism).

39. *Id.*

40. *See* DR. KATHLEEN K. REARDON & CHRISTOPHER T. NOBLET, CHILDHOOD DENIED: ENDING THE NIGHTMARE OF CHILD ABUSE AND NEGLECT 85 (2008) (noting the mindset in the colonial period thought the father, or head of the household, had "complete rights" to his children and their labor).

41. *Colonial Period 1607–1776*, SCHOLASTIC, https://www.scholastic.com/teachers/articles/teaching-content/colonial-period-16071776/ [https://perma.cc/9AEN-HHDP].

42. REARDON & NOBLET, *supra* note 40, at 85.

43. *Id.*

44. *See* SHULMAN, *supra* note 33, at 42 ("The state could not take from the father his right of parental control, any more than it could deprive him of more tangible property rights.").

45. JOHN LOCKE, TWO TREATISES OF GOVERNMENT: AND A LETTER CONCERNING TOLERATION 122 (Yale Univ. Press 2003); *see* BLACKSTONE & COOLEY, *supra* note 36, at 452–53 ("[A] mother . . . is entitled to no power [over her child], but only to reverence and respect . . . ."); *see also* SHULMAN, *supra* note 33, at 20 (describing how the Lockean theory consisted of the parent having a privilege or duty to ensure that their kids have a freedom of thinking and development that prepares the child with "mental, moral, and physical capability to meet any situation." Locke "repudiated the absolute power of the domestic patriarch" other theorist during that time period believed should be a father's "right of dominion.").

46. REARDON & NOBLET, *supra* note 40, at 85 ("[T]he father had a natural right to his children and the mother 'was entitled to no power . . . .").

47. *Id.* at 86.

48. *Id.*

for producing a productive member of the community.[49] In some colonies, the failure to produce a productive member of the community could result in town officials removing and placing a child into an involuntary apprenticeship with another master.[50] Apprenticeships could also be voluntary, whereby the child's father entered into an arrangement with another party to train the child in a specific trade in exchange for the child's labor.[51]

During the nineteenth century, legal and social statuses started changing by emphasizing the interests of children as individuals with rights.[52] This transitional period contained many inconsistencies and breakthroughs in the area of custodial law.[53] During this period, courts within the same state battled contradiction and could not decide whether to uphold the primacy of father's rights or to hold onto a new-founded belief the mother better served the interests of the child as the natural guardian.[54] This transitional period resulted in the recognized importance of a mother's parental rights and gave rise to a new era in the history of parental rights—the tender years doctrine.[55]

Family law transcended from a father's near-absolute right to a child into a movement applying the best interest standard while simultaneously using the tendered years doctrine to determine who would serve in the child's best interest and gain custody of the child.[56] Highlighted by

49. Mary Ann Mason, *Masters and Servants: The American Colonial Model of Child Custody and Control*, 2 INT'L J. CHILD RTS. 317, 320 (1994).

50. *Id.* at 321 ("In New England . . . if, following the town officials' warning the child . . . was found 'rude, stubborn and unruly,' the town officials had the right to remove the children from the parents and 'place them with some masters for years . . . [while] forcing them to submit unto government . . . .").

51. *Id.* at 324.

52. *See* REARDON & NOBLET, *supra* note 40, at 96 (addressing society's attempt to shift away from fathers having absolute control over the child).

53. *Id.* at 87.

54. *Id.* (reiterating the inconsistencies between courts in the same state).

55. *Understanding the Tender Years Presumption in Custody Cases*, MEN'S RTS., https://mensrights.com/tender-years-presumption/ [https://perma.cc/LF99-AVAB] ("[T]he tender years presumption, often referred to as the tender years doctrine, originated in the United States in 1881 . . . ."); *see* Latham v. Latham, 71 Va. 307, 333 (1878) ("When the child . . . is of very tender years, and the mother is deemed a suitable person, the custody is given to her, as essential to the health and life of the infant . . . .").

56. Ana M. Novoa, *Count the Brown Faces: Where is the Family in the Family Law of Child Protective Services*, 1 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 5, 14–15 (1999) (describing the shift of custody cases from the mid-nineteenth to twentieth century).

societal perception, the tender years doctrine stood for the presumption mothers were better equipped in meeting the needs of a young child and thus were the preferred parent for a child to reside with after the resolution of a custodial dispute[57] The notion of the tender years doctrine represented a new found power and change in history underscoring the reformation of the mother's parental right to her child.[58] It stood as a right altering the landscape of the playing field in custodial law by favoring mothers as natural guardians of the child until the doctrine met its demise in the mid-twentieth century.[59] Following the departure of the tender years doctrine, courts were left with the vague best interest standard to resolve cases involving custodial rights.[60]

2. The Supreme Court of the United States and its Interpretation of the Twentieth Century Evolution of Parental Rights

At the turn of the twentieth century, the Supreme Court of the United States found itself within the boundaries of revolutionizing family law.[61] More specifically, the Supreme Court, through a series of cases, made defining decisions on one of the most critical aspects of family law: parental rights.[62] These decisions established clear, binding precedent

57. *See generally Understanding the Tender Years Presumption in Custody Cases*, *supra* note 55 (analyzing the evolution of the meaning and impact of the tender years doctrine on child custody cases).

58. *See id.* (implying the tender years doctrine gave power to the mother and gave her more rights); *see also* Lee v. Lee, 2000-CA-00872-SCT (¶ 17) (Miss. 2001) (describing the early development of the tender year doctrine favored women when it came to custodial disputes of a child unless the mother was deemed unfit).

59. *See* REARDON & NOBLET, *supra* note 40, at 100 (noting how state legislatures and courts systematically erased the tender years doctrine); *see also Understanding the Tender Years Presumption in Custody Cases*, *supra* note 55 (describing the demise of the tender years presumption as a result of violations of the Equal Protection Clause of the Fourteenth Amendment).

60. REARDON & NOBLET, *supra* note 40, at 100; *see* Seibert v. Seibert, 584 N.E.2d 41, 42-43 (1990) (recognizing other courts use of the "relevant" factors to determine a child's best interest).

61. *The Supreme Court's Parental Rights Doctrine*, PARENTALRIGHTS.ORG, https://parentalrights.org/understand_the_issue/supreme-court/ [https://perma.cc/G4JU-Y2H3] (summarizing the defining Supreme Court cases that heightened parental rights and the rugged steps that followed and led to a lack of clear precedent).

62. *Id.*; *see* Linda Elrod, *The Federalization of Family Law*, A.B.A. (July 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law/ [https://perma.cc/TU5Y-CLUM] (discussing how family law protections became constitutional and how it evolved over the twentieth century through Supreme Court decisions).

courts followed without confusion until the beginning of the twenty-first century when the Supreme Court decided *Troxel v. Granville*.[63] The Supreme Court, prior to *Troxel*,[64] continuously protected parental rights in a long line of cases by giving parental rights the highest respect and protection possible.[65]

Starting with *Meyer v. Nebraska*, the Supreme Court began a century-long endeavor to protect parental rights from state intervention.[66] In *Meyer*, the Court dealt with a state statute prohibiting the teaching of foreign languages to students who had not passed eighth grade.[67] The Court invalidated the statute by holding the statute was arbitrary and unreasonably exceeding the proper exercise of the state's police power by infringing on fundamental rights protected by the Fourteenth Amendment.[68] The Court's decision made it clear a parent, as an individual, has certain fundamental rights under the liberty guaranteed by the Fourteenth Amendment.[69] These fundamental rights include establishing a home and the ability to direct the religious upbringing and education of their children.[70]

63. Troxel v. Granville, 530 U.S. 57 (2000); *The Supreme Court's Parental Rights Doctrine*, *supra* note 61.

64. *See generally* Troxel v. Granville, 530 U.S. at 58 (referring to the history of parental rights prior to this case).

65. *See generally* Christopher J. Klicka, *Decisions of the United States Supreme Court Upholding Parental Rights as "Fundamental"*, HOME SCH. LEGAL DEF. ASS'N (Oct. 27, 2003), [https://perma.cc/9EKL-DKXM] (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) ("The Supreme Court of the United states has traditionally and continuously upheld the principle that parents have a fundamental right . . . [and] has unwaveringly given parental rights the highest respect and protection possible.").

66. *See generally* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (acknowledging the state does not have the power to prohibit schools from teaching any other languages to children besides English because "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life.").

67. *Id.* at 396–97.

68. U.S. CONST. amend. XIV; Meyer v. Nebraska, 262 U.S. at 399–402.

69. *See* Meyer v. Nebraska, 262 U.S. at 401 (establishing individuals have certain fundamental rights that must be respected). *See generally* U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

70. U.S. CONST. amend. XIV; *see* Meyer v. Nebraska, 262 U.S. at 401–03 (interpreting the right to teach children a foreign language and direct their education is a fundamental right of a parent); *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (explaining how legislation cannot interfere with the liberty of a parent to direct the upbringing and education of children under their control).

These rights were furthered in *Pierce v. Soc'y of Sisters* when the Supreme Court asserted it was a parent's fundamental right to keep their child free from government standardization.[71] The Court struck down a state law requiring all children to attend public schools by making it clear a "child is not the mere creature of the state . . . [it is only those] who nurture him and direct his destiny [who] have the right and high duty to . . . prepare additional obligations [on the child]."[72] As a result, parents received a Constitutional liberty interest guaranteeing their right to engage teachers regarding their child's instruction and the power to control the child's education over the preferences of the state.[73]

In *Prince v. Massachusetts*, the Supreme Court noted parental rights were not limitless and could be restrained through the states as "*parens patriae*."[74] There, the Court upheld a state law regulating child labor because the state, as *parens patriae*, could restrict a parent's control by prohibiting or regulating child labor to prevent psychological or physical injury.[75] Highlighted by the state's police powers, the Court held the state encompassed a wide range of powers to limit parental freedom when dealing with a child's welfare.[76] However, the Court's stance was not without regard for the high protection and respect of parental rights in the private realm of family life.[77]

The recognition of these heightened parental rights continued as more

71. Pierce v. Soc'y of Sisters, 268 U.S. at 535 ("The fundamental theory of liberty . . . excludes any general power of the state to standardize its children . . . ."); Klicka, *supra* note 65 (stating it is the parent's right to direct the upbringing and education of their children).

72. Pierce v. Soc'y of Sisters, 268 U.S. at 535; U.S. CONST. amend. XIV; Meyer v. Nebraska, 262 U.S. at 399–400 (holding parents have an interest in their children's upbringing). *See generally* Klicka, *supra* note 65 (providing an outline of parent's fundamental rights).

73. Pierce v. Soc'y of Sisters, 268 U.S. at 535; Klicka, *supra* note 65.

74. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways."); *see Parens Patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[T]he State in its capacity as provider of protection to those unable to care for themselves.").

75. Prince v. Massachusetts, 321 U.S. at 166–67 ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . .").

76. *Id.* at 166–67.

77. *Id.* at 166 ("It is cardinal with us 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.").

cases involving parental rights reached the Supreme Court.[78] With the Due Process Clause standing in the way of state intervention, the evolution of parental rights revolved around the notion the state could not sever the ties of a family or its parental rights unless the state proved: (1) there was parental consent; or (2) a showing of unfitness and a finding it would be in the child's best interest.[79] However, the Supreme Court did not stop there.[80]

Instead, in *Santosky v. Kramer*, the Supreme Court elevated the belief of unfitness.[81] The Court, realizing the severity and impact of a parental termination case, recognized there was a fundamental liberty interest at stake and reversed the lower court's decision for using an improper standard of proof.[82] The Court, in landmark language, held the fundamental rights of a parent could not "evaporate" simply because parents failed to act as model parents or temporarily lost custody of their child.[83] Rather, to sever such a relationship, unfitness had to be proved by clear and convincing evidence.[84] A burden of proof the lower courts in this case erroneously failed to use by applying the preponderance of

78. *See* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("[T]his case involves the fundamental interest of parents, as contrasted with that of the state, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); s*ee also* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 843 (1977) ("[L]iberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'").

79. *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (noting a state's forceful breakup of a family without a showing of unfitness would offend the Due Process Clause); *see also* Reno v. Flores, 507 U.S. 292, 303–04 (1993) (explaining "the best interest of a child" standard is not the absolute or exclusive criterion for the government when making custodial decisions; the best interest must be reconciled with many other concerns).

80. *See* Klicka, *supra* note 65 (summarizing the Supreme Court's interpretation of parental rights over the twentieth and twenty-first century); *see also The Supreme Court's Parental Rights Doctrine*, *supra* note 61 (explaining the parental right evolution captivated the twentieth century).

81. Santosky v. Kramer, 455 U.S. 745, 753 (1982) (recognizing parental rights do not terminate simply because they were not a model parent or have temporarily lost custody to the state).

82. *Id.* at 769–70 (holding the standard of "clear and convincing evidence" is the proper standard of review in parental termination cases).

83. *Id.* at 753.

84. *Id.* at 769 ("[Holding a clear and convincing standard] adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process.").

evidence standard.[85] Anything less than a clear and convincing standard would violate the parent's liberty interest protected under the Fourteenth Amendment.[86]

The Supreme Court went a step further in *Washington v. Glucksberg* and held freedoms protected under the Due Process Clause as liberty interests—including the right to direct the education and upbringing of a parent's children—could not be infringed unless the state could prove the infringement was narrowly tailored to serve a compelling state interest.[87] Despite the century-long advancement of parental rights, the twentieth century would end on a much different note than the beginning of the twenty-first century.[88]

3. Current Legal Doctrine

The twentieth century came with consistent rulings by the Supreme Court concerning the parental rights doctrine.[89] However, the start of the twenty-first century was anything but consistent.[90] The Court brought a halt to this consistency when they decided *Troxel*.[91] Despite the clearly established precedent, the Court found itself with a plurality opinion of

85. *Id.* at 747–48 (striking the New York law which requires only "fair preponderance of the evidence" to support a parental termination claim); *see also Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[S]uperior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.").

86. *See* Santosky v. Kramer, 455 U.S. at 768–69 ("[Use of the] fair preponderance of the evidence' standard in a parental termination case . . . violates the Due Process Clause of the Fourteenth Amendment and 'a clear and convincing evidence' standard of proof strikes a fair balance between the rights of the natural parents and the state's legitimate concerns.").

87. U.S. CONST. amend. XIV; Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

88. *See generally The Supreme Court's Parental Rights Doctrine*, *supra* note 61 (commenting on the how the Supreme Court decided to forgo upholding clearly established precedent in favor of an unclear line of reasoning that has left a "confusing legacy" for practitioners in family law).

89. *See id.* (discussing the consistent culmination of Supreme Court rulings heightening parental right protections).

90. *E.g.*, *id.* (describing the disastrous aftermath of the Supreme Court decision in Troxel and how individual judges and states could now apply their own rules to parental rights).

91. *See* Troxel v. Granville, 530 U.S. 57 (2000) (plurality opinion) (sparking a debate and split amongst six justices about the Constitutionality of state statutes implicating a parent's rights to control visitation with third parties). *See generally The Supreme Court's Parental Rights Doctrine, supra* note 61 (describing the differences between parental right cases before and after Troxel).

five separate conflicting concurring and dissenting opinions.[92] Generating a total of six opinions from the nine justices and a country full of dazed family law practitioners.[93]

This case centered on a grandparent's right to visitation and carefully underlined the state's involvement in the parent-child relationship.[94] However, the viewpoints expressed by the justices in separate opinions gave way to confusion.[95] The confusion in *Troxel* introduced a new era where clarity was obscured by the varying standards courts interpreted the case to stand for.[96] In *Troxel*, the Court faced a decision regarding a Washington state law permitting any person to petition a state court for visitation rights to a child at any time as long as it was found by the court to serve the best interest of a child.[97]

There, the paternal grandparents sought visitation rights to their grandchildren after their son's untimely death left the children's mother with full control over visitation.[98] Although the mother allowed the grandparents to see the children regularly, she soon limited visitation to "one short visit per month."[99] The conflicted Court, through a plurality opinion, affirmed the judgment of the state Supreme Court in favor of the mother holding: (1) the state statute swept too broadly and (2) unconstitutionally interfered with a parent's fundamental rights.[100]

The plurality opinion emphasized the growing demographic changes in American society as the average American family composition

92. Troxel v. Granville, 530 U.S. at 57; John Dewitt Gregory, *The Detritus of Troxel*, 40 FAM. L. Q. 133, 143 (2006).

93. Edward Walsh, *Court Limits Visitation Rights of Grandparents*, WASH. POST (June 6, 2000), https://www.washingtonpost.com/archive/politics/2000/06/06/court-limits-visitation-rights-of-grandparents/ca2ceba8-d405-49ca-90fa-28a6dac54078/ [https://perma.cc/PVN4-GKYE].

94. Troxel v. Granville, 530 U.S. at 65–66 (O'Connor, J., plurality).

95. *See* Alessia Bell, *Public and Private Child: Troxel v. Granville and the Constitutional Rights of Family Members*, 36 HARV. C.R.-C.L. L. REV. 225, 227 (2001) (providing examples of the various reactions to the justices' myriad opinions).

96. *See* Sandra Martinez, *The Misinterpretation of Troxel v. Granville: Construing the New Standard for Third-Party Visitation*, 36 FAM L. Q. 487, 495 (2002) (exploring how the lack of clarity resulted in courts applying varying standards).

97. Troxel v. Granville, 530 U.S. at 60 (deciding whether parental rights outweighed visitation rights of third parties).

98. *Id.* at 60.

99. *Id.* at 61.

100. *Id.* at 72–73 (O'Connor, J., plurality).

transitioned to include more single-parent households.[101] Doing so allowed the Court to evaluate parental rights in a modern setting by considering individuals outside of the immediate family who frequently assisted in child-rearing.[102] This allowed the Court to ignore precedent established three years prior in *Washington v. Glucksberg*, where the Court held the infringement of parental rights required a strict scrutiny analysis.[103]

As a result, the Court affirmed and continued their protection of fundamental parental rights at the expense of foregoing recent precedent that strengthened those same rights in favor of a balancing approach considering the best interest of a child and fitness of a parent.[104] The plurality not only went against clear precedent, but it also caused more confusion in the dynamics of family law by refusing to consider the precise scope of parental due process in the context of non-parental visitation.[105] The *Troxel* decision held onto traditionally protected rights but concluded by leaving out a strict scrutiny requirement in favor of the vague best interest standard.[106]

This case not only caused confusion with law once considered consistent, but it also showed there were other views by justices who disagreed with the plurality.[107] One such view came from Justice Thomas, who urged the appropriate standard of review when dealing with fundamental constitutional rights required strict scrutiny.[108] Another view, exhibited by Justice Stevens, stood for the belief: (1) there was no

101. *Id.* at 63–64 (O'Connor, J., plurality).

102. *Id.* at 64 (explaining the importance of protecting the bonds between individuals beyond the immediate family who frequently assist with child rearing).

103. *See generally* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (affirming the Due Process Clause protects fundamental rights such as child rearing and must be subject to the highest scrutiny).

104. Troxel v. Granville, 530 U.S. at 70–72 (O'Connor, J., plurality).

105. *See* Troxel v. Granville, 530 U.S. at 73 (O'Connor, J., plurality) (explaining the standard for awarding visitation rights to individuals outside the immediate family are specific to each case and therefore cannot be determined with an all-encompassing ruling).

106. *Id.* at 73–74 (O'Connor, J., plurality). *See generally The Supreme Court's Parental Rights Doctrine*, *supra* note 61 (detailing the confusion caused by the Supreme Court's decision in Troxel).

107. *See generally* Troxel v. Granville, 530 U.S. at 57 (emphasizing the six concurring and dissenting opinions expressed by the justices in the visitation context of parental due process).

108. *Id.* at 80 (Thomas, J., concurring) (stressing the importance of applying strict scrutiny to infringements of fundamental rights of parents, such as the right to raise their children and make decisions about their education and socialization).

need to review *Troxel*;[109] and (2) for a perspective favoring state autonomy when dealing with the Due Process Clause.[110] The common theme of *Troxel* established there is no longer a clear precedent, much less a clear opinion by the Supreme Court on the appropriate basis of review on such issues.[111] Instead, what has followed reveals states are inconsistent in their standard of review when dealing with proceedings attempting to infringe on the parent-child relationship.[112] Approaches used have varied and will likely continue to do so in the absence of a present-day Supreme Court case assessing the appropriate scrutiny.[113]

II. APPROACHES TO THE TERMINATION OF THE PARENT-CHILD RELATIONSHIP

A. The Texas Approach to the Termination of Parental Rights

In Texas, the process of terminating parental rights begins with the Texas Department of Family and Protective Services (Department).[114]

109. *See id.* at 84–91 (Stevens, J., dissenting) (expressing the view that the Due Process Clause provides enough protection for state courts to individually review cases and decide the Due Process issues presented to them without unnecessary interference from a higher court).

110. *Id.* at 80, 90 (Stevens, J., dissenting) (discussing there was no need to reexamine the issues presented in *Troxel* and by doing so the Court has failed to recognize trial judges usually take the wishes of the parent into account and place a great deal of weight on their choices).

111. *Cf. The Supreme Court's Parental Rights Doctrine*, *supra* note 61 (detailing the fundamental difference of parental rights cases handled prior to Troxel decision and the confusion left on courts after the decision).

112. *See* TEX. FAM. CODE ANN. § 161.001(b) (providing the involuntary termination of the parent-child relationship is sufficient under the clear and convincing standard of evidence if it is in the best interest of the child and a parent meets one of the factors listed in the statute). *But see* UTAH CODE ANN. § 78A-6-507 (West 2012) (reiterating the termination of parental rights may be allowed only if found by the court to be strictly necessary); *see also* ARIZ. REV. STAT. ANN. § 1-601 (West 2010) (recognizing the infringement of parental rights cannot occur unless strict scrutiny is met); *see also* In re CC, 102 P.3d 890, 894 (Wyo. 2004) ("[A]pplication of statutes for termination of parental rights is a matter for strict scrutiny."). *See generally The Supreme Court's Parental Rights Doctrine*, *supra* note 61 ("[T]he Supreme Court's split decision in Troxel . . . opened the door for individual judges and states to apply their own rules to parental rights.").

113. *See* Margaret Ryznar, *A Curious Parental Right*, 71 S.M.U. L. REV. 127, 128–30 (2018) (commenting on the confusion left in the wake of Troxel and emphasizing the lack of a Supreme Court holding that clearly defines the appropriate scrutiny has led to uncertainty within the lower courts across the United States).

114. *See generally Child Protective Investigations*, TEX. DEP'T. OF FAM. & PROTECTIVE SERV.'S, https://www.dfps.state.tx.us/Investigations/default.asp [https://perma.cc/RUL5-EUNM] (indicating the steps and responsibilities taken by the Department throughout an investigation which can lead to the termination of rights).

One of the ways the Department gets involved is by investigating whether a child's safety is at risk after receiving a report about possible abuse or neglect.[115] If the investigator determines a child faces a significant safety risk, the Department may seek a temporary order removing the child from the possession of the parents.[116] Additionally, the investigator could possibly end the parent's rights through the initiation of a Suit Affecting Parent-Child Relationship (SAPCR).[117]

The Department's removal of a child can be done in one of two ways.[118] The first approach requires the Department file a temporary order requesting court permission to take possession of a child if, "there is an imminent danger to the health and safety of the child; the child's continued living in a home" with his parents or guardians "would endanger the child's welfare; and for situations where there would be no time to obtain" an "adversary hearing."[119] Under the second approach, if "there is no time to obtain a temporary order," the Department may remove the child if they have "personal knowledge of facts" or "information furnished by another" indicative of imminent danger to the "health and safety of the child."[120]

If the Department comes into possession of a child without receiving a court order, the court must hold a hearing on or before the first working day after removal to determine who the child will remain with.[121] Further, the Department must also file a SAPCR and request the child be appointed an attorney ad litem (AAL).[122] However, assuming the Department received a court order or was determined in the previous hearing to maintain possession of the child after removal, then a full

115. *See generally id.* (outlining the responsibilities of the Department and the process used to handle reports of neglect, abuse, and human trafficking).

116. *See generally id.* (stating the requirements necessary to use a temporary order to protect a child from an unsafe household).

117. *See generally id.* (indicating an investigator responsibilities include making a finding on whether a child is safe or unsafe and describing the discretionary alternative actions the investigator may take when a child is deemed unsafe).

118. TEX. FAM. CODE ANN. § 262.102(a)(1)–(3); TEX. FAM. CODE ANN. § 262.104(a).

119. TEX. FAM. CODE ANN. § 262.102(a)(1)–(3).

120. TEX. FAM. CODE ANN. § 262.104(a)(1)–(2).

121. *See* TEX. FAM. CODE ANN. § 262.106(a)–(c) (explaining if the hearing is not done within the prescribed limits of the statute, the child will be returned to the parents).

122. TEX. FAM. CODE ANN. § 262.105(a)(1)–(2); *see Attorney Ad Litem*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Attorney ad litem is a court appointed lawyer who represents a child during the course of a legal action, such . . . as a [parental] termination [proceeding].").

adversary hearing must be done no later than fourteen days after the child was removed.[123]

Additionally, the court must not commence the hearing without informing parents who are unrepresented by counsel of their right to representation and, if indigent, their right to court-appointed counsel.[124] In this adversarial hearing, unless an extension is granted, the court must decide whether the Department will maintain conservatorship, where the placement of the child will be, assess the rights of parents involved, and examine the risk of danger to a child.[125]

Following a court's order of conservatorship, there must be a status hearing within sixty days to review the status of the child and service plan.[126] After the status hearing, a permanency hearing is held within six months after the order granting the Department conservatorship to review the permanency plan, the status of the child, and to ensure a final order will be rendered before the required dismissal of the suit.[127] A series of subsequent permanency hearings may be held prior to a final order if it is no later than four months after the initial or subsequent permanency hearings.[128] In the subsequent permanency hearings, the same tasks employed by the court in the initial permanency hearing are utilized to evaluate the progress of the parties involved in the case.[129]

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123. *See* TEX. FAM. CODE ANN. § 262.201(a) (requiring an advisory hearing be done in a timely manner).

124. *See* TEX. FAM. CODE ANN. § 262.201(c)(1)–(2) (mandating specifically worded disclosure must be given to parents about their rights to an attorney).

125. *See generally* TEX. FAM. CODE ANN. § 262.201(g) (outlining conditions in which a child might continue to be in the possession of the Department after an adversarial hearing).

126. TEX. FAM. CODE ANN. § 263.201(a).

127. TEX. FAM. CODE ANN. § 263.304(a); *see* TEX. FAM. CODE ANN. § 263.401(a) ("Unless the court has commenced the trial on the merits or granted an extension . . . on the first Monday after the first anniversary of the date the court rendered a temporary order appointing the department as temporary managing conservator, the court's jurisdiction over the [SAPCR] . . . that requests termination of the parent-child relationship or requests that the department be named conservator of the child is terminated and the suit is automatically dismissed without a court order.").

128. *See* TEX. FAM. CODE ANN. § 263.305 (clarifying time frames for permanency hearings must take place before a final order can be rendered).

129. *See* TEX. FAM. CODE ANN. § 263.306(4) (discussing duties and tasks the court must perform in each permanency hearing including: (1) identify[ing] all persons and parties present at the hearing; (2) reviewing the efforts of the department; . . . (4) review[ing] the extent of the parties' compliance with temporary orders and the service plan and the extent to which progress has been made toward alleviating or mitigating the cause necessitating the placement of the child in foster care; . . . ."). *See generally* TEX. YOUNG LAW.'S ASS'N, WHAT YOU SHOULD KNOW

If a year has passed since the Department was granted temporary managing conservatorship, the court must enter a "final order"[130] or dismiss the case on the first Monday after the year anniversary, unless there is a finding of "extraordinary circumstances."[131] If the court determines there were extraordinary circumstances, the SAPCR may be retained for no more than six months after the finding was made.[132] Finally, suppose the final order ends in a mistrial, a new trial, or is remanded by an appellate court.[133] In that case, the court must schedule a new trial date no longer than six months the final order's initial conclusion or automatically terminate the suit if a new trial has not commenced.[134]

Once a court enters a trial on the merits, it may only enter a final order terminating the rights of a parent if it meets the two-pronged analysis outlined in the Texas Family Code.[135] To properly terminate a parent's rights, the Department must first prove its burden by clear and convincing evidence that at least one of the grounds listed in the statute has been

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ABOUT YOUR CHILD ABUSE, NEGLECT OR CPS CASE 15–17, http://26i1x33zddmb2ub5ei1n3bec-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/CPSTimelineDFPSHandbookFINAL1.pdf [https://perma.cc/5BKX-MFZW] (elaborating on the step-by-step process of hearings and removals from inception to end).

130. *See* TEX. FAM. CODE ANN. § 263.401 revisor's note ("a final order is an order that: (1) requires that a child be returned to the child's parent; (2) names a relative of the child or another person as the child's managing conservator; (3) without terminating the parent child relationship, appoints the Department as the managing conservator of the child; or (4) terminates the parent child relationship and appoints a relative of the child, another suitable person, or the Department as managing conservator of the child."); *see also* TEX. YOUNG LAW.'S ASS'N, *supra* note 129, at 17, http://26i1x33zddmb2ub5ei1n3bec-wpengine.netdna-ssl.com/wp-content/uploads/2018/11/CPSTimelineDFPSHandbookFINAL1.pdf [https://perma.cc/5BKX-MFZW] (outlining what the protocol is for continuing/dismissing a case after one year); *cf.* In re C.T., 491 S.W.3d 323, 329 (Tex. 2016) (expounding on the necessity of the final order after one year of removal to ensure stability for the child removed).

131. TEX. FAM. CODE ANN. § 263.401(b); *see also* In re C.T., 491 S.W.3d at 329 (explaining how case law has not developed or described circumstances qualifying as extraordinary circumstances).

132. TEX. FAM. CODE ANN. § 263.401(b).

133. TEX. FAM. CODE ANN. § 263.401(b-1).

134. *See* TEX. FAM. CODE ANN. § 263.401(b-1) (detailing procedures to be followed if the commencement of a final order ends in a new trial, mistrial, or is remanded by an appellate court for further action).

135. TEX. FAM. CODE ANN. § 161.001(b)(1)–(2).

met.[136] Secondly, the Department must show it is in the best interest of the child to terminate the parent-child relationship.[137] Courts often employ the non-exhaustive *Holley*[138] factors to ascertain the best interest of the child.[139] According to *Holley*, some of the factors courts consider include, "the parental abilities of the individuals seeking custody . . . and any acts or omissions of the parent,"[140] which can often include acts and omissions of disadvantaged parents such as those in an immigrant family.[141]

Since a parent's right to their kids involves fundamental constitutional rights, proceedings seeking the termination of a parent's rights must be strictly scrutinized and construed in favor of the parent.[142] Thus, an action seeking to disrupt the parent-child relationship is untenable without solid and substantial justifications.[143] In Texas, there is a rebuttable presumption the best interest of a child is served by

136. *See* TEX. FAM. CODE ANN. § 161.001(b)(1)(A)–(U) (listing the statutory basis utilized by the Department for terminating parental rights); *see also* TEX. FAM. CODE ANN. § 161.001(b)(1)(K) (recognizing a parent's right to voluntarily terminate their parental rights).

137. TEX. FAM. CODE ANN. § 161.001(b)(2); *see also* 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.").

138. Holley v. Adams, 544 S.W.2d 367, 372 (Tex. 1976).

139. *See, e.g.*, In re G.M., No. 04-19-0080-CV, WL 3432088, at *5 (Tex. App.—San Antonio July 31, 2019, no pet.) (applying and analyzing non-exhaustive Holley factors to analyze the best interest of the child).

140. Holley v. Adams, 544 S.W.2d at 372 ("[Holley factors include: (1)] the desires of the child; [(2)] the present and future emotional and physical needs of the child; [(3)] the present and future emotional and physical danger to the child; [(4)] the parental abilities of the individuals seeking custody; [(5)] the programs available to assist these individuals to promote the best interest of the child; [(6)] the plans held by the individuals seeking custody of the child; [(7)] the stability of the home of the parent and the individuals seeking custody; [(8)] the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and [(9)] any excuse for the acts or omissions of the parent."); *see also* TEX. FAM. CODE. ANN. § 263.307(b)(12)–(13) (listing other relevant statutory factors to determine the best interest of the child, such as "whether the child's family demonstrates adequate parenting skills.").

141. *See* Catrina Guerrero, Comment, *Divided States of America: Why the Right to Counsel is Imperative for Migrant Children in Removal Proceedings*, 22 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 29, 85–86 (2020) (discussing how indigent parent's rights are stripped without adequate representation in a termination case for their migrant child).

142. *See generally* Holick v. Smith, 685 S.W.2d 18, 20 (Tex. 1985) ("[T]ermination proceedings should be strictly scrutinized, and involuntary termination statutes are strictly construed in favor of the parent.").

143. In re G. M., 596 S.W.2d 846, 84647 (Tex. 1980).

maintaining the parent-child relationship.[144] Even with this strong presumption in favor of preserving the parent-child relationship, Texas recognizes the "prompt and permanent placement of the child in a safe environment" is in the best interest of the child.[145] A presumption accompanied by the logic of providing children with permanence but otherwise incognizant of the permanent disruptive dangers posed to families by an incentive-based federal system rewarding states for expeditiously terminating the parent-child relationship.[146]

B. The Approaches of Other States to the Termination of Parental Rights

Although Texas has uniformly prescribed the termination of the parent-child relationship through a statutory approach similar to the Court's viewpoints in *Troxel*,[147] other states carry distinct variations in their legislative code and court opinions.[148] Some states have gone above and beyond in their interpretation of *Troxel*[149] by adding language strengthening the basis of parental rights.[150] Regardless, the consensus is there will be variation among states until the Supreme Court decides to clear up the inconsistencies in *Troxel*[151] by clarifying the law.[152] Until

144. *Id.* at 847 ("[T]he courts of this State have often employed more than a preponderance of the evidence to rebut the strong presumption that the best interest of a child is usually served by maintaining the parent-child relationship.").

145. TEX. FAM. CODE ANN. § 263.307(a).

146. *See* Kim Phagan-Hansel, *One Million Adoptions Later: Adoption and Safe Families Act at 20*, IMPRINT (Nov. 28, 2018, 6:00 AM), https://imprintnews.org/adoption/one-million-adoptions-later-adoption-safe-families-act-at-20/32582#targetText=One%20Million%20Adoptions%20Later%3A%20Adoption%20and%20Safe%20Families%20Act%20at%2020,-November%2028%2C%202018&targetText=Enter%20the%20Adoption%20and%20Safe,with%20relatives%20or%20adoptive%20parents [https://perma.cc/4D47-GYTK] (noting the evolution of a federal incentive-based system's push for permanency and its disruptive effects on parental rights).

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

148. *See* TEX. FAM. CODE ANN. § 161.001(b) (explaining the two-prong analysis courts must follow to involuntarily terminate the parent-child relationship); *see also Protecting Parental Rights at the State Level*, PARENTALRIGHTS.ORG, https://parentalrights.org/states/ [https://perma.cc/YB2H-8VNF] (highlighting the varying state laws in the "parental rights" context).

149. Troxel v. Granville, 530 U.S. at 57.

150. *See* UTAH CODE ANN. § 78A-6-507 (West 2020) (requiring courts to find the termination of parental rights "strictly necessary" before doing so); *see also* ARIZ. REV. STAT. ANN. § 1-601 (2010) (demanding the state to meet strict scrutiny before infringing on parental rights).

151. Troxel v. Granville, 530 U.S. at 57.

152. Ryznar, *supra* note 113, at 130 ("A uniform or predictable level of scrutiny in parental right cases will not appear without being addressed by the U.S. Supreme Court. . . . [S]electing a

then, Family law practitioners must be comfortable with being uncomfortable when dealing with the inconsistencies in the law of parental rights.[153] Notable differences regarding parental termination include state legislation and caselaw from Utah and Arizona.[154]

1. Utah's "Strictly Necessary" and Arizona's Strict Scrutiny

Utah has differentiated itself from other states by introducing the words "strictly necessary" in its statute governing parental termination proceedings.[155] Its implementation attempts to strengthen parental rights after an extensive amount of caselaw diluted the meaning of the two-part analysis defined by the state legislature.[156] Similarly to other states, Utah's two-part analysis requires a finding: (1) of a statutory ground favoring termination; and (2) that termination would serve the best interest of the child.[157] However, unlike many states, the addition of the "strictly necessary" language is used as an integral part of the best interest inquiry and has been interpreted by the Utah Appellate court to authorize the severance of parental rights "only when it is absolutely essential to the child's best interest."[158] The vague nature of such words illustrates the perplexing approaches some states are taking to strengthen the fundamental rights of parents since the *Troxel* opinion unclearly set parameters in the parental right context.[159]

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level of scrutiny grows more complicated as courts encounter a wider range of parental right cases and as states regulate more on issues implicating parents. Given that one role of the Supreme Court is to clarify the law, the Court should not get accustomed to leaving the levels of scrutiny in family law cases unclear.").

153. *See id.* (concluding the Troxel decision led to inconsistencies and unpredictability in the application of the law).

154. *Compare* UTAH CODE ANN. § 78A-6-507 (West 2020) (broadening the requirements for terminating parental right by requiring courts to find the termination is "strictly necessary"), *with* Trisha A. v. Dep't of Child Safety, 446 P.3d 380, 388 (Ariz. 2019) (Bolick, J., dissenting) (citing the legislative intent of the state to enforce strict scrutiny while admonishing the majority's oppressive ruling and its blatant disregard for said legislative intent).

155. UTAH CODE ANN. § 78A-6-507(1) (West 2020).

156. *See* In re B.T.B., 2018 UT App 157, ¶¶ 20–32, 436 P.3d 206, at 213–16 (demonstrating how Utah case law has shifted the burden of proof in parental termination cases to parents and has consistently been in contrast to statutory commands, including the new statutory language strengthening the rights of parents).

157. UTAH CODE ANN. § 78A-6-507(1) (West 2020).

158. In re B.T.B., 2018 UT App 157, ¶¶ 44–51, 436 P.3d 206, at 219–20.

159. *See* Troxel v. Granville, 530 U.S. 57, 73 (2000) (choosing not to define the precise scope of the parental due process right and indicating that the standard varies from case to case

Notwithstanding the vagueness attributed to the "strictly necessary" language, the legislature and courts of Utah are using the application of such language to disavow a line of Utah cases setting unfavorable precedent for parental rights.[160] The disavowed "almost automatically" line of cases in Utah courts unfairly concluded if a statutory ground for termination was found, it "almost automatically" followed that termination was in the best interest of the child.[161] Such an inference veers away from recognized fundamental parental rights.[162] It's an inference Utah is attempting to remedy in order to protect and strengthen parental rights from the ill-advised methods its courts have utilized in the past to sever the parent-child relationship.[163] This statutory scheme demonstrates how state courts often move too quickly to sever the parent-child relationship when, in reality, it should only be severed in the most "extreme cases."[164]

Arizona, on the other hand, is akin to other states who utilize a form of strict scrutiny consistent with the pre-*Troxel* era.[165] Although Arizona approaches parental rights in a similar context as other states, its similarity should not be misguided.[166] While many states endorse the fundamental protections of parental rights, few have taken statutory steps

based on the facts); *cf. The Supreme Court's Parental Rights Doctrine*, *supra* note 61 (illustrating the lengths that States take to strengthen fundamental parental rights after *Troxel*).

160. *See* In re B.T.B., 2018 UT App 157, ¶ 61, 436 P.3d 206, at 222 (concluding a line of cases in Utah made ill-advised holdings that were and continue to be in tension with the constitutional rights of parents).

161. *Id.* at 219 (emphasizing how the "best interest" element should be applied independently and wholly separate from the statutory grounds analysis).

162. *Id.* at 222.

163. *Id.* (providing guidance on the dichotomy of the two-part test for termination of parental rights).

164. *See id.* at 211 ("[T]he termination of parental rights is a drastic measure that should be resorted to only in extreme cases, when it is clear that the home is unable or unwilling to correct the evils that exist."); *see also* Vivek Sankaran, *Termination of Parental Rights: What's The Rush?*, IMPRINT (Sept. 20, 2018, 6:11 AM), https://imprintnews.org/opinion/termination-of-parental-rights-whats-the-rush/32250 [https://perma.cc/DCX9-W95U] (acknowledging Utah's statutory scheme and its prioritization on preservation of important relationships).

165. ARIZ. REV. STAT. ANN. § 1-601 (2010). *See generally* Troxel v. Granville, 530 U.S. 57 (2000) (creating an inconsistent standard of review with regards to a parent's fundamental rights); *see generally Protecting Parental Rights at the State Level*, *supra* note 148 (indicating which states protect parental rights through strict scrutiny).

166. *See Protecting Parental Rights at the State Level*, *supra* note 148 (clarifying Arizona's intricacies within its state laws).

to protect those rights with the express usage of strict scrutiny.[167] Arizona's statute, enacted roughly a decade after the *Troxel* decision, demonstrates the legislature's intent to protect parental rights with the highest level of scrutiny.[168]

Consistent with the views raised by Justice Thomas' concurring opinion in *Troxel*, Arizona's judiciary is the only piece of the puzzle lagging behind in the state.[169] Since the enactment, Arizona courts have seldom utilized strict scrutiny as a part of their analysis.[170] The judiciary's blatant disregard for the statutory protections resulted in Arizona courts' ruling the statute inapplicable to the case at hand and therefore absent from the analysis or as part of a dissenting opinion in the state's highest court.[171] While the statute aspires to strengthen parental rights, the perplexing nature of *Troxel* continues to create sharp divides within the Supreme Court and throughout branches of state governments.[172]

III. THE ADOPTION AND LEGAL GUARDIANSHIP INCENTIVE PAYMENTS PROGRAM AND ITS EFFECTS ON PARENTAL TERMINATIONS IN TEXAS

A. Origination

Throughout the 1990s, a drastic surge of children entered into foster

167. ARIZ. REV. STAT. ANN. § 1-601 (2010); *see Protecting Parental Rights at the State Level*, *supra* note 148 (emphasizing how some states still do not protect parental rights through strict scrutiny).

168. ARIZ. REV. STAT. ANN. § 1-601 (2010) (requiring the elements of strict scrutiny be applied when evaluating parental rights). *See generally* Troxel v. Granville, 530 U.S. at 80 (Thomas, J., concurring) (concluding the plurality recognized a parent's fundamental right but failed to articulate an appropriate standard of review).

169. *See* Troxel v. Granville, 530 U.S. at 80 (Thomas, J., concurring) (stating the appropriate standard of review should be strict scrutiny); *see also* Trisha A. v. Dep't of Child Safety, 446 P.3d 380, 388 (Ariz. 2019) (Bolick, J., dissenting) ("[T]oday's decision offends another essential of due process, the right to know how to comply with the law.").

170. *See, e.g.*, Trisha A. v. Dep't of Child Safety, 446 P.3d at 388 (Bolick, J., dissenting) (critiquing the lower court's termination of parental rights process for straying far from constitutional requirements).

171. *Id.* at 395 (Bolick, J., dissenting).

172. *Compare* ARIZ. REV. STAT. ANN. § 1-601 (2010) (explaining parental rights cannot be infringed without meeting strict scrutiny), *with* Trisha A. v. Dep't of Child Safety, 446 P.3d at 388–89 (Bolick, J., dissenting) (noting current termination procedures "do not provide adequate due process protections"). *See generally* Troxel v. Granville, 530 U.S. at 80 (Thomas, J., concurring) (noting how the majority did not articulate an appropriate standard of review).

care due to a growing drug-use epidemic.[173] As the influx of children in foster care increased, child welfare programs were often left ill-equipped to preserve the parent-child relationship and, as a result, faced heartbreaking choices.[174] In 1997, Congress responded with the Adoption and Safe Families Act (ASFA), a bipartisan bill implemented to speed up a foster child's path to permanency.[175] To achieve this goal, the ASFA utilized controversial enactments which included the 15/22 rule[176] and a federal incentivizing program awarding monetary funds to states who annually increased their baseline number of children adopted.[177]

Over time, the incentive program was reauthorized, revised, and transformed into the Adoption and Legal Guardianship Incentive Payments Program (ALGIP).[178] Under a revised framework, the ALGIP awarded incentives based on four-designated baselines: (1) foster child adoptions; (2) foster child legal guardianships; (3) pre-adolescent foster child adoptions and legal guardianships for children between the ages of nine through thirteen; and (4) older child adoptions and legal guardianships for children fourteen and older.[179] With awards ranging from $4,000–$10,000, states only needed to surpass the previous fiscal year's number of adoptions in a designated baseline to bring in monetary funds.[180] A total of forty-three million dollars were authorized to be appropriated for the 2015 and 2016 fiscal years, giving states like Texas

173. Phagan-Hansel, *supra* note 146.

174. *See id.* (explaining states were "desperately" slow to find children homes which led children to remain in foster care for years).

175. *Id.*

176. *See* Olivia Golden & Jennifer Macomber, *The Adoption and Safe Families Act (ASFA)*, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 8–34, https://affcny.org/wp-content/uploads/IntentionsandResults.pdf [https://perma.cc/2JD3-VGGU] (illustrating how the 15/22 rule required states to terminate parental rights if a child has been in foster care for fifteen of the last twenty-two months).

177. Phagan-Hansel, *supra* note 146.

178. *See generally* Memorandum from United States Department of Health and Human Services: Administration of Children, Youth and Families to the State, Territorial and Tribal Agencies Administering or Supervising the Administration of Title IV-E of the Social Security Act 1–2 (July 8, 2015), https://www.acf.hhs.gov/sites/default/files/cb/pi1508.pdf [https://perma.cc/RD3J-L4T3] (summarizing the federal program's history and transformation throughout the 1990s to 2010s).

179. *Id.* at 2.

180. *Id.* at 2–6 (detailing the requirements to gain monetary compensation through each baseline category of the ALGIP).

the ability to capitalize on such funds by prioritizing terminations to reach the end goal: leaving more children available for adoption while improving their capability to receive monetary awards for such efforts.[181]

While forty-three million dollars may not be the billion-dollar incentive states dream of, it certainly is enough to fatally and implicitly promote the severance of familial ties for states aiming to capitalize on Congress's attempt to speed up the adoption process.[182] Although these funds served a methodical purpose at its inception, it is essential to realize these incentives could always be construed to serve a purpose suitable for today's world.[183] A purpose prompted towards incentivizing states for keeping families intact instead of tearing them apart.[184]

B. Criticism, Effects, and Statistics

The ALGIP is not without its fair share of critics.[185] The ALGIP has been critiqued by many for leaving numerous children as orphans because they aged out of system that failed to find a successful adoption placement.[186] Although the ALGIP has declined the amount of time

181. *See generally* DeLeith D. Gossett, *The Client: How States Are Profiting from the Child's Right to Protection*, 48 MEM. L. REV. 820 (2018) (describing how financial incentives prioritizing adoption have disrupted families and led to the speedy termination of parental rights).

182. Phagan-Hansel, *supra* note 146.

183. *See* Susan Notkin et al., *Intentions and Results: A Look Back at the Adoption and Safe Families Act* 130–36, https://affcny.org/wp-content/uploads/IntentionsandResults.pdf [https://perma.cc/2JD3-VGGU] ("[I]t is important to affirm that families should be provided with appropriate and timely services to help them resolve issues that led to their involvement with the child protection system. As many of the families involved with the child welfare system are low income, significant investment in services to support these families must occur, and systems must have the flexibility to tailor these services to support the unique needs of individual families."); *see also* Phagan-Hansel, *supra* note 146 (addressing the idea more resources should have been put behind keeping families together).

184. *See Notkin*, *supra* note 183, at 134 ("The current adoption incentive program should be expanded to reward states' efforts to reunite children with their families and place them permanently with relatives . . . ."); *see also* Phagan-Hansel, *supra* note 146 (condemning the federal program for promoting incentives for terminating parental rights instead of allocating more resources to keeping families together).

185. *E.g.*, Phagan-Hansel, *supra* note 146 (noting how critics have asserted the program has failed to decrease the youth aging out of or being emancipated from foster care).

186. *Id.*; David Crary, *Terminating Parental Rights: State Policies Vary Widely*, AP NEWS (Apr. 30, 2016), https://apnews.com/c9fec9ee24d64f4b9e56d1425179a50e [https://perma.cc/SN3U-BFUU] (discussing how federal and state policies favor terminating parental rights and leave orphans without a family and without anything gained as they age out of a foster care system).

needed for adoptions to be completed and increased the number of finalized adoptions per year, these increases remain outpaced by the number of kids slated for such outcomes.[187] While adoptions have increased by fourteen percent since 2012, reaching nearly 60,000 in 2017, the amount of children waiting to be adopted throughout the same time frame has increased by approximately twenty-three percent.[188] As a result, over 120,000 children are left waiting for their chance at permanency.[189]

While federal data suggests the states are lowering the number of parental right terminations occurring in their jurisdiction, some states, including Texas, are bucking the trend by implementing more parental terminations.[190] As a result, states bucking the trend are terminating parental rights at rates twenty-five times higher than states at the lower end of the scale.[191] Further, for the first time since the program's implementation, less than fifty percent of children originally separated from their parents are reunited.[192] These repercussions have left more children in foster care as their parents face the legal system head-on with the possibility of termination inching closer to fruition.[193]

Critics of the Texas family law system believe there is a "culture of bias against the biological parent."[194] A bias leaving some to believe Texas is too quick to conclude adoption is the best outcome for a child while leaving biological parents without a chance to address their situation equitably.[195] Since the ALGIP was established in 1997, states have received a total of 713 million dollars in funding from incentives

187. Phagan-Hansel, *supra* note 146.

188. *Id.*

189. *Id.*

190. Crary, *supra* note 186.

191. *See id.* (highlighting the inconsistency between federal data showing a decrease in parental rights terminations and other federal data show some states drastically increasing parental rights terminations).

192. Phagan-Hansel, *supra* note 146.

193. *See* Crary, *supra* note 186 (explaining the hardships and negative bias parents face in the legal system after their children are taken away which creates a presumption that their rights are already terminated).

194. *Id.*

195. *Id.*

offered.[196] Of the fifty states, thirty-four have received less than ten million dollars throughout the program's entire history.[197]

Unsurprisingly, Texas is not one of those thirty-four states.[198] Texas is at the forefront "consistently" reaping the rewards of the federal incentive program.[199] As of 2019, Texas has hauled in nighty-four million dollars, encompassing over thirteen percent of the funding handed out.[200] Historically, Texas leads all states in incentive-earning history with a whopping thirty-two million dollars of separation between the second-highest incentive earning state, California.[201]

Since 2006, Texas has proceeded to terminate the parental rights of over 90,000 children.[202] Besides California, no other state has been able to exceed 43,000 parental terminations in the same time frame.[203] While the number of terminations can always be attributed to the sheer population size of Texas, it does not coincide with the fact Texas consistently surpasses the previous fiscal year's designated baseline of adoptions to bring in federal monetized incentives.[204] With fiscal years ending in earnings upwards of twelve million dollars, Texas has been coined the king of adoptions.[205] A title earned because of the

196. John Sciamanna, *HHS Releases FY 2019 Adoption/Guardianship Incentives for States*, CWLA https://www.cwla.org/hhs-releases-fy-2019-adoption-guardianship-incentives-for-states/ [https://perma.cc/UZ3R-A39Q].

197. Christie Renick, *Bigger in Texas: Number of Adoptions, and Parents Who Lost Their Rights*, IMPRINT (May 24, 2018, 7:00 AM), https://imprintnews.org/featured/bigger-in-texas-adoptions-and-parents-who-lose-their-rights/30990 [https://perma.cc/SF2J-V5QB].

198. *See id.* (addressing how Texas received eight times the amount of money in incentives as of 2015 alone compared to the thirty-four states who had received less than ten million dollars over eighteen years).

199. *Id.* (examining how Texas is repeatedly at the top of the list of states receiving incentives from the ALGIP despite the program's decision to make revisions to its calculations over the last two decades).

200. Sciamanna, *supra* note 196.

201. *Id.*

202. Renick, *supra* note 197.

203. *See id.* (identifying California terminating parental rights for 79,218 children since 2006, only second to Texas in that time frame).

204. *Id.*; *see* Sciamanna, *supra* note 196 (noting the amount of federal incentives earned by States per fiscal year in the Adoption and Legal Incentive Payment Program).

205. *See* Renick, *supra* note 197. *See generally* Sciamanna, *supra* note 196 (providing statistics showing Texas has accumulated the most amount of federal incentives from the ALGIP since it was established in the late 1990s).

overwhelming amount of terminations occurring in the state.[206]

In striking contrast, many states fail to draw awards from the incentive program.[207] As many as twenty-seven to thirty-two states have failed to yield an adoption incentive award in different fiscal years.[208] Even states, such as California, who have been able to draw out some of the largest awards, have not seen consistent results.[209] Unlike all other states, Texas is in a league of its own and has consistently capitalized on the incentive-based program since it was first implemented.[210]

Critics attribute the way Texas handles its process of parental terminations as a basis for their consistent success in the ALGIP program.[211] With a practice of initiating terminations upon the removal of a child, critics claim Texas has caused the "de facto goal" to be termination.[212] Advocates believe this practice is an underlying policy to serve the state's convenient purposes rather than the child's best interest.[213] A standard standing directly against the intent to serve a child's best interest.[214]

Texas's ratio of parental right terminations is exceedingly high.[215] For every 1,000 children in foster homes, 296 have had their parent's rights terminated.[216] In contrast to California, where 26,000 more children are in foster care, Texas's ratio of children who parents had their rights terminated is more than double the size of California's ratio.[217] With

206. *See* Renick, *supra* note 197 (stating Texas has terminated the highest number of parental rights than any other state since 2006).

207. *Id.*

208. *Id.* (comparing the number of States that have failed to receive an adoption award over different years).

209. *Id.*

210. *See id.* ("For Texas . . . the incentives have become a modest, but predictable, stream of revenue year after year. . . . The state's incentive has topped $1 million in all but five of the last 18 years . . . .").

211. *Id.* (illustrating how the correlation between children being put for adoption and the steps Texas takes to terminate parental rights leads to a consistent source of incentives earned from the ALGIP).

212. *Id.*

213. *See id.* (explaining how the manner and mode that Texas terminates parental rights seems to be aligned more with ensuring consistent funding through the ALGIP).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

such a high ratio and number of terminations occurring in Texas, it begs the question: where do the millions of dollars received go to?[218]

While thirty percent of the incentives are federally mandated to be spent on post-adoption services; the rest is placed in Child Protective Services (CPS) purchased services, substance abuse purchased service, and CPS direct delivery staffing.[219] Both CPS purchased services and CPS direct delivery staff expenses are considered to be non-adoption related expenses.[220] Surprisingly, the bulk of the incentives are spent on the CPS direct delivery staff.[221] Activities associated with the CPS direct delivery staff include salaries for caseworkers who help children in the process of permanency.[222]

However, are these incentives aligned in the most efficient manner?[223] With an abundant amount of terminations occurring every year, is Texas implicitly affecting the way courts handle parental right cases?[224] San Antonio area District Judge Peter Sakai ties local parental right cases and their results to their association with "poverty, drugs, and a lack of mental health services."[225] Further, Judge Sakai also offers what he believes is a key to resolving this crisis: "empowering families is the key to reunifying them."[226]

It appears the Texas system is failing parents by infringing on their constitutional rights.[227] The system lacks protection for those parents

218. *Cf. id.* ("As of fiscal 2015, the Lone Star State has hauled in $84 million in incentives, 15 percent of the $556 million in total funding given out.").

219. *Id.* (outlining where and how the adoption incentives are allocated in Texas).

220. *Id.*

221. *Id.*

222. TEX. DEP'T OF FAM. & PROTECTIVE SERVS., THE STATE OF TEXAS 2018 ANNUAL PROGRESS AND SERVICES REPORT 734 (2018), [https://perma.cc/A5MK-X35J] (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

223. *E.g.*, Renick, *supra* note 197 ("Prior to 2014, most states failed to consistently draw an award from the program. In 2006, 32 states failed to earn any adoption incentive.").

224. *See, e.g.*, Crary, *supra* note 186 (describing how there are "state-to-state disparities in the rate of terminations and the extent of support services to avoid foster care placements.").

225. *Id.*

226. *Id.*

227. *See* Renick, *supra* note 197 ("The blanket practice of filing petitions to terminate . . . places parental rights at legal risk with little or no evidence to substantiate termination.").

whose parental rights were underserving of termination.[228] Texas's response to the enactment of ALGIP has been critically acclaimed to treat adoptions as "much more than a cure-all than they really are."[229] With more adoptions occurring annually, and a consistent flow of incentives coming into the state, there is good reason to believe adoptions have catapulted the rate of terminations in Texas.[230] This effect causes concerns amongst advocates who believe some of the kids affected by the termination movement "could have been *safely* returned to their parents."[231]

While Texas does finalize adoptions at an exceedingly high rate, the state often fails to succeed at finding permanency "for all of the children whose parents' rights" have been terminated.[232] For the time being, advocates can only hope the newly enacted "Family First Prevention Services Act" (FFPSA) will adequately provide effective services for parents.[233] With the congressional intent to restructure federal child welfare funding, the FFPSA seeks to reduce children's entry into foster care and promote services to parents by increasing access to substance abuse and mental health services.[234] Only time will tell whether the FFPSA alleviates the burden associated to parents in the context of parental terminations.[235]

228. *See id.* ("The practice in most parts of Texas is to file a termination for parental rights petition at the beginning of most cases even if there is no real indication that termination is needed.").

229. Crary, *supra* note 186.

230. *See* Phagan-Hansel, *supra* note 146 ("The programs that the Adoption and Safe Families Act govern thwart its very purpose as children continue to languish in foster care waiting for permanent adoptive homes, often until they age out of the system into negative life outcomes.").

231. Renick, *supra* note 197.

232. *See id.* (describing Texas's failures at finding permanency for children going through termination proceedings).

233. *See* Phagan-Hansel, *supra* note 146 (confirming the FFPSA aims to include "more federal funds for services aimed at preventing the use of foster care" by addressing and improving "service gaps" to help parent's needs).

234. Title VII—Family First Prevention Services Act, Pub. L. No. 115–123, 132 Stat. 232, 232–45 ("[P]rovid[ing] enhanced support to children and families and prevent[ing] foster care placements through the provision of mental health and substance abuse prevention and treatment services, in-home parent skill-based programs, and kinship navigator services.").

235. Phagan-Hansel, *supra* note 146.

IV. THE IMPERMISSIBLE BASIS: HOW BEXAR COUNTY COURTS IMPROPERLY TERMINATE PARENTAL RIGHTS

While passage of the ALGIP resulted in numerous controversies throughout the nation, its effects in the Texas judicial system are particularly evident.[236] Its implicit effects are seen in the manner Bexar County judicial officials treat parental right proceedings.[237] While some parental right are fairly terminated, not all terminations are severed equally.[238] Some involve egregious acts justifying the termination of a highly regarded, constitutionally protected principle.[239]

Others involve minimal amounts of evidence presented by the Department of Family and Protective Services (DFPS) to substantiate their claim arguing termination would be in the best interest of the child.[240] However, such claims are not always representative of the clear

236. *See* Renick, *supra* note 197 (illustrating the perverse effects of the ALGIP in Texas).

237. *See* In re J.E.H., 384 S.W.3d 864, 870–72 (Tex. App.—San Antonio 2012, no pet.) (holding the evidence was insufficient to terminate a parent's rights because the trial court relied upon evidence it could not take judicial notice over); *see also* In re G.M., No.04-19-0080-CV, WL 3432088, at *5 (Tex. App.—San Antonio July 31, 2019) (Martinez, J. dissenting) (reproving the trial court's improper use of evidence); *see also* In re T.N.J.J., No.04-19-00228-CV, WL 6333470 at *9 (Tex. App.—San Antonio Nov. 27, 2019) (Martinez, J., dissenting) (arguing the limited evidence presented was factually insufficient to support a decision to terminate the parent-child relationship).

238. *See, e.g.*, In re K.M.J., No. 04-18-00728-CV, WL 1459565, at *7 (Tex. App.—San Antonio Apr. 3, 2019, pet. denied) (mem. op.) (reversing an order terminating a father's parental rights because a caseworker's vague testimony coupled with a lack of "hard evidence" was insufficient to support a termination); *see also, e.g.*, In re M.A.S.L., No. 04-18-00496-CV, WL 6624405, at *5 (Tex. App.—San Antonio Dec. 19, 2018, no pet.) (mem. op.) (explaining the caseworker's testimony concerned conclusory opinions that failed to establish the support needed to provide a finding of a statutory ground of termination); *see also, e.g.*, In re J.E.H., 384 S.W.3d at 870–71 (showing the trial court's reliance on improperly judicially noticed evidence resulted in a reversal because there was no evidence to support the trial court's finding); *see also, e.g.*, In re E.F., 591 S.W.3d 138, 148–50 (Tex. App.—San Antonio 2019) (Chapa, J., dissenting) (citing the role of innate biases in the context of parental terminations).

239. *See, e.g.*, In the Interest of T.N.S., 230 S.W.3d 434, 439 (Tex. App.—San Antonio 2007, no pet.) (affirming the termination of a mother's parental rights for endangering her child after using cocaine while pregnant and causing the child to be born positive for cocaine).

240. *See* In re A.J.L., No. 04-14-00013-CV, WL 4723129, at *5 (Tex. App.—San Antonio Sept. 24, 2014, no pet.) (mem. op.) (holding the Department failed to meet its burden justifying the termination of a mother's parental rights because the record was replete with evidence of the mother's compliance with the family service plan and revealed there was no evidence showing the children were in danger or had an improper relationship with the mother); *see also* In re R.S.D., 446 S.W.3d 816, 822 (Tex. App.—San Antonio 2014, no pet.) (holding evidence of a mother's

and convincing standard and proof required by the state's legislative history.[241] Such claims only reflect the miscarriages of justice occurring in the Bexar County family law system.[242] These miscarriages perpetuate irrevocable damage that is felt most by the parents and children involved in the proceedings.[243]

While the state receives federal funding for slating children through terminations to effectuate adoptions, their efforts have left many children as orphans.[244] Sadly, these orphans will never get to see the end result the state envisioned when terminating their parent-child relationship.[245] In reality, over ninety percent of terminations in the state do not occur due to abuse or neglect but rather because a parent failed to adhere to the completion of court-ordered services.[246] While the services are intended to benefit parents, they run the risk of providing a bigger hurdle of burdens for the parent to jump through.[247] These services, while portrayed as a lifeline, are critically acclaimed as a noose to parental rights.[248]

Rightfully so, these services were meant to benefit the parents and children.[249] However, these mandated services typically leave parents

limited criminal history along with the conclusory testimony was insufficient to support the trial court's termination of her parental rights).

241. *See* In re R.S.D., 446 S.W.3d at 822 ("[C]onclud[ing] the State did not meet its burden to establish by clear and convincing evidence that termination of appellant's parental rights is in the child's best interest."); *see also* In re K.M.J., WL 1459565, at *7 ("[W]e cannot say that the 'degree of proof' rose to the level of 'clear and convincing' as required to support the best interest findings.").

242. *See, e.g.*, In re E.F., 591 S.W.3d at 150 ("[Parental termination cases] are not easy for parents, children, the Department, attorneys, or the courts because these cases involve fundamental rights of parents and important public concerns for child welfare. Although our primary concern is the children's welfare, parental termination cases are not made easier when innate bias negatively influences how some parents are treated in court.").

243. *See id.* (reiterating the difficulties experienced by parties in a parental termination case and how the trial court's determination compelled the children to face the prospect of possibly spending the next decade in foster care without the possibility of adoption).

244. Phagan-Hansel, *supra* note 146.

245. *See* Renick, *supra* note 197 ("For every 1,000 children subject to a TPR, 386 are not adopted.").

246. *Id.* ("What should be a lifeline is actually a noose that terminates parents' rights.").

247. *Id.* (providing that most terminations arise from a parent's failure to complete court-ordered services).

248. *Id.*

249. *See* STATE BAR OF TEX., A HANDBOOK FOR PARENTS AND GUARDIANS IN CHILD PROTECTION CASES, https://www.texasbar.com/AM/Template.cfm?Section=Consider_a_State_

in a shortfall, especially those who try but are unable to complete the court-ordered services and unfortunately face an inevitable fate of losing their parental rights.[250] A fate whose likelihood in Bexar County seems to be demised primarily through the evidentiary process and its: (1) improper use of judicial notice and (2) admittance of an unacceptable amount of evidence portrayed by the Department to meet the onerous burden of proof.[251] While a logical inference may exist indicating parents who fail to complete these services are simply unwilling to adapt their lifestyles to reunify themselves with their children, it is also true compliance or the physical completion of some classes shows parents are willing to take the necessary steps toward reunification.[252] Thus, while the failure to complete a service plan may support grounds for termination under TEX. FAM. CODE ANN. § 161.001(b)(1)(O), courts must still be mindful such a finding is not an automatically reason it is the child's best interest to terminate their parental rights.[253] Rather, sufficient evidence must still be shown under the heightened burden of proof required by the Texas Family Code.[254] It is important we do not confuse an inference of unwillingness where progression exists.[255]

Bar_Committee&Template=/CM/ContentDisplay.cfm&ContentID=28735 [https://perma.cc/U3H8-ACJ7] ("[A] purpose of [a permanency planning team meeting] is to come up with a service plan for [the] child and . . . family that will help get the family together again . . . .").

250. *See* In re T.N.J.J., No.04-19-00228-CV, WL 6333470 at *8 (Tex. App.—San Antonio Nov. 27, 2019 no pet.) (mem. op.) (affirming the termination of a father's parental rights because the trial court could reasonably conclude the father "failed to participate in drug treatment and individualized counseling" as required by the family service plan).

251. *See* In re J.E.H., 384 S.W.3d 864, 870–871 (Tex. App.—San Antonio 2012, no pet.) (describing how the trial court adduced no evidence to support a determination to terminate the parent's rights because the trial court improperly took judicial notice over facts it could not take judicial notice on); *see also* In re R.S.D., 446 S.W.3d 816, 822 (Tex. App.—San Antonio 2014, no pet.) (holding the conclusory testimony along with the scant evidence produced was insufficient to support the trial court's termination of her parental rights).

252. *See* In re E.F., 591 S.W.3d 138, 157 (Tex. App.—San Antonio 2019) (Chapa, J., dissenting) (reasoning an appellant who successfully took advantage of programs she did need in contrast to programs she did not need is a factor weighing against termination and not against a child's best interest).

253. *See id.* (describing how a basis of removal may be statutorily found without a finding supporting termination is in the child's best interest).

254. TEX. FAM. CODE ANN. § 161.001(b).

255. *See, e.g.*, In re E.F., 591 S.W.3d at 157 ("[The Parent] did not complete her parenting, domestic violence, and anger management courses, and the majority weighs this against [her]. While this evidence might support a finding of a ground for termination under subsection (O) for failing to comply with court-ordered provisions of a service plan, there is no evidence showing

While the state has millions to lose by not meeting an ever-changing annual quota of adoptions, it is equally important to acknowledge the consequences of meeting the baseline quota.[256] Such actions promote funding at the expense of parents who are robbed of the chance of making a lifetime of memories with their children.[257] Admittedly, not all parents are deserving of such memories, but it is the job of the judiciary to make this determination rightfully, impartially, and free of bias.[258]

A. ALGIP Implications and the Problematic Evidentiary Process of Some Bexar County Courtrooms

To fully consider the implications carried by ALGIP on Texas, it is important to realize in most parts of Texas, including Bexar County, the process of filing a petition to terminate a parent's rights begins at the outset of a case even when "no real indication" exists to show termination is needed.[259] Unfortunately, this places a perverse effect on parents whose rights are put at risk immediately following the removal of their children.[260] An effect promoting adoptions as the forefront option while curtailing other equally plausible options.[261] Options which promote the likelihood of preventing the severance of the parent-child relationship in cases where it can be maintained.[262]

Texas has fallen under immense scrutiny for the high percentage of parental terminations occurring and developing as a result of significant

appellant lacked parenting skills, engaged in domestic violence in any of her relationships, or had anger management issues. I respectfully disagree with the majority's suggestion that it is against the children's best interest if a parent has yet to complete courses, which the parent has shown no signs of needing. . . . [U]ndisputed evidence establishes [the parent] successfully took advantage of programs she *did* need. . . . Because undisputed evidence shows progression and appellant successfully took advantage of programs available to assist her where she actually needed improvement, this factor weighs moderately against termination.").

256. *See* Renick, *supra* note 197 ("[W]hile Texas finalizes adoptions at a high rate, it is hardly successful at finding permanency for all of the children whose parents' rights are terminated. . . . A large portion of those children languish in foster care through their teenage years . . . .").

257. *Id.* ("We do a disservice to kids by putting adoption on a pedestal when there are other options . . . where important relationships can be maintained.").

258. *See, e.g.*, Crary, *supra* note 186 (discussing how bias against the biological parents ensues once a parental termination proceeding begins).

259. Renick, *supra* note 197.

260. *Id.*

261. *Id.*

262. *Id.*

problems in the state's child-welfare system.[263] Such problems include turnover amongst the senior leadership, a class action suit alleging pervasive flaws in a conservatorship program, controversial deaths of foster children in the system, and, most importantly, a lack of services helping parents meet and address their needs.[264] While the Department attributes a lack of engagement by parents as reasons for the lack of services available, critics have expressed their concerns and allege the system's failure to give parents a fair chance to address their problems throughout the so-called reunification process.[265]

The funding received by the ALGIP is another consideration adding to the backdrop of problems associated within the Texas child-welfare system.[266] While the funding received is amongst the top 100 funding sources in Texas, the annual incentives should not justify why Texas perceives adoptions as the best outcome for children or as a reason to instill bias against biological parents.[267] With an estimated total of six million dollars in funding throughout the 2018 fiscal year, the ALGIP's impact has gone beyond funding and has implicitly affected the state's judicial recognition of parental rights.[268]

Although the ALGIP is one of the top 100 sources of funding in Texas, it sits at the bottom of the list at 97.[269] Unlike other states, this revenue has been a predictable stream of annual funding for Texas.[270] Texas, for the last two decades, has borne the fruits of ALGIP by pushing for

263. Crary, *supra* note 186.

264. *Id.*

265. *Id.* (analyzing whether parents lack of engagement or the state system's shortcoming are correlated to problems with reunification).

266. *See* Renick, *supra* note 197 (noting Texas' push for adoptions is causally correlated to the consistent stream of incentives earned annually through the ALGIP).

267. LEGIS. BUDGET BD., TOP 100 FEDERAL FUNDING SOURCES IN THE TEXAS STATE BUDGET 10 (Apr. 2019), https://www.lbb.state.tx.us/Documents/Publications/Primer/5075_Top_100_Federal_Funding_Sources_2018.pdf [https://perma.cc/F9JN-835Y].

268. *Id.* at 54; *see* Renick, *supra* note 197 (demonstrating continual funding has led Texas's thrust for adoptions by severing parental rights).

269. *See* LEGIS. BUDGET BD., *supra* note 267, at 15 (illustrating Adoption and Legal Guardianship Incentive Payment is ranked nearly last in the top one-hundred funding sources in Texas).

270. ADMIN. FOR CHILD. & FAMILIES, ADOPTION AND LEGAL GUARDIANSHIP INCENTIVE PAYMENTS PROGRAM - EARNING HISTORY BY STATE: FY 1998—FY 2018 (Dec. 2, 2019), https://www.acf.hhs.gov/sites/default/files/cb/adoption_incentives_earning_history.pdf [https://perma.cc/T7BC-82LW].

adoptions and simultaneously being rewarded for doing so.[271] With the ideal of attaining federal funding, Texas has consistently moved disturbingly quickly towards terminating parents' rights.[272]

An ideal putting the desire for incentives ahead of protecting the constitutional rights of parents.[273] With a lack of empowerment towards families and the state's short fuse with parents, some district courts in Bexar County have failed to accord the means of reaching an impartial jurisprudential result.[274] Some of the various ways this occurs stems from the inequitable ways evidence is presented and admitted in Bexar County family courtrooms.[275]

1. Judicial Notice and the Insufficiency of Evidence

One of the primary mechanisms depriving parents of an equitable parental termination proceeding involves the sufficiency of the evidence presented by the Department.[276] Throughout numerous parental termination cases, presiding District Judges in Bexar County have taken judicial notice of facts they could not take judicial notice over and have considered evidence held by the appellate courts to be factually insufficient to support a holding terminating a parent's rights.[277] A court may take judicial notice regarding facts not subject to reasonable dispute,

271. Renick, *supra* note 197.

272. *Id.*

273. *See, e.g.*, *id.* (implying the incentive of federal funds clouds parental rights since the "blanket practice" of filing petition to terminate is contrary to the DFPS policy).

274. Crary, *supra* note 186.

275. *See, e.g.*, In re J.E.H., 384 S.W.3d 864, 870–71 (Tex. App.—San Antonio 2012, no pet. h.) (explaining the trial court's reliance on the evidence was insufficient to support the termination of the parent's rights because the court had improperly taken judicial notice and, as a result, there was no evidence to support the trial court's finding).

276. *See, e.g.*, In re R.M.P., No. 04-17-00666-CV, WL 2976451, at *5 (Tex. App.—San Antonio June 13, 2018) (Martinez, J., dissenting) ("The law sets a high evidentiary bar for termination of parental rights. We do not alleviate the plight of Texas foster children by lowering that bar and perpetuating diminished judicial expectations of the proof that must be presented by the Department.").

277. *See* In re J.E.H., 384 S.W.3d at 871 (reversing a trial court order to terminate a parent's rights because: (1) evidence was improperly judicially noticed; and (2) the remaining evidence could not support the trial court's finding); *see also* In re R.S.D., 446 S.W.3d 816, 822 (Tex. App.—San Antonio 2014, no pet.) (revealing the scant record did not justify the trial court's termination of the mother's parental rights).

including previous orders and findings of fact from the same case.[278]

However, a trial court must not take judicial notice regarding the truth of the allegations in the records, such as allegations or affidavits made in a family service plan or concerning an expert's testimony.[279] As a result, even a sworn affidavit cannot be subject to judicial notice.[280] Further, if the affidavit is not introduced as an exhibit during a trial, the trial court's use of the affidavit could subject their determination to reversal due to a lack of sufficient evidence.[281] To do otherwise would violate the integrity of the court's truth-seeking function and would deny parents of their due process rights.[282] Thus, it is of the utmost importance judges deny opportunities to rely on facts that were not previously admitted into evidence.[283]

In Bexar County, justices in the Texas Fourth Court of Appeals are cracking down on the trial court's problematic reliance on facts not included in the evidence of parental terminations cases.[284] For example,

278. In re J.E.H., 384 S.W.3d at 870; *see* In re J.L., 163 S.W.3d 79, 85 (Tex. 2005) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.").

279. In re J.E.H., 384 S.W.3d at 870 ("A court may not, however, take judicial notice of the *truth* of allegations in its records. . . . [Thus, a] trial court [cannot] take judicial notice of the allegations [a] caseworker ma[kes] in the family service plan."); *see, e.g.*, In re J.L., 163 S.W.3d at 85 ("If a fact is generally known, then obviously no expert is needed. Moreover, expert testimony invariably concerns matters in dispute which are not capable of accurate resolution from outside, unquestioned sources.").

280. *See, e.g.*, In re Allen, 359 S.W.3d 284, 289 n.5 (Tex. App.—Texarkana 2012, no pet.) (illustrating how a sworn affidavit was not admitted as evidence in trial because it was not introduced as an exhibit nor did the trial court take judicial notice of its content).

281. *See id.* ("Our review of the record indicates that the sworn affidavit accompanying the petition was neither introduced as an exhibit at trial, nor was there any indication that the trial court took judicial notice of its content. No judicial notice could have been taken of its content because the content was not a subject matter for judicial notice. Accordingly, it was not evidence at the trial.").

282. In re E.F., 591 S.W.3d 138, 149 (Tex. App.—San Antonio 2019, no pet.) (explaining how by improperly taking judicial notice of the truth of allegations, "the trial court denied appellant her clearly established due process rights and impaired the integrity of the court's truth-seeking function.").

283. *See id.* ("[T]o protect parents' due process rights . . . the trial court should make extraordinary efforts to consider only the evidence admitted at trial.").

284. *See id.* ("Looming deadlines and overcrowded dockets cannot justify shortcuts that undermine the truth-seeking function of our courts."); *see also* In re K.M.J., No. 04-18-00728-CV, WL 1459565, at *7 (Tex. App.—San Antonio Apr. 3, 2019, pet. denied) (mem. op.) ("[W]e cannot say that the 'degree of proof' rose to the level of 'clear and convincing' as required to support the

In re G.M., two sitting justices took exception over the trial court's use of evidence to support an order terminating a parent's rights.[285] Although the majority affirmed the trial court's ruling, Justice Martinez and Justice Watkins in their respective dissenting and concurring opinions scolded the trial court's use of: (1) a videotape in the reporter's record that was not admitted into evidence; (2) inadmissible hearsay statements from the father's girlfriend; and (3) the lack of a developed record.[286]

The videotape and hearsay statements were criticized by Justice Martinez as indiscernible upon review because it was not under the record and, as a result, could not be considered upon review to support the trial court's decision to terminate the parent's rights.[287] Thus, it is paramount the trial court explicitly admit evidence instead of implicitly relying on it being admitted simply because the proponent offers it into evidence.[288]

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best interest findings."); *see also* In re M.A.S.L., No. 04-18-00496-CV, WL 6624405, at *1–6 (Tex. App.—San Antonio Dec. 19, 2018, no pet.) (mem. op.) (reversing termination order supported by legally and factually insufficient evidence that showed the caseworker: had no contact with father, did not meet with father to discuss family service plan, and had "no idea" whether he completed services); *see also* In re D.B.T., No. 04-14-00919-CV, WL 1939072, at *4 (Tex. App.—San Antonio Apr. 29, 2015, no pet.) (mem. op.) ("[The] State presented no evidence about [the father]'s parenting skills that would make his failure to complete a parenting course probative of [child]'s best interest."); *see also* In re J.A.J., No. 04-14-00684-CV, WL 7444340, at *3 (Tex. App.—San Antonio Dec. 31, 2014, no pet.) (mem. op.) ("[The Court] may exercise [their] broad discretion to remand for a new trial in the interest of justice when there is a probability that a case has not been fully developed for any reason."); *see also* In re U.B., No. 04-12-00687-CV, WL 441890, at *2 (Tex. App.—San Antonio Feb. 6, 2013, no pet.) (mem. op.) (finding the evidence legally insufficient to support the termination order); *see also* In re A.Q.W., 395 S.W.3d 285, 290–91 (Tex. App.—San Antonio 2013, no pet.) (holding the evidence legally insufficient because the record did not support the State's argument that father had been jailed repeatedly or been in and out of drug treatment). *See generally* In re D.M., 452 S.W.3d 462, 475 (Tex. App.—San Antonio 2014) (Martinez, J., dissenting) ("We are duty bound to carefully scrutinize termination proceedings and must strictly construe involuntary termination statutes in favor of the parent.").

285. *See* In re G.M., No.04-19-0080-CV, WL 3432088, at *3 (Tex. App.—San Antonio July 31, 2019) (Watkins, J., concurring) (expressing concerns over the requirement to review orders that permanently sever constitutionally protected parental rights when the appellate record is "so underdeveloped"); *see also* In re G.M., WL 3432088, at *5–6 (Martinez, J., dissenting) (criticizing the court for its reliance on material not in the record and its improper use of hearsay testimony to terminate a parent's rights).

286. In re G.M., WL 3432088, at *4–5 (Watkins, J. concurring) (denouncing the appellate court's review of a video tape improperly admitted into evidence and the trial court's underdeveloped record); *id.* at *5–6 (Martinez, J., dissenting).

287. *Id.* at *5 (Martinez, J., dissenting).

288. *See id.* at *5 (Martinez, J., dissenting) ("[M]aterial that is not on the record . . . cannot be considered on review or support the trial court's termination order."); *see also* In re E.F., 591

Further, Justice Watkins expressed similar sentiments citing a scant record and concerns over the trial court's dedication to protect parent's fundamental constitutional rights.[289] In the opinion, Justice Watkins expressed dissatisfaction with the trial court's record since it involved the irrevocable divestment of parental rights using a record that was not fully developed under the Texas Family Code.[290] After all, a record comprised of fewer than forty pages of evidence, including facts not admitted into evidence, can hardly establish a record comprised of the due diligence required to establish by clear and convincing evidence the termination of parental rights.[291]

By acknowledging the finality surrounding parental terminations, the Fourth Court of Appeals implores the trial court of their role in creating a fully developed reporter record with admitted evidence.[292] A record, if left undeveloped, deprives appellate courts of meaningful review and increases the possibility of reversal for terminating a parent's rights with factually insufficient evidence.[293] After all, due process requires the Department to meet a standard of proof no less than clear and convincing.[294] Thus, due process requires an exacting standard on the Department to prove with admitted evidence an explicitly developed record supporting the termination of a parent's rights.[295]

S.W.3d 138, 142 n.4 (Tex. App.—San Antonio 2019, no pet.) ("[The only evidence that can support the trial court's [parental termination] order is that evidence admitted at trial.").

289. In re G.M., WL 3432088, at *3–5 (Watkins, J., concurring).

290. *Id.* at *4–5 (Watkins, J., concurring) (discussing the importance of a fully developed record to protect fundamental constitutional parental rights); *see* TEX. FAM. CODE ANN. § 161.001(b) (referencing the statutory means for terminating a parent-child relationship).

291. In re G.M., WL 3432088, at *4 (Watkins, J., concurring); *see* In re E.F., 591 S.W.3d 138, 142 n.4 (Tex. App.—San Antonio 2019, no pet.) (urging the trial court to more completely develop the reporter's record given the magnitude of the constitutional rights involved).

292. In re G.M., WL 3432088, at *3 (Watkins, J., Concurring) ("I also write to add my voice to the chorus of opinions from this court imploring trial courts and parties to dedicate the time, attention, and resources required to protect the fundamental constitutional relationship between parents and their children.").

293. In re G.M., WL 3432088, at *3 (Watkins, J., Concurring) (recognizing the fundamental liberty interests at stake with an underdeveloped appellate record).

294. TEX. FAM. CODE ANN. § 161.001(b).

295. *Cf.* In re A.J.L., No. 04-14-00013-CV, WL 4723129 at *2–5 (Tex. App.—San Antonio Sept. 24, 2014, no pet.) (mem. op.) ("There was no evidence at trial regarding any emotional or physical danger to the children, or that the parent-child relationship was improper. Accordingly, it appears that the Department abandoned its reunification goal because Mother was incarcerated, and that the Department recommended termination solely because the deadline for the court to either

Similarly, *in re E.F.*, Justice Chapa expressed her concerns with the number of parental terminations in their jurisdiction and the innate biases against parents.[296] In the case, the trial court ignored undisputable evidence surrounding a parent's management of their mental health condition and instead relied on the diagnosis as the reason to terminate the parent-child relationship.[297] While the judiciary is to refrain from advocating for one side in legal proceedings, judges are human and remain susceptible to implicit biases.[298] These biases, taken together with a trial court's reliance on facts not in evidence, negatively influence how parents are treated in the trial level.[299] Such negative influences cloud a trial court's capacity to effectively differentiate sufficient evidence from the insufficiencies relied upon while terminating a parent-child relationship.[300]

As a result, a parent's compliance with some services in the family service plan or their proactive management in treating a mental health condition is often overlooked with demeaning results.[301] With a burden of proof consisting of clear and convincing evidence, the drastic remedy of terminating a parent's rights must be strictly

render a final order of termination or to dismiss the suit was approaching. We thus reverse . . . the trial court's judgment terminating Mother's parental rights . . . .").

296. In re E.F., 591 S.W.3d 138, 148–50 (Tex. App.—San Antonio 2019) (Chapa, J., dissenting).

297. *Id.* at 145–49.

298. *See id.* at 149 (Chapa, J., dissenting) ("[I]nnate biases might have played a role in the termination of the appellant's parental rights."); *see also* Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 278, 308 (2014) ("While judges strive to apply the law fairly and impartially, they are human and therefore must view things through their own cognitive lenses—judges, like all humans, are not free from biases. . . .").

299. *See, e.g.*, In re E.F., 591 S.W.3d at 148 ("The trial court's remarks suggest that merely having bipolar disorder and a shaved head makes a parent less able, makes children 'needier,' or both, and so much so that depriving a parent and her children of a relationship is warranted.").

300. *Id.* at 149–50.

301. *See id.* at 143 ("[T]he trial court ignored undisputed evidence establishing appellant manages her condition proactively and effectively and it expressly relied on appellant's mental health diagnosis as a reason for terminating her parental rights."); *see also* In the Interest of T.N.J.J. No.04-19-00228-CV, WL 6333470 at *51 (Tex. App.—San Antonio Nov. 27, 2019) (Martinez, J., dissenting) ("I cannot agree to affirm termination under a factual sufficiency review based on the limited evidence of Father's drug use and incomplete drug treatment where there is also evidence of partial completion and explanations for incompletion.").

scrutinized.[302] Any evidence requiring the "piling of inferences" upon inferences cannot constitute the clear and convincing evidence needed to support termination.[303] It is crucial trial courts do not seek to justify looming deadlines or overcrowded dockets as a shortcut to undermine a parent's fundamental due process rights.[304] The prospect of compelling a child to foster care with the possibility of never being adopted—when a relationship between the parent and child can still be maintained—gives rise to a result-oriented jurisprudence favoring adoptions.[305] These results only diminish parents' rights while simultaneously disintegrating the chances a parent has at keeping their family together.[306]

However, the problems occurring in Bexar County courtrooms are not unfixable.[307] Bexar County trial courts have shown they are capable of properly considering evidence at trials terminating a parent-child relationship.[308] For example, *in re S.A.C.*, the Fourth Court of Appeals held the trial court properly took judicial notice over previous orders and findings of fact concerning the same case.[309] As a result, the Fourth Court had no problem affirming the trial court's holding because the judicially noticed evidence sufficiently supported a finding terminating the parent's rights.[310] Changes as simple as dedicating more time in court developing the record, putting forth admissible testimonial evidence, and properly taking judicial notice can help diminish the

302. *Cf.* In re K.M.J., 443 S.W.3d 101, 112 (Tex. 2014) ("The natural rights between a parent and their child are of constitutional dimensions and termination of parental rights is 'complete, final and irrevocable.'").

303. In re E.F., 591 S.W.3d at 151 (illustrating the standard of clear and convincing evidence cannot be based on conclusory presumptions).

304. *Id.* at 150.

305. David Crary, *Terminating Parental Rights: State Policies Vary Widely*, AP NEWS (Apr. 30, 2016), https://apnews.com/c9fec9ee24d64f4b9e56d1425179a50e [https://perma.cc/SN3U-BFUU]; *see* In re E.F., 591 S.W.3d at 158 (emphasizing how the majority affirmed a parental termination order when "the undisputed evidence establishes the children are being deprived" of a relationship with their mother when it can still be maintained).

306. *Cf.* Crary, *supra* note 305 (acknowledging how once children are taken into foster care, the likelihood that a parent will be reunited with their child decreases due to the lack of available legal services).

307. *See, e.g.*, In re S.A.C., No. 04-13-00058-CV, WL 2247471 at *3 (Tex. App.—San Antonio May 22, 2013, no pet.) (mem. op.) (noting the trial court properly took judicial notice).

308. *See, e.g.*, *id.* at *3 (affirming the trial court's proper utilization of judicial notice in the termination proceeding).

309. *Id.*

310. *Id.*

impractical ways Bexar County has disparaged parental rights.[311] As a legal community, we must do better. We must ensure Bexar County courtrooms adequately protect the fundamental constitutional rights afforded to parents.[312] To do otherwise only shows an inadequate commitment to jurisprudential duties.[313]

CONCLUSION

The Supreme Court left practitioners, families, and states devoid of uniformity within the family law sphere after its decision in *Troxell*.[314] After the Supreme Court cast its nebulous decision, some states have vigorously attempted to protect parental rights under the strictest scrutiny available, while others have attenuated such efforts in a minuscule way.[315] Texas has not been a stout defender of parental rights.[316]

311. *See* In re G.M., No.04-19-0080-CV, WL 3432088, at *5 (Tex. App.—San Antonio July 31, 2019) (Martinez, J., dissenting) (explaining the need for the trial court to not imperishably rely on facts not admitted into evidence when ordering the termination of parental rights); *see also* In re E.F., 591 S.W.3d 138, 142 (Tex. App.—San Antonio 2019, no pet.) ("[W]e urge the trial court and the parties to more completely develop the evidence at trial, so the appellate record is commensurate with the finality of parental termination."); *see also* In re S.A.C., WL 2247471, at *3 (noting how the trial court properly took judicial notice and provided sufficient evidence to terminate the parent-child relationship).

312. *But cf.* Crary, *supra* note 305 ("According to federal data, some states terminate parental rights at a rate 25 times higher than states at the low end of the scale.").

313. *Cf.* In re G.M., WL 3432088, at *7 (Martinez, J., dissenting) (illustrates how parental rights were terminated with paltry evidence not meeting the clear and convincing evidence standard).

314. Troxel v. Granville, 530 U.S. 57 (2000) (plurality opinion). *See generally The Supreme Court's Parental Rights Doctrine*, PARENTALRIGHTS.ORG, https://parentalrights.org/understand_the_issue/supreme-court/ [https://perma.cc/G4JU-Y2H3] (recognizing the impact of the *Troxel* decision on judges and states, regarding ruling on parental rights).

315. *See Protecting Parental Rights at the State Level*, PARENTALRIGHTS.ORG, https://parentalrights.org/states/ [https://perma.cc/YB2H-8VNF] (showing the variation of state laws in the parental rights context). *Compare* UTAH CODE ANN. § 78A-6-507 (West 2020) (broadening the requirements for terminating parental rights by requiring courts to terminate parental right if it is "strictly necessary"), *and* Trisha A. v. Dep't of Child Safety, 446 P.3d 380, 388 (Ariz. 2019) (Bolick, J., dissenting) (citing the legislative intent of the state to enforce strict scrutiny), *with* TEX. FAM. CODE ANN. § 161.001(b) (showing the two-prong analysis courts must follow to terminate the parent-child relationship).

316. *See* Christie Renick, *Bigger in Texas: Number of Adoptions*, *and Parents Who Lose Their Rights*, IMPRINT (May 24, 2018, 7:00 AM), https://imprintnews.org/featured/bigger-in-texas-adoptions-and-parents-who-lose-their-rights/30990 [https://perma.cc/SF2J-V5QB] (explaining Texas' "penchant" to terminate parental rights).

Instead, Texas has become known as the "king of adoptions."[317] A title earned by expeditiously terminating parental rights, even in times when familial ties could be maintained.[318] A title capable of irrevocably destroying families.[319] What encompasses the improper termination of parental rights in Texas includes terminations encapsulated by insufficient evidence, the wrongful application of judicial notice, and a lack of empowerment towards maintaining familial bonds.[320]

Change within Texas, especially within Bexar County family courtrooms, is needed to ensure parental rights are treated with the dignity they deserve.[321] Change is not implausible.[322] However, until the Supreme Court clarifies the *Troxel* decision, states will remain divided on their approaches to parental rights cases.[323] Until clarification is made, states such as Texas must attempt to remedy and address improper approaches some counties have taken to terminate parental rights.[324] Although change cannot help families whose relationships are already irrevocably destroyed, change can help empower the future and the families who could deal with the possibility of improperly losing their

317. *Id.*

318. *See generally id.* (reiterating adoptions in Texas are a symptom of the state's failure to reunify families).

319. In re R.H., No. 04-98-00051-CV, 1998 WL 904355, at *2 (Tex. App.—San Antonio Dec. 30, 1998, no pet.).

320. Crary, *supra* note 305 (explaining the lack of reunification between families in the Bexar County is tied to a lack of empowerment); *see, e.g.*, In re J.E.H., 384 S.W.3d 864, 870–71 (Tex. App.—San Antonio 2012, no pet.) (concluding the trial court's reliance on an affidavit's allegations when terminating a parent's rights was the result of improperly taking judicial notice and, as a result, left no evidence to support the trial court's finding); *see also, e.g.*, In re R.S.D., 446 S.W.3d 816, 822 (Tex. App.—San Antonio 2014, no pet.) (holding the scant record was insufficient to support the trial court's parental termination order).

321. *See, e.g.*, Crary, *supra* note 305 (exploring the different initiatives and efforts of San Antonio District Judge who is using initiatives aimed at "avoiding unnecessary foster-care placements and [parental] terminations.").

322. *See id.* (Citing the Department's efforts to offer and produce "several initiatives aimed at promoting reunification.").

323. *See* Sandra Martinez, *The Misinterpretation of Troxel v. Granville: Construing the New Standard for Third-Party Visitation*, 36 FAM. L.Q. 487, 495 (2002) ("[C]ourt's interpreting the [Troxel] case have been without guidance and thus have applied varying standards.").

324. *See, e.g.*, In re J.E.H., 384 S.W.3d at 870–72 (reversing the trial court's termination order for impermissibly considering evidence that was improperly judicially noticed).

familial ties.[325] This change cannot save all families, but it can ensure parents maintain their rights in cases where it is possible to be maintained.[326] Bexar County courts can properly administer such change by providing: (1) an adequate amount of evidence to meet the threshold burden of proof; (2) emphasizing taking judicial notice properly; and (3) empowering reunion instead of empowering adoptions.[327] These changes, taken cumulatively, can allow Bexar County courts to terminate parental rights properly.[328] Although change is always easier said than done, what matters most is we afford parents the justice they constitutionally deserve.

325. *See* In re E.F., 591 S.W.3d 138, 150 (Tex. App.—San Antonio 2019) (Chapa, J., dissenting) (implying if courts preserve their "truth-seeking function," the probability of wrongfully severing parental rights will be diminished).

326. *See, e.g.*, *id.* at 149 (explaining how "the undisputed evidence" was not properly considered by the trial court and resulted in depriving a child of a relationship with their mother when it can still be maintained); *see also* Renick, *supra* note 316 (describing how Texas perversely terminates relationships that are capable of being maintained).

327. *See* In re E.F., 591 S.W.3d at 142 (emphasizing how the trial court must strive to make a more completely developed record for the purpose of providing an appellate court with a record commensurate with the finality of a parental termination.); *see also* In re G.M., No.04-19-0080-CV, WL 3432088, at 5 (Tex. App.—San Antonio July 31, 2019) (Martinez, J., dissenting) (emphasizing the need for the trial court to not imperishably rely on facts not admitted into evidence when ordering the termination of parental rights); *see also, e.g.*, In re S.A.C., No. 04-13-00058-CV, WL 2247471 at *3 (Tex. App.—San Antonio May 22, 2013, no pet.) (mem. op.) (describing how the trial court's proper utilization of judicial notice provided sufficient evidence to terminate the parent-child relationship).

328. *See* In re G.M., WL 3432088, at *5 (Watkins, J., concurring) (expressing the importance of properly administering proceedings and the collection of sufficient evidence at the trial court level, especially when parental rights are at stake).