The Scholar: St. Mary's Law Review on Race and Social Justice

Volume 6 | Number 1 Article 4

10-1-2003

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CHILD CUSTODY IN TEXAS AND THE BEST INTEREST STANDARD: IN THE BEST INTEREST OF WHOM?

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"[I]n suits involving the parent-child relationship, we have more than two interests involved, we have three interests: the mother's interests, the father's interests, and, of paramount importance, the child's interests"[1]

—Justice Wanda McKee Fowler,
Texas Court of Appeals

The divorce rate in the United States stands between 40 and 50 percent.[2] As a result, children are often caught in the crossfire as litigation over child custody ensues.[3] Generally, child custody litigation involves parents who seek to establish that they should be awarded primary custody of their children.[4] During such litigation, courts must entertain the competing interests of all parties involved; however, courts have repeatedly stated that the best interest of the child is the paramount consideration.[5]

As is often the nature of child custody litigation, parents go about persuading the court that they should receive primary custody of their child, while the child remains voiceless in the matter.[6] In order to provide a voice for the child, courts assume the role of *parens patriae*, defined as a "provider of protection to those unable to care for themselves."[7] Acting

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1. Lowe v. Lowe, 971 S.W.2d 720, 725 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (quoting the Honorable Justice Wanda McKee Fowler of the Texas Court of Appeals).

2. Americans for Divorce Reform, *Divorce Statistics Collection: Summary of Findings so Far*, *at* http://www.divorcereform.org/results.html (last visited Sept. 1, 2003).

3. *See* Judith S. Wallerstein et al., *The Unexpected Legacy of Divorce: A 25 Year Landmark Study*, *in* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW CASES AND MATERIALS 803 (2d ed. 2002) (recognizing the effects of divorce on children).

4. Litigation is generally between parents because the basic presumption, common to most courts, is that a child's best interest is served by awarding custody to one of the natural parents. *See In re* V.L.K., 24 S.W.3d 338, 341 (Tex. 2000); *In re* K.C.M., 4 S.W.3d 392, 395 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); McGowen v. State, 558 S.W.2d 561, 563 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ. ref'd n.r.e.).

5. *See* Sellers v. Sellers, 638 So. 2d 481, 485 (Miss. 1994); McDaniels v. Carlson, 738 P.2d 254, 262 (Wash. 1987); Tetreault v. Tetreault, 55 P.3d 845, 851 (Haw. 2002); Johnson v. Murray, 648 N.W.2d 664, 672 (Minn. 2002).

6. Generally, children are not allowed to express their wishes to the court with regards to their choice of custodian until they reach a certain age. In Texas, children twelve years or older can choose the custodial parent, however, this decision is subject to court approval, TEX. FAM. CODE ANN. §§ 153.008–153.009 (Vernon 2002) *amended by* Act of June 20, 2003, 78th Leg., R.S. Ch. 1036.

7. BLACK'S LAW DICTIONARY 911 (7th ed. 2000). *See also* C. Gail Vasterling, Note, *Child Custody Modification Under the Marriage and Divorce Act: A Statute to End the Tug-of-War?*, 67 WASH. U. L.Q. 923, 923-24 (1989) (stating that the future and best parent to raise the child must be decided by a trial court judge).

within this capacity, courts then perform the function of determining what is in the child's best interest.[8]

The purpose of this comment is to evaluate the manner with which the "best interest of the child" theory is implemented in child custody cases.[9] More specifically, this comment will focus on the "best interest of the child" standard, commonly referred to as the *Holley* factors, applied in Texas child custody cases.[10] Additionally, this comment will explore whether the current best interest standard in Texas is appropriate in a child custody context or whether a new standard should be considered.

In order to set a proper perspective from which to evaluate the Texas best interest standard, Part I of the comment reviews the historical background and evolution of various child custody standards adopted by courts. Part II considers and evaluates the Uniform Marriage and Divorce Act's "best interest" standard. Part III analyzes the *Holley* approach taken by Texas courts, and discusses its inherent flaws. Part IV evaluates *Holley* in light of other considerations such as race, religion, and sexual preference. Part V evaluates recently proposed custody determination standards, and Part VI recommends changes in the manner Texas courts apply the best interest standard to child custody disputes.

I. HISTORY

A. *Paternal Preference*

The evolution of the "best interest" standard begins with the paternal preference at common law. At common law, the father had an absolute right to custody of his children.[11] This right, known as the paternal preference rule, has its roots in the dominant thought of that era.[12] As head of the household, the father was responsible for the protection, educa-

8. *See* Vasterling, *supra* note 7, at 924 (noting that a judge, pursuant to State statutes, must consider the "best interests" of the child).

9. The author acknowledges that other child custody standards have been used by the courts. *E.g.*, Bah v. Bah, 668 S.W.2d 663, 666 (Tenn. Ct. App. 1983) (discussing the doctrine of comparative fitness); *see* also Garska v. McCoy, 278 S.E.2d 357, 360 (W. Va. 1981) (discussing the primary caretaker presumption). However, the author has chosen to focus on the best interest of the child standard in order to conduct a comparative analysis of Texas child custody law.

10. *See* Holley v. Adams, 544 S.W.2d 367, 372 (Tex. 1976) (enumerating "best interest" factors).

11. *See* Albright v. Albright, 437 So. 2d 1003, 1004 (Miss. 1983) (explaining that a father had an "absolute proprietary right to the custody of his legitimate minor children").

12. Devine v. Devine, 398 So. 2d 686, 689 (Ala. 1981) (discussing that law and nature mandate that the father have custody of his children); *see also Albright*, 437 So. 2d at 1004 (noting that the paternal right "was incorporated into the jurisprudence of our country").

tion, "and religious training of his children".[13] As such, the father was entitled to reap the benefits his children provided.[14] The mother, on the other hand, had no legal rights to the custody of her children.[15] Therefore, in custody disputes, the father enjoyed an absolute proprietary right to custody of the children.[16]

B. *Tender Years Doctrine*

As society's values and beliefs gradually began to change, dominant thought shifted away from the paternal preference rule in favor of a maternal presumption, referred to as the tender years doctrine.[17] The tender years doctrine created a presumption that the mother should be awarded custody of young children in cases of divorce or separation.[18] This presumption was rebuttable by establishing that the mother was unfit.[19]

In 1830, pursuant to *Helms v. Franciscus*,[20] Maryland became the first State in the United States to recognize the tender years doctrine by stating:

> [t]he father is the rightful and legal guardian of all his infant children; and in general, no court can take from him the custody and control of them, thrown upon him by the law, not for his gratification, but on account of his duties, and place them against his will in the hands even of his wife. Yet even a court of common law will not go so far as to hold nature in contempt, and *snatch helpless, pulling infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father.* The mother is the softest and safest nurse of infancy, and with her it will be left in opposition to this general right of the father.[21]

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13. *See Devine*, 398 So. 2d at 688 (noting that the privileges of the father were "considered dependent upon the recognized laws of nature and in accordance with the presumption that the father could best provide for the necessities of his children").

14. *See id.* (stating that the father was entitled to his children's "services and association").

15. *See id.* (noting that at marriage, "husband and wife became one person", her identity merging completely with the husband); Bradwell v. State, 83 U.S. 130, 141 (1873) (noting that man and woman were one, with the man being the representative).

16. *Albright,* 437 So. 2d at 1004.

17. *Id.* (discussing that enlightened attitudes gradually began to acknowledge a maternal preference over the common law rule of paternal custody).

18. *See Devine*, 398 So. 2d at 689 (noting that in England, custody of children less than seven years old was awarded to the mother).

19. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW CASES AND MATERIALS 803 (2d ed. 2002).

20. Helms v. Franciscus, 2 G. & J. 544 (Md. 1830).

21. *Id.* at 563 (emphasis added).

As such, *Helms* marks the beginning of the tender years presumption history in the United States.[22] Courts that utilized the doctrine treated it as either 1) a tie-breaker which required the mother to be awarded custody upon a showing that all other factors were equal;[23] 2) a rule which placed the burden of persuasion upon the father to prove that it was in the child's best interest to award custody to the father;[24] or 3) a rule which required the father to prove that the mother was unfit in order for the father to receive custody of their child.[25]

In the years that followed, the doctrine began to lose support.[26] Several States declared the doctrine unconstitutional on the grounds that it violated the Fourteenth Amendment.[27] Although States found the doctrine unconstitutional, the United States Supreme Court never decided the doctrine's constitutionality.[28] While the doctrine has lost much support, its legal effect has not been completely abolished because courts continue to take the child's age into account when determining custody.[29]

II. UNIFORM MARRIAGE AND DIVORCE ACT OF 1970

The Uniform Marriage and Divorce Act ("Act") officially gave birth to the "best interest of the child" theory.[30] The Act was enacted in 1970 by

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22. *See Devine*, 398 So. 2d. at 689 (discussing the origin of the tender years presumption).

23. Robert F. Cochran, Jr., *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 U. RICH. L. REV. 1, 10 (1985).

24. *Id.*

25. *Id.*

26. *See* Caban v. Mohammed, 441 U.S. 380, 388-89 (1979) (stating that a mother does not necessarily have a closer relationship with her children); Passmore v. Passmore, 820 So. 2d 747, 750 (Miss. Ct. App. 2002) (recognizing a weakening of the tender years doctrine through the passage of time). *See also* New York *ex rel.* Watts v. Watts, 350 N.Y.S.2d 285, 290 (NY Fam. Ct. 1973) (citing studies showing that children need "mothering," not necessarily a mother). *But see* Hollon v. Hollon, 784 So. 2d 943, 947 (Miss. 2001) (stating that the tender years doctrine is still a factor to be weighed in a best interest of the child analysis).

27. *See* Pusey v. Pusey, 728 P.2d 117, 119-20 (Utah 1986) (stating that the Fourteenth Amendment precludes a reliance "on gender as a determining factor" in child custody cases); *Watts*, 350 N.Y.S.2d at 287 (stating that the tender years presumption violates state law).

28. WEISBERG & APPLETON, *supra* note 19, at 803.

29. *E.g.*, Mercier v. Mercier, 717 So. 2d 304, 307 (Miss. 1998); Davidson v. Davidson, 576 N.W.2d 779, 785 (Neb. 1998) (noting that age of a child is a factor to be considered in determining the child's best interest); Hollandsworth v. Knyzewski, 109 S.W.3d 653, 663-64 (Ark. 2003) (listing the age of the child as a factor in reaching a best interest determination).

30. *See* UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 561 (2003) (amended 1971, 1973).

the National Conference of Commissioners on Uniform State Laws for the purpose of providing guidance to courts adjudicating marriage and divorce issues.[31] Enactment of the Act came upon the heels of the decline of the tender years doctrine.[32] During this era, focus shifted from the interest of the parents to the best interest of the child.[33]

In keeping with prevailing dominant thought, Section 402 of the Act codified the "best interest of the child" theory.[34] Section 402 requires a court to consider:

> 1) the wishes of the child's parent or parents as to his custody, 2) the wishes of the child as to his custodian, 3) the interactions and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest, 4) the child's adjustment to his home, school and community, and 5) the mental and physical health of all individuals involved.[35]

While the Act was consistent with the prevailing thought of the 1970s, it was not readily adopted by the states.[36] In the years that have followed, only a handful of states have adopted the "best interest standard" as set forth in the Act.[37]

The best interest of the child theory under the Act has received much criticism.[38] Some of the criticisms it has received are that the Act's best interest theory is subject to broad judicial discretion and is indeterminate, resulting in increased litigation.[39] The Act has also been criticized be-

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31. *See* UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A., Prefatory Note (1987) (updated 1998). *See generally* Vasterling, *supra* note 7, at 936-37 (discussing that some states look to the UMDA for custody disputes).

32. *See* Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 10 (1987) (noting that the tender years doctrine was replaced by the best interest of the child theory during the 1970s).

33. Vasterling, *supra* note 7, at 924-26 (noting that no-fault divorce statutes and demise of the tender years doctrine shifted the focus to the child). *See also* 22 AMJUR TRIALS 357 § 4 (1975) (explaining that the spirit of the best interest theory requires that both parents be accorded equal footing, with neither parent receiving preference).

34. *See* UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 561 (2003).

35. *See id.*

36. Vasterling, *supra,* note 7, at 936.

37. *See id.* (noting that very few states "have adopted statutes similar to the UMDA in terms of initial custody decision").

38. *Id.* at 926. *See generally* Elster, *supra* note 32, at 11-28 (discussing the principle as indeterminate, unjust, self-defeating and overridden by public interest).

39. *See* Elster, *supra* note 32, at 28-29 (arguing that judge's reasoning may be influenced by other factors). *See generally* Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975) (discussing judicial functions in child custody law).

cause it does not prioritize nor give any indication of the weight to be accorded each factor.[40] Nevertheless, the best interest theory under the Act continues to be a model for States to follow despite the fact that few States have adopted the Act.

III. TEXAS STANDARD

A. *Best Interest of the Child in Texas*

Texas statutory and case law reveal that Texas courts' primary consideration in determining child custody is the best interest of the child.[41] However, Texas has not adopted the Act's "best interest of the child" standard, nor has Texas codified a list of best interest factors in the Texas Family Code.[42] Rather, the best interest standard in Texas has developed from factors established by the Texas Supreme Court in *Holley v. Adams*,[43] a 1976 parental rights termination case.[44]

In *Holley v. Adams*, the father, David Adams, filed suit to terminate his former wife's legal right to a parent-child relationship.[45] The divorce decree named David Adams as the managing conservator of their child,

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40. Carl E. Schneider, *Legislature and Legal Change: The Reform of Divorce Law*, 86 MICH. L. REV. 1121, 1127 (1988) (reviewing HERBERT JACOB, A SILENT REVOLUTION: ROUTINE POLICY MAKING AND THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988)).

41. *In re* Marriage of Bertram, 981 S.W.2d 820, 822 (Tex. App.—Texarkana 1998, no pet.); Doyle v. Doyle, 955 S.W.2d 478, 480 (Tex. App.—Austin 1997, no pet.); TEX. FAM. CODE ANN. § 153.002 (Vernon 2002).

42. *Bertram*, 981 S.W.2d at 822 (explaining that while Texas does not have a codification of best interest standards, the Texas Supreme Court has established factors for a court to consider in determining child custody); *In the Interest of T.D.C., Fort Worth Court of Appeals*, 18 TEXAS LAWYER No. 21 (July 29, 2002) (noting that the Texas Family Code does not define nor list factors to be considered in modification suits). *See also* TEX. FAM. CODE ANN. § 263.307 (Vernon 2002) (listing "best interest" factors applicable only to Chapter 263: Review of Placement of Children Under Care of Department of Protective and Regulatory Services).

43. 544 S.W.2d 367 (Tex. 1976).

44. *Id.* at 371-72. Prior to 1976, Texas had adopted a form of the maternal preference rule which gave custody of children of tender years to mothers when all things were equal between the parents. Spitzmiller v. Spitzmiller, 429 S.W.2d 557, 561 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.); Erwin v. Erwin 505 S.W.2d 370, 372 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). Eventually the maternal preference rule was abolished by Act of Jan. 1, 1974, 63d Leg., R.S. ch. 543, § 1, 1973 Tex. Gen. Laws 1413 *repealed by* Act of Apr. 6, 1995, 74th Leg., R.S. ch. 20, § 2, 1995 Tex. Gen. Laws 282. which required a court to disregard the sex of either parent in deciding custody. Altamarino v. Altamarino, 591 S.W.2d 336, 337 (Tex. Civ. App.—Corpus Christi 1979, no writ); Adams v. Adams, 519 S.W.2d 502, 503 (Tex. Civ. App. —El Paso 1975, no writ). Section 14.01 was amended in 1995 and is currently TEX. FAM. CODE ANN. § 153.003 (Vernon 2002).

45. *See Holley*, 544 S.W.2d at 367.

but did not order his former wife, Nanci Holley, to pay child support.[46] Pursuant to Section 15.02 of the Texas Family Code, the trial court terminated the parental rights of Mrs. Holley.[47] The grounds for termination were that Mrs. Holley failed to provide child support; that she engaged in conduct which "endangered the emotional well-being of the child"; and, that "terminating the parent-child relationship was in the best interest of the child."[48]

The trial court held that while Mrs. Holley was not required to pay child support pursuant to a court order, she had a duty to do so under Texas Family Code Section 4.02.[49] The trial court further held that abandonment of her son for almost six years constituted conduct endangering the "emotional well-being of the child."[50] Finally, the trial court concluded that the best interest of the child would be served by terminating Mrs. Holley's parental rights.[51] This holding was predicated on findings that Mrs. Holley voluntarily left the child with Mr. Adams, unexpectedly departed to Washington, and remarried two more times.[52] The trial court culminated its analysis by noting that in the span of six years, Mrs. Holley only saw her child a total of three times during which time she only sent him about $100.00.[53] The Texas Court of Civil Appeals affirmed the trial court's decision.[54]

On appeal to the Texas Supreme Court, the lower courts' decision to terminate the parent-child relationship was reversed.[55] The Court held that while Mrs. Holley did not comply with her duty to support her child, she did not engage in conduct endangering the emotional well-being of

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46. *See id.* at 368.

47. *See id.* Act of May 24, 1973, 63d Leg., R.S., ch. 543, § 1, 1973 Tex. Gen. Laws 1426-7, *repealed by* Act of Apr. 6, 1995, 74th Leg., ch. 20, § 2, 1995 Tex. Gen. Laws 282 provided that:

> "[a] petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that: (1) the parent has: (D) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or (E) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; and (2) termination is in the best interest of the child."

Section 15.02 was repealed in 1995 and replaced with TEX. FAM. CODE ANN. § 161.001(1)(E) (Vernon 2002).

48. *Holley*, 544 S.W.2d at 368.

49. *Id.* at 367.

50. *Id.* at 368.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 373.

her child.[56] Therefore, the court found that termination of Mrs. Holley's parental rights was not in the best interest of the child.[57]

B. *Holley Factors*

In reaching its best interest determination in *Holley*, the Texas Supreme Court considered several factors applied by other courts when determining the best interest of a child.[58] These factors were then compiled into a list for Texas courts to consider when evaluating the best interest of the child.[59] The factors set forth in *Holley* are:

> A) the desires of the child; B) the emotional and physical needs of the child now and in the future; C) the emotional and physical danger to the child now and in the future; D) the parental abilities of the individuals seeking custody; E) the programs available to assist these individuals to promote the best interest of the child; F) the plans for the child by these individuals or by the agency seeking custody; G) the stability of the home or proposed placement; H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and I) any excuse for the acts or omissions of the parent.[60]

The Texas Supreme Court indicated that this list was not exhaustive and that the factors were "considerations which either have been or would appear to be pertinent."[61]

C. *Problems With Holley*

When a court seeks to determine the best interest of the child, the court possesses both a right and a duty to inquire into all circumstances relating to a disposition of the child.[62] Unfortunately, application of the *Holley* factors falls short of this duty by presenting the following basic flaws: 1) *Holley v. Adams* was a parental rights termination case, and, therefore, some of these factors may not be appropriate in a child custody

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56. *Id.* at 371-72.

57. *Id.* at 373.

58. *Id.* at 371-72.

59. *Id.* at 372.

60. *Id.*

61. *Id.* It should be noted that only a few of the factors were applicable to *Holley*. *Id.* The factors the court applied were: (1) "acts or omissions of the parent, (2) excuse of acts or omissions, and (3) the emotional needs of the child." *Id.*

62. Conley v. St. Jacques, 110 S.W.2d 1238, 1242 (Tex. Civ. App.—Amarillo 1937, writ dism'd w.o.j.).

context;[63] 2) the *Holley* factors do not consider the parents' wishes, thereby raising constitutional issues;[64] and 3) courts are not required to address the relevance of each *Holley* factor.[65]

1. Inappropriate Contexts

First, the *Holley* factors have been applied, and in some instances misapplied, to various legal contexts including modification,[66] parental notification,[67] parental rights termination,[68] and child custody cases.[69] Whereas the *Holley* factors may be appropriate for termination of parental rights proceedings, they cannot practicably be applicable to all custody related issues.[70] This flaw was recently recognized in the dissenting opinion of *In re Doe 2,*[71] where Justice *Nathan L. Hecht* and Justice *Greg Abbott* stated that:[72]

[t]he Court derives from its opinion in *Holley v. Adams*, a case involving the termination of a spouse's parental rights, four factors that trial

63. *See Holley*, 544 S.W.2d at 371-72 (noting that only a limited number of factors were used in resolving the issue).

64. *See id.* a 372 (omitting the parents' wishes from among the list of factors to be considered).

65. *See In re* Doe 2, 19 S.W.3d 278, 282 (Tex. 2000) (stating that only four of the *Holley* factors are relevant to the parental notification context). *See also* Reyes v. Lafferty, No. 04-95-00937-CV (Tex. App.—San Antonio Jan. 15, 1997, no writ) (not designated for publication), 1997 WL 13607, *2 (stating that not all factors were relevant).

66. *See In re* T.D.C., 91 S.W.3d 865, 873 (Tex. App.—Fort Worth 2002, no pet.) (applying *Holley* factors to determine whether modification would be in the child's best interest); *see also* Turner v. Turner, 47 S.W.3d 761, 767 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (applying *Holley* factors in a modification suit).

67. *See Doe 2*, 19 S.W.3d at 297 (applying *Holley* factors in determining whether it would be in the child's best interest to bypass parental notification).

68. *See In the Interest of* C.B. and V.B., No. 01-01-00117-CV (Tex. App.—Houston [1st Dist.] July 25, 2002, no pet.) (not designated for publication), 2002 WL 1722035, at *4 (applying *Holley* factors in suit involving parental rights termination); *see also* Perrett v. Tex. Dept. Protective and Regulatory Services, No. 03-01-00474-CV (Tex. App.—Austin 2002, no pet.) (not designated for publication), 2002 WL 1343220, *5, *7 (applying *Holley* factors in making determination that "termination of mother and father's parental rights was in the best interests of their children").

69. *See In re* Marriage of Bertram, 981 S.W.2d 820, 822-823 (Tex. App.—Texarkana 1998, no pet.) (recognizing but not applying the *Holley* factors because the court was addressing the presumption that it is in the child's best interest for parents to be appointed joint managing conservators); *see also Reyes*, 1997 WL 13607 at *1 (indicating that the "best interest of the child" standard is used by trial courts in Texas as a guide for determining who to name as managing conservator).

70. *See In re* W.S., 899 S.W.2d 772, 776 (Tex. App.—Fort Worth 1995, no writ) (noting that the applicable standard in termination proceedings is by clear and convincing evidence).

71. 19 S.W.3d 278 (Tex. 2000).

72. *Id.* at 297 (Hecht & Abbot JJ., dissenting).

courts should consider in deciding whether parental notification of a minor's wish to have an abortion is not in the minor's best interest. Any connection between a termination of parental rights and parental notification is not immediately apparent, and the Court does not bother to explain its rationale. The Court has simply sought out its only prior decision in any context listing 'best interest' factors and attempted to apply it here.[73]

Further support for the proposition that the *Holley* factors should not be so readily applied to contexts other than the parental rights termination context can be illustrated by considering the different rights implicated in the various contexts.[74] For example, the problem with applying *Holley* in child custody cases is that the issues in child custody disputes generally revolve around the allocation of child rearing rights and duties between the parents.[75] Furthermore, the decision by the trial court is revocable and the court acquires continuing jurisdiction.[76] These aspects make custody cases different from parental notification or parental termination cases.[77] Therefore, it follows that the *Holley* factors may not be appropriate for determining the best interest of a child in child custody cases.

2. Lack of Parental Consideration

Secondly, while the primary focus should be on the best interest of the child, in order for the standard to be constitutional, parents should be given an opportunity to have their position regarding their child's best interest considered.[78] In *Troxel v. Granville*,[79] the United States Supreme Court stated that in determining the best interest of a child, a parent's wishes should be accorded some weight.[80] The *Holley* factors do not provide parents this opportunity and run the risk of being held unconstitutional.[81]

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73. *Id.* A review of the *Holley* factors reveals that while the Texas Supreme Court purports to have adopted four *Holley* factors, the fourth factor listed by the court was not derived from *Holley*. *See* Holley v. Adams, 544 S.W.2d 367, 372 (Tex. 1976) (listing the *Holley* factors, none of which include the fourth factor used in *Doe 2*).

74. *See Doe 2*, 19 S.W.3d at 288-89 (comparing rights involved in custody cases with parental notification cases).

75. *Id.*

76. *Id.* at 289.

77. *Id.*.

78. *See* Troxel v. Granville, 530 U.S. 57, 69 (2000) (identifying the problem of not taking the parent's decision into consideration when deciding the child's best interest).

79. 530 U.S. 57 (2000).

80. *Id.* at 70.

81. *See* Holley v. Adams, 544 S.W.2d 367, 371-72 (Tex. 1976) (omitting parents' interest from among the list of factors to be considered).

Troxel can be distinguished from a child custody case because *Troxel* dealt with grandparents seeking visitation rights, rather than custody.[82] Nevertheless, the United States Supreme Court reaffirmed the fundamental right parents have "to make childrearing decisions."[83] Certainly, decisions by parents as to what is in the best interest of their child and with whom the child should live are childrearing decisions. As such, they fall within the parent's fundamental rights and should always be considered by the courts.

Under *Holley*, a judge may entertain the parent's views, but is not required to weigh these views in making a determination of the child's best interest.[84] If a court does not consider parents' views, the United States Supreme Court noted that the best interest determination would be placed "solely in the hands of the judge."[85] Failing to consider parents' views coupled with wide judicial discretion can lead to a decision that is not in the best interest of the child.[86] In effect, judges' decisions could reflect their individual beliefs rather than the child's best interest.[87] "If personal values are the measuring device for custody decisions, fault inevitably becomes a determinative factor, and the child custody decision focuses on parental conduct rather than the best interests of the child."[88]

3. Failure to Address the Relevance of Every Factor

Lastly, *Holley* does not require the courts to address the relevance, or lack thereof, of every factor.[89] For example, in *Reyes v. Lafferty,*[90] Mr. Reyes appealed his appointment as possessory conservator of his son.[91] An ad litem report containing a recommendation of the child's best interest had been prepared for the court.[92] The report used the *Holley* factors

82. *Troxel*, 530 U.S. at 61.

83. *Id.* at 72-73.

84. *Holley*, 544 S.W.2d at 372. Parental views on a child's best interest are not listed amongst the *Holley* factors. *Id.*

85. *Troxel*, 530 U.S. at 67.

86. *Id.* at 73 (stating that "[t]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made.").

87. Gary Crippen, *Stumbling Beyond the Best Interest of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment With the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 444 (1990).

88. *Id.* at 444-45.

89. *See* Reyes v. Lafferty, No. 04-95-00937-CV (Tex. App.—San Antonio 1997, no writ) (not designated for publication), 1997 WL 13607, at *2 (recognizing that not all factors are relevant in child custody cases).

90. *Id.* at *1.

91. *Id.*

92. *Id.*

in order to determine the child's best interest.[93] Reyes argued that the report did not reveal the best interests of his son because the report failed to address each of the *Holley* factors.[94] The court responded by noting that the ad litem report listed each factor, but that the report only needed to address the relevant factors.[95] With this rationale, the court found that the report did not fall "below the minimum standards"[96] in determining the child's best interest.[97]

This type of reasoning further perpetuates the subjective nature of the best interest theory in Texas. Presumably a court could make a determination as to what is in a child's best interest after only considering one or two "relevant" factors. Without requiring a court to address each *Holley* factor and explain its relevance, or lack thereof, courts fall short of their duty to protect a child's best interest.

IV. OTHER CONSIDERATIONS

Holley does not directly address issues such as religion, race, or the parents' sexual preference.[98] Therefore, some discussion regarding these issues is appropriate in order to determine if *Holley* is correct in omitting such issues from consideration.

A. *Religion*

Courts throughout the United States generally adhere to one of the following approaches where a parent desires to make religious preference an issue: 1) allow religion to be a factor, as long as it is not the sole or dominant factor,[99] 2) consider how religion impacts the child's well being,[100] 3) consider religion in cases where the child has an identifiable religious preference or in cases where religion is an important part of a child's identity,[101] or 4) refuse to consider religion as a factor.[102]

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93. *Id.* at *2.

94. *See id.* (arguing that the report did not address the child's wishes and did not list any acts or omissions which indicated that the parent-child relationship was improper).

95. *Id.*

96. The court explained neither the origins nor the framework of "minimum standard". *See id.* at *3.

97. *See Id.*

98. Holley v. Adams, 544 S.W.2d 367, 371-72 (Tex. 1976) (omitting race, religion, and parental sexual preference from amongst the list of factors to be considered).

99. *See* Donald L. Beschle, *God Bless the Child?: The Use of Religion as a Factor in Child Custody and Adoption Proceedings*, 58 FORDHAM L. REV. 383, 397-98 (1989) (indicating that though many courts have endorsed religion as a factor, many have taken steps to minimize the role of religion).

100. *See id.* 398-99 (explaining how a court's discretion may either seriously hinder consideration of religion or may place no limit on it at all).

101. *Id.* at 399.

As noted above, *Holley* does not include religion as a factor to be considered in making a best interest determination.[103] While *Holley* is silent on the issue of religion, one Texas court has directly addressed this issue.[104] The Amarillo Court of Appeals explained that:

> [i]t is beyond the power of the court, in awarding the custody of a child or children to prefer the religious views or teachings of either parent, even though the beliefs and practices of one parent might be more 'normal' or more in accord with majority religious views or practices.[105]

Although it appears that Texas law is settled with respect to religion and child custody determinations, such a conclusion may be inconsistent with the Texas Family Code which provides that a parent who has possession of the child has "the right to direct the moral and religious training of the child."[106] This apparent conflict reveals that Texas law may be inconsistent with respect to religion and child custody determinations.[107] As such, it cannot be determined whether *Holley* appropriately omits religion as a factor.

B. *Race*

As noted previously, *Holley* does not address what role, if any, race should play in determining a child's best interest. Furthermore, neither Texas case law nor the Texas Family Code directly address race in the custody context, with the exception of the adoption context.[108] However, the Texas Constitution and the United States Supreme Court suggest that race should not be a factor to be considered when determining the best interest of the child during a child custody determination. Article I, Section 3a of the Texas Constitution states that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."[109] A literal reading of this section suggests that in Texas,

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102. *See In the Matter* of the Marriage of Knighton, 723 S.W.2d 274, 278 (Tex. App.—Amarillo 1987, no writ) (stating that religion is not a factor to be considered).

103. *Holley*, 544 S.W.2d at 371-72 (failing to address religion as a factor).

104. *See Knighton*, 723 S.W.2d at 274, 278.

105. *Id.* at 278.

106. TEX. FAM. CODE ANN. § 153.074(4) (Vernon 2002).

107. *See* Kelly McClure & Clint Westhoff, *Fighting Over Faith: Religious Beliefs and Practices Play a Role in Custody Litigation*, 17 TEXAS LAWYER, No. 22, (August 6, 2001) (recognizing the apparent conflict between Texas case and statutory law).

108. *See* TEX. FAM. CODE ANN. § 162.105 (Vernon 2002); *In re* Adoption of Gomez, 424 S.W.2d 656, 659 (Tex.Civ.App.—El Paso 1967, no writ) (finding a Texas statute which prohibited interracial adoptions as unconstitutional and in violation of Article 3a of the Texas State Constitution).

109. TEX CONST. art. I, § 3a.

race should not be a deciding factor in determining the best interests of a child.

Further support for the proposition that race should not be a factor in making a best interest determination is found in the United States Supreme Court case, *Palmore v. Sidoti.*[110] In *Palmore*, the father sought to modify an existing judgment granting custody to the mother, on grounds that the mother was living with a man of another race.[111] The father was awarded custody by the trial court which reasoned that it was not in the child's best interest to live in an interracial home.[112] This holding was subsequently affirmed by the appellate court.[113] The Supreme Court reversed the lower courts' decisions explaining that in modification proceedings, race should not be a factor.[114] Considering the holding in *Palmore*, and the language contained in the Texas Constitution, it follows that *Holley* appropriately omits race as a factor in best interest determinations.

C. *Sexual Preference*

Texas law does not directly address which position Texas courts take with respect to homosexual parents and child custody. However, at least one Texas court has allowed a parent's sexual preference to be a factor when terminating parental rights.[115] Other states have dealt with the issue in one of several ways. For example, Mississippi holds that a difference in "personal values and lifestyles" should not be the "sole basis for custody decisions."[116] Therefore, in Mississippi, a court is entitled to consider homosexuality as a factor as long as it is not the only factor considered.[117]

Arkansas follows the view that homosexuality is presumed detrimental to a child if homosexual conduct takes place in the presence of the

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110. 466 U.S. 429, 429 (1984).

111. *Id.* at 430.

112. *Id.* at 430.

113. *Id.*

114. *See id.* (concluding that possible injury and private biases are not permissible considerations for removing a child from the mother).

115. *See In Interest* of McElheney, 705 S.W.2d 161, 163 (Tex. App.—Texarkana 1985, no writ) (allowing testimony of a mother's sexual preference to be considered as one factor among several others).

116. Fulk v. Fulk 2002 WL 31248616 (Miss. Ct. App. 2002); *see* Hollon v. Hollon, 784 So. 2d 943, 949 (Miss. 2001) (stating that a "homosexual relationship is not, per se, a basis to determine that child custody should be denied").

117. *See* Morris v. Morris, 783 So. 2d 681, 693 (Miss. 2001) (holding that a court was justified in considering a mother's homosexual lifestyle amongst other relevant factors). *See also* S.B. v. L.W., 793 So. 2d 656, 661 (Miss. Ct. App. 2001) (noting that the court did not find any case law requiring that homosexuality be ignored).

child.[118] Similarly, New Mexico allows custody to be denied if a parent's sexual preference will have an adverse impact upon the child.[119] In tandem with this view, Louisiana holds that when determining a child's best interest, a court should determine whether the child is being negatively affected by the homosexual lifestyle of the parent.[120]

As discussed above, Texas courts do not directly address the issue of homosexuality and its impact, or lack thereof, on child custody. Furthermore, the Texas legislature does not provide guidance on the issue. Therefore, with the lack of case and statutory law on the issue, coupled with the recent decision in *Lawrence v. Texas*,[121] whereby a Texas sodomy law was declared unconstitutional by the Supreme Court of the United States, one may conclude that *Holley* appropriately omits sexual preference as a factor.

V. Alternatives to the Best Interest Standard

With the frequent criticism of the best interest of the child standard, alternative standards have been proposed. Such standards include the primary caretaker presumption[122] and the past caretaker standard.[123]

A. *Primary Caretaker Standard*

Under the primary caretaker standard, there is a presumption that the best interest of the child is served by placing the child with the parent who has been the predominant caretaker.[124] In determining which parent is the predominant caretaker, the standard focuses on who provided

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118. Thigpen v. Carpenter, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987); *see* Ketron v. Aguirre, 692 S.W.2d 261, 263 (Ark. Ct. App. 1985) (stating that the Court has "never condoned a parent's promiscuous conduct or lifestyle when such conduct has been in the presence of the child").

119. A.C. v. C.B., 829 P.2d 660, 664-65 (N.M. Ct. App. 1992).

120. *See* Scott v. Scott, 665 So. 2d 760, 766 (La. Ct. App. 1st Cir. 1995). In making this determination Louisiana courts consider "1) whether the children were aware of the illicit relationship, 2) whether sex play occurred in their presence, 3) whether the furtive conduct was notorious and brought embarrassment to the children, and 4) what effect the conduct had on the family home life." *Id.*

121. 123 S. Ct. 2472, 2484 (2003) (holding that the state could not constitutionally proscribe the sexual practices common to the homosexual lifestyle engaged in by consenting, adult homosexuals in the privacy of their own home).

122. *See* Vasterling, *supra* note 7, at 927 n.23 (noting that the primary caretaker standard is one alternative to the best interest of the child standard).

123. *See* Robert F. Kelly & Shawn L. Ward, *Social Science Research and the American Law Institute's Approximation Rule*, 40 Fam. Ct. Rev. 350, 352 (2002) (discussing the rationales in favor of the "approximation rule" as opposed to the best interest standard") The "approximation rule" is also referred to as the "past caretaker standard." *Id.* at n.5.

124. Weisberg & Appleton, *supra*, note 19 at 805.

the child's daily needs.[125] In *Garska v. McCoy*,[126] the West Virginia Supreme Court explained that in determining which parent predominantly provided for the child's daily needs, a court should consider which parent was responsible for:

> (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing, and arithmetic.[127]

Proponents of the standard emphasize that it is gender neutral, that it encourages less litigation, and is predictable.[128] Criticism includes that it is not gender neutral, but merely a return to the tender years doctrine,[129] and that the standard focuses on the parent's conduct rather than on the child's best interest.[130]

While the presumption is not currently utilized by any state,[131] the primary caretaker standard remains viable because several States allow primary caretaker status to be considered as a factor when determining the best interest of a child.[132] As for Texas, courts are to consider the parents' participation in child rearing, but only when determining whether to grant joint custody.[133]

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125. Vasterling, *supra*, note 7, at 927 n.23 (noting that "the parent who previously provided the child's daily needs, receives custody"). *See also* Crippen, *supra*, note 87, at 439 (explaining that the standard focuses on the "physical care of the child").

126. 278 S.E.2d 357, 357 (W. Va. 1981).

127. *Id.* at 363.

128. *See* Vasterling, *supra* note 7, at 927 n.23.

129. *Id.* (referring to the maternal preference rule, also known as the tender years doctrine).

130. Crippen, *supra* note 87, at 486.

131. WEISBERG & APPLETON, *supra* note 19, at 805.

132. *E.g.*, Kjelland v. Kjelland, 609 N.W.2d 100, 106 (N.D. 2000); Zuniga v. Zuniga, 664 S.W.2d 810, 813 (Tex. Civ. App.—Corpus Christi 1984, no writ); Rossen v. Rossen, 792 S.W.2d 277, 278 (Tex. Civ. App.—Houston [1st Dist.] 1990, no writ).

133. TEX. FAM. CODE ANN. § 153.134(a)(4) (Vernon 2002). *E.g.*, *In re* Marriage of Bertram, 981 S.W.2d 820, 824 (Tex. App.—Texarkana 1998, no pet.).

B. *Past Caretaking Standard*

The American Law Institute (ALI) has also recognized the inherent problems with the best interest of the child theory.[134] In response, the ALI has proposed a past caretaking standard.[135] Under the proposed standard, physical custody is awarded to each parent consistent with the amount of time that each parent spent taking care of the child prior to separation.[136] The focus of this standard is on past caretaking behavior as opposed to predicted future patterns of behavior under the best interest of the child theory.[137] Proponents of this standard claim that this approach will increase predictability in custody disputes because parents will have a general idea of how much "custody time" they will be awarded.[138] The benefit realized, according to proponents, is that the more predictable the outcome, the less likely litigation will occur.[139] Proponents further claim that the amount of time a parent spends with the child prior to and after a divorce will remain consistent, thus maintaining stability in a child's life.[140]

While this standard sounds very much like the primary caretaker presumption discussed supra, it varies in certain aspects.[141] For example, unlike the primary carektaker presumption, the past caretaking standard requires parents "to submit a parenting plan" for the future.[142] Furthermore, the past caretaking standard allows a continuum of allocation possibilities.[143] This standard may also be rebutted by certain factors such as any prior agreement between the parents, the child's preferences, desire to keep siblings together, potential harm to the welfare of the child, harm due to emotional attachment to either parent, parental relocation issues, and the need to avoid any impractical custodial arrangements that interfere with the child's stability.[144]

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134. *See* Kelly & Ward, *supra* note 123, at 352 (stating that the best interest theory creates uncertainty).

135. *Id. See generally* A.L.I, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, (Tentative Draft No. 3 (1998) (referring to the caretaking standard as the "approximation rule").

136. Kelly & Ward, *supra* note 123 at 351.

137. *Id.* at 352.

138. *Id.*

139. *Id.*

140. *Id.* at 353.

141. *See* WEISBERG & APPLETON, *supra* note 19, at 807.

142. *Id.* at 806.

143. *Id.*

144. *Id.* at 807.

VI. RECOMMENDATIONS

Holley is an improvement from the paternal preference and tender years doctrine. Nevertheless, application of *Holley* in the child custody arena poses problems. The following substantive and procedural suggestions should help to ameliorate the problems.

A. *Different Standards for Different Contexts*

The starting point for arriving at an appropriate best interest standard for child custody is to recognize that different contexts require different standards. *Holley* may be appropriate for parental rights termination cases, but it is inappropriate in the child custody context. The legislature has already customized the best interest factors in at least one context.[145] Section 263.307 of the Texas Family Code lists thirteen factors the court should consider before returning a child, who has been taken into state custody, to their parent.[146] In this statute, the factors are targeted specifically to deal with the issue before the court.[147] Either the Texas legislature or the judiciary should create a similar list in the child custody context.

B. *Parental Input*

Texas courts should be required to consider a parent's wishes regarding their child's best interest. Without considering this factor, Texas courts are not addressing the presumption that a parent acts in the best interest of the child.[148] Furthermore, it does not comply with the holding in *Troxel* that a parent's wishes as to their child's best interest must be considered by the court.[149] This particular recommendation appears to fly in the face of the purpose and focus of this comment, that promoting the best interest of the child, and not the parents' interests, is what courts should strive to achieve. This recommendation does not detract from that focus. Instead, recognizing parents' wishes merely compliments the goal of achieving a child's best interest while satisfying constitutional requirements. A parent's wish as to their child's best interest should be

145. *See* TEX. FAM. CODE ANN. § 263.307 (Vernon 2002).

146. *See id.*

147. *See id.*

148. *See* TEX. FAM. CODE ANN. § 153.131 (Vernon 2002) (stating the presumption that appointing parents as joint managing conservators is in the best interest of the child).

149. *See* Linder v. Linder, 72 S.W.3d 841, 856-57 (Ark. 2002) (noting that a statute that does not accord weight to a parent's decision as to what is in their child's best interest is in contravention of *Troxel*). *See also* Sleater v. Sleater, 42 S.W.3d 821, 823 (Mo. Ct. App. 2001) (stating that a parent's wishes as to a child's custody are relevant, though not binding).

another factor recognized by the court and accorded some weight, but it should not be the determining factor.

C. *Address Rationale*

Procedural changes in the way Texas courts arrive at a child's best interest should also be considered. One such procedural change is to require presiding judges to address each and every factor. In *Fulk v. Fulk*,[150] the Mississippi Court of Appeals held that the chancellor committed reversible error by failing to address and analyze each factor.[151] The Court explained that requiring a chancellor to address each factor lends clarity to the chancellor's decision-making process, thus making an appellate review more meaningful.[152] Implementing such a requirement only assures that the subjective nature of the *Holley* best interest standard is curtailed. Furthermore, by analyzing and addressing each factor, a court will ensure that it is being thorough in its search for the best interest of the child.

D. *Provide Rationale*

In addition to addressing each and every factor, a court should also be required to "give sufficient findings as to why" it arrived at the conclusions it did.[153] As the Mississippi Court of Appeals stated in *Fulk,* "[s]imply dictating that the father was favored without explaining *why* he was favored is not enough."[154] The appellate court recognized that their duty to review the chancellor's decision becomes futile when no rationale for a chancellor's decision is present.[155] Requiring courts to provide a valid and unbiased explanation as to their best interest determination would reduce the subjective nature inherent in the *Holley* best interest standard.

E. *Proposed Factors*

Combining factors from the various standards developed in child custody cases, this comment proposes the following factors for Texas courts to consider in making a best interest determination in child custody cases:

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150. 827 So. 2d 736 (Miss. Ct. App. 2002).

151. *See id.* at 739. Mississippi courts have their own set of factors, the *Albright* factors, that they use when deciding a child's best interest in custody cases. *See* Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983) (enumerating the factors to be considered in deciding where to place a child after custody disputes).

152. *Fulk*, 827 So. 2d at 739.

153. *Id.*

154. *Id.* at 740.

155. *Id.* (citing *Powell v. Ayars*, 792 So. 2d 240, 244 (Miss. 2001)).

1) age and health of the child;
2) emotional and physical danger to the child;
3) emotional ties between the parents and the child;
4) primary caretaker prior to separation;
5) parenting skills of both parents;
6) stability of the home;
7) parents' wishes as to the child's custody;
8) interrelationship of the child with his parents, siblings, and any other individual who significantly affects the child's best interest and
9) the mental and physical health of all individuals involved.

VII. CONCLUSION

A child's best interest in Texas continues to be determined by the factors enumerated in *Holley*.[156] As such, parents who find themselves in child custody disputes are likely to remain subject to the wide judicial discretion accorded under such a standard.[157] Different standards should be adopted for the different contexts in which a child's interests are at stake.[158] In sum, while the *Holley* factors should not be discarded from the child custody context, the *Holley* best interest standard should be both substantively and procedurally targeted to the child custody context.

156. *E.g., In re* D.G., No. 04-02-00893-CV, at *1 2003 WL 22489643 (Tex. App.—San Antonio, Nov. 5, 2003, no pet. hist.); *In re* R.F., 115 S.W.3d 804 (Tex. App.—Dallas 2003, no pet. hist.).

157. *See* Vasterling, *supra* note 7, at 927 (claiming many commentators have criticized the wide discretion this standard allots to judges); *see also* Rt. Hon. Dame Sian Elias, *The Family Court and Social Change*, 40 FAM. CT. REV. 297, 302 (2002) (describing the wide latitude judges have under the best interest standard as "dangerous").

158. *E.g., In re* C.E.H., 837 S.W.2d 947, 954 (Mo. Ct. App. 1992) (adopting the *forum non conveniens* standard and rejecting the best interest of the child theory in resolving a transfer issue).