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IN RE V.L.K. v. TROXEL: IS THE "BEST INTEREST" STANDARD IN A MOTION TO MODIFY THE SOLE MANAGING CONSERVATOR SUBJECT TO A DUE PROCESS OR DUE COURSE CHALLENGE?

DAVID F. JOHNSON*

I. INTRODUCTION

A mother and father divorce, and the father is named sole managing conservator over their only child. Two years later the father loses his job, and the father's mother (the child's grandmother) files a motion to modify custody and requests that the trial court name her the sole managing conservator. In doing so, the grandmother argues that she is better equipped to raise the child as she is

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wealthy and can provide a safe home and good education for the child. The father fights the grandmother's attempt to be named sole managing conservator and argues he is the child's natural father and the child is better off with a natural parent.

Texas has long held that in a custody dispute between a parent and a nonparent that the parent should be given a rebuttable presumption ("the parental presumption") that the best interest of the child is served by having the parent retain custody.[1] This presumption ensured that the natural parent retained an advantage over other persons seeking to gain custody of the child. However, in *In re V.L.K.*[2] the Texas Supreme Court found that the long established parental presumption does not apply in a motion to modify setting (i.e., a motion to alter the sole managing conservatorship status after it had already been established).[3]

Around the same time that the Texas Supreme Court issued *In re V.L.K.*, the Supreme Court of the United States issued *Troxel v. Granville*,[4] and in a plurality opinion found that the Washington Supreme Court did not err in holding that a Washington custody statute was unconstitutional under the due process clause as the statute did not give a parent's decision regarding his or her child enough deference.[5] This Article will attempt to reconcile Texas's practice concerning motions to modify custody with the Supreme Court of the United States' decision in *Troxel*.

II. History of Parental Rights

Common law has long recognized parental rights as a key concept, not only for the specific purposes of domestic relations law, but as a fundamental assumption about the family as a basic social, economic, and political unit.[6] One commentator has stated:

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1. *In re* V.L.K., 24 S.W.3d 338, 341 (Tex. 2000) (stating that this "presumption is based upon the natural affection usually flowing between parent and child").

2. 24 S.W.3d 338 (Tex. 2000).

3. *In re* V.L.K., 24 S.W.3d 338, 342 (Tex. 2000).

4. 530 U.S. 57 (2000) (plurality opinion).

5. Troxel v. Granville, 530 U.S. 57, 75 (2000) (plurality opinion) (concluding that the Washington statute, as applied, violated the due process rights of the plaintiff because the statute affords no deference to the parent's estimation of the child's best interest).

6. Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* BYU L. Rev. 605, 615 (1976).

> No assumption more deeply underlies our society than the assumption that it is the individual [parent] who decides whether to raise a family, . . . and, in broad measure, what values and beliefs to inculcate in the children who will later exercise the rights and responsibilities of citizens and heads of families. . . . The immensely important power of deciding about matters of early socialization has been allocated to the family, not to the government.[7]

Prerevolutionary Anglo-American common law vested in fathers the right to custody of their minor legitimate children, who were viewed as an asset of the father's estate.[8] Families "formed the first society, among themselves."[9] At common law, the state did not interfere with the family; the family was viewed by the courts as an autonomous entity, existing under natural law separate and independent from the state.[10] The state's ability to intervene in family matters was limited to protecting the parent-child relationship.

The common law view prevailed until the early nineteenth century when state courts began to temper the primacy of paternal rights with a concern for child nurturing and an acceptance of women as distinct legal individuals.[11] With the door open to competing custody claims of mothers and fathers, courts began to use their equitable discretion to select a custodial parent. One early commentator recognized the primacy of paternal rights, but noted that the father's rights could be disregarded depending on the particular "nature of the case."[12] By the late nineteenth century, state legisla-

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7. Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees:* Roe v. Wade *and its Critics*, 53 B.U. L. REV. 765, 772-73 (1973).

8. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 235 (1985) (noting custody law held that children were dependent, subordinate beings whose services and earnings were owned by their paternal masters).

9. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 47 (1765).

10. *See* Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 898-900 (1975) (explaining that, at common law, the state was reluctant to interfere in the relationship between parents and children except in the most extreme cases).

11. *See, e.g.*, Prather v. Prather, 4 S.C. Eq. (4 Des.) 33 (1809), 1809 WL 329 (S.C.) (recognizing that the court must interfere to give relief to an abused plaintiff wife, granting her prayer for alimony and custody of her infant daughter); Commonwealth v. Addicks, 2 Serg. & Rawle 174 (Pa. 1815), 1815 WL 1309 (Pa.) (determining that a father should be awarded custody of the children rather than the adulterous mother, in order to spare the impressionable children from the immoral influence of their mother).

12. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *194-95 (1884).

tion had preempted the common law rights of the father, putting both parents on equal ground.[13]

The Supreme Court of the United States recognized the right to raise one's children free of state interference as one of the oldest of all personal liberties more than seventy-five years ago.[14] In that case, the Court held that the liberties protected by the Due Process Clauses of the Fifth and Fourteenth Amendments encompass a parent's right to bring up children free of state interference.[15] "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."[16]

Further, the Court has held that "[t]he 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."[17] "Choices about marriage, family life, and the upbringing of children are among associational rights [the Supreme Court of the United States] has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."[18] Additionally, the Court has recognized that the right of parents to raise their children free of state interference is within the Constitution's protections of privacy, liberty, personal integrity, and association.[19] The

13. *See* 2 JOEL PRENTISS BISHOP, COMMENTARIES ON MARRIAGE, DIVORCE AND SEPARATION § 1190, at 463-64 (1891) (explaining that courts commonly find that parents have equal rights to custody as a result of a statute permitting the court to determine custody).

14. *See* Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (declaring a law unconstitutional that required classes to be taught in only English).

15. *See id.* at 399 (recognizing a parent's right to "establish a home and bring up children").

16. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

17. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

18. M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (quoting *Boddie*, 401 U.S. at 376).

19. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984) (describing the ability of marriage and family relationships to define a person's identity as a necessary component to sustain the concept of liberty); Moore v. City of East Cleveland, 431 U.S. 494, 505 (1977) (recognizing an associational right because child rearing decisions have typically been shared by grandparents and other relatives of the same household); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (stating that the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, along with the Ninth Amendment, protect

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right to decide with whom one will associate is at the core of the intimate family relationship that is afforded constitutional protection.[20]

In *Troxel v. Granville*, the Supreme Court of the United States recently stated:

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."
>
> The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago . . . we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later . . . we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained . . . that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." We returned to the subject . . . and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "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."
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> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children . . . . In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to

family integrity); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (noting various constitutional guarantees that create zones of privacy; specifically, the Fourth and Fifth Amendments protect the sanctity of the home and privacies of life from government invasion).

20. *See Roberts*, 468 U.S. at 619-20 (recognizing that interpersonal relationships are afforded constitutional protection).

> make decisions concerning the care, custody, and control of their children.[21]

Therefore, courts currently recognize that parents have a fundamental right in the care, custody, and control of their children that is protected by the United States Constitution.

III. Statutory Provisions for Child Custody Determinations in Texas

There are many different provisions in the Texas Family Code for the determination of conservatorships over a child.

A. *Initial Determination After Divorce*

The initial decision over the custody of a child after a divorce is found in chapter 153 of the Texas Family Code. In this preliminary determination, a parent of a child is entitled to a presumption that it is in the best interest of the child to be with a natural parent. This presumption states:

> [U]nless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.[22]

The Texas Supreme Court has recently stated, "The presumption that the best interest of the child is served by awarding custody to the parent is deeply embedded in Texas law. The parental presumption is based upon the natural affection usually flowing between parent and child."[23]

Under chapter 153, the nonparent can rebut the parental presumption by showing that the appointment of the parent would significantly impair the child's health or development, i.e., some harm to the child.[24] Further, a nonparent can only rebut the parental presumption by showing that the natural parent has voluntarily

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21. Troxel v. Granville, 530 U.S. 57, 65-66 (2000) (plurality opinion) (citations omitted).

22. Tex. Fam. Code. Ann. § 153.131(a) (Vernon 2002).

23. *In re* V.L.K., 24 S.W.3d 338, 341 (Tex. 2000) (citations omitted).

24. *See* Brook v. Brook, 881 S.W.2d 297, 298 (Tex. 1994) (noting the higher standard of proof necessary for the appointment of a nonparent as sole managing conservator).

surrendered actual care, control, and possession of the minor child to the nonparent for one year or more and the nonparent's appointment as managing conservator is in the child's best interest.[25]

B. *Modification of Initial Conservatorship Determination*

After an initial conservatorship determination, a party can move to modify it. The modification requirements depend upon whether the party seeks to supercede a sole managing conservator, simply change the terms of a joint managing conservatorship, replace a joint managing conservatorship with a sole managing conservatorship, or replace a sole managing conservatorship with a joint managing conservatorship.[26] Enacted in 1973, the Texas Family Code established that a material and substantial alteration in circumstances along with a determination of the best interest of the child was required to justify a modification of managing conservatorship.[27] These tests are still a part of a motion to modify proceeding.

The material and substantial change element is based upon the same interests behind res judicata—to prevent repetitive litigation with respect to children.[28] Findings on child custody issues in final divorce proceedings are final with regard to existing conditions, and custody should not be subsequently changed unless there are new or altered conditions.[29] There is no definite guideline as to what constitutes a material change of circumstances or conditions

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25. *See* TEX. FAM. CODE. ANN. § 153.373 (Vernon 2002) (stating that voluntary relinquishment of "actual care, control, and possession of the child" rebuts the presumption in favor of the parent(s)); *In re* V.L.K., 24 S.W.3d at 341-42 (examining the statutory presumptions that nonparents must overcome to be named managing conservators).

26. *See* TEX. FAM. CODE ANN. § 153.131(b) (Vernon 2002) (providing that the presumption in favor of the parents is rebutted by a history of family violence); TEX. FAM. CODE ANN. § 153.373 (Vernon 2002) (discussing voluntary relinquishment); Turner v. Turner, 47 S.W.3d 761, 763 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (outlining the statutory possibilities for the modification of an original conservatorship determination).

27. *See* Jenkins v. Jenkins, 16 S.W.3d 473, 478 (Tex. App.—El Paso 2000, no pet.) (discussing the test for modifying a sole managing conservatorship).

28. *See* Watts v. Watts, 573 S.W.2d 864, 867 (Tex. Civ. App.—Fort Worth 1978, no writ) (identifying the legal standards that must be met in order to change an initial conservatorship determination).

29. *See* Lightfoot v. Sowell, 278 S.W.2d 291, 293 (Tex. Civ. App.—Amarillo 1955, no writ) (emphasizing that child custody determinations are final, unless the conditions are altered subsequent to the determination).

that affect the welfare of a child—the determination must be made in each case according to the circumstances as they arise.[30]

In order for a material and substantial change in conditions to support a modification, the change must be one that is injurious to the child and affects the best interest of the child.[31] A slight change in conditions does not warrant a change of custody.[32] Accordingly, just because there has been a change in circumstances does not mean the court must modify a custody order.[33] The following, however, have supported a finding of material and substantial change: (1) psychological stress to a child by the situation of the parties following divorce;[34] (2) neglect of the child;[35] (3) mistreatment of the child;[36] (4) remarriage of one of the parents;[37] (5) custodial parent becomes mentally ill;[38] (6) entry into armed forces;[39]

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30. *See* Wright v. Wright, 610 S.W.2d 553, 555 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) (examining rules regarding material changes of circumstances affecting child welfare).

31. Jeffers v. Wallace, 615 S.W.2d 252, 253 (Tex. Civ. App.—Dallas 1981, no writ); *see also* Wilkinson v. Evans, 515 S.W.2d 734, 738 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (emphasizing that the father had the burden of proving that conditions had drastically changed since the divorce and that leaving the children with the mother would be harmful to their welfare).

32. Short v. Short, 163 Tex. 287, 354 S.W.2d 933, 936 (1962); *In re* Soliz, 671 S.W.2d 644, 648 (Tex. App.—Corpus Christi 1984, no writ).

33. *See* Blair v. Blair, 434 S.W.2d 943, 946 (Tex. Civ. App.—Dallas 1968, no writ) (indicating the trial court has discretion to modify a custody order even if a parent can prove a change of conditions); Simmons v. Hitchcock, 283 S.W.2d 84, 87 (Tex. Civ. App.—El Paso 1955, no writ) (recognizing that a parent must prove a change of conditions as a necessary attribute to a change of custody, and the trial court maintains discretion to decide whether a change of conditions warrants a change in custody).

34. *See* Doyen v. Doyen, 713 S.W.2d 370, 371 (Tex. App.—Beaumont 1986, no writ) (acknowledging the court's decision to change custody because the stress imposed upon a child was injurious to the child's psychological welfare).

35. *See* Wright v. Wright, 610 S.W.2d 553, 555 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) (concluding that the mother did not provide adequate supervision of the child, expressed hatred of the child's father to the child, and generally neglected the child, which amounted to a change in conditions substantiating an order for a change in custody).

36. Leonard v. Leonard, 218 S.W.2d 296, 301 (Tex. Civ. App.—San Antonio 1949, no writ).

37. *Id.*

38. *See* Farris v. Farris, 404 S.W.2d 638, 640 (Tex. Civ. App.—Amarillo 1966, no writ) (taking into consideration the deterioration of the custodial parent's mental condition).

39. *See* Trevino v. Trevino, 193 S.W.2d 254, 256 (Tex. Civ. App.—1946, no writ) (allowing a change in custody because the custodial parent was away on military duty and could not enjoy an association with the child until the parent returned from duty).

(7) moving the child multiple times;[40] (8) child having a new sibling;[41] and (9) failure to appropriately handle the child's medical condition.[42] In conjunction with the material and substantial change element, Texas courts have held that a court had to find that the change in custody would be a "positive improvement" for the child.[43] Texas courts have defined "positive improvement" as "that which should clearly enhance or make better the circumstances of the child."[44]

The "best interest" of the child is always the primary consideration of a court in determining issues of conservatorship.[45] Therefore, before a court can modify a custody order, it must be shown by evidence that the modification would be in the best interests of the child.[46] Regarding the best interests of a child, there is a difference between the determination of that issue in the initial award of custody and in the determination of the issue in a modification situation.[47] As the modification of custody disrupts the child's living arrangements, a court should order it only when it is convinced that the change will effectuate a positive improvement for the child.[48] In determining the best interest of a child, a court should

40. *See* Scroggins v. Scroggins, 753 S.W.2d 830, 832 (Tex. App.—Houston [1st Dist.] 1988, no writ) (explaining that moving a child multiple times, when considered with other circumstances, is evidence of a material and substantial change since the divorce decree).

41. *See id.* (having an additional sibling may contribute to a determination of a material change).

42. *See* Wright v. Wentzel, 749 S.W.2d 228, 233 (Tex. App.—Houston [1st Dist.] 1988, no writ) (finding that the failure to tend to a child's medical condition is evidence of a material change).

43. *See* Jenkins v. Jenkins, 16 S.W.3d 473, 478 & n.1 (Tex. App.—El Paso 2000, no pet.) (discussing the hurdles that must be overcome before a court may modify a sole managing conservatorship).

44. *See* Talley v. Leach, 802 S.W.2d 21, 22 (Tex. App.—Beaumont 1990, writ denied) (holding that the change of custody must improve or enhance the child's circumstances).

45. *See* TEX. FAM. CODE ANN. § 153.002 (Vernon 2002).

46. *See* Enriquez v. Krueck, 887 S.W.2d 497, 503 (Tex. App.—San Antonio 1994, no writ) (reversing the trial court's order because the evidence was factually insufficient to support modification of the custody order); Barrera v. Barrera, 668 S.W.2d 445, 448 (Tex. App.—Corpus Christi 1984, no writ) (finding the record contained sufficient evidence to allow a custody order modification); Watts v. Watts, 563 S.W.2d 314, 315 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (providing "that the best interest of the child shall be a primary consideration" to modify a custody order).

47. Rosson v. De Arman, 323 S.W.2d 75, 79 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.).

48. Taylor v. Meek, 154 Tex. 305, 276 S.W.2d 787, 790 (1955); Sutter v. Hendricks, 575 S.W.2d 308, 310 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

review "all facts and circumstances that bear directly or indirectly on [the] child, including but not limited to, present or future physical, mental, emotional, educational, social, disciplinary and moral welfare, well-being, stability, and developmental needs."[49]

In 1975, an additional test was added requiring a finding that retention of the existing managing conservator would be injurious to the welfare of the child.[50] Although the Texas statute is somewhat vague,[51] courts have defined "'injurious to the welfare of the child'" as "harmful, hurtful, damaging, destructive, or detrimental in effect to the good fortune, health, or prosperity of the child."[52] This injurious retention test was used by courts when a party attempted to change sole managing conservators.[53]

In 1995, the Texas Legislature amended the Texas Family Code section 156.101, which controls a trial court's decision in a motion to modify a sole managing conservatorship setting and deleted the injurious retention test. The former statute stated:

> (a) The court may modify an order that designates a sole managing conservator of a child of any age if:
>
> (1) the circumstances of the child, sole managing conservator, . . . or other party affected by the order have materially and substantially changed since the date of the rendition of the order; and
>
> (2) the appointment of the new sole managing conservator would be a positive improvement for the child.
>
> (b) The court may modify an order that designates a sole managing conservator of a child 10 years of age or older if:
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> (1) the child has filed with the court in writing the name of the person who is the child's choice for managing conservator; and

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49. Fair v. Davis, 787 S.W.2d 422, 429 (Tex. App.—Dallas 1990, no writ).

50. *See Sutter*, 575 S.W.2d at 310 (discussing the requirement that a person establish that it would be "injurious to the welfare of the child" to remain with the current managing conservator before requesting a modification).

51. *See* Turner v. Turner, 47 S.W.3d 761, 764 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (noting that the Texas Family code fails to define "'detrimental to the welfare of the child,'" or provide factors for a trial court to consider when determining whether there is a detrimental effect).

52. Talley v. Leach, 802 S.W.2d 21, 22 (Tex. App.—Beaumont 1990, writ denied).

53. *See id.* (illustrating the court's use of the injurious retention test).

> (2) the court finds that the appointment of the named person is in the best interest of the child.[54]

Under this statute, a person seeking to modify an order must show that the child's circumstances have "'materially and substantially changed'" and that the modification "'would be a positive improvement for the child.'"[55] As described below, the Texas Supreme Court decided under this statute that a natural parent does not have the benefit of the parental presumption in a motion to modify parental custody proceeding.[56]

Effective September 2001, the Texas Legislature once again substantially amended Texas Family Code section 156.101. It currently provides:

> The court may modify an order or portion of a decree that provides for the appointment of a conservator of a child, that provides the terms and conditions of conservatorship, or that provides for the possession of or access to a child if modification would be in the best interest of the child and:
>
> (1) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the date of the rendition of the order;
>
> (2) the child is at least 12 years of age and has filed with the court, in writing, the name of the conservator who is the child's preference to have the exclusive right to determine the primary residence of the child; or
>
> (3) the conservator who has the exclusive right to establish the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months.[57]

In other words, the legislature has removed the "injurious retention" and "positive improvement" requirements that were part of the statute in the past and has made it substantially easier for a nonparent to usurp a natural parent's right to possession and care

54. Act effective Sept. 1, 1999, 76th Leg., R.S., ch. 1390, 1999 Tex. Gen. Laws 4696 (amended 2001) (current version at TEX. FAM. CODE ANN. § 156.101 (Vernon 2002)).

55. *In re* V.L.K., 24 S.W.3d 338, 342 (Tex. 2000) (citing section 156.101 of the Texas Family Code); *see also* Act effective Apr. 20, 1995, 74th Leg., R.S., ch. 20, 1995 Tex. Gen. Laws 113 (amended 2001) (current version at TEX. FAM. CODE ANN. § 156.104 (Vernon 2002)) (continuing to allow for modification utilizing the injurious retention test).

56. *See In re* V.L.K. 24 S.W.3d at 342 (explaining that chapter 156 of the Texas Family Code does not include a parental presumption in modification suits).

57. TEX. FAM. CODE ANN. § 156.101 (Vernon 2002).

over his or her child. Currently, all a nonparent has to show is that it is in the "best interest" of the child and one of three other conditions exist: (1) the traditional material and substantial change requirement; (2) the child is over twelve and has filed a written preference naming the new conservator; or (3) the current conservator with rights to possession has voluntarily relinquished possession of the child to another for at least six months.[58]

IV. Texas Supreme Court's *In re V.L.K.* Decision

In *In re V.L.K.*, a paternal aunt and uncle filed a motion to modify seeking appointment as joint managing conservators of a child.[59] The child's mother, who was in jail, had voluntarily given up legal custody to the child's grandmother. When the child's paternal aunt and uncle attempted to become joint managing conservators, the mother filed a cross-petition requesting that she be appointed as sole managing conservator.[60] The trial court included an instruction in the charge that stated that there was no parental presumption when there had previously been an order awarding custody to a third party, or when the parent "'voluntarily relinquished actual care, control, and possession of the child to a nonparent for a period of one year or more.'"[61] The jury found that the aunt and uncle should be appointed managing conservators, and the trial court entered a verdict consistent with this finding.[62] The mother appealed and argued that she was entitled to the parental presumption, and the court of appeals agreed with the mother and reversed the trial court's order. The aunt and uncle appealed that decision to the Texas Supreme Court.

In *In re V.L.K.* the Texas Supreme Court cited its own decision in *Taylor v. Meek*.[63] The court stated:

> This Court has previously considered the parental presumption. In *Taylor*, the maternal grandparents were named managing conservators in the parent's divorce decree. Several years later, the father sought to modify the order to regain custody of his daughter. This

58. *Id.*
59. *In re* V.L.K., 24 S.W.3d at 338.
60. *See id.* at 340 (presenting the factual background leading to the present case).
61. *Id.* at 340-41.
62. *Id.* at 341.
63. 154 Tex. 305, 276 S.W.2d 787, 790 (1955).

> Court noted that, after a court has awarded custody to a nonparent, a parent cannot merely show that she is a fit person to be entitled to custody. Instead, the court should order a change only when convinced that the change is a positive improvement for the child.[64]

However, instead of following this precedent and holding that the parental presumption only disappears when a trial court has already appointed a nonparent managing conservator, the Texas Supreme Court held that in modification of conservatorship proceedings that a parent *never* has the parental presumption.[65] The court explained:

> Chapter 153 and Chapter 156 are distinct statutory schemes that involve different issues. Chapter 156 modification suits raise additional policy concerns such as stability for the child and the need to prevent constant litigation in child custody cases. The Legislature has determined that the standard and burden of proof are different in original and modification suits. A natural parent has the benefit of the parental presumption in an original proceeding, and the nonparent seeking conservatorship has a higher burden. However, the Legislature did not impose different burdens on parents and nonparents in modification suits. . . . Because the Legislature did not express its intent to apply the presumption in Chapter 156 modification suits, courts should not apply the presumption in those cases.[66]

Therefore, following the broad holding in *In re V.L.K.*, a parent in a modification proceeding does not have the benefit of the parental presumption, and a third party can take the managing conservatorship role away from the natural parent without any showing that the natural parent is in any way unfit or that retention by the natural parent would be detrimental to the child.[67]

V. THE SUPREME COURT OF THE UNITED STATES' *TROXEL* OPINION

Around the same time as *In re V.L.K.*, the Supreme Court of the United States issued an opinion that supported a parent's right to determine the custody of his or her child. In *Troxel v. Granville*,

64. *In re* V.L.K., 24 S.W.3d at 342-43 (citations omitted).

65. *See id.* at 343 (recognizing that courts of appeals have found there is no parental presumption in modification suits).

66. *Id.*

67. *See id.* (explaining that section 156.101 of the Texas Family Code does not include a requirement that the parent is unfit).

Jennifer Troxel and her husband petitioned a Washington trial court for the right to visit their grandchildren.[68] The mother, Tommie Granville, opposed the petition.[69] The Washington statute allowed "[a]ny person" to petition a trial court "for visitation rights at any time," and authorized the trial court to grant such visitation rights whenever "visitation may serve the best interest of the child."[70] The trial court found for the Troxels and awarded them visitation rights.[71] Granville appealed, and ultimately, the Washington Supreme Court found that the Washington statute was unconstitutional because it infringed on the parents' fundamental right to rear their children.[72]

Specifically, the Washington Supreme Court found that in order to prevent "harm or potential harm to a child" a state could constitutionally interfere with the parents' right to rear their children, but that the Washington statute fails that standard because it requires no threshold showing of harm.[73] Further, the court found that the Washington statute's "best interest" standard was too broad; the court stated, "'It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision.'"[74]

The Troxels appealed the Washington Supreme Court's decision to the Supreme Court of the United States. The Court first discussed the breadth of the Washington Statute:

> [T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.
>
> [The Washington statute], as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad. . . . [The statute's language] effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed

68. Troxel v. Granville, 530 U.S. 57, 61 (2000) (plurality opinion).
69. *Id.* at 61.
70. *Id.*
71. *Id.*
72. *Id.* at 61-63.
73. *Troxel*, 530 U.S. at 63.
74. *Id.*

> before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. [The statute] contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests.[75]

The Court then turned to the facts of the case and stated that the Troxels did not allege and did not provide any evidence that Granville was an unfit parent.[76] Furthermore, the court commented on a parent's right to rear their children by stating:

> [T]here is a presumption that fit parents act in the best interests of their children. . . . Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[77]

The Court affirmed the Washington Supreme Court's ruling that the trial court's order granting visitation to the Troxels was unconstitutional.[78] The Court held:

> As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made. Neither the Washington nonparental visitation statute generally—which places no limits on either the persons who may petition for visitation or the circumstances in which such a petition may be granted—nor the Superior Court in this specific case

75. *Id.* at 66-67.

76. *Id.* at 66.

77. *Id.* at 68-69.

78. *Troxel*, 530 U.S. at 73. The court did not reach the more specific question of whether the Due Process Clause of the Fourteenth Amendment required the trial court to find that the parent was harmful to the child before granting nonparental visitation. Troxel v. Granville, 530 U.S. 57, 73 (2000) (plurality opinion). The Court held that it was sufficient in this case to hold that the Washington statute was unconstitutional due to the lack of limits or standards that the statute gave to the trial court in granting visitation rights. *Id.*

> required anything more. Accordingly, we hold that [the Washington statute], as applied in this case, is unconstitutional.[79]

In essence, the Court found that the Washington statute was overly broad and unconstitutional on two grounds. One, the statute was too broad in that it allowed anyone to petition a court for custody. In other words, the statute did not have sufficient limits on the standing of persons to file a motion for visitation. Two, the statute was too broad in that it failed to provide sufficient guidelines to a trial court in making the actual determination on visitation—the statute did not give sufficient deference to the parent's opinion.

VI. The Potential Unconstitutionality of Texas's Custody Statute as Interpreted by the Texas Supreme Court

Historically, the constitutionality of Texas's child custody statute has been upheld.[80] However, after *Troxel* there is a strong argument that the Texas Family Code section 156.101(a), as interpreted by the Texas Supreme Court in *In re V.L.K.*, is unconstitutional as applied in certain foreseeable circumstances. Importantly, the Texas Supreme Court never addressed any constitutional issues in its *In re V.L.K.* opinion as they were apparently never raised; therefore, the Texas Supreme Court has not addressed the issues raised in *Troxel*.[81]

A. *Are There Sufficient Protections Regarding Standing?*

In *Troxel*, the Supreme Court of the United States held that the Washington visitation statute was unconstitutional because it allowed anyone to file a motion for visitation.[82] In Texas, the standing to file a motion to modify custody is more limited. Texas's

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79. *Id.* at 72-73.

80. *See* Crahan v. N.R., 581 S.W.2d 272, 275 (Tex. Civ. App.—Fort Worth 1979, writ dism'd w.o.j.) (declaring that there was no reason to hold unconstitutional sections of the Texas Family Code pertaining to parent-child relationships); *In re* H.D.O., 580 S.W.2d 421, 424 (Tex. Civ. App.—Eastland 1979, no writ) (holding the Texas Family Code's standard of the "best interest of the child" constitutional).

81. *See* Tex. Dep't of Protective & Regulatory Servs. v. Sherry, 46 S.W.3d 857, 861 (Tex. 2001) (asserting that constitutional arguments not raised are waived).

82. *Troxel*, 530 U.S. at 73.

standing provision for a motion to modify is found in section 156.002, which states:

> (a) A party affected by an order may file a suit for modification in the court with continuing, exclusive jurisdiction.
>
> (b) A person or entity who, at the time of filing, has standing to sue under Chapter 102 may file a suit for modification in the court with continuing, exclusive jurisdiction.[83]

Under subpart (a), "a party affected by an order" can file a motion to modify.[84] One interpretation of "a party affected by an order" may be to limit such class of people to those that were either named in the original order or who were involved in the original suit.[85] That interpretation has not prevailed, however, and the class of people who can file a motion to modify as a party affected by an order is not limited to those that are named in the original order or those that were involved in the original suit.[86] Specifically, courts have held that grandparents who were not named in the original order and were not involved in the original suit have standing to file a motion to modify as a party affected by an order.[87] The courts, however, have limited to some extent the class of individuals that constitute a "party affected by an order."[88]

Under subpart (b), a person who has general standing to file suit under the Family Code can file a motion to modify.[89] The general standing statute states:

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83. TEX. FAM. CODE ANN. § 156.002 (Vernon 2000).

84. *Id.*

85. *See In re* J.W., 645 S.W.2d 340, 341-42 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.) (examining appellant's argument that appellee lacked standing to modify a conservatorship because appellee "was not an original party to the divorce suit").

86. *See id.* at 342 (explaining that persons who meet other statutory requirements may be eligible to seek conservatorship modification).

87. *See* Dohrn v. Delgado, 941 S.W.2d 244, 248 (Tex. App.—Corpus Christi 1996, no writ) (acknowledging that a grandparent has standing to bring suit for custody when children do not receive proper care); McCord v. Watts, 777 S.W.2d 809, 812 (Tex. App.—Austin 1989, no writ) (stating that a grandparent may have standing if they were a party affected by a prior order); Watts v. Watts, 573 S.W.2d 864, 868 (Tex. Civ. App.—Fort Worth 1978, no writ) (allowing a grandfather to intervene in a suit for custody because he was a party affected by the decree).

88. *See* Pratt v. Tex. Dep't of Human Res., 614 S.W.2d 490, 495 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.) (summarizing conflicting Texas case law that determines whether a court should be open to any person who desires to change a managing conservatorship).

89. TEX. FAM. CODE ANN. § 156.002(b) (Vernon 2002).

(a) An original suit may be filed at any time by:
(1) a parent of the child;
(2) the child through a representative authorized by the court;
(3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;
(4) a guardian of the person or of the estate of the child;
(5) a governmental entity;
(6) an authorized agency;
(7) a licensed child placing agency;
(8) a man alleging himself to be the father of a child filing in accordance with Chapter 160, subject to the limitations of that chapter, but not otherwise;
(9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition;
(10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161 or to whom consent to adoption has been given in writing under Chapter 162;
(11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition;
(12) a person who is the foster parent of a child placed by the Department of Protective and Regulatory Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition; or
(13) a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter 573, Government Code, if the child's parents are deceased at the time of the filing of the petition.[90]

In addition to the general standing requirements set forth in section 102.003, a grandparent may have standing under section 102.004 if the court finds a serious question regarding "the child's

90. *Id.* § 102.003.

physical health or welfare" in his or her present environment, or that the parent(s) or managing conservator agreed to the suit or filed the petition.[91] Notwithstanding the limitations set out in chapter 102, courts have held that under the more vague subsection (a), grandparents have standing to file a motion to modify custody.[92] Even so, the Texas standing statute to file a motion to modify is substantially more narrow than in *Troxel*, and the Supreme Court of the United States would most likely find that it would not violate a parent's constitutional due process rights.[93]

B. *Are There Sufficient Protections Regarding the Standard?*

Texas Family Code section 156.101 allows a trial court to change a custody order based upon a finding of the "best interest" of the child and a finding that: (1) there has been a material and substantial change; (2) the child is over twelve and has filed a written preference naming the new conservator; or (3) the current conservator with rights to possession has voluntarily relinquished possession of the child to another for at least six months.[94] In *Troxel*, however, the Supreme Court of the United States held that the Washington visitation statute was unconstitutional because it allowed the trial court to grant visitation against the parent's will upon the showing of what was the "best interest" of the child.[95] The Texas statute similarly allows a trial court to modify a custody order based upon

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91. *Id.* § 102.004.

92. *Cf.* Padgett v. Lankford, No. 04-95-00126-CV, 1996 WL 551400, at *2 (Tex. App.—San Antonio Sept. 30, 1996, no writ) (not designated for publication) (citing TEX. FAM. CODE ANN. § 102.004(a)(1) (Vernon 1996) and stating that the family code allows for a grandparent to bring a suit seeking managing conservatorship if there is satisfactory proof that "the child's present environment presents a serious question concerning the child's physical health or welfare").

93. *Compare* TEX. FAM. CODE ANN. § 102.003 (Vernon 2002) (failing to include over inclusive language such as "any person" and "at any time"), *with* WASH. REV. CODE ANN. § 26.10.160(3) (West 1997) (including broad language such as "any person" and "at any time").

94. *See* TEX. FAM. CODE ANN. § 156.101 (Vernon 2002) (giving the requirements for a modification of conservatorship).

95. *See* Troxel v. Granville, 530 U.S. 57, 72-73 (2000) (plurality opinion) (explaining that "the Due Process Clause does not permit a state to infringe on the fundamental right of parents to make child rearing decision simply because a judge believes a 'better' decision could be made").

the best interest standard.[96] The resulting issue is whether the Texas statute governing motions to modify custody is constitutional due to its use of the "best interest" standard.

The example given in the introduction is a situation where a father who has custody over his son loses his job. The father's mother files a motion to modify the custody order and seeks to be named sole managing conservator because she is financially stable and can more readily provide a home for the child. At this point, the grandmother has standing pursuant to Texas Family Code section 156.002(a), and there has been a "material and substantial change in circumstances." Under this example, the only standard that the trial court has to follow is the "best interest" standard in determining custody between a natural parent and a third person.

There are situations where a state may and should intervene in family life to protect children and promote the common good. Parents, like everyone else, are subject to a host of general laws that states may enact pursuant to their police powers.[97] While parents' rights are not absolute, it does not follow that their rights are meaningless or easily disregarded. The fact that some parents misuse their authority and neglect their children does not negate the existence and importance of parental rights or justify their abrogation. The Supreme Court of the United States has noted:

> Some parents "may at times be acting against the interests of their children" . . .[, which] creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.[98]

The government may not infringe "'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"—a strict scrutiny review.[99] A state court custody decision constitutes

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96. TEX. FAM. CODE ANN. § 156.101 (Vernon 2002). However, the statute does require that a party requesting the modification to meet at least one more requirement, which is in addition to the best interest of the child standard. *Id.* § 156.101(1), (2), (3).

97. *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972) (discussing Illinois statutes imposing restrictions on a guardian).

98. Parham v. J.R., 442 U.S. 584, 602-03 (1979) (citations omitted).

99. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

state action for the purposes of the Fourteenth Amendment.[100] The state acts through the use of its courts and judiciary.[101] The statutory standard in this case, i.e., that state action may be instituted if it would be in the child's "best interest," does not satisfy the exacting strict scrutiny standard.

A "best interest" test that gives no deference to a fit parent's decision fails to meet the compelling state interest test. A "best interest" requirement is inherently indeterminative, both because society lacks the tools to make intelligent predictions about the future—an implicit feature of intervention in child rearing decisions—and because there is no single set of social values to be used in making the decision.[102] The "best interest" test is not a proper standard.[103] The test allows decision makers to justify their judgments about a child's future: "like an empty vessel into which adult perceptions and prejudices are poured."[104]

The Supreme Court of the United States has rejected the reliance on the "best interest" as "the only relevant consideration in determining the propriety of governmental intervention in the raising of children."[105] Although the Court has recognized the "best interests" test as "a proper and feasible criterion for making the decision as to which of two parents will be accorded custody,"[106] the Court rejected the use of the "best interest" test for "other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others."[107] The "best interest" test is properly used to decide unavoidable disputes between parents, but it is not properly used between a parent

100. *See* Palmore v. Sidoti, 466 U.S. 429, 432 n.1 (1983) (discussing the consequences of state action on racial discrimination issues under the Fourteenth Amendment).

101. *See* Shelley v. Kraemer, 334 U.S. 1, 14 (1948) (finding the establishment of this proposition dates back to the earliest cases involving the Fourteenth Amendment); *Ex parte* Virginia, 100 U.S. 339, 346 (1879) (asserting that the Fourteenth Amendment forbids state agencies, including officers and agents, from denying equal protection of the law).

102. *See* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Function in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 257-58 (1975) (arguing that judges usually lack necessary information to make decisions regarding parents' future plans).

103. Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 513 (1973).

104. *See id.* (stating that the best interest standard "does not offer guidelines for how adult powers should be exercised").

105. Stanley v. Illinois, 405 U.S. 645, 653 n.5 (1972).

106. Reno v. Flores, 507 U.S. 292, 303-04 (1993).

107. *Id.* at 304.

with rights to custody and the state or a third party who invokes the power of the state to seek a court ordered change in conservatorship status.[108]

The statute in this case, as in *Troxel*, fails a constitutional challenge because it allows the trial court to change managing conservator status whenever the court feels that it would be in the "best interest" of the child and without giving any criteria for establishing such a decision.[109] The "best interest" standard, without any criteria that will protect a parent's interest in autonomous decision making, is not narrowly tailored to meet any compelling state interest.[110] In nearly every parent-child relationship, observers looking in from the outside can undoubtedly find better methods of child-rearing.[111] Real life, however, does not allow for such crystal ball tactics.[112] A relationship between a parent and a child naturally ebbs and flows—most likely, there is not a single parent-child relationship in existence that would not survive a "best interest" analysis at some point in the relationship. That does not mean that every parent should lose his right to raise his child. The substantive right to parental autonomy necessarily includes protection from state action that allows infringement of that right in an arbitrary and standardless manner.[113]

As the Supreme Court of the United States might state, "in practical effect, in the State of [Texas] a court can disregard and overturn *any* decision by a fit [natural] parent concerning [his managing conservator's status] whenever a third party affected by the decision files a . . . petition, based solely on the judge's determination

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108. *See id.* (stating that "even if it were shown, for example, that a particular couple desirous of adopting a child would *best* provide for a child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*).

109. TEX. FAM. CODE ANN. § 156.101 (Vernon 2002).

110. *See In re* Gault, 387 U.S. 1, 18-19 (1967) (emphasizing that the lack of rules and standards, while allowing for discretion, often produces undesirable results, such as depriving individual juveniles of their fundamental rights leading to the infringement of due process of law).

111. *In re* Aubin, 29 S.W.3d 199, 204 (Tex. App.—Beaumont 2000, orig. proceeding) (Walker, J., dissenting).

112. *Id.*

113. *See* Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966) (agreeing that a state law allowing a jury to assess costs against an acquitted criminal defendant is "invalid under the Due Process Clause because of vagueness and the absence of any standards").

of the child's best interest."[114] In *Troxel*, the Supreme Court of the United States found that the Due Process Clause requires more than a "best interest" showing.[115]

Moreover, *Troxel* dealt with a grandparent seeking visitation rights, which would only effect the custody of the child several times a month, to which the Supreme Court of the United States held that the Washington statute was unconstitutional.[116] The example given above deals with a natural parent losing his status as managing conservator and the attendant rights that go with that status.[117] Certainly, due to the more extensive loss of parental rights, the test under the Due Process Clause of the Fourteenth Amendment would be more strict in this example than in *Troxel*.[118]

In line with *Troxel*, a recent decision from the Beaumont Court of Appeals supports the conclusion that section 156.101 can be unconstitutional as applied. In *In re Aubin*,[119] nonparents filed a suit seeking sole managing conservatorship over children from the mother.[120] The mother filed a motion for equitable relief claiming

114. Troxel v. Granville, 530 U.S. 57, 67 (2000) (plurality opinion).
115. *Id.* at 72-73.
116. *Id.* at 60, 73.
117. *See* TEX. FAM. CODE ANN. § 153.132 (Vernon 1999). The statute states:

> A parent appointed as sole managing conservator of a child has the . . . following *exclusive* rights:
> (1) the right to establish the primary residence of the child;
> (2) the right to consent to medical, dental, and surgical treatment involving invasive procedures, and to consent to psychiatric and psychological treatment;
> (3) the right to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child;
> (4) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
> (5) the right to consent to marriage and to enlistment in the armed forces of the United States;
> (6) the right to make decisions concerning the child's education;
> (7) the right to the services and earnings of the child; and
> (8) except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government.

Id. (emphasis added).

118. *See* A.K.P. v. J.A.P., 684 S.W.2d 762 (Tex. App.—Corpus Christi 1984, no writ) (noting that the prerequisite of proof of changed circumstances is much more relaxed in a visitation case than in a change of custody case).
119. 29 S.W.3d 199 (Tex. App.—Beaumont 2000, orig. proceeding).
120. *In re* Aubin, 29 S.W.3d 199, 201 (Tex. App.—Beaumont 2000, orig. proceeding).

a violation of her due process rights under both the Texas Constitution and the United States Constitution.[121] The trial court appointed the nonparents as temporary possessory conservators with the right of possession, and the mother filed a writ of mandamus to the court of appeals.[122]

The court of appeals started the opinion by quoting from *Troxel*: "The Due Process Clause does not permit a State to infringe on the fundamental rights of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made."[123] The court again quoted *Troxel* stating:

> Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[124]

The court of appeals agreed with the trial court that the plaintiffs had not met the burden of showing that possession of the children by the mother was a detriment to their health.[125] The court of appeals held that a mother has a fundamental right as a parent to decide whether her children will have any contact with a third party, unless that decision will significantly impair the safety and welfare of those children.[126] Under the Due Process Clause of the United States constitution, the courts may not interfere with that right.[127] The court of appeals found the relevant Texas Family Code section unconstitutional as applied to the trial court's temporary orders.[128] It also found that the trial court, in appointing a third party as temporary possessory conservator, clearly abused its discretion.[129] The court then conditionally granted the mother's

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121. *Id.*

122. *In re* Aubin, 29 S.W.3d 199, 200-01 (Tex. App.—Beaumont 2000, orig. proceeding).

123. *See id.* (quoting Troxel v. Granville, 530 U.S. 57, 72-73 (2000)).

124. *See id.* at 203 (quoting *Troxel*, 530 U.S. at 68-69).

125. *See id.* (stating that plaintiffs had not met their burden of showing that appointing the parent as sole managing conservator of her children would greatly impair their health and emotional development).

126. *In re* Aubin, 29 S.W.3d at 203-04 (summarizing the court's reasoning for vacating the lower court's temporary orders).

127. *Id.*

128. *Id.*

129. *Id.*

writ of mandamus.[130] Therefore, as the Beaumont Court of Appeals held, the Texas Family Code and its requirements regarding custody decisions is unconstitutional where it deprives a natural parent of the right to possession over his child and grants that right to a third person without any showing that the natural parent is unfit or that the natural parent's custody of the child will be detrimental to the welfare of the child.[131]

The analysis is similar under the Texas Due Course of law provision. Custodial rights of parents come within the protection of the Due Process Clauses of the federal and state constitutions.[132] While the Texas Constitution is textually different in that it refers to "due course" rather than "due process," Texas courts regard these terms as the same.[133] Courts have sometimes equated the Due Course Clause in article I, section 19 of the Texas Constitution with the guarantees of Due Process under the Fourteenth Amendment to the United States Constitution;[134] however, Texas courts are not bound by the Supreme Court of the United States' decisions addressing due process issues.[135] Texas's due course provision may be larger and provide greater protections than its federal counterpart, which would be consistent with Texas's strong tradition of protecting personal freedoms.[136]

Under a Texas due course challenge, a court has to determine whether the challenged law arbitrarily deprives someone of life, liberty, or property privileges or immunities without due process of law. This determination requires a two-step analysis: first, the as-

130. *Id.* at 204.

131. *In re* Aubin, 29 S.W.3d at 203.

132. *See* Rodarte v. Cox, 828 S.W.2d 65, 80 (Tex. App.—Tyler 1991, writ denied) (regarding a suit to terminate parental rights by foster parents); Pettit v. Engelking, 260 S.W.2d 613, 616 (Tex. Civ. App.—San Antonio 1953, writ ref'd n.r.e.) (concerning an application to have an infant declared a neglected and dependent child).

133. *See* Mellinger v. City of Houston, 68 Tex. 37, 3 S.W. 249, 252-53 (1887) (discussing the similarities between the Texas Constitution and the United States Constitution regarding due course and due process).

134. *See* Norris v. State, 788 S.W.2d 65, 72 (Tex. App.—Dallas 1990, writ ref'd) (noting that courts have historically viewed the Due Process and Due Course Clauses in relation to each other).

135. *See* Wilson v. State, 825 S.W.2d 155, 162 (Tex. App.—Dallas 1992, writ ref'd) (explaining that Texas courts are not bound by the Supreme Court of the United States decisions regarding due process).

136. *See In re* J.W.T., 872 S.W.2d 189, 197 n.23 (Tex. 1994) (suggesting that the Texas due course provision is broader than its federal counterpart).

serted individual interest must be encompassed within the constitutional protection of life, liberty, or property; and second, if it is encompassed, the procedures thus employed must afford due process of law.[137] In the example given before, section 156.101 would violate the natural parent's Due Course rights as guaranteed by the Texas Constitution.

One Texas commentator has stated that the Texas Legislature and the Texas Supreme Court in *In re V.L.K.* have *not* given adequate thought to the constitutional considerations in the standards applicable to the example given above.[138]

> [I]f the United States Supreme Court's recent *Troxel v. Granville* decision stands for anything, it would be that the parental presumption counts in parent versus nonparent conservatorship decisions. . . . [However,] the decision in *V.L.K.* would still appear to leave an opening for constitutional arguments in a case in which those arguments are properly raised.[139]

This same commentator goes further and argues that the current section 156.101 will be unconstitutional under many fact situations.[140] Simply because the Texas legislature is pursuing an attempted piece meal dissolution of parental rights in Texas does not mean that it has such a right. For example, the Supreme Court of the United States has previously noted the importance of such rights:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's rights to life, liberty, . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[141]

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137. Sullivan v. Univ. Interscholastic League, 599 S.W.2d 860, 863 (Tex. Civ. App.—Austin 1980) (citing Ingraham v. Wright, 430 U.S. 651, 672 (1977)), *aff'd in part and rev'd in part on other grounds*, 616 S.W.2d 170 (Tex. 1981).

138. *See* James W. Paulsen, *Family Law: Parent and Child*, 54 SMU L. REV. 1417, 1441 (2001) (implying that neither the Texas Supreme Court nor the Texas Legislature has fully considered the constitutionality of the applicable standards).

139. *Id.* at 1441-42.

140. *Id.* at 1442-51.

141. W. Va. State Bd. of Educ. v. Barnette, 319 U.S 624, 638 (1943).

Therefore, Texas courts need to be ready to step in and hold this provision unconstitutional where properly challenged under appropriate fact situations.

VII. Conclusion

The Texas Family Code section 156.101 as interpreted by the Texas Supreme Court can and will be unconstitutional under many fact situations. The example given in this Article, referring to a grandparent seeking sole managing conservatorship status due solely to the natural father's loss of employment, is a situation where the "best interest" test does not adequately protect the father's constitutionally protected parental rights. Although there is someone else that might have the money to do a better job of raising a child this does not mean that the natural parent is unfit or that any harm will befall the child if custody remains with the natural parent. A natural parent should not lose his rights to custody simply because a judge feels that someone else might do a "better" job. The Texas Legislature should once again amend section 156.101 and re-establish the "injurious retention" test. This test would ensure that before a natural parent would lose custody to someone else, that the trial court has to find that retention by the natural parent would be "injurious" to the child. This test would give some more concrete standard and more protection to natural parents who find their rights to custody challenged by a third party.