

FOSTER PARENT STANDING AND INTERVENTION IN CPS LITIGATION:
THE HISTORY AND THE IMPACT OF TEXAS'S 2017 AMENDMENT.

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I. INTRODUCTION

Baby Alexis was born with cocaine in her system.¹ On her second day of life, the Texas Department of Protective and Regulatory Services placed baby Alexis into the loving home of Bill and Sue Smith.² As her foster parents, Bill and Sue quickly bonded with baby Alexis and they treated her as if she was their own daughter. They also hoped to adopt Alexis if the biological mother was unable to overcome her drug addiction.

After seven months, the Department of Protective and Regulatory Services (“the Department”) decided to move baby Alexis to the home of an elderly, disabled, maternal great-aunt because the great-aunt was related to the child by blood.³ Bill and Sue intervened under Tex. Fam. Code § 102.004(b) to prevent Alexis from leaving their care.⁴ At a subsequent hearing, the parties agreed that if the placement with the great-aunt failed, Alexis would be placed back with the Smith family.⁵ Two months later, the placement failed when the great-aunt passed away.⁶ However, instead of returning Alexis to the Smith family, the Department placed Alexis with the

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¹*In re A.M.*, 60 S.W.3d 166, 167 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The names of all parties have been changed.

²*Id.*

³*Id.*

⁴*Id.*

⁵*Id.* at 168.

⁶*Id.*

great-aunt's brother and sister-in-law, Larry and Jane Johnson, because they were "family" and had cared for Alexis for three months while the great-aunt was sick.⁷ Subsequently, Larry and Jane Johnson intervened under Section 102.004(b) as well.⁸ Thus, a custody battle began between the Smith family and the Johnson family with 10-month-old baby Alexis as the prize.⁹

The first year of Alexis's life was wrought with adults fighting over who should be her guardian.¹⁰ The Smiths believed that it would be in Alexis's best interest to be with them because they had cared for her since she left the hospital and for over 80% of her life.¹¹ Bill and Sue Smith had bonded to baby Alexis since her second day of life.¹² The Johnson family believed that they were entitled to custody of Alexis because they were "family" via the deceased great-aunt.¹³ Eventually, the Smith family prevailed over the great-aunt's brother and sister-in-law, and the Smith family adopted baby Alexis.¹⁴ The Smiths' intervention would not have been possible if it were not for the provision in the Texas Family Code § 102.004(b) that granted standing to intervene in ongoing Child Protective Services (CPS) litigation to certain persons like Bill and Sue Smith.¹⁵

In 2017, the Texas Legislature amended Section 102.004(b) in a way that now prohibits a foster parent from doing what the Smiths did.¹⁶ Foster parents are now prohibited from intervening in ongoing CPS litigation unless the CPS case has been extended beyond the statutory limit of 12-months due to "extraordinary" circumstances.¹⁷ For foster parents like the Smiths, there is now no option to protect their own interests or what they believe to be in the best interest of the child. Distant relatives like the Johnsons, however, can still use Section 102.004(b) to intervene because they are not foster parents.

In Section II, this article will begin by exploring the history of foster parent's legal rights to be involved in court proceedings. In Section III, this comment will look at House Bill 1410, which was passed by the 85th

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *See id.* at 169.

¹¹ *Id.*

¹² *Id.*

¹³ *See id.* at 168.

¹⁴ *Id.* at 167 (affirming trial court's adoption order).

¹⁵ TEX. FAM. CODE ANN. § 102.004(b).

¹⁶ *Id.*; *see infra* Section III (A).

¹⁷ TEX. FAM. CODE ANN. § 263.401; *see infra* Section V (C).

Legislature in 2017 and the changes that this legislation made to Section 102.004(b) of the Texas Family Code. Section IV will put things into context by exploring the constitutionally protected rights of both the biological parents as well as the foster parents. Section V will then address some problems and implications that may result from the newly amended statute.

From the outset of this comment, it is important to acknowledge the irreplaceable role that foster parents play within Texas's Child Welfare System. The Texas Legislature passed House Bill 1410 in the context of a broken child welfare system that is in desperate need of more foster parents.¹⁸ The shortage of foster homes is forcing children to sleep overnight in government offices.¹⁹ Additionally, the lack of adequate foster homes means that foster children are currently placed into facilities and homes that are unable to meet their developmental needs—resulting in a direct harm to the children's psychological health.²⁰ Moreover, no amount of funding or recruitment effort can guarantee more foster parents; at the end of the day, foster parents are volunteers and their availability is outside of the State's control.²¹

This comment is built on the premise that certain circumstances may necessitate a foster parent to become a party to the litigation to help the court determine what is in the best interest of the child.²² A New Jersey court rightly explained the need for a foster parent's involvement in this way:

¹⁸ See *M.D. v. Abbott*, No. 2:11-CV-84, 2017 U.S. Dist. LEXIS 2939, at *17 (S.D. Tex. Jan. 9, 2017).

¹⁹ Neena Satija, *For troubled foster kids in Houston, sleeping in offices is "rock bottom,"* THE TEXAS TRIBUNE, (Apr. 20, 2017), <https://www.texastribune.org/2017/04/20/texas-foster-care-placement-crisis/> [<https://perma.cc/DA6Q-LLR8>]; see also *Abbott*, 2017 U.S. Dist. LEXIS 2939, at *17–20 (taking judicial notice of multiple comments made by Governor Abbott, LT. Governor Patrick, Speaker Straus, and various other administrative officials that Texas is desperate for foster parents and that children are sleeping in CPS offices).

²⁰ *M.D. v. Abbott*, 907 F.3d 237, 268 (5th Cir. 2018).

²¹ *Id.* It is beyond the scope of this comment to predict whether HB 1410 will have any impact on the availability of foster homes in Texas. However, the context begs the question of why the Texas Legislature passed such a sweeping change to a foster parent's right to intervene at a point in time in which there is a critical shortage of foster parents.

²² The author recognizes the complexities of the child welfare system. This comment will not delve into the endless abyss of interrelated issues such as the psychological parenting theory, foster-parent compensation, the influence of federal child welfare legislation, the child's due process rights, other third-party interests, and the ongoing efforts to reform the Texas Child Welfare System. Rather, this note will focus on the historical and practical issues related to Section 102.004(b) and the amendment made by HB 1410.

[W]here parents, natural and foster, do battle with custody of a child as the prize, neither alone may fully represent the best interests of the child. When facts indicate the existence of a *bona fide* dispute between competing sets of parents grounded in a potential for serious psychological and emotional harm to the very young, the best interests of the child demand a full exposure of the facts prior to any change in custody.²³

To be sure, not all foster parents should be granted leave to intervene, and not all interventions should result in the foster parents prevailing. However, closing the courthouse door to foster parents like the Smiths while simultaneously not doing the same to distant relatives like the Johnsons slants the evidence in only one direction.

II. TEXAS FOSTER PARENT INVOLVEMENT IN COURT: FROM TEXAS'S FORMATION TO 2017

The ability of Texas foster parents to be involved in court proceedings regarding their foster children has varied over time.²⁴ In the past forty years, the Texas courts and Legislature have made significant changes to the law as they have each attempted to determine where the line for foster parent standing should be drawn. The most recent change—the 2017 passage of House Bill 1410—is arguably the largest shift in the law since 1985.

A. *From Texas's early days*

In Texas, the concept of a “foster parent” is as old as the state itself. In the 19th century, as Texas was inundated with children sent from New York and other large east coast cities as part of the “orphan trains” movement, the orphaned children were placed in foster homes without adoption formalities.²⁵ Simultaneously, Texas employed court guardianship laws and

²³ Doe v. State, 398 A.2d 562, 568 (N.J. Super. Ct. App. Div. 1979).

²⁴ See *infra* Section II (A–E).

²⁵ BUREAU OF RESEARCH IN THE SOCIAL SCIENCES, THE UNIVERSITY OF TEXAS, TEXAS' CHILDREN: THE REPORT OF THE TEXAS CHILD WELFARE SURVEY 42 n. 16 (1938); *Riding West on the Orphan Train*, TEXAS HISTORICAL COMMISSION (Feb. 14, 2019), <http://www.thc.texas.gov/blog/riding-west-orphan-train> [https://perma.cc/SDJ7-5ZTU].

apprenticeship laws to care for children who were orphaned, neglected, or otherwise in need of care.²⁶

Then, in 1907, the Texas Juvenile (Dependency and Neglect) Act was created to provide courts with greater control over the children to prevent the abuses happening under apprenticeships.²⁷ Any resident of the county could bring a neglected child to the court's attention by filing a petition with the court.²⁸ Once a person established the need for guardianship, the court had broad discretion to select an appropriate foster home for the child.²⁹ The court had the statutory and chancery powers to determine what was "for the best interest" of the child.³⁰ To do this, courts necessarily relied upon persons who were most knowledgeable of the children's situation—often times lay persons or neighbors.³¹

Over the next few decades, local child welfare boards and probation staff were slowly established at the county level to provide state regulation of dependent or neglected children.³² However, the various state laws continued to allowed for multiple avenues by which a foster parent could advocate on behalf of a child's best interest.³³ "Any person" could bring a suit to declare

²⁶BUREAU OF RESEARCH IN THE SOCIAL SCIENCES, *supra* note 25, at 43.

²⁷*Id.* at 42–43. An apprenticeship was a contractual arrangement where the court appointed a "master" over the child who would promise to support and educate the child in exchange for the child's labor and service. However, beyond the general promise to support and educate the child there were no requirements for the master to do anything for the child. Apprenticed children became known as "little slavey's" because they were overworked, undereducated, and generally neglected. The only protection that the child had was to sue when he reached the age of majority at twenty-one. The case of *Kuhlman v. Blow* is such an example. *Kuhlman v. Blow*, 31 Tex. 628 (1869). In that case, the child was apprenticed at age eight and spent almost all of the next thirteen years subject to hard labor, nearly froze to death due to being inadequately clothed, and was illiterate due to almost no schooling. *Id.* at 629–31.

²⁸BUREAU OF RESEARCH IN THE SOCIAL SCIENCES, *supra* note 25, at 86.

²⁹*Id.* at 98–99.

³⁰*Id.* at 299.

³¹*Id.* The court used lay persons to "fill the gap" in counties for whether the County Child Welfare Board had insufficient staffing to provide services to the children. *Id.* at 280. Lay persons who were neighbors, family friends, or teachers would discover the child who was neglected and would bring the child to the attention of the court. *See id.* at 86, 299. Other times, lay persons provided the court with social study reports, which were a requirement in order for the court to grant an adoption decree. *Id.* at 299–300.

³²*Id.* at 301–02; Child Protective Services Program, DFPS, https://www.dfps.state.tx.us/About_DFPS/Annual_Report/1986/pdf/ar-cps86.pdf [<https://perma.cc/2TMV-HZUW>](last visited Mar. 11, 2019).

³³Eugene L. Smith, *Title 2. Parent and Child*, 5 TEXAS TECH L. REV. 389, 394 (1974).

a child dependent or neglected if they resided in the same county as the child.³⁴ “Any person who wished to claim an interest” in the child could bring a suit to determine custody of a child.³⁵ And “any adult” could bring a petition to adopt a child.³⁶ These various disjointed statutes were all repealed in 1973 when Title 2 of the Texas Family Code was enacted to create a single cause of action: a suit affecting the parent-child relationship (SAPCR).³⁷

B. 1973: The creation of Title 2 and the Suit Affecting the Parent-Child Relationship.

In 1973, Title 2 of the Texas Family Code established the SAPCR as the new procedural vehicle by which parties may litigate an aspect of a child’s welfare.³⁸ As defined in Section 11.01, a SAPCR includes a suit in which the petitioner seeks the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship.³⁹ This new SAPCR model shifted the court’s focus onto the best interest of the child.⁴⁰ Where the previous focus of the court was a particular cause of action filed by the petitioner, the court was limited to the remedies available for that cause of action.⁴¹ Now, the court had broad powers in equity to apply any number of possible remedies that the court determined to be in the best interest of the child.⁴²

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* These broad statutes did not limit the courts supervisory and discretionary powers that were traditionally used to prevent abuses and accord equity. *Lutheran Soc. Serv., Inc. v. Meyers*, 460 S.W.2d 887, 890 (Tex. 1970). In fact, the same legislative enactment that allowed “any adult” to bring a petition to adopt a child also “empower[ed] the court to remove the child from the custody of its adoptive parents and award custody to the natural parents or other persons upon proof of abuse, neglect, or ill treatment of the child by the adoptive parents.” *Id.*

³⁷ Smith, *supra* note 33, at 389, 391, 394.

³⁸ *Id.* at 389, 391.

³⁹ *Id.* at 390. The definition of a Suit Affecting the Parent-Child Relationship remains substantially the same today. *Compare with* TEX. FAM. CODE ANN. § 101.032(a) (“Suit affecting the parent-child relationship” means a suit filed as provided by this title in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is requested).

⁴⁰ Smith, *supra* note 33, at 391–92.

⁴¹ *Id.* at 392. In light of *Troxel v. Granville*, this broad statute is likely unconstitutional without some showing of parental unfitness for a non-parent SAPCR. 530 U.S. 57, 68–69 (2000). See *infra* Section V.A.

⁴² See Smith, *supra* note 33, at 391–92.

The new code also provided broad standing for who could bring a suit affecting the parent-child relationship: “any person with an interest in the child.”⁴³ However, the statute did not define what exactly was an “interest in the child.”⁴⁴ A contemporaneous commentary by one of the principal drafters of this broad statutory language, Eugene L. Smith, explained why the term “interest” was added to the code.⁴⁵ As he explained, the Texas Supreme Court, in *Page v. Sherrill*, created a legal fiction in which district courts had general supervisory power over minors.⁴⁶ Under the *Page* precedent, once the court’s jurisdiction attaches, the standing of the party who originally brought the action becomes immaterial and the court’s supervisory power over the minor allows for an “unrestricted open-door policy” for individuals to join the litigation.⁴⁷ The intent of the Legislature, by adding the term “an interest in the child”, was to cut-back on this open-door policy previously allowed by the Texas statutes and the *Page* precedent.⁴⁸

Unfortunately, this created a whole host of issues for lawyers, judges, and legal scholars as they tried to determine whether grandparents, foster parents, fathers of illegitimate children, or parents whose rights had been terminated had an “interest” sufficient to bring a SAPCR action.⁴⁹ For foster parents, multiple appellate courts concluded that, in light of the broad adoption statute in Section 16.02, foster parents have an interest in the child that is sufficient to grant standing for a petition to adopt.⁵⁰ They reasoned that the very nature of adoption is to form a parent-child relationship between two people who were previously “legal strangers.”⁵¹ Thus, foster parents could independently

⁴³ Acts of May 26, 1973, 63rd Leg., R.S., ch. 543, § 1, sec. 11.03, 1973 Tex. Gen. Laws 1411, 1413 (current version at TEX. FAM. CODE ANN. § 102.003).

⁴⁴ See *infra* Section II.C.

⁴⁵ John J. Sampson, *Title 2. Parent and Child*, 1986 Texas Family Code Symposium, 17 TEXAS TECH L. REV. 1065, 1068 (1986).

⁴⁶ Smith, *supra* note 33, at 394; *Page v. Sherrill*, 415 S.W.2d 642, 645 (Tex. 1967).

⁴⁷ Smith, *supra* note 33, at 394.

⁴⁸ Sampson, *supra* note 45, at 1068.

⁴⁹ *Id.* at 1068–69; *Mendez v. Brewer*, 626 S.W.2d 498, 500 (Tex. 1982).

⁵⁰ See *In re Unnamed Child*, 584 S.W.2d 476, 479–80 (Tex. Civ. App.—Fort Worth 1979, writ ref’d n.r.e.); *Harris Cty. Child Welfare Unit v. Caloudas*, 590 S.W.2d 596, 599 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

⁵¹ *In re Unnamed Child*, 584 S.W.2d at 479–80 (holding that the general rule of § 11.03 is modified by the specific rule of § 16.02 because the purpose of the statutory scheme is to create a parent-child relationship between two people who were previously legal strangers).

pursue an adoption of a child if they could prove to the court that it was in the child's best interest.⁵²

C. 1982: The Mendez Standard establishes that foster parents must show a "justiciable interest" to intervene.

In 1982, the Texas Supreme Court case of *Mendez v. Brewer* specifically addressed a foster parent's petition to intervene in ongoing CPS litigation for the first time.⁵³ In *Mendez*, the foster parents attempted to intervene in the termination proceedings of that child's biological parents.⁵⁴ Although the Texas Family Code did not directly address a motion to intervene, the court looked to Rule 60 of the Texas Rules of Civil Procedure which governs a party's intervention pleadings.⁵⁵ Rule 60 stated that an intervention may be stricken by the court for sufficient cause on the motion of the opposite party.⁵⁶ Additionally, the court looked at Section 11.03 of the Texas Family Code, which gave a person original standing if they had an "interest in the child".⁵⁷ The Texas Supreme Court explained that the foster parent's only interest in the child was their desire to adopt him, which is contingent upon a termination decree.⁵⁸ Because parental rights were not yet terminated, the court concluded that foster parents had no standing to intervene.⁵⁹ The Court further explained that it is within the sound discretion of the court to strike a motion to intervene if the intervenor has no "justiciable interest" in the lawsuit.⁶⁰ Thus, the "justiciable interest" standard for SAPCR intervenors was born and foster parents were looked upon as a class of persons without ability to intervene in ongoing CPS litigation.⁶¹

⁵² *Caloudas*, 590 S.W.2d at 599.

⁵³ 626 S.W.2d at 499.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* This rule is substantially the same today. Compare TEX. R. CIV. P. 60 ("Any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.") and *Mendez*, 626 S.W.2d at 499 (describing Texas Rule of Civil Procedure 60: "any party may intervene, subject to being stricken by the court for sufficient cause on the motion of the opposite party.").

⁵⁷ *Mendez*, 626 S.W.2d at 500.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 499.

⁶¹ *In re N.L.G.*, 238 S.W.3d 828, 830 (Tex. App.—Fort Worth 2007, no pet.).

Simultaneously, foster parents were denied standing to initiate an original suit affecting the parent-child relationship.⁶² In *Pratt v. Texas Department of Human Resources*, the court held that although the plain language of Section 11.03 provided broad standing to persons with an “interest” in the child, Section 11.09 was the legislative determination of who’s “interest” warranted standing.⁶³ The court explained that Section 11.09, which provided for citation and notice requirements, was a legislative determination of who “had a relationship with the child of sufficient legal dignity to be entitled to participate in an action involving the child.”⁶⁴ Section 11.09 included a narrow list of persons which did not include grandparents or foster parents.⁶⁵

This statutory construction was met by sharp criticism by family law attorneys as being bad law and inconsistent with both the Texas Family Code as well as the overall responsibility of the district court to make decisions concerning children.⁶⁶ Other appellate courts also disagreed with the *Pratt* holding.⁶⁷ Thus, *Pratt* set up a division on the issue of standing within Texas

⁶²*Pratt v. Tex. Dep’t of Human Res.*, 614 S.W.2d 490, 495 (Tex. App.—Amarillo 1981, writ ref’d n.r.e.) (concluding that “the persons listed in section 11.09 are the persons who have ‘an interest in the child’ that gives them standing to bring a suit affecting the parent-child relationship.”).

⁶³*Id.*

⁶⁴*Id.*

⁶⁵Acts of May 26, 1973, 63rd Leg., R.S., ch. 543, § 1, sec. 11.09(a), 1973 Tex. Gen. Laws 1411, 1416 (current version at TEX. FAM. CODE ANN. § 102.009(a)). In 1973, the list of persons authorized citation and notice included: (1) the managing conservator; (2) the possessory conservator; (3) persons having access to the child under an order of the court; (4) persons required by law or court order to provide support for the child; (5) the guardian of the person of the child; (6) the guardian of the estate of the child; (7) each parent as to whom the parent-child relationship has not been terminated or process has not been waived; and (8) the alleged father or probable father under special circumstances. *Id.*

⁶⁶Sampson, *supra* note 45, at 1069 n.7. The chairman of the Family Law Section of the State Bar of Texas stated:

Now folks, [*Pratt*] is so antithetical to the structure of the entire Family Code it could not possibly be the law, in my judgment It was the intention of the draftsmen [especially Professor Eugene Smith] to make the question of standing consistent with the general overall responsibility of district courts to make decisions concerning children in a unitary fashion, without regard to the particular relief pled for. [*Pratt*] is 180 degrees out of phase with the intention of, and the genius of, the Family Code.

Id.

⁶⁷*See, e.g., Herod v. Davidson*, 650 S.W.2d 501, 503 (Tex. App.—Houston [14th Dist.] 1983, no writ) (disagreeing with *Pratt* rational by determining that grandparents have standing to intervene even though they are not listed in Section 11.09).

courts.⁶⁸ Shortly thereafter, the Texas Legislature stepped in with a direct response to the *Pratt* holding by enacting revisions to Section 11.03 in 1983 and 1985.⁶⁹

D. 1983 and 1985 Amendments: The Texas Legislature gives foster parents statutory standing to sue and intervene.

The 1983 Legislature's re-write of Section 11.03 was to correct the error made in *Pratt*.⁷⁰ Under the revised law, an "interest in a child" was defined as being when a person has "possession and control of the child for at least six months immediately preceding the filing of the petition" or if the person is named in Section 11.09(a).⁷¹ This six-month timeframe, combined with the disjunctive term "or" effectively disjoined the statutory provisions that the *Pratt* court had previously held to be part of a combined statutory scheme.⁷² The Amarillo Court of Appeals, which had previously authored the *Pratt* opinion, recognized this itself in the 1983 case of *In re Van Hersh*.⁷³ However, the 1983 amendment still left several questions unanswered and courts continued to struggle with the issue of standing in SAPCR for grandparents and foster parents alike.⁷⁴

Shortly thereafter, the Waco Court of Appeals held in two separate cases that the foster parents did not have standing to maintain a SAPCR against natural parents based upon the *Mendez* and *Pratt* rationale.⁷⁵ In *Ready v.*

⁶⁸ See *id.*; *Young v. Young*, 693 S.W.2d 696, 697–98 (Tex. App.—Houston [14th] 1985, no pet.).

⁶⁹ Acts of May 30, 1983, 68th Leg., R.S., ch. 424, § 2, sec. 11.03, 1983 Tex. Gen. Laws 2346, 2353 (current version at TEX. FAM. CODE ANN. § 102.003(a)).

⁷⁰ Sampson, *supra* note 45, at 1070.

⁷¹ Act of May 30, 1983, 68th Leg., R.S., ch. 424, § 3, sec. 11.03, 1983 Tex. Gen. Laws 2346, 2353 (current version at TEX. FAM. CODE ANN. § 102.003(a)).

⁷² See *id.*; *Pratt v. Tex. Dep't of Human Res.*, 614 S.W.2d 490, 495 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.)

⁷³ *In re Van Hersh*, 662 S.W.2d 141, 145 (Tex. App.—Amarillo 1983, no writ) (explaining that the child's aunt and uncle were denied standing under the pre-1983 version of Section 11.03 but a remand was proper because the couple probably had standing under the amended version of the statute since they had actual possession of the child for more than six months).

⁷⁴ Sampson, *supra* note 45, at 1070 (stating that "the 1983 amendment turned out to be woefully inadequate to the task because it did not address the crucial question of whether the new extension of standing to *Pratt*-like circumstances was illustrative of 'an interest in a child,' or whether it constituted the exclusive expansion of standing").

⁷⁵ *Sullivan v. Enoch*, 654 S.W.2d 546, 547 (Tex. App.—Waco 1983, writ dism'd) (explaining that only the persons listed in Section 11.09 have an interest in the child sufficient to bring a

Hughes, the court cited Section 11.09 and *Pratt* to explain that the foster parents did not have standing even though the foster parents had possession of the child for more than six months immediately preceding the filing of their petition.⁷⁶ Then, in 1984, the Amarillo Court of Appeals in *Benavides v. Wright* held that grandparents did not have standing to file a SAPCR even after learning that the stepfather was sexually abusing their granddaughter.⁷⁷ The court's unjust holding in *Benavides* triggered a sweeping revision of Section 11.03 by the next Legislative Session.⁷⁸

In 1985, the Texas Legislature again rewrote Section 11.03.⁷⁹ This time, the Legislature provided a detailed "laundry list" of persons given standing to initiate a SAPCR.⁸⁰ The proponents of the revision intended to "blast to smithereens" the precedent set by *Pratt* and *Benavides*.⁸¹ The Tyler Court of Appeals also recognized that these 1985 amendments amounted to a legislative overruling of the "justiciable interest" standard established by *Mendez*.⁸²

The new amendment provided four avenues by which a foster parent could initiate or intervene in a SAPCR.⁸³ First, the foster parents could bring an original suit if they had "actual possession and control of the child for at least six months."⁸⁴ Secondly, a foster parent could bring an original suit if the court deemed the foster parents to have "substantial past contact with the child" and if the foster parents showed satisfactory proof that the child's environment with the parents endanger their physical health or emotional

SAPCR); *Ready v. Hughes*, 846 S.W.2d 1, 5 (Tex. App.—Waco 1985, no writ) (stating that the amended Family Code Section 11.03 did not give appellee foster parents standing because they previously did not have standing under Section 11.09).

⁷⁶846 S.W.2d at 4–5.

⁷⁷No. 07-84-00234-CV, (Tex. App.—Amarillo Oct. 31, 1984, no writ) (mem. op., not designated for publication); Sampson, *supra* note 45, at 1070.

⁷⁸Sampson, *supra* note 45, at 1070–71.

⁷⁹Act of May 27, 1985, 69th Leg., R.S., ch. 802, § 1, sec. 11.03, 1985 Tex. Gen. Laws 2841, 2842 (amended 1995) (current version at TEX. FAM. CODE ANN. §§ 102.003–.005).

⁸⁰Sampson, *supra* note 45, at 1072 n.15.

⁸¹*Id.* at 1072 n.15.

⁸²*Rodarte v. Cox*, 828 S.W.2d 65, 70 (Tex. App.—Tyler 1991, writ denied).

⁸³Act of May 27, 1985, 69th Leg., R.S., ch. 802, § 1, sec. 11.03, 1985 Tex. Gen. Laws 2841, 2842 (amended 1995) (current version at TEX. FAM. CODE ANN. §§ 102.003–.005).

⁸⁴Act of May 27, 1985, 69th Leg., R.S., ch. 802, § 1, sec. 11.03(a)(8), 1985 Tex. Gen. Laws 2841, 2842 (amended 1995) (current version at TEX. FAM. CODE ANN. § 102.003(a)(9)).

development.⁸⁵ Third, foster parents could intervene in a pending suit if the court deemed them to have “substantial past contact with the child.”⁸⁶ Fourth, a foster parent could bring a suit for the simultaneous termination of the parent-child relationship and adoption.⁸⁷

This amendment in 1985 marked the point at which foster parents had the greatest ability to petition the court to establish what they believed to be in the best interest of the child.⁸⁸ Since then, subsequent Legislatures have incrementally limited the broad standing provisions provided by their 1985 predecessor.⁸⁹

E. 1995-2017: Texas limits foster parent involvement in court to promote reunification.

In 1995, the Family Code was recodified, and the Texas Legislature divided the old Section 11.03 into three separate Sections: 102.003, 102.004, and 102.005.⁹⁰ Former Section 11.03(a) became Section 102.003 and provides general standing to file a SAPCR to the same “laundry list” of specific persons.⁹¹ Former Section 11.03(b) and (c) became Section 102.004

⁸⁵ Act of May 27, 1985, 69th Leg., R.S., ch. 802, § 1, sec. 11.03(b), 1985 Tex. Gen. Laws 2841, 2842 (amended 1995) (current version at TEX. FAM. CODE ANN. § 102.004(a)).

⁸⁶ Act of May 27, 1985, 69th Leg., R.S., ch. 802, § 1, sec. 11.03(c), 1985 Tex. Gen. Laws 2841, 2842 (amended 1995) (current version at TEX. FAM. CODE ANN. § 102.004(b)).

⁸⁷ Act of May 27, 1985, 69th Leg., R.S., ch. 802, § 1, sec. 11.03(d)(2)–(4), 1985 Tex. Gen. Laws 2841, 2842 (amended 1995) (current version at TEX. FAM. CODE ANN. § 102.005(2)–(4)).

⁸⁸ See Sampson, *supra* note 45, at 1072 n.16. The broadening effect of the 1985 legislature was summarized by Texas Supreme Court Justice James P. Wallace when he stated:

[T]he [previous] test was construed very narrowly by the courts . . . at times [it] led to somewhat hard and inconsistent results, leaving one to wonder whether the best interests of the child were actually being served. More often than not, these situations involved either grandparents, foster parents, or close relatives who had more than adequately demonstrated that their “interest” in the child was real and significant. Recognizing these concerns, the legislature in 1983 added a provision defining ‘interest in a child’ However, the courts again sought to strictly confine the standing requirement, reading the 1983 amendment as *the* definition of ‘interest’ rather than *a* definition raising an almost irrebuttable presumption. In retrospect, the latter reading more accurately reflected the legislative intent, as demonstrated by the major overhaul performed this year.

Id. (citation omitted).

⁸⁹ See *infra* Section II E.

⁹⁰ Act of April 10, 1995, 74th Leg., R.S., ch. 20, § 1, sec. 102.003–.005, 1995 Tex. Gen. Laws 113, 125 (current version at TEX. FAM. CODE ANN. §§ 102.003–.005).

⁹¹ TEX. FAM. CODE ANN. § 102.003.

and provides standing for grandparents and other persons under certain circumstances, as well as standing to intervene.⁹² Former Section 11.03(d) became Section 102.005 and provides standing to request a simultaneous termination and adoption.⁹³ Since the recodification in 1995, each statute has maintained some form of language that provides foster parents an opportunity to have standing in Texas courts,⁹⁴ and foster parents have used them to do just that.⁹⁵

1. Section 102.003(a)(12): General standing to file suit.

In 1997, foster parents gained their own sub-section under Section 102.003(a)(12).⁹⁶ Under the new sub-section, foster parents had original standing to file a SAPCR after having the child in their home for eighteen months.⁹⁷ Whereas foster parents had previously filed suit after only six months under the more general provision, rules of statutory construction now

⁹² *Id* at § 102.004.

⁹³ *Id* at § 102.005.

⁹⁴ *See infra* Sections II E. 1–3.

⁹⁵ *See, e.g., In re E.C.*, No. 05-17-00723-CV, 2017 WL 6505867 (Tex. App.—Dallas Dec. 20, 2017, no pet.); *In re S.B.*, No. 02-11-00081-CV, 2011 WL 856963, at *3 (Tex. App.—Fort Worth Mar. 11, 2011, no pet.); *In re Shifflet*, 462 S.W.3d 528, 538–40 (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding); *In re J.W.M.*, 153 S.W.3d 541, 546–47 (Tex. App.—Amarillo 2004, pet. denied); *In re M.T.*, 21 S.W.3d 925, 926–27 (Tex. App.—Beaumont 2000, no pet.); *In re A.M.*, 60 S.W.3d 166, 169 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Rodarte v. Cox*, 828 S.W.2d 65, 70 (Tex. App.—Tyler 1991, writ denied). These cases show a general recognition by Texas appellate courts that foster parents may have standing under Section 102.003, 102.004, or 102.005 depending upon the circumstances of the case.

⁹⁶ James W. Paulsen, *Family Law: Parent and Child*, 51 SMU L. REV. 1087, 1099 (1998). The Legislature's 1997 addition to expressly include foster parents coincided with pending federal legislation. The Adoption and Safe Families Act of 1997 (ASFA) was passed to promote the adoption of children in foster care. The ASFA was a large shift in child welfare law as the federal government used federal dollars to promote change amongst the state child welfare systems. As Senator John Chafee, a leading sponsor of the law, stated, "We will not continue the current system of always putting the needs and rights of the biological parents first." Instead, the new law was to give more weight to the child's health and safety. Katharine Q. Seelye, *Clinton Approves Sweeping Shift in Adoption*, THE N.Y. TIMES (Nov. 17, 1997), <https://www.nytimes.com/1997/11/17/us/clinton-to-approve-sweeping-shift-in-adoption.html> [https://perma.cc/2NCB-YGKP].

⁹⁷ Paulsen, *supra* note 96, at 1099.

made that unavailable to them.⁹⁸ Two years later, the Texas Legislature reduced the time for foster parents to have standing from eighteen months down to twelve months.⁹⁹ The statute has remained the same since 1999.¹⁰⁰

2. Section 102.004(b): Standing for grandparents or other person.

Section 102.004(b) contains the more relaxed standard required to intervene in an ongoing SAPCR.¹⁰¹ As originally enacted in 1985 under Section 11.03(c), the standard is not defined by months; rather, it is defined by having “substantial past contact with the child,” as deemed by the court.¹⁰² According to one appellate court, the purpose of this new statute was to grant standing to intervene to persons who otherwise lacked standing to file an original suit.¹⁰³ Thus, foster parents who could not meet the former “justiciable interest” standard of *Mendez*, could use Section 102.004(b) to intervene.¹⁰⁴ Courts began making a clear distinction between a party having original standing via Section 102.003(a)(12) and standing to intervene via Section 102.004(b).¹⁰⁵ They concluded that a relaxed standard to intervene via Section 102.004(b) is sound policy because “[w]here a suit is already pending, concern for the privacy of the parties is subordinate to the overriding concern for the best interest of the children.”¹⁰⁶ However, this statute was

⁹⁸ *Id.* (explaining that the maxim of the specific controls the general will prevent foster parents from arguing for standing under the general provision that they have “actual care, control and possession of the child for not less than six months”).

⁹⁹ Act of May 31, 1999, 76th Leg., R.S., ch. 1390, § 2, sec. 102.003, 1999 Tex. Gen. Laws 4696, 4697.

¹⁰⁰ TEX. FAM. CODE ANN. § 102.003(a)(12).

¹⁰¹ *In re N.L.G.*, 238 S.W.3d 828, 830 (Tex. App.—Fort Worth 2007, no pet.) (per curiam) (citations omitted) (“Sound policy supports the relaxed standing requirements. There is a significant difference between filing a suit which could disrupt the children’s relationship with their parents, and intervening in a pending suit, where the relationship is already disrupted. In the latter case, intervention may enhance the trial court’s ability to adjudicate the cause in the best interest of the child.”).

¹⁰² Compare *supra* note 85, with TEX. FAM. CODE ANN. § 102.004(b).

¹⁰³ *In re S.B.*, No. 02-11-00081-CV, 2011 WL 856963, at *2 (Tex. App.—Fort Worth March 11, 2011, orig. proceeding) (mem. op.).

¹⁰⁴ See *id.*

¹⁰⁵ *In re M.T.*, 21 S.W.3d 925, 926 (Tex. App.—Beaumont 2000, no pet.); see also *id.*; *In re E.C.*, No. 05-17-00723-CV, 2017 WL 6505867, at *3 (Tex. App.—Dallas Dec. 20, 2017, no pet.) (mem. op.); *In re Shifflet*, 462 S.W.3d 528, 537 (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding).

¹⁰⁶ *In re M.T.*, 21 S.W.3d at 927.

amended in 2005 to require the party seeking intervention to show “satisfactory proof” that “appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child’s physical health or emotional development.”¹⁰⁷ Thus, the intervention statute was no longer “relaxed.”¹⁰⁸

Although original standing pursuant to Section 102.003(a)(12) was automatic for foster parents if the twelve-month statutory requirement was met, intervention pursuant to Section 102.004(b) was not.¹⁰⁹ Under Section 102.004(b), it was within the trial court’s sound discretion whether or not to grant leave for a motion to intervene.¹¹⁰ Courts saw this as consistent with the rest of the Texas Family Code’s insistence that the best interest of the child is always to be paramount.¹¹¹ When the statutory prerequisites are met and the trial court believes that an intervention will assist its ability to determine what is in the best interest of the child, the court possessed the ability to grant a leave on a motion to intervene.¹¹² Courts viewed these interventions as enhancing their ability to adjudicate the ongoing SAPCR in the best interest of the child.¹¹³

In 2017, Section 102.004(b) saw a significant amendment that now bars a foster parent from intervening until the same twelve-month statutory requirement of Section 102.003(a)(12) is met.¹¹⁴ Now, for a foster parent to intervene in an ongoing SAPCR they must also have standing to bring an original SAPCR.¹¹⁵

3. Section 102.005: Standing to request termination and adoption.

Section 102.005 allows for an original suit for adoption, or a suit for termination joined with a petition for adoption, to be filed by certain

¹⁰⁷ TEX. FAM. CODE ANN. § 102.004(b). The 2005 amendment modified the statute to recognize the U.S. Supreme Court’s holding in *Troxel* that a fit parent is presumed to act in the best interest of their child. *See infra* Section IV.A.

¹⁰⁸ *In re* S.M.D., 329 S.W.3d 8, 15 (Tex. App.—San Antonio 2010, pet. dismissed).

¹⁰⁹ *See In re* E.C., No. 05-17-00723-CV, 2017 WL 6505867, at *3 (Tex. App.—Dallas Dec. 20, 2017, no pet.) (mem. op.).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See id.* at *3–4.

¹¹³ *Id.* at *4 (citing *In re* N.L.G., 238 S.W.3d 828, 830 (Tex. App.—Fort Worth 2007, no pet.) (per curiam)).

¹¹⁴ *See infra* Section III.

¹¹⁵ TEX. FAM. CODE ANN. § 102.004(b-1).

persons.¹¹⁶ The statutory language remains broad enough to allow a foster parent, under certain circumstances, to possibly fit the mold of four out of the five persons listed;¹¹⁷ however, case law reveals that most foster parents that have used Section 102.005 as their basis for standing to file a termination and adoption suit have specifically used Subsection 102.005(5).¹¹⁸

While foster parents have typically used Subsection 102.005(5), it is also worth noting that under the plain language of Subsection 102.005(3), it is possible for a foster parent to have original standing to bring a SAPCR after having possession of the child for only two months.¹¹⁹ The *Rodarte* court recognized this too, and explained that this is not a problem because of the

¹¹⁶ *Id.* § 102.005.

¹¹⁷ *Id.* Section 102.005 provides the following five persons standing to request a termination of the parent-child relationship joined with a petition for adoption:

- (1) a stepparent of the child;
- (2) an adult who, as the result of a placement for adoption, has had actual possession and control of the child at any time during the 30-day period preceding the filing of the petition;
- (3) an adult who has had actual possession and control of the child for not less than two months during the three-month period preceding the filing of the petition;
- (4) an adult who has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child; or
- (5) another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so.

Id. A plain reading of Section 102.005 permits a foster parent to possibly intervene under Subsections (2), (3), (4), and (5).

¹¹⁸ *In re D.A.*, No. 02-14-00265-CV, 2015 Tex. App. LEXIS 1150, at *8–9 (Tex. App.—Fort Worth Feb. 5, 2015, no pet.) (mem. op.) (concluding that a grandmother had standing under Section 102.005(5)); *In re A.B.*, 412 S.W.3d 588 (Tex. App.—Fort Worth 2013), *aff'd*, 437 S.W.3d 498 (Tex. 2014); *In re M.J.R.B.*, No. 12-11-0000-CV, 2012 Tex. App. LEXIS 8249, at *6–7 (Tex. App.—Tyler Sept. 28, 2012, no pet.) (mem. op.) (recognizing that informal foster parents had standing under Section 102.005(3), (5) after caring for the child for seven months); *Rodarte v. Cox*, 828 S.W.2d 65, 70 (Tex. App.—Tyler 1991, writ denied) (granting foster parent original standing under 11.03(d)(4) recodified as 102.005(5)); *In re A.C.*, No. 10-15-00192-CV, No. 10-15-00193-CV, 2015 Tex. App. LEXIS 10882, at *28 (Tex. App.—Waco Oct. 22, 2015, no pet.) (mem. op.) (recognizing that foster parents had standing under Section 102.005(5) by being in their care for nine months).

¹¹⁹ TEX. FAM. CODE ANN. § 102.005(3); *Rodarte*, 828 S.W.2d at 70.

ample discretion the court has to determine if the particular circumstances of such a case warrants standing.¹²⁰

III. THE 2017 AMENDMENT TO SECTION 102.004.

In 2017, the Texas Legislature amended Section 102.004.¹²¹ The statute now requires that “[a] foster parent may only be granted leave to intervene . . . if the foster parent would have standing to file an original suit as provided by Section 102.003(a)(12).”¹²² This change makes it almost impossible for a foster parent to intervene in ongoing CPS litigation.¹²³ However, the legislative history of HB 1410 reveals that the Texas Legislature originally intended that the amendment would make it easier—not harder—for foster parents to intervene.¹²⁴

A. *The amendment to HB 1410 worked against the legislation’s original purpose.*

The stated purpose of HB 1410 is that “foster parents deserve more influence in suits involving the conservatorship of a child.”¹²⁵ Analysis of the bill further explains that this new amendment will expressly grant leave for foster parents to intervene in certain ongoing SAPCR litigation.¹²⁶ As originally introduced, the bill added foster parents to the statutory language but included no time restriction to their ability to intervene;¹²⁷ however, it

¹²⁰ *Rodarte*, 828 S.W.2d at 70.

¹²¹ Act of May 19, 2017, 85th Leg., R.S., ch. 341, § 1, sec. 102.004, 2017 Tex. Gen. Laws 985–86 (current version at TEX. FAM. CODE ANN. § 102.004).

¹²² TEX. FAM. CODE ANN. § 102.004(b-1).

¹²³ See *infra* notes 202–203 and accompanying text; see also *In re N.L.G.*, 238 S.W.3d 828, 830 (Tex. App.—Fort Worth 2007, no pet.) (per curiam).

¹²⁴ H. Comm. on Juvenile Justice & Family Issues, Bill Analysis, Tex. H.B. 1410, 85th Leg., R.S. 1 (2017), <https://capitol.texas.gov/tlodocs/85R/analysis/pdf/HB01410H.pdf#navpanes=0>. The Texas House Democratic Caucus promotes the bill as “giving foster parents more say in court proceedings.” *Protecting Kids*, TEX. HOUSE DEMOCRATIC CAUCUS (2017), <https://texashousedems.com/issue/protecting-kids/> [<https://perma.cc/JHV7-Z828>] (last visited May 13, 2019).

¹²⁵ Bill Analysis, *supra* note 124.

¹²⁶ *Id.*

¹²⁷ See *id.* at 2.

was later amended by the influence of advocacy groups to restrict the ability of foster parents to intervene.¹²⁸

The original language of HB 1410 added “foster parents *described* by Section 102.003(a)(12)” to the statute.¹²⁹ The amended language changed this to allow a foster parent to intervene only if “the foster parent *would have standing to file an original suit as provided* by Section 102.003(a)(12).”¹³⁰ Now, a foster parent who wants to intervene in ongoing CPS litigation must wait until they also qualify as having original standing to bring a SAPCR according to Section 102.004.¹³¹

The House Committee on Juvenile Justice & Family Law Issues held a hearing on the amended version of HB 1410 on March 29, 2017.¹³² At that hearing, four witnesses testified for the passage of the bill and no witness testified against it.¹³³ For the nineteen minute long hearing, the vast majority of the testimony was about DFPS’s primary goal of reunification and family preservation and how an intervention of a foster parent does nothing but disrupt that.¹³⁴ Unfortunately, much of the testimony was conclusory and inaccurate.

The sponsor of the bill told the committee that “the primary goal of CPS service plan is *always* family preservation and reunification.”¹³⁵ One witness, a representative from the National Association of Social Workers—Texas

¹²⁸ Stephen Howsley, *Policy Review: Victory at the 85th Texas Legislature!*, TEXAS HOME SCHOOL COALITION ASSOCIATION, <https://thsc.org/victory-85th-texas-legislature/#comments> [<https://perma.cc/EK4U-7DKS>].

¹²⁹ Bill Analysis, *supra* note 124, at 2 (emphasis added).

¹³⁰ *Id.*

¹³¹ TEX. FAM. CODE ANN. § 102.004(b-1).

¹³² Hearings on Tex. H.B. 1410 Before the H. Comm. on Juvenile Justice & Family Issues, 85th Leg., R.S. (Mar. 29, 2017) (timestamp 01:25:36) (video recording available at <https://house.texas.gov/video-audio/committee-broadcasts/>).

¹³³ H. Comm. on Juvenile Justice & Family Issues, Witness List, Tex. H.B. 1410, 85th Leg., R.S., (2017) *available at* <https://capitol.texas.gov/tlodocs/85R/witlistbill/pdf/HB01410H.pdf#navpanes=0>.

¹³⁴ *See generally* Hearing on Tex. H.B. 1410, *supra* note 132.

¹³⁵ Hearings on Tex. H.B. 1410, *supra* note 132 at 01:20:05 (statement of Representative Rodríguez) (video recording available at <https://house.texas.gov/video-audio/committee-broadcasts/>) (emphasis added). Contrary to what the witness stated, the Texas Family Code allows the department’s permanency plan for a child to have one of four goals: (1) reunification; (2) relative adoption; (3) awarding Permanent Managing Conservatorship to a relative or other suitable individual; or (4) another planned, permanent living arrangement for the child such as non-relative adoption. *See* TEX. FAM. CODE ANN. § 263.3026.

Chapter, stated that foster parents “were never intended to be included as a party able to intervene before twelve months.”¹³⁶ Another witness, from the Center for Families and Children at the Texas Public Policy Foundation, told the committee that a foster parent’s “interest” is defined by the 1982 Texas Supreme Court case of *Mendez* which “held that foster parents can’t intervene in any CPS case because they don’t have a justiciable interest until the parent’s rights are terminated.”¹³⁷ He told the House Committee that the current use of the intervention statute was a problematic “shortcut” that allows foster parents to abuse the system and disrupt CPS’s goals of family reunification.¹³⁸ The witness did not explain to the Committee that foster parents have been intervening with court approval well before the intervention statute was enacted.¹³⁹ Additionally, the witness did not adequately explain that the *Mendez* holding was legislatively overruled when the Texas Legislature rewrote Section 11.03 in 1985—over 30 years ago.¹⁴⁰ The final witness, a representative from the Parent Guidance Center, told the Committee that a foster parent’s relationship with a child is “contrived or constructed substantial past contact” and “relatives really have that real substantial past contact.”¹⁴¹

¹³⁶Hearings on Tex. H.B. 1410, *supra* note 132 at 01:22:55 (video recording available at <https://house.texas.gov/video-audio/committee-broadcasts/>); *contra supra* Section II. D. This statement made by a social worker is simply wrong—the courts and legislature alike have repeatedly recognized, both expressly and impliedly, that persons such as foster parents are exactly the type of people for whom the intervention statute exists. That is why foster parents have repeatedly been intervening successfully, prior to twelve months of custody, since 1985.

¹³⁷ *Id.* at 01:25:36.

¹³⁸ *Id.* at 01:24:50.

¹³⁹ *Id.* at 01:24:03–01:28:09.

¹⁴⁰ *Id.* at 01:24:03–01:28:09; *see supra* note 82 and accompanying text. Although the witness used the 1983 case of *Mendez* to justify his claim that there is “confusion” about foster parent intervention, he failed to point out that the confusion ended in 1985 when the Legislature amended Section 11.03 (now codified as Section 102.004). As one court put it:

Mendez has been deprived of its precedential value. Whatever uncertainty existed when *Mendez* was decided, the Legislature eliminated by its subsequent amendment to Section 11.03 specifically providing for the trial judge to determine that one with substantial past contact with a child has standing to bring such a suit. . . . The trial court has extensive discretion in determining standing to intervene.

Rodarte v. Cox, 828 S.W.2d 65, 70 (Tex. App.—Tyler 1991, writ denied). The *Mendez* holding had been bad law for over 32 years at the time of the witness’s testimony.

¹⁴¹Hearings on Tex. H.B. 1410, *supra* note 132, at 01:34:31.

For the duration of the hearing, none of the witnesses discussed the court's goal of determining the best interest of the child.¹⁴² Neither did any witness mention that intervention is not automatic and it may only be granted at the discretion of the court.¹⁴³ Additionally, nobody mentioned that many of the intervention efforts by foster parents have been due to last minute distant relatives that surface after the children have bonded significantly with the foster parent (i.e., for many foster parents, the purpose of intervention is not to present evidence against reunification with a biological parent; rather, it is to present evidence against a distant relative with little or no prior contact with the child).¹⁴⁴

HB 1410 was originally intended to benefit foster parents but the amended version does just the opposite. This is likely due, in part, by faulty testimony that was presented to the House Committee. Foster parents are now much more restricted in their right to intervene while House Representatives are boasting that they are “giving foster parents more say in court proceedings.”¹⁴⁵

B. The amendment to HB 1410 is inconsistent with the statutory scheme and the case law history.

The Texas Legislature was certainly well-intended in their efforts to clarify Section 102.004(b); however, the resulting statute is inconsistent with the statutory scheme. Section 263.401(a) of the Texas Family Code requires a mandatory dismissal of all CPS cases after twelve months.¹⁴⁶ Although the court can grant a single 180-day extension under certain “extraordinary circumstances,”¹⁴⁷ all non-extraordinary CPS cases must comply with the

¹⁴² *Id.* at 01:17:00–01:36:23.

¹⁴³ *Id.* at 01:17:00–01:36:23.

¹⁴⁴ *Id.* at 01:17:00–01:36:23.

¹⁴⁵ *Protecting Kids*, *supra* note 124.

¹⁴⁶ TEX. FAM. CODE ANN. § 263.401(a).

¹⁴⁷ *Id.* § 263.401(b). The statute does not define what are “extraordinary circumstances.” *Id.* It also does not require the court to explain what is “extraordinary” when granting an extension in a particular case. *Id.* However, Texas case law reveals several circumstances that do not meet the “extraordinary” standard. *See, e.g., In re R.J.B.*, No. 05-17-01411-CV, 2018 Tex. App. LEXIS 2623 (Tex. App.—Dallas Apr. 12, 2018, no pet.) (mem. op., not designated for publication) (holding that the father's impending release from jail is not an extraordinary circumstance); *In re O.R.F.*, 417 S.W.3d 24, 42 (Tex. App.—Texarkana 2013, no pet.) (holding that a newly discovered clean drug test does not constitute an extraordinary circumstance); *In re A.S.D.*, No. 02-10-00255-CV, 2011 Tex. App. LEXIS 9205 (Tex. App.—Fort Worth Nov. 17, 2011, no pet.) (mem. op., not designated

strict twelve-month timeline.¹⁴⁸ Because Sections 102.004(b) and 263.401(a) both apply a twelve-month rule, this amounts to a complete bar to intervention for the vast majority of foster parents.¹⁴⁹ Additionally, this new amendment completely undermines the original intent of the 1985 Legislature when they created the intervention statute to be more relaxed for persons who did not have standing to file an original suit.¹⁵⁰ Now, for foster parents only, there is no distinction between original standing pursuant to Section 102.003 and standing to intervene pursuant to Section 102.004.

HB 1410 is also clearly inconsistent with the case law history. Although the legislative intent was to expressly grant foster parents a right that was previously only implied: the right to intervene in ongoing CPS litigation,¹⁵¹ the version of the bill that the Legislature finally passed does just the opposite.¹⁵² The result is an amended statute that is inconsistent with the history, nature, or extent of which foster parents have been involved in CPS litigation.¹⁵³ The Texas Legislature has stopped foster parents from doing exactly what they had been doing for over three decades.

IV. THE CONSTITUTIONAL RIGHTS OF THE INTERESTED PERSONS.

The Supreme Court of the United States has provided notable guidance to the relative parties' interest in the child. Although the contours are unclear in certain contexts and with particular classes of persons, there are some rights of privacy that are clearly protected by the Due Process Clause of the Fourteenth Amendment.¹⁵⁴ This comment will limit the analysis to the rights of biological parents and the rights of foster parents, as the conflict between these two classes of persons seem to be one of the primary reasons for advocates in support of HB 1410.¹⁵⁵

for publication) (holding that the mother's recent pregnancy and immigration status were not extraordinary circumstances).

¹⁴⁸ TEX. FAM. CODE ANN. § 263.401(b).

¹⁴⁹ TEX. FAM. CODE ANN. §§ 102.004(b), 263.401(a).

¹⁵⁰ See *supra* note 103.

¹⁵¹ See *supra* notes 126–127.

¹⁵² See *supra* notes 128–131 and accompanying text.

¹⁵³ See *supra* section II.

¹⁵⁴ See U.S. CONST. amend. XIV.

¹⁵⁵ See *supra* section III.A.

A. A biological parent's right to determine what is in the best interest of their child.

The U.S. Supreme Court has recognized that there is a fundamental liberty interest that a fit parent has to determine what is in the best interest of their child.¹⁵⁶ In *Troxel v. Granville*, Jenifer and Gary Troxel, the paternal grandparents, filed a petition to obtain visitation rights with their two granddaughters.¹⁵⁷ The Troxels had an ongoing relationship and regular visits with their grandchildren;¹⁵⁸ however, when the Troxel's son died, the children's mother wanted to limit the Troxels contact with their grandchildren to only a brief visit once a month.¹⁵⁹ The Troxels wanted more contact than that so they filed a suit under a broad visitation statute in Washington State Court.¹⁶⁰ The U.S. Supreme Court held that the Washington State statute was too broad to pass constitutional muster because it allowed "any person" to petition for visitation rights to a child at "any time."¹⁶¹ The Supreme Court explained that for a person to insert themselves between the sacred relationship of a parent and child there must be a showing that the biological parent is unfit.¹⁶² Additionally, the majority opinion expressly limited the extent of their holding to overly broad statutes that provide "unlimited power," as in the case of Washington State.¹⁶³ The Court explained that statutes granting nonparental visitation are not unconstitutional *per se*.¹⁶⁴

Texas had already codified a "parental presumption" prior to the Supreme Court's opinion in *Troxel* by creating a rebuttable presumption that it is in the best interest of the child to appoint both parents as the joint managing

¹⁵⁶ See U.S. CONST. amend. XIV; *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

¹⁵⁷ *Troxel*, 530 U.S. at 68.

¹⁵⁸ *Id.* at 60.

¹⁵⁹ *Id.* at 60–61.

¹⁶⁰ *Id.* at 61.

¹⁶¹ *Id.* at 63.

¹⁶² *Id.* at 68–69 (explaining that this privacy right is conditional "so long as a parent adequately cares for his or her children (*i.e.*, is fit)").

¹⁶³ *Id.* at 73.

¹⁶⁴ *Id.* at 73. The majority opinion did not need to address the parental rights as they relate to a foster parent situation because it was outside the scope of the case at bar. However, Justice Stevens expressly noted that there are many circumstances—such as foster care or guardianship—in which the constitutionality of the Court's action would not even be implicated. See *id.* at 85 (Stevens, J. dissenting). He further explained that the child's interest "in preserving established familial or family-like bonds" was likely to warrant independent constitutional protection. *Id.* at 88.

conservators of the child.¹⁶⁵ However, in 2005 the Legislature amended the Grandparent Visitation Access Statute to further clarify any ambiguity that may still exist in light of *Troxel*.¹⁶⁶ Section 153.433 of the Texas Family Code now states that a grandparent can only overcome the presumption that a parent acts in the best interest of the parent's child by proving that denial of access or possession "would significantly impair the child's physical health or emotional well-being."¹⁶⁷ The Texas Supreme Court has recognized that this statutory language satisfies the parental presumption established in *Troxel*.¹⁶⁸

The identical statutory language is found in Section 102.004(b) as it relates to the standing to intervene in ongoing SAPCR litigation.¹⁶⁹ Courts have recognized that this high burden of proof is identical to that of Section 153.131.¹⁷⁰ Thus, the statutory prerequisites to a foster parent intervening in an ongoing SAPCR directly complies with the holding in *Troxel*: no foster parent can insert themselves between a parent-child relationship unless they overcome the parental presumption by a showing of parental unfitness.

B. A foster parent's right to maintain their familial bonds.

The U.S. Supreme Court has also recognized that foster parents have some degree of a protected liberty interest in the "right to familial privacy" of their foster family.¹⁷¹ In *Smith v. Organization of Foster Families for Equality & Reform*, individual foster parents and an organization of foster parents sued the State of New York.¹⁷² The foster parents alleged that a New York law governing the removal of foster children from their home violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹⁷³ Although the Court held that the New York law did not

¹⁶⁵TEX. FAM. CODE ANN. § 153.131(b). This statute was created as a legislative response to *Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990) (explaining that the parental presumption can be rebutted with evidence that there would be a significant physical or emotional impairment of the child if a parent is appointed as managing conservator).

¹⁶⁶TEX. FAM. CODE ANN. § 153.433(a)(2); Linda B. Thomas, et al., *Family Law: Parent &(and) Child*, 61 SMUL. REV. 819, 820 (2008).

¹⁶⁷TEX. FAM. CODE ANN. § 153.433(a)(2).

¹⁶⁸*In re Derzapf*, 219 S.W.3d 327, 333 (Tex. 2007) (orig. proceeding).

¹⁶⁹*In re S.M.D.*, 329 S.W.3d 8, 15 n.5 (Tex. App.—San Antonio 2010, pet. dismiss'd).

¹⁷⁰*Id.*

¹⁷¹*Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 842 n.45 (1977).

¹⁷²*Id.* at 818–19.

¹⁷³*Id.* at 820.

violate any constitutional rights,¹⁷⁴ the Court simultaneously recognized that the natural bond that develops between foster parents and their foster children creates some degree of “familial privacy.”¹⁷⁵

The U.S. Supreme Court recognized that the “family life” protected by the Due Process Clause of the Fourteenth Amendment extends beyond mere biology to other “emotional attachments that derive from the intimacy of daily association.”¹⁷⁶ The Court pointed to the marriage relationship—the basic foundation of the family in our society—as an example of familial rights to privacy despite the absence of a blood relation.¹⁷⁷ The Court reasoned that, just as a married couple can form an intimate relationship entitled to constitutionally protected rights of privacy, so also can a foster parent and a foster child form a similar relationship with similar constitutional protections.¹⁷⁸

Familial bonds of affinity have a degree of constitutional protections just as do familial bonds of consanguinity; however, the Court also recognized that the foster family has its origins in state law and contractual arrangements, not biology.¹⁷⁹ The Court went on to explain that whatever degree of liberty interest that a foster parent has may be subordinate to the greater liberty interest that a biological parent has by way of natural rights.¹⁸⁰

The Court made it clear that a foster parent’s interest “must be substantially attenuated” when a court is returning the child to his natural parents.¹⁸¹ But how should a court compare the interest of a foster parent to that of a distant relative? The U.S. Supreme Court did not clearly define the boundaries of a foster parent’s liberty interest in maintaining a relationship with their foster child.¹⁸² However, because the Court implied that some degree of liberty interest exists for foster parents,¹⁸³ courts and legislatures

¹⁷⁴ *Id.* at 849.

¹⁷⁵ *Id.* at 842 n.45.

¹⁷⁶ *Id.* at 844.

¹⁷⁷ *Id.* at 843.

¹⁷⁸ *Id.* at 844–45.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 846–47.

¹⁸¹ *Id.* at 847.

¹⁸² *Id.*

¹⁸³ *Id.* at 842 n.45. Much more has and could be written on the topic of a foster parent’s liberty interest. For a more thorough discussion, see James F. Troester, Note, *A Pre-Removal Hearing in Custody Decisions: Protecting the Foster Child*, 4 COOLEY L. REV. 375 (1987); Matthew Asman, Note, *The Rights of A Foster Parent versus the Biological Parent who Abandoned the Child: Where*

alike should consider a foster parent's liberty interest when applied to situations such as baby Alexis.¹⁸⁴

V. PROBLEMS AND IMPLICATIONS OF HB 1410.

HB 1410 presents several problems in light of the statutory history, the original intent of the bill, and the constitutional guidance from the U.S. Supreme Court. Much of the case law shows foster parents seeking to intervene when a distant relative gets involved late in the case. In such cases, the denial of a foster parent intervention amounts to a restriction of the court's ability to determine what is in the best interest of the child. Thus, foster parents are left with little, if any, ability to protect their own interest in the child. Additionally, foster parents have no ability to directly present evidence to the court when they believe that the child's best interest is not being addressed.

A. *HB 1410 prevents foster parents from protecting their interests against a distant relative of the child.*

HB 1410 now places distant relatives who have no prior or ongoing relationship with the child into a position of priority over foster parents—in all circumstances prior to the twelve-month mark. Previously, foster parents could use their ability to intervene under Section 102.004(b) as a means by which they could protect their interest against a distant relative.¹⁸⁵ But that door is now closed.

DFPS policy says that a relative, and other persons to whom the child is connected, shall have prioritization in placement decisions.¹⁸⁶ For placement decisions, Texas law defines a “relative” as someone who is a descendant of another or when “they share a common ancestor.”¹⁸⁷ DFPS' guidance also

Do the Best Interests of the Child Lie?, 8 CONN. PROBATE L.J. 93 (1993); and Gilbert Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994).

¹⁸⁴ See *supra* notes 1–13 and accompanying text.

¹⁸⁵ *Seale v. Texas Dep't of Family & Protective Servs.*, 2011 Tex. App. LEXIS 1552, at *4, *12, *15 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (mem. op.); *In re A.M.*, 60 S.W.3d 166, 166–67 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

¹⁸⁶ Child Protective Services Handbook § 4114.1, Texas Department of Family and Protective Services, https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_4000.asp#CPS_4114 (last updated Sept. 3, 2019).

¹⁸⁷ TEX. FAM. CODE ANN. § 262.114. This statute adopts the definition of “relative” established in Section 264.751, which borrows its definition from TEX. GOV'T CODE ANN. § 573.022(a).

says that relative placements take priority over former foster parents.¹⁸⁸ The policy provides no consanguinity limitation—the “relative” can be extremely remote and have no personal relationship or connection to the child.¹⁸⁹ Under DFPS policy, a great-aunt or cousin twice removed with no prior relationship with the child has priority in placement over a foster parent to whom the child already has a strong bond.

Additionally, under Section 102.004(a), relatives within the third degree of consanguinity have standing to intervene without proving a “substantial past contact with the child.”¹⁹⁰ A relative within the third degree of consanguinity is defined by Chapter 573 of the Texas Government Code to include parents, grandparents, great-grandparents, paternal and maternal uncles and aunts, siblings, and nephews and nieces of the parents.¹⁹¹

When a distant relative with no prior relationship with the child becomes involved in an ongoing CPS case, the foster parent has no means to protect their own interest or what they believe to be in the child’s best interest. Additionally, if DFPS decides to move the child out of the foster parent’s home to live with a different foster parent or any other placement option, the foster parent has no ability to advocate in court to keep their foster family together.

B. HB 1410 hinders the best interest of the child determination.

HB 1410 now hinders the court’s ability to determine what is in the best interest of the child. The best interest of the child is always the primary consideration in determining conservatorship.¹⁹² Additionally, the best interest of the child is one of two necessary findings the court must make for grounds of an involuntary termination of a parent-child relationship.¹⁹³ The best interest of the child includes, but is not limited to: (1) the child’s desires; (2) the child’s present and future emotional and physical needs; (3) any present or future emotional and physical danger to the child; (4) the parental

¹⁸⁸ Placement Process Resource Guide, Texas Department of Family and Protective Services—Child Protective Services, 13, https://www.dfps.state.tx.us/handbooks/CPS/Resource_Guides/Placement_Process_Resource_Guide.pdf.

¹⁸⁹ *See id.*

¹⁹⁰ Compare TEX. FAM. CODE ANN. § 102.004(a), with TEX. FAM. CODE ANN. § 102.004(b).

¹⁹¹ TEX. GOV’T CODE ANN. § 573.023(c).

¹⁹² TEX. FAM. CODE ANN. § 153.002.

¹⁹³ *Id.* at § 161.001(b)(2).

abilities of the individuals seeking custody; (5) the programs available to assist the individuals seeking custody to promote the child's best interest; (6) the plans for the child by the individuals or agency seeking custody; (7) the stability of the home or proposed placement; (8) the parent's acts or omissions which may indicate that the existing parent-child relationship is improper; and (9) any excuse for the parent's acts or omissions.¹⁹⁴

The exclusion of foster parents amounts to a restriction of best interest evidence in CPS litigation.¹⁹⁵ For many of these factors, there is often nobody more suitable to inform the court of these things than the foster parent who has actual care, control, and possession of the child. For example, who is in the best position to inform the court about the child's present and future emotional and physical needs? Arguably, the answer would be the child's primary caregiver because they have the most daily interaction with the child. While the child's caseworker and attorney ad litem are charged with representing to the court what is in the child's best interest as well as what the child desires,¹⁹⁶ courts have recognized that Texas's CPS workers have too demanding of caseloads to effectively do their jobs.¹⁹⁷ The average caseworker has over thirty cases to manage—more than twice the recommended number.¹⁹⁸

Providing daily care and interaction with the child puts foster parents in the unique position of being able to present the court with evidence that other parties to the litigation may not be able to. Of course, any party may call the

¹⁹⁴Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976). The court must also consider thirteen other statutorily-mandated factors when assessing the biological parent's willingness and ability to provide the child with a safe home environment. See TEX. FAM. CODE ANN. § 263.307(b).

¹⁹⁵This has repeatedly been recognized by Texas Appellate Courts. *In re N.L.G.*, 238 S.W.3d 828, 830 (Tex. App.—Fort Worth 2007, no pet.) (explaining that the intervention of a foster parent into ongoing CPS litigation “may enhance the trial court's ability to adjudicate the cause in the best interest of the child.”); *In re M.T.*, 21 S.W.3d 925, 927 (Tex. App.—Beaumont 2000, no pet.) (explaining that a relaxed standard to intervene via Section 102.004(b) is sound policy because “where a suit is already pending, concern for the privacy of the parties is subordinate to the overriding concern for the best interest of the children.”).

¹⁹⁶Child Protective Services Handbook § 5220, Texas Department of Family and Protective Services, https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_5200.asp#CPS_5220 (last updated Sept. 3, 2019); TEX. FAM. CODE ANN. § 107.003(a).

¹⁹⁷Robert T. Garrett, *Texas CPS Should Cut Caseloads in Half for Workers who Help Foster Kids, Advisers Tell Judge*, DALLAS MORNING NEWS (Nov. 4, 2016), <https://www.dallasnews.com/news/texas-legislature/2016/11/04/texas-cps-cut-caseloads-half-workers-help-foster-kids-special-masters-advise-federal-judge> [<https://perma.cc/75VE-H48R>].

¹⁹⁸*Id.*

foster parent to testify as a witness—thereby enabling the foster parents to present evidence to the court—but this puts the foster parents at the mercy of the other parties to the litigation. Unless foster parents are granted leave to intervene and become a party themselves, they have no independent ability to present their own testimony, call their own witness, or cross-examine other witnesses.

C. Foster parents and their remaining rights.

A survey of the Texas Family Code reveals the limited extent that a foster parent may currently become a party to a suit regarding their foster children. Foster parents have three ways to gain standing: (1) original standing to sue after caring for the foster child for twelve months;¹⁹⁹ (2) standing to intervene after caring for the foster child for twelve months and also showing “satisfactory proof” of parental unfitness;²⁰⁰ and (3) standing to request termination and adoption if they have “substantial past contact.”²⁰¹ However, these rights of a foster parent cannot properly be understood unless viewed in the context of the overall timeline for a CPS case.

As previously mentioned, a CPS case in Texas must be dismissed after twelve months.²⁰² The court may grant a one-time, six-month extension if the court finds that “extraordinary circumstances necessitate” an extension.²⁰³ Thus, absent extraordinary circumstances, a foster parent’s right to original standing and standing to intervene cannot mature because the Texas Family Code requires CPS litigation to be dismissed at the same twelve-month mark.

Therefore, the right to standing to request a simultaneous termination and adoption seems to be the one remaining avenue by which a foster parent can advocate for their foster child during the typical twelve-month timeline of a CPS case.²⁰⁴ Courts that have looked at Section 102.005(5) have recognized its similarity to the former Section 102.004(b) as they both applied a “substantial past contact” standard.²⁰⁵ Historically, Sections 102.005(3)–(5)

¹⁹⁹ TEX. FAM. CODE ANN. § 102.003(a)(12).

²⁰⁰ *Id.* at § 102.004; *see supra* section IV.A.

²⁰¹ TEX. FAM. CODE ANN. § 102.005.

²⁰² *Id.* at § 263.401(a); *see supra* section III.B.

²⁰³ TEX. FAM. CODE ANN. § 263.401(b).

²⁰⁴ *See* TEX. FAM. CODE ANN. § 102.005(5).

²⁰⁵ *In re* A.B., 412 S.W.3d 588, 608 (Tex. App.—Fort Worth 2013), *aff’d*, 437 S.W.3d 498 (Tex. 2014).

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have been used by foster parents and other caregivers to assert their interest in the child.²⁰⁶

Section 102.005 was not amended by the Legislature in 2017.²⁰⁷ It contains the same language that it did when it was previously used by foster parents to petition for simultaneous termination of parental right and adoption.²⁰⁸ It now seems possible—even likely—that foster parents will attempt to use Section 102.005 in greater frequency to gain standing. The implications of this possibility are unclear. In light of the 2017 amendment to Section 102.004, it is yet to be determined how a court will apply Section 102.005 to a foster parent’s petition to simultaneously terminate parental rights and adopt while a CPS SAPCR is ongoing.

VI. CONCLUSION

HB 1410 is one of the largest changes to the rights of Texas foster parents in the past four decades. While the expressed intent of the Texas Legislature was to expand the rights of foster parents to be involved in ongoing CPS litigation, it had the opposite effect. Now, foster parents like the Smiths have no opportunity to protect their interest when a distant relative surfaces at the eleventh hour. More importantly, foster children will not have the benefit of their primary caregiver advocating on their behalf when the circumstances may necessitate it. The Texas Legislature should recognize that this amendment to Section 102.004(b) is harming the court’s ability to determine what is in the best interest of the child. Ultimately, that harm is directly impacting the lives of many of Texas’s foster children like Alexis.

²⁰⁶ See *supra* note 95.

²⁰⁷ See TEX. FAM. CODE ANN. § 102.005.

²⁰⁸ See *supra* note 87.