

## BEST INTEREST OF THE CHILD PROPOSED CHANGES

### FACT SHEET

February 12, 2017

**Bill Title:** § 153.002 Best Interest of the Child

**Bill Number:** 85(R) SB 816

**Sponsor:** Sen. Donna Campbell MD

**Our Position:** Oppose pending reevaluation of amendments;

SB 816 would add additional wording to statute 153.002 which currently reads as follows: Sec. “The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.” This statute is found in chapter 153 of the Texas Family Code which deals with Conservatorship, Possession, and Access. It is a chapter that affects parents in a Suit Affecting the Parent-Child Relationship (SAPCR) between fit parents. A SAPCR suit is mandatory for parents of minor children who file for divorce.

While much of the new text in the proposed bill appears to improve conditions for parents it perpetuates presumptions that have been found to be unconstitutional, it provides vague criteria which judges will interpret to allow them to continue business as usual, and it provides no real procedural protections for the fundamental rights of parents or children.

- It continues the falsehood that parental rights are dependent upon the marriage and that filing a SAPCR deprives parents of their existing natural right to conservatorship, possession, and access to their own children.
- It continues the falsehood that parents can be classified in a manner to reduce constitutional guarantee based on nothing more than marital status.
- It continues the falsehood that children can be classified in a manner to reduce constitutional guarantees based on lawful choices made by their parents.
- It presumes that in SAPCR the right of parents to be presumed to be acting in their child’s best interest can be ignored.
- It presumes that unfitness can be determined outside the bounds established in statute 161.
- It provides no procedural protections for the fundamental rights of parents or children.
- It fails to define precisely what “adequate care” is and sets adequate care as a standard in SAPCR between fit parents that is not applied to other parents.
- It presumes that a judge in a SAPCR case can infringe constitutional guarantee of parent and/or child simply because the judge believes it to be in the child’s best interests.
- This bill allows a judge to enter a compromise order between that requested by either parent without any boundaries for that decision or any requirement for due process protection.

Section 153 comes into play primarily when a fit parent sues another fit parent for custody or possession. It does not come into play when the state seeks to take children from married parents. This bill seems to say that a judge in a SAPCR between fit parents can declare one of the parents unfit to be a parent but provides no definition of this term or any guidance for the judge to follow. This leaves the judge to make things up as they go.

Currently, the only place in the Family Code where a parent can be found to be unfit is Section 161. This section contains many specifically worded violations with which a parent may be charged as a basis for declaring them unfit or in other words to terminate their rights. These specifically worded violations are vitally important because the parent has to be charged with specific violations and the definitions provide a means for defending against unfair allegations. Section 153 provides no such protections and judges make up their own rules as they go.

Without a clear and narrowly defined definition for unfitness, the courts will continue to do as they please. Unless, the Legislature seriously adds these kinds of procedural protections for fit parents in SAPCR, you can be sure they are not in the least bit serious about making real changes to protect parents and children. This bill does add language that says unfitness means “that the parent does not adequately care for the parent’s child.” However, without any definition of the term “adequately care[s]” this phrase is too vague to benefit parents. From that perspective, unless more clarity is added, the reference to fitness appears to be nothing more than a subterfuge to make parents believe their rights are being protected when they are not. This language is likely to lead to parents being labeled as “unfit” without adequate procedural protections and will lead to more harm than good.

This language does demand an increased standard of evidence for determining unfitness, setting the bar at “clear and convincing.” Keeping this standard and adding sufficient clarity around the terms “fitness” and “adequately cares” could lead the center to raise its position on this bill to “support.”

This bill allows the judge to issue orders that conform with one fit parent’s wishes over the objection of the other fit parent’s wishes with no indication that the judge’s authority is limited by constitutional guarantees for either parent or the child. Currently, judges recognize few if any constitutional guarantees that may not be overridden by a statement that doing so is in the child’s best interest. This bill would continue those violations and does nothing at all to stop them.

(b)(3) of this bill allows the judge to enter compromise orders without any definitions or limitations on the term “compromise orders.” This leaves the judge to do just as they do today and issue any orders they choose. This section completely neuters (b)(1) which deals with fitness. So long as the judge can enter any compromise order they choose, the judge can simply ignore the unfitness requirement. Unless this section is fixed The Center cannot raise its position beyond “neutral” because the bill would likely effect little change to current practices.

This bill continues to allow judges to violate fundamental rights of parents and children at will. Nothing in the Texas Family Code statutes affecting SAPCR between fit parents acknowledges that the state may not infringe fundamental rights and constitutional guarantees of either the parents or the child. Texas judges presume that constitutional guarantees and limitations do not apply to them in SAPCR between fit parents and this bill will do nothing to convince them otherwise.

Texas judges believe they can infringe constitutional guarantees in SAPCR between fit parents, they say, because the Legislature authorizes them to do so. Unless the Texas Legislature clearly articulates that it is beyond their legislative authority to authorize any state actor to violate the constitution, state judges are likely to continue violating family rights.