

# BEST INTEREST

Using the *Holley* factors in child custody cases.

BY HON. DONALD DOWD

The presiding judge in a court of general jurisdiction is often called upon to decide family law cases involving the custody of children. In making these decisions, the judge has almost unbridled discretion because the Texas Family Code provides that the court is to consider the “best interest” of the children.<sup>1</sup> That decision can be extremely difficult in cases where there is little real difference between the litigants in terms of their suitability to raise children. Too often, judges merely witness battles of character assassination by the two competing parents, instead of receiving relevant information about which parent can really serve the best interests of the child.

A more convincing case can be made by comparing the abilities of the parents to meet the particular needs of the child based upon the child’s current age and development. In a study aimed at helping judges decide such cases, the American Bar Association recommends that a child’s development be a paramount consideration of the court.<sup>2</sup>

While the familiar “best interest of the child” test is to guide the court, the State Bar of Texas Pattern Jury Charges—Family and Probate Committee takes the position that “‘best interest of the child’ is not a legal term having a peculiar meaning unknown to the layperson,” and that “Texas case law has not developed a definition or list of factors that is more complete or enlightening than the phrase itself.”<sup>3</sup> However, in *Holley v. Adams*<sup>4</sup>—a case involving termination of parental rights—the Texas Supreme Court listed factors a judge should consider when deciding the “best interest” test.

Many Texas courts have held that the *Holley* factors should also be applied in ordinary child custody matters in addition to those involving termination,<sup>5</sup> and from anecdotal evidence in those cases, it appears that many trial judges use the factors to judge best interest custody cases. Viewed from the standpoint of the trial judge, applying the *Holley* factors may not be that helpful in a case where each parent is a suitable choice to have primary custody.

To illustrate the difficulty for the court in applying the *Holley* factors, assume the following hypothetical: In a pending divorce, a wife and mother is a registered nurse working a 9 a.m. to 6 p.m. shift, and the husband and father is a peace officer working a similar shift for the city. Neither parent has ever engaged in any harmful or illegal activities nor has a substance abuse issue. They have a 2-year-old boy, a 13-year-old girl who has signed an affidavit stating that she wants to reside with her mother, and a 16-year-old boy who has signed an affidavit stating that he wants to reside

with his father. The court agrees to interview both teens in chambers.

Assume the court will consider the nine factors outlined in *Holley*. Given the facts shown in the hypothetical, what kind of evidence is the court looking for in order to give due consideration to the requirements?

The first *Holley* factor requires the court to consider the desires of the child. In this case, the two older children want to reside with separate parents and the youngest child is too young to make a choice. Deciding the case solely based on this factor will separate the teens and will not determine custody of the toddler.

The American Bar Association suggests the second factor—the physical and emotional needs of the child now and in the future—should be paramount in the court’s decision but is sometimes neglected by counsel in the presentation of the evidence.

The third factor—any emotional and physical danger to the child now and in the future—is not usually present in these types of cases.

The fourth factor—the parental ability of the individual seeking custody—can be satisfied by showing the parent’s understanding and involvement with the child’s developmental needs.

The fifth factor—programs available to assist the parent and the children—can be used in evidence to emphasize those programs available to meet developmental needs.

The sixth factor—the plans for the child by the parent seeking custody—and the seventh—the stability of the home for proposed placement—are also not usually an issue in these types of cases.

The eighth and ninth factors—acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one and any excuse of the acts or omissions of the parent—are also not likely to be issues.

Without being provided more information concerning the second *Holley* factor, the trial court is left with little evidence to distinguish between the abilities of each parent to meet those needs.

The American Bar Association’s *A Judge’s Guide: Making Child-Centered Decisions in Custody Cases*<sup>6</sup> suggests that the court should seek answers to relevant questions about which parent can best meet the developmental needs of the child. Depending on the child’s age, the guide suggests that the court would benefit from the attorney asking his or her client at least some of the following questions:

### Infant (birth to 18 months)<sup>7</sup>

1. How can the parent respond to the child's needs in eating, sleeping, and bathing?
2. Is the parent aware of things that could endanger an infant?
3. Has the parent shown capability in supplying basic needs?
4. How is a parent's physical and psychological health?
5. Does a parent have a substance abuse issue or medical problem? If so, has the issue been addressed?

### Toddler (18 months to 5 years)<sup>8</sup>

1. What kinds of learning opportunities does the parent create for the child to master both physical and mental tasks, including language development?
2. If the parent is working, are day care arrangements carefully selected and monitored to ensure that a safe and stimulating environment is provided for the child?
3. Does the parent provide sufficient opportunities for the child to socialize with other children and supervise these activities in order to ensure safety?
4. Does the parent set expectations and rules that promote self-control and safety?
5. How does each parent support the child's relationship with the other parent?

### Early Elementary School-Aged Child (5 to 7 years)<sup>9</sup>

1. How is the parent involved in the child's community, school, and religious activities?
2. Does the parent provide the child with time and a place to do homework, as well as provide assistance when needed?
3. Does the parent communicate with teachers, coaches, and leaders?
4. How does the parent handle academic difficulties that may require assessment, intervention, financial resources, and individual help?
5. Knowing a child of this age experiences loyalty conflicts, does the parent assure the child of a loving relationship with the other parent?

### Older Elementary School-Aged Child (8 to 10 years)<sup>10</sup>

1. How does the parent encourage the child's need for productivity and self-reliance by supporting and facilitating involvement in activities?
2. Does the parent seem to recognize the importance of peer friendships and foster these relationships?
3. Is the parent aware of the child's academic progress, mastery of material, completion of homework, and any behavioral difficulties in school?
4. How does the parent minimize loyalty conflicts or prevent the child from feeling compelled to take sides?
5. Does the parent avoid dwelling on financial or legal concerns with the child or within the child's earshot?

### Middle School-Aged Child (11 to 13 years)<sup>11</sup>

1. Is the parent able to contain hostility and negative discussion

about the separation in the presence of the child?

2. Does the parent recognize the younger adolescent's sensitivity to criticism at this stage of self-doubt?
3. How flexible and supportive is the parent of peer relationships and activities?
4. How does the parent help the child remain organized and have a predictable study area and time, particularly between households?
5. Does the parent know the younger adolescent's friends and their parents?

### Adolescent or High School-Aged Child (14 to 18 years)<sup>12</sup>

1. Does the parent support the adolescent's participation in age appropriate activities, including financial, transportation, and psychological support?
2. Does the parent attend events that the adolescent wants the parent to attend?
3. How well informed is the parent of the adolescent's school attendance, standardized and special testing, and history of report cards?
4. Does the parent help the adolescent evaluate and assess decisions about the adolescent's future and help the child plan financially?
5. How does the parent discuss sexuality, healthy relationships, and other factors that may impact the adolescent, such as substance abuse, sexually transmitted diseases, and gangs?

Depending upon the age of the child, the attorney who gives the judge the answers to these questions in close cases such as these may give the client the slight edge needed to win the case.

To read the additional questions provided in the guide for each age group, go to [americanbar.org/content/dam/aba/images/probono\\_public\\_service/ts/judges\\_guide.pdf](http://americanbar.org/content/dam/aba/images/probono_public_service/ts/judges_guide.pdf). **TBJ**

### Notes

1. Tex. Fam. Code Sec. 153.002.
2. *A Judge's Guide: Making Child-Centered Decisions in Custody Cases*, American Bar Association, 2008 (used with permission).
3. See Comments to *State Bar of Texas Pattern Jury Charges—Family and Probate*, Sec. 215.1.
4. 544 S.W.2d. 367 (Tex. 1976).
5. See e.g., *Patterson v. Brist*, 236 S.W. 3d. 238, (Tex. App.—Houston [1st Dist.] 2006), review dism'd.
6. *A Judge's Guide*, *supra* at p. 50.
7. *Id.*
8. *Id.* at p. 55.
9. *Id.* at p. 59.
10. *Id.* at p. 64.
11. *Id.* at p. 69.
12. *Id.* at p. 73.



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