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## Family Law - The Wrong Side of the Coin - Policy, Permanency and the Problem of Legal Orphans in Wyoming: In re A.D., D.D., K.D. v. Wyoming Department of Family Services, 151 P.3d 1102 (Wyo. 2007)

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## CASE NOTE

### FAMILY LAW—The Wrong Side of the Coin—Policy, Permanency and the Problem of Legal Orphans in Wyoming: *In re A.D., D.D., K.D. v. Wyoming Department of Family Services*, 151 P.3d 1102 (Wyo. 2007).

*Megan K. Holbrook\**

#### INTRODUCTION

In January of 2003, the Department of Family Services (DFS) removed C.L. and C.D.'s three minor children, D.D., K.D., and A.D. from their care.<sup>1</sup> DFS removed the children based on allegations of physical abuse by their father and neglect.<sup>2</sup> Upon inspection, DFS also found the home in a filthy and unsafe condition.<sup>3</sup> Both the mother and father admitted to neglecting their children, and the District Court of Platte County adjudicated the case accordingly, removing the children from the home.<sup>4</sup> In July of 2003, DFS returned the three children to the care of their biological parents for a trial home placement.<sup>5</sup> This attempt to reunify the family ended two months later.<sup>6</sup> DFS, once again, removed the children from their parents, based upon new allegations of physical abuse and neglect.<sup>7</sup> Following the second removal, the children remained in DFS' custody and did not return to their biological parents' care.<sup>8</sup>

After DFS took custody of their children, the parents became uncooperative.<sup>9</sup> The children's mother acted openly hostile towards the caseworker assigned to their family.<sup>10</sup> The parents also neglected to maintain consistent employment, support their children, or keep a suitable home.<sup>11</sup> The children's father was incarcerated during the children's stay in foster care.<sup>12</sup> Thus, DFS attempted to assist the children's mother with the goal of reuniting them with their mother

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<sup>1</sup> AD, DD, KD v. Wyo. Dep't. of Family Servs., 151 P.3d 1102,1103 (2007).

<sup>2</sup> *Id.* Only the father was found to have physically abused the children. *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 1104.

<sup>5</sup> *Id.*

<sup>6</sup> AD, 151 P.3d at 1104.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> AD, 151 P.3d at 1104.

<sup>12</sup> *Id.*

permanently.<sup>13</sup> The mother, however, did not comply with DFS' requirements, and in July of 2004 DFS filed a petition to terminate both parents' parental rights, citing a lack of progress in reunifying the family.<sup>14</sup>

The Platte County District Court held an initial hearing on the termination petition in the spring of 2005.<sup>15</sup> At this hearing, the court terminated the father's rights.<sup>16</sup> Nevertheless, the court ruled that DFS had not shown, by clear and convincing evidence, that placing the children in their mother's care seriously jeopardized their health and safety.<sup>17</sup> Further, the court determined that DFS did not carry its burden by proving that the mother was unfit to have custody of her children.<sup>18</sup> The district court, therefore, ordered a hearing continuation in six months.<sup>19</sup> The court also required DFS to retain custody of the children while making additional efforts to rehabilitate their mother.<sup>20</sup> The court told the mother she had one final chance to meet DFS' reunification requirements, and ordered her to cooperate fully with DFS.<sup>21</sup>

Subsequently, DFS and the mother agreed to a case plan.<sup>22</sup> The plan outlined several objectives and tasks for the mother, including that she achieve emotional stability, provide for her children, maintain a stable and safe home environment, live a drug- and alcohol-free lifestyle, attend weekly visitations with her children, and arrange telephone visits with them.<sup>23</sup> In November of 2005, the district court held a second hearing to consider DFS' termination petition.<sup>24</sup> The evidence presented at this hearing established that the mother performed many of the tasks set forth in the case plan.<sup>25</sup> Nevertheless, because she had changed residences three times and changed jobs once, her therapist, the children's therapist, and the DFS caseworker testified that she had not demonstrated a sufficiently stable lifestyle to regain custody of her children.<sup>26</sup> As a result, none of them recommended

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *AD*, 151 P.3d at 1104.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *AD*, 151 P.3d at 1104.

<sup>22</sup> *Id.* A case plan lays out goals for a parent to complete to be better equipped to care for his or her children; such as living a drug and alcohol free lifestyle, attending therapy sessions, finding suitable housing, finding steady employment, etc. *Id.*

<sup>23</sup> *Id.* at 1105.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *AD*, 151 P.3d at 1105.

reunification.<sup>27</sup> The district court terminated the mother's parental rights at this hearing, reasoning that the children needed permanency in their lives and the extended period of foster care did nothing to advance this goal.<sup>28</sup> Following the district court's decision, the mother filed an appeal with the Wyoming Supreme Court.<sup>29</sup>

When the Wyoming Supreme Court reviewed the case in February 2007, the three children were already adolescents at fourteen, thirteen and ten years old.<sup>30</sup> The Wyoming Supreme Court emphasized that the right to associate with one's family is fundamental, and therefore the courts must strictly scrutinize petitions to terminate a parent's rights to his or her children.<sup>31</sup> Because of this fundamental right, an agency, such as DFS, must present clear and convincing evidence to warrant a termination of parental rights.<sup>32</sup> The district court, in its ruling, found clear and convincing evidence to terminate the mother's parental rights.<sup>33</sup> Wyoming statutory provisions state the court may terminate the parent-child legal relationship if clear and convincing evidence establishes the child's parent has abused or neglected the child, reasonable efforts by an authorized agency or mental health professional have been unsuccessful in rehabilitating the family, and the child's health and safety are in jeopardy if he or she remains with or returns to the parent.<sup>34</sup> Additionally, the court may terminate the parent-child legal relationship if the state of Wyoming has cared for the child or children in question for fifteen of the most recent twenty-two months, and there is a showing that the parent is unfit to have custody and control of the child.<sup>35</sup> After a review of the district court's decision, the Wyoming Supreme Court affirmed and granted DFS' petition by permanently terminating CL's parental rights.<sup>36</sup>

This case note looks to relevant case law and statutory history in Wyoming to describe the current approach to termination of parental rights.<sup>37</sup> Then, this

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1112 (Hill, J., dissenting).

<sup>31</sup> *AD*, 151 P.3d at 1105 (quoting *SLB v. JEO*, 136 P.3d 797, 799-800 (Wyo. 2006) (quoting *SLJ v. Dep't of Family Servs.*, 104 P.3d 74, 79-80 (Wyo. 2005))).

<sup>32</sup> *AD*, 151 P.3d at 1105 (citing *SLJ v. Dep't. of Family Servs.*, 104 P.3d 74, 79-80 (Wyo. 2005)). Clear and convincing evidence denotes proof that would persuade a trier of fact that the contention's truth is highly probable. *Id.*

<sup>33</sup> See *AD*, 151 P.3d at 1105. The district court made its decision pursuant to the provisions in WYO. STAT. ANN. §§ 14-2-309(a)(iii), (v) (2007). *Id.*

<sup>34</sup> WYO. STAT. ANN. § 14-2-309(a)(iii) (2007).

<sup>35</sup> *Id.* at § 14-2-309(a)(v).

<sup>36</sup> *AD*, 151 P.3d at 1103.

<sup>37</sup> See *infra* notes 43-104 and accompanying text for a discussion on Wyoming case law and statutory history regarding termination of parental rights.

note offers an analysis of the court's ruling in *In re AD*.<sup>38</sup> It also examines other jurisdictions' statutory requirements in termination of parental rights proceedings, and analyzes the differences between those jurisdictions' termination statutes and Wyoming's current statute.<sup>39</sup> This note also considers the problems that arise in Wyoming regarding the court's reliance on case plans, which are not currently required by Wyoming's termination statute.<sup>40</sup> From there, this note examines the problem of legal orphans.<sup>41</sup> Finally, this note advances suggestions as to how Wyoming courts and family services can work to improve the role the court plays in deciding the fate of older children who are left in the custody of the state after termination of parental rights.<sup>42</sup>

### BACKGROUND

Prior to 1955, no statutes existed in Wyoming that conferred power on the courts to sever the legal parent-child relationship.<sup>43</sup> Not until the late 1950s did the Wyoming Legislature enact the first statute to give a court this power.<sup>44</sup> At the time, this was a progressive piece of legislation.<sup>45</sup> Wyoming was one of few states to enact such a law.<sup>46</sup> Before the statute's existence, there was neither common law nor statutory law allowing the state or petitioners in adoption proceedings to obtain permanent custody of an abused or neglected child without first getting the consent of the biological parents.<sup>47</sup> Wyoming's new law provided for a possible severance of all parental rights when an unfit parent's behavior threatened a child's welfare.<sup>48</sup>

The Wyoming Supreme Court decided the first case concerning the new termination statute in 1967.<sup>49</sup> The county attorney of Sheridan County filed a

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<sup>38</sup> See *infra* notes 105–125 and accompanying text for a discussion of the Wyoming Supreme Court's ruling in *In re AD*.

<sup>39</sup> See *infra* notes 133–160 and accompanying text for an analysis of Wyoming's statutory requirements regarding termination of parental rights.

<sup>40</sup> See *infra* notes 161–178 and accompanying text for a discussion of the Wyoming Supreme Court's reliance on the case plan.

<sup>41</sup> See *infra* notes 217–249 for a discussion of legal orphans.

<sup>42</sup> See *infra* notes 250–269.

<sup>43</sup> Sidney L. Moller, Note, *Termination of Parental Rights: Establishing Standards for the Wyoming Law*: In the Matter of Parental Rights to X, Y and Z, DS v. Dept. of Public Assistance & Social Services, 16 LAND & WATER L. REV. 295, 296-97 (1981).

<sup>44</sup> WYO. COMP. STAT. § 58-701 (Supp. 1957).

<sup>45</sup> Robert A. Hufsmith, Note, *Termination of Parental Rights*, 13 WYO. L. J. 185, 185 (1958).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 186.

<sup>48</sup> *Id.*

<sup>49</sup> *In re Shreve*, 432 P.2d 271 (Wyo. 1967).

petition to terminate Dona Shreve's parental rights to her five children.<sup>50</sup> The county attorney alleged that Dona Shreve was unfit to have care and control of her children because she abused and neglected them.<sup>51</sup> As petitioner, the county attorney asked the court to terminate the mother's rights, and to find a suitable permanent guardian for the children.<sup>52</sup> The trial court terminated the mother's rights citing neglect, and named the Sheridan County Department of Public Welfare as the children's guardian.<sup>53</sup> Shreve appealed, arguing that the State's evidence against her was insufficient to support the trial court's decision to terminate her rights.<sup>54</sup> Ultimately, the Wyoming Supreme Court simply relied on the lower court's assertions, and ruled the mother neglected her children.<sup>55</sup> Thus, the Supreme Court affirmed the lower court's decision.<sup>56</sup>

The second case that the state supreme court decided based on the statute's provisions occurred in 1976.<sup>57</sup> The case involved the deputy county and prosecuting attorney, who petitioned to terminate the parental rights of mentally retarded parents of an infant child.<sup>58</sup> At the first hearing, the district court found the parents to be unfit because they unintentionally neglected their baby.<sup>59</sup> The trial court also found the parents unable to comprehend the situation and their actions.<sup>60</sup> Because of the parents' mental inability to understand, the court determined the neglect would likely continue.<sup>61</sup> The court ultimately ruled that the child's welfare took precedence over the parents' rights and terminated the parental rights.<sup>62</sup>

On appeal, the parents noted that the burden of proof lies with the State in a termination of parental rights proceeding.<sup>63</sup> This burden, they argued, should be one of clear and satisfactory evidence.<sup>64</sup> The parents argued that the State did

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<sup>50</sup> *Id.* at 271-72.

<sup>51</sup> *Id.* at 272.

<sup>52</sup> *Id.* Shreve's sister-in-law, brother-in-law, and mother all filed offers to accept custody of the children. *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Shreve*, 432 P.2d at 272.

<sup>55</sup> *Id.* at 272-73.

<sup>56</sup> *Id.* at 273.

<sup>57</sup> *In re CM*, 556 P.2d 514 (Wyo. 1976).

<sup>58</sup> *Id.* at 515.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *CM*, 556 P.2d at 515.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 516.

<sup>64</sup> *Id.*

not carry that burden, and the court should adjust the standard of proof to one of clear and convincing evidence.<sup>65</sup> The Wyoming Supreme Court noted the statute's silence as to the burden of proof, but dismissed the parents' contention that the court should designate the burden as "clear and convincing" or "clear and satisfactory" instead of a "preponderance of the evidence."<sup>66</sup> Ultimately, the supreme court found no error in the lower court's ruling, and upheld its decision to terminate parental rights.<sup>67</sup>

Two years later, the Wyoming Supreme Court handed down a landmark decision that addressed evidentiary standards, the importance of strict scrutiny in termination of parental rights proceedings, and the policy of finding permanency for the children involved in such proceedings.<sup>68</sup> The Sheridan County Attorney petitioned the Sheridan County District Court to terminate the parental rights of mother to a three-year-old child, X, based on allegations of neglect.<sup>69</sup> The county attorney also petitioned the court to terminate the mother's rights to her twin children Y and Z.<sup>70</sup> The district court awarded custody of all three children to the State Department of Public Assistance and Social Services, and stated that it would review its decision within one year.<sup>71</sup>

One year later, the mother requested that the district court review its prior decision.<sup>72</sup> The court granted this request, and, upon that review, the court permanently terminated the mother's parental rights.<sup>73</sup> The mother appealed the district court's decision to the Wyoming Supreme Court.<sup>74</sup> She set out to prove that her situation had changed for the better.<sup>75</sup> She also claimed the State could not, and had not shown she had neglected X, and that she was fit to care for her child.<sup>76</sup> The mother's main contention on appeal was that the evidence presented

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<sup>65</sup> *Id.* By raising the evidentiary standard to "clear and convincing," the court acknowledged that parents have a fundamental right to raise their own children and therefore made it harder to terminate parental rights without strong evidence that the child would be endangered by staying with his or her natural parents. *Id.*

<sup>66</sup> *CM*, 556 P.2d at 518.

<sup>67</sup> *Id.* at 519.

<sup>68</sup> *In re X, Y and Z*, 607 P.2d 911 (Wyo. 1980).

<sup>69</sup> *Id.* at 913.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 914.

<sup>72</sup> *Id.*

<sup>73</sup> *X*, 607 P.2d at 914.

<sup>74</sup> *Id.* Y and Z had serious health issues, and the mother chose not to seek reconsideration of the court's decision regarding them. *Id.*

<sup>75</sup> *Id.* at 920-22.

<sup>76</sup> *Id.*

at the original trial was not sufficient to justify the district court's termination of her rights.<sup>77</sup>

The Wyoming Supreme Court noted that in *In re C.M.* and *In re Shreve*, the plaintiffs raised the issue of the evidentiary standard courts should use when parents are accused of abuse or neglect.<sup>78</sup> In both cases, the court declined to define the standard.<sup>79</sup> The fact that the legislature failed to define the terms "neglect" and "abuse" disturbed the court.<sup>80</sup> Thus, the court decided to establish standards to guide courts in future decisions regarding claims of parental abuse or neglect.<sup>81</sup>

The court determined that it must always apply the most rigorous scrutiny possible in reviewing claims to terminate parental rights.<sup>82</sup> The court further acknowledged parents' fundamental right to raise their own children.<sup>83</sup> Thus, a court must only make the decision to terminate parental rights when there is clear and unequivocal evidence, established by close scrutiny that a child's well-being is in jeopardy because of a parent's neglect or abuse.<sup>84</sup> Ultimately, the court reversed the lower court's decision and returned X to his mother's custody.<sup>85</sup> In reviewing the evidence presented at trial, the court made a distinction between an occasionally messy home and an excessively and continuously unkempt home that creates fire and sanitary risks.<sup>86</sup> The court also emphasized that most parents fall short of perfection in many ways when it comes to raising their children.<sup>87</sup> Thus, the court noted, the issue was not whether foster parents could do a better job than the natural parents, but whether the natural parent has actually neglected a child to the extent that would justify separating parent and child permanently.<sup>88</sup>

Following its determination that clear and convincing evidence is appropriate in termination proceedings, the Supreme Court reprimanded the lower court's actions.<sup>89</sup> The court criticized the lower court for taking the child away from his mother while allowing reconsideration a year later, and ruled that the statute does

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<sup>77</sup> X, 607 P.2d at 914.

<sup>78</sup> *Id.* at 917.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> X, 607 P.2d at 918.

<sup>83</sup> *Id.* at 919.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 923.

<sup>86</sup> *Id.* at 922.

<sup>87</sup> X, 607 P.2d at 922.

<sup>88</sup> *Id.*

<sup>89</sup> *See id.* at 921-22.



not allow a judge to keep a child's future uncertain.<sup>90</sup> The supreme court also admonished the district court for forcing X to adjust to two different foster care homes while his mother waited for reconsideration.<sup>91</sup> By making a non-decision, amounting to a temporary order concerning the child's fate, the lower court not only prevented X from living with his mother, but also effectively prevented X's possible adoption.<sup>92</sup>

In 1981, the Wyoming Legislature repealed the then-existing termination of parental-rights statute, and replaced it with the current statute.<sup>93</sup> This current statutory version essentially codified the *In re X* decision.<sup>94</sup> In response to the holding in that case, the new statute explicitly provided specific definitions for abuse and neglect.<sup>95</sup> The new statute also set the standard of proof required for termination.<sup>96</sup> The earlier statute did not specify the standard of proof in termination cases, leaving courts with the burden to decide the standard of proof to accept in each case.<sup>97</sup>

The new statute explicitly requires "clear and convincing" proof that a child's health and well-being are in jeopardy by remaining with the natural parents in order to terminate a parent's rights.<sup>98</sup> The new standard eliminates the court's need to determine the standard of proof on a case-by-case basis, but does not go so far as to require proof beyond a reasonable doubt.<sup>99</sup> The statute also adopted the *In re X* court's emphasis on parental rights by omitting language referring to "best interests of the child."<sup>100</sup> Even if someone else does a better job raising the child in question, this is not reason enough to remove him or her from the child's natural parents.<sup>101</sup> Rather, according to the statute, the child must be in a situation dangerous enough to jeopardize his or her well-being before the court may take the child away from his or her parents permanently.<sup>102</sup> Thus, the Wyoming courts and

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<sup>90</sup> *Id.* at 916.

<sup>91</sup> *Id.*

<sup>92</sup> *X*, 607 P.2d at 916.

<sup>93</sup> WYO. STAT. ANN. § 14-2-309 (2007). The current version of the statute specifically requires an evidentiary standard of clear and convincing evidence in termination cases. *Id.*

<sup>94</sup> See Becky Klempt, Comment, *Family Law—Wyoming's New Termination of Parental Rights Statute*, 17 LAND & WATER L. REV. 621, 622 (1982).

<sup>95</sup> *Id.* at 623-24 (explaining the new statute cross-references to another section of Title 14, where the definitions are found). This eliminates the need for courts to speculate as to the legislature's intent concerning these definitions. *Id.*

<sup>96</sup> *Id.* at 624.

<sup>97</sup> *Id.*

<sup>98</sup> WYO. STAT. ANN. § 14-2-309(a) (2007).

<sup>99</sup> Klempt, *supra* note 94, at 624-25.

<sup>100</sup> *Id.* at 627.

<sup>101</sup> *Id.* at 626.

<sup>102</sup> WYO. STAT. ANN. § 14-2-309(a)(iii) (2007).

legislature followed the United States Supreme Court's holding that the parents' right to raise their own children, free from State interference, is fundamental.<sup>103</sup> The court will separate children from their natural parents only if their continued health and well-being is actually in serious jeopardy from the parents' actions.<sup>104</sup>

#### PRINCIPAL CASE

After its review of the district court's ruling, the Wyoming Supreme Court handed down the *In re AD* decision in February of 2007.<sup>105</sup> Justice Kite wrote the majority opinion, joined by Justices Voigt and Burke.<sup>106</sup> Justice Hill filed a dissenting opinion which Justice Golden joined.<sup>107</sup> C.L., the mother and petitioner, asked the Wyoming Supreme Court to reverse the decision made by the Platte County District Court to terminate her parental rights to her three children.<sup>108</sup> C.L. argued primarily that the evidence presented by DFS was insufficient to separate her permanently from her children.<sup>109</sup> The Wyoming Supreme Court's opinion began with a statement of recognition that the right to associate with one's family is a fundamental one, and that the court is bound to apply nothing short of the strictest, most rigorous scrutiny to the evidence when deciding a termination of parental rights case.<sup>110</sup> In its opinion, the Wyoming Supreme Court examined the evidence pertaining to the mother's fitness and the evidence concerning the health and safety of the children as interrelated.<sup>111</sup>

The mother argued the district court erred by failing to recognize her compliance with the case plan, and the court should have measured her fitness to care for her children by her situation at the time of the second hearing.<sup>112</sup> She complied with almost all of the objectives set forth in the case plan, and had made significant efforts to rehabilitate herself.<sup>113</sup> Nevertheless, the Wyoming Supreme Court ultimately decided the district court's ruling promoted the children's interest in a safe and stable home, outweighing the mother's rights as a parent.<sup>114</sup>

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<sup>103</sup> *X*, 607 P.2d at 918, (citing *Stanley v. Illinois*, 405 U.S. 645 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

<sup>104</sup> *X*, 607 P.2d at 919.

<sup>105</sup> *AD, DD, KD v. Wyo. Dep't. of Family Servs.*, 151 P.3d 1102,1103 (2007).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1110.

<sup>108</sup> *Id.* at 1105.

<sup>109</sup> *Id.* at 1106.

<sup>110</sup> *AD*, 151 P.3d at 1106; *see also SLB*, 136 P.3d at 799-800; *TF v. Dep't of Family Servs.*, 120 P.3d 992, 1000 (Wyo. 2005).

<sup>111</sup> *AD*, 151 P.3d at 1106.

<sup>112</sup> *Id.* at 1108.

<sup>113</sup> *Id.* at 1108-10.

<sup>114</sup> *Id.* at 1110.

In his dissent, Justice Hill focused on the fact that the record did not contain clear and convincing evidence justifying termination of the mother's parental rights.<sup>115</sup> Justice Hill's dissent reasoned the mother complied as well as the court could reasonably have expected.<sup>116</sup> The dissent also noted that many of the mother's failings with respect to the case plan were completely reasonable.<sup>117</sup> The Wyoming Supreme Court's majority opinion faulted her for losing one of her part-time jobs, but she lost it because she left work to avoid missing a visit with her children.<sup>118</sup> The case plan also required her to maintain full-time employment so she could support her children, but again the court criticized her because her full-time employment status would prevent her from spending time with her children.<sup>119</sup> She progressed enough in her work with a therapist to only need sessions twice a month.<sup>120</sup> Nevertheless, the court chastised her for not seeing the therapist every week.<sup>121</sup>

Thus, as the dissent pointed out, the court based its conclusion that the mother was unfit only on evidence of those minor, reasonable failings.<sup>122</sup> The dissent also noted the district court and DFS took the position that any hint of failure to live up with the case plan after six months would result in the termination of the mother's parental rights.<sup>123</sup> Additionally, DFS took the stance that if the children ended up back with their mother, it would refuse to continue to work with the family.<sup>124</sup> In conclusion, the dissent argued that the majority refused to consider the totality of the mother's circumstances in ruling on her case.<sup>125</sup>

#### ANALYSIS

The Wyoming Supreme Court erred by upholding the lower court's decision to terminate C.L.'s parental rights.<sup>126</sup> Instead, it should have returned the children

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<sup>115</sup> *Id.* (Hill, J., dissenting).

<sup>116</sup> *AD*, 151 P.3d at 1111 (Hill, J., dissenting). At the time of the first petition to terminate both the father's and the mother's rights, the district court found there was not sufficient evidence to support terminating the mother's rights, nor was there evidence that living with her would jeopardize her children. *Id.* Following the court's determination that she neglected her children, it ordered DFS to continue rehabilitation efforts with the mother. *Id.* While the mother was not able to comply 100% with the case plan, the court conceded that her efforts were, to a vast extent, successful. *Id.*

<sup>117</sup> *Id.* at 1111-12 (Hill, J., dissenting).

<sup>118</sup> *Id.* at 1111 (Hill, J., dissenting).

<sup>119</sup> *Id.* (Hill, J., dissenting).

<sup>120</sup> *Id.* at 1111-12. (Hill, J., dissenting). This was according to the therapist herself. *Id.*

<sup>121</sup> *AD*, 151 P.3d at 1111-12 (Hill, J., dissenting).

<sup>122</sup> *Id.* at 1112 (Hill, J., dissenting).

<sup>123</sup> *Id.* (Hill, J., dissenting).

<sup>124</sup> *Id.* (Hill, J., dissenting).

<sup>125</sup> *See id.* at 1111-12 (Hill, J., dissenting).

<sup>126</sup> *See AD*, 151 P.3d. at 1110.

to their mother's care, with continued support and resources from DFS.<sup>127</sup> This would ideally result in the family's successful reunification and rehabilitation, and promote the family's long-term solidity.<sup>128</sup> The analysis examines the specific role of DFS and multi-disciplinary teams in termination proceedings.<sup>129</sup> It focuses on the current statute governing termination of parental rights in Wyoming, then looks closely at the court's consideration of the case plan and the obstacles the mother faced in attempting full compliance with its terms.<sup>130</sup> The analysis then looks to Wyoming's lack of adherence to the requirements of the Adoption and Safe Families Act (ASFA), and the problem of judicially created orphans as a result.<sup>131</sup> Finally, it examines permanency planning, especially for older children, in termination proceedings, in other jurisdictions, and advance suggestions as to how Wyoming may follow such examples to improve the lot of older children and adolescents whose parents' rights are legally terminated.<sup>132</sup>

### *Department of Family Services and Multi-Disciplinary Teams*

In Wyoming, statutes govern the Department of Family Services and its role in termination of parental rights proceedings.<sup>133</sup> As the state youth services authority, the law charges DFS with the responsibility to "work with children and families in order to encourage the resolution of intrafamily problems through counseling and other services."<sup>134</sup> According to the statute, DFS shall "work on reuniting youth with their families in cases where the child has been placed out of the home and where additional work needs to be done in order for the youth to be reintegrated into the family."<sup>135</sup>

Despite the authority DFS possesses that allows it to intervene in families, DFS social workers do not recommend or control placement decisions concerning children in termination proceedings.<sup>136</sup> Instead, according to another Wyoming statute, the court must appoint a multi-disciplinary team (MDT) to make recommendations in child-protection cases, including termination of

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<sup>127</sup> *Id.* at 1112 (Hill, J., dissenting).

<sup>128</sup> *Id.* (Hill, J., dissenting).

<sup>129</sup> See *infra* notes 133-143 for a discussion of DFS and MDTs in termination proceedings.

<sup>130</sup> See *infra* notes 144-160 for an analysis of Wyoming's statute governing termination of parental rights.

<sup>131</sup> See *infra* notes 179-249, discussing Wyoming's lack of adherence to ASFA and an analysis of the problem of legal orphans created by terminations.

<sup>132</sup> See *infra* notes 250-269 for a discussion of more successful procedures in other jurisdictions and how Wyoming can move forward.

<sup>133</sup> WYO. STAT. ANN. § 9-2-2101 (2007). This statute defines DFS' duties and responsibilities.

<sup>134</sup> WYO. STAT. ANN. § 9-2-2101(e)(ii) (2007).

<sup>135</sup> WYO. STAT. ANN. § 9-2-2101 (e)(iii) (2007).

<sup>136</sup> Tony Lewis, *The State's Challenge For Children in Custody*, 24-DEC WYO. LAW. 24, 24 (2001).

parental rights proceedings.<sup>137</sup> By and large, the courts tend to follow MDT's recommendations concerning a child's long-term placement.<sup>138</sup> The MDT does not have the authority to terminate parental rights, but instead makes a recommendation to the court regarding the child's case.<sup>139</sup> Along with its recommendations, the MDT must also submit a case plan for the child and family in question.<sup>140</sup> If the MDT recommends termination of parental rights, then the court may order DFS to begin termination proceedings.<sup>141</sup> Failure to put together an MDT to make a recommendation may result in the court refusing to terminate parental rights.<sup>142</sup> DFS' own analysis of whether this current process is effective indicates that there is a lack of consistent standards statewide, and that there is a need to develop consistent operation and standards for MDTs.<sup>143</sup>

### *Statutory Provisions*

The court erred in considering the case plan that DFS submitted in its ultimate ruling regarding C.L.'s children, and failed to properly adhere to the provisions of Wyoming Statute §14-2-309, which governs termination of parental rights.<sup>144</sup> The statute makes no specific mention of case plans nor does it explicitly require

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<sup>137</sup> WYO. STAT. ANN. § 14-3-427(b) (2007). The MDT must include the child's parent, parents, or guardian, a representative of the school district who has direct knowledge of the child, a representative from DFS, the child's mental health professional if one exists, the district attorney, the child's attorney or guardian ad litem, a volunteer lay advocate if appointed by the court, and the foster parent. *Id.* at § 14-3-427(c).

<sup>138</sup> Lewis, *supra* note 136, at 24-25.

<sup>139</sup> See *In re* HB, 93 P.3d 982, 982 (Wyo. 2004).

<sup>140</sup> WYO. STAT. ANN. § 14-3-427(n) (2007).

<sup>141</sup> See Lewis, *supra* note 136, at 24-25.

<sup>142</sup> See *In re* FM, 163 P.3d 844, 844 (Wyo. 2007).

<sup>143</sup> Lewis, *supra* note 136, at 24-25.

<sup>144</sup> WYO. STAT. ANN. § 14-2-309 (2007). This statute states:

(a) The parent-child legal relationship may be terminated if any one (1) or more of the following facts is established by clear and convincing evidence:

(i) The child has been left in the care of another person without provision for the child's support and without communication from the absent parent for a period of at least one (1) year. In making the above determination, the court may disregard occasional contributions, or incidental contacts and communications;

(ii) The child has been abandoned with no means of identification for at least three (3) months and efforts to locate the parent have been unsuccessful;

(iii) The child has been abused or neglected by the parent and reasonable efforts by an authorized agency or mental health professional have been unsuccessful in rehabilitating the family or the family has refused rehabilitative treatment, and it is shown that the child's health and safety would be seriously jeopardized by remaining with or returning to the parent;

their use in termination proceedings.<sup>145</sup> The court made an erroneous decision to terminate the mother's parental rights based on a failure to comply 100% with the case plan.<sup>146</sup>

Wyoming precedent, expressly discussing termination of parental rights, states that under the rule requiring the court to strictly construe the statute, the court must not consider any ground not specifically included in the statute as a basis for terminating a parent's legal relationship with his or her children.<sup>147</sup> The

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(iv) The parent is incarcerated due to the conviction of a felony and a showing that the parent is unfit to have the custody and control of the child;

(v) The child has been in foster care under the responsibility of the state of Wyoming for fifteen (15) of the most recent twenty-two (22) months, and a showing that the parent is unfit to have custody and control of the child;

(vi) The child is abandoned at less than one (1) year of age and has been abandoned for at least six (6) months;

(vii) The child was relinquished to a safe haven provider in accordance with W.S. 14-11-101 through 14-11-109, and neither parent has affirmatively sought the return of the child within three (3) months from the date of relinquishment.

(b) Proof by clear and convincing evidence that the parent has been convicted of any of the following crimes may constitute grounds that the parent is unfit to have custody or control of any child and may be grounds for terminating the parent-child relationship as to any child with no requirement that reasonable efforts be made to reunify the family:

(i) Murder or voluntary manslaughter of another child of the parent or aiding and abetting, attempting, conspiring to commit or soliciting such a crime; or

(ii) Commission of a felony assault which results in serious bodily injury to a child of the parent. As used in this paragraph "serious bodily injury" means as defined by W.S. 6-1-104.

(c) Notwithstanding any other provision of this section, evidence that reasonable efforts have been made to preserve and reunify the family is not required in any case in which the court determines by clear and convincing evidence that:

(i) The parental rights of the parent to any other child have been terminated involuntarily;

(ii) The parent abandoned, chronically abused, tortured or sexually abused the child; or

(iii) Other aggravating circumstances exist indicating that there is little likelihood that services to the family will result in successful reunification.

<sup>145</sup> WYO. STAT. ANN. § 14-2-309 (2007).

<sup>146</sup> *See id.*

<sup>147</sup> *See In re SCN*, 659 P.2d 568, 572 (Wyo. 1983).

case plan was a part of DFS' overall attempt to help the mother.<sup>148</sup> DFS created the case plan in an attempt to ensure that the mother would be better equipped to care for her children; however, a case plan is not a specific requirement within the termination of parental rights statute.<sup>149</sup> The court, therefore, inappropriately considered the extent of the mother's compliance with the case plan as a basis to terminate her parental rights.<sup>150</sup> Other jurisdictions have explicitly included case plans in termination of parental rights statutes, which the parent or parents must comply with to regain or keep custody of their children.<sup>151</sup> The Adoption Assistance and Child Welfare Act also includes a provision for the court to consider a case plan as part of the process of rehabilitation in a termination proceeding.<sup>152</sup> In such jurisdictions a case plan serves as an officially sanctioned and regulated measuring stick to determine the probability of a successful long-term reunification.<sup>153</sup>

Despite the lack of statutory authorization to rely solely on the case plan, the Wyoming Supreme Court reasoned that if there had been total and complete compliance with the case plan, the mother would have been fit to regain custody of her children.<sup>154</sup> Conversely, if the mother lacked total and complete compliance, the Supreme Court would have considered this an establishment of clear and convincing evidence that the mother was unfit.<sup>155</sup> Wyoming's current termination statute omits any definite mention of case plans; therefore, courts should only use them as a tool to measure progress and gauge a parent's desire as well as genuine efforts to make the changes deemed necessary.<sup>156</sup> Thus, the court should only consider noncompliance with the case plan as a complete bar to eventual reunification if such noncompliance plainly demonstrates a parent's blatant disinterest or significant inability to make efforts to regain custody of his or her children; as opposed to enforcing a case plan that amounts to a serious of hoops through which a parent must jump, and imposes unrealistic goals on people living below middle-class status.<sup>157</sup> In this case, the evidence showed that the mother complied to a great extent with the case plan requirements, demonstrating her sincere desire to reunite with her children.<sup>158</sup> Moreover, there was no evidence

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<sup>148</sup> See WYO. STAT. ANN. § 9-2-2101 (2007) (defining DFS' duties towards families it becomes involved with).

<sup>149</sup> WYO. STAT. ANN. § 14-2-309 (2007).

<sup>150</sup> See *In re SCN*, 659 P.2d at 572.

<sup>151</sup> See, e.g., MINN. STAT. ANN. §§ 260C.301(5)(i), (ii) (2007).

<sup>152</sup> Adoption and Safe Families Act, 42 U.S.C. § 671(a)(15)(E)(16) (1997).

<sup>153</sup> See, e.g., MINN. STAT. ANN. §§ 260C.301(5)(i), (ii); 42 U.S.C. § 675(5)(E)(ii) (2007).

<sup>154</sup> *AD*, 151 P.3d at 1109.

<sup>155</sup> *Id.* at 1110.

<sup>156</sup> See *SCN*, 658 P.2d at 572.

<sup>157</sup> See J. Bohl, "Those Privileged Long Recognized": *Termination of Parental Rights Law, the Family Right to Integrity, and the Private Culture of the Family*, 1 CARDOZO WOMEN'S L.J. 323, 357 (1994).

<sup>158</sup> *AD*, 151 P.3d at 1111 (Hill, J., dissenting).

showing her disinterest in making the efforts necessary to reunite with her children.<sup>159</sup> Nevertheless, the court dismissed her efforts to comply with the case plan.<sup>160</sup>

### *Case Plan Consideration*

It was unreasonable for the court to fault the mother for her shortcomings in this case because complete compliance with the plan was not possible.<sup>161</sup> Her failures regarding the case plan were a result of her efforts to comply with other requirements.<sup>162</sup> For example, she lost one of her jobs because she left early, which taken on its own could be an irresponsible decision.<sup>163</sup> She chose to leave work, however, because she was unwilling to miss visitation with her children that had just been set on a new schedule.<sup>164</sup> The case plan required her to arrive on time to every scheduled visit with her children.<sup>165</sup> Rather than risk missing the visit, she chose to leave work early.<sup>166</sup> Unfortunately, that choice ultimately caused the loss of the job.<sup>167</sup>

Additionally, the case plan required that the mother attain emotional stability and mental health.<sup>168</sup> Other courts have held that a parent's emotional stability is only one factor that affects a child's well-being, and not the most important one.<sup>169</sup> Additionally, the same court held it determinative when a mental health professional endorsed the parent.<sup>170</sup> The Supreme Court failed to consider that the mother completed a number of therapy sessions, and had progressed in therapy so much that her therapist felt it beneficial to reduce her sessions.<sup>171</sup> The court should have recognized this significant progress, and committed to the family by ordering her to continue in therapy and followed up with her case after returning her children to her care.<sup>172</sup>

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<sup>159</sup> *Id.* at 1110-11 (Hill, J., dissenting).

<sup>160</sup> *Id.* at 1109-10.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1111 (Hill, J., dissenting).

<sup>163</sup> *AD*, 151 P.3d at 1111 (Hill, J., dissenting).

<sup>164</sup> *Id.* (Hill, J., dissenting).

<sup>165</sup> *Id.* (Hill, J., dissenting).

<sup>166</sup> *Id.* (Hill, J., dissenting).

<sup>167</sup> *Id.* (Hill, J., dissenting).

<sup>168</sup> *AD*, 151 P.3d at 1106.

<sup>169</sup> *Angelone v. Angelone*, 404 N.E.2d 672, 673 (Mass. 1980).

<sup>170</sup> *Id.*

<sup>171</sup> *AD*, 151 P.3d at 1110-11 (Hill, J., dissenting).

<sup>172</sup> *See* 45 C.F.R. § 1357.15(n) (2007).



### *Obstacles in Complying With the Case Plan*

The Wyoming Supreme Court's reliance on the case plan was also problematic because the plan failed to consider properly the obstacles the mother faced in complying with it.<sup>173</sup> In many cases, family services and the foster care system serve primarily poor children and their families.<sup>174</sup> Often, many of the parents involved in these proceedings live in poverty, as was the mother here.<sup>175</sup> Poverty makes fulfilling basic needs, such as finding and maintaining shelter, obtaining health care, or even providing food and clothing, far more difficult.<sup>176</sup> If the mother in this case had cavalierly flaunted the case plan requirements, thereby demonstrating her unwillingness to change her lifestyle, even at the risk of losing her children forever, the court would have been more justified in relying on that fact.<sup>177</sup> The mother, however, clearly made great efforts to comply with the plan requirements, successfully completing nearly all of them, despite the inherent obstacles she faced while doing so.<sup>178</sup>

### *Concurrent Adoption Planning*

The court erred in permanently terminating the parental rights without knowing that the children involved would actually find permanency afterwards.<sup>179</sup> While DFS attempted reunification, no concurrent permanency planning took place.<sup>180</sup> This illustrates Wyoming courts' lack of adherence to federal requirements laid out in the Adoption and Safe Families Act (ASFA).<sup>181</sup> ASFA's provisions eliminate the problem of children waiting indefinitely in foster care by requiring courts to hold a permanency hearing within twelve months of the child's entry into foster care.<sup>182</sup> If it deems best, the court then orders termination of parental rights to free the child in the proceeding for adoption.<sup>183</sup> ASFA also requires,

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<sup>173</sup> Elizabeth D. Jones & Karen McCurdy, *National Committee for the Prevention of Child Abuse: The Links Between Types of Maltreatment and Demographics*, 16 CHILD ABUSE & NEGLECT 201, 201(1992).

<sup>174</sup> NORA S. GUSTAVSSON & ELIZABETH A. SEGAL, *CRITICAL ISSUES IN CHILD WELFARE* 94 (Sage Publishing 1994).

<sup>175</sup> See U.S. Advisory Bd. On Child Abuse & Neglect, *A Nation's Shame: Fatal Child Abuse and Neglect in the United States* 13 (1995).

<sup>176</sup> Jones & McCurdy, *supra* note 173, at 201.

<sup>177</sup> See Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case For "Impermanence"*, 34 CAP. U. L. REV. 405, 448 (2005).

<sup>178</sup> *AD*, 151 P.3d at 1111 (Hill, J., dissenting).

<sup>179</sup> See *id.* at 1112 (Hill, J., dissenting).

<sup>180</sup> *Id.*

<sup>181</sup> See Thomas Wade Young & Jae M. Lee, *Responding To The Lament of Invisible Children: Achieving Meaningful Permanency for Foster Children*, 72 J. KAN. B.A. 46, 47-48 (2003); see also 42 U.S.C. §675 (2007).

<sup>182</sup> See 42 U.S.C. § 671(a)(15) (1997).

<sup>183</sup> *Id.*

concurrent with the initiation of termination proceedings, the initiation of the process of identifying, recruiting, processing, and approving a qualified family for adoption.<sup>184</sup> By simultaneously planning for both outcomes, the court ensures that children are not simply sent back to foster care or a group home without an adoptive situation in place when it terminates parental rights.<sup>185</sup>

The court stated that its policy was to promote permanency and stability in the lives of the children involved in the proceeding.<sup>186</sup> Despite this, the court made no effort to help find a viable permanency option for the children upon permanent removal from their mother's care.<sup>187</sup> Consequently, the children went straight back into DFS' custody, likely either ending up in foster care or a group home situation.<sup>188</sup> While a short period in temporary foster care is acceptable, at ages fourteen, thirteen and ten, the children in this proceeding are unlikely to exit foster care into an adoptive family.<sup>189</sup> The court's decision to send them back into DFS' custody amounted to sentencing them to permanent foster care or group home, with little hope of finding an adoptive family situation.<sup>190</sup> This decision also exposed the children to the risks often faced by teenagers who age out of the foster care system.<sup>191</sup>

### *Current Problems in Wyoming*

The *In re A.D.* decision did not change the law; rather, this decision reflects Wyoming law as it currently relates to children involved in termination of parental rights cases.<sup>192</sup> This case does nothing more than illustrate the existing problems relating to the policy of permanency for children and the lack of effective standards in Wyoming courts' termination rulings.<sup>193</sup> Traditionally, Wyoming courts have been reluctant to terminate parental rights without serious cause.<sup>194</sup> The children in such cases are subject to statutory provisions requiring separation from their families for at least fifteen months before the State may initiate termination proceedings.<sup>195</sup> Furthermore, many of these children have gone through one or

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<sup>184</sup> *Id.* at § 671(a)(15)(F).

<sup>185</sup> Young & Lee, *supra* note 181, at 53.

<sup>186</sup> *AD*, 151 P.3d at 1108.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1112 (Hill, J., dissenting).

<sup>189</sup> *Id.* (Hill, J., dissenting).

<sup>190</sup> *Id.* (Hill, J., dissenting).

<sup>191</sup> Alice Bussiere, *Permanence For Older Foster Youth*, 44 FAM. CT. REV. 231, 232 (2006).

<sup>192</sup> *See AD*, 151 P.3d at 1103.

<sup>193</sup> *See generally AD*, 151 P.3d 1102; *see also* Lewis, *supra* note 136, at 25.

<sup>194</sup> *See, e.g., AD*, 151 P.3d 1102; *SLB*, 136 P.3d 797.

<sup>195</sup> *AD*, 151 P.3d at 1102.

more periods of attempted rehabilitation and, possibly, one or more attempted reunifications before DFS files a final termination of parental rights petition.<sup>196</sup>

With parents' fundamental right to raise their own children free from state interference in mind, courts make the decision to terminate parental rights as a last resort.<sup>197</sup> Thus, a court's goal in terminating the parental rights includes freeing the child for adoption if it considers termination in the child's best interest.<sup>198</sup> In situations where termination of parental rights is at stake, courts and family service agencies tend to consider the child's adoption the most permanent possible outcome for children who have been severed from their parents.<sup>199</sup> There is no statutory requirement that an adoptive family be found and waiting to take the children after termination of the biological parent-child relationship.<sup>200</sup> This situation exists despite the court's policy of promoting permanency by freeing children for adoption.<sup>201</sup> Inevitably, many children find themselves in the foster care system after being taken from their parents, and must linger there until an agency finds adoptive parents for them, growing less likely the older the children get.<sup>202</sup>

By the time a termination actually takes place, these children have likely already gone through considerable upheaval for an extended period of time.<sup>203</sup> Most children will have likely undergone a long period of uncertainty and trauma leading up to the termination hearing.<sup>204</sup> Often this initial uncertainty relates to these children being taken from their parents.<sup>205</sup> From the child's point of view, "a bad home with his or her natural parents may be preferable to an excellent foster home" with strangers.<sup>206</sup> The uncertainty and trauma grow as the children go back and forth between foster care and home while the system attempts parental rehabilitation.<sup>207</sup> Thus, a final termination decree may amount to nothing more

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<sup>196</sup> *Id.*

<sup>197</sup> *AD*, 151 P.3d at 1109.

<sup>198</sup> 42 U.S.C. § 671(b)(15) (1997).

<sup>199</sup> *Id.*

<sup>200</sup> See WYO. STAT. ANN. § 14-2-209 (2007).

<sup>201</sup> *AD*, 151 P.3d at 1110. Without adoptive parents waiting to take the children when a court orders termination, the children risk lingering indefinitely in foster care. *Id.*; see also 42 U.S.C. § 671(b)(15)(C) (1997).

<sup>202</sup> Bussiere, *supra* note 191, at 236.

<sup>203</sup> *Id.*

<sup>204</sup> *AD*, 151 P.3d at 1109-10.

<sup>205</sup> Theo Liebmann, *What's Missing From Foster Care Reform? The Need For Comprehensive, Realistic and Compassionate Removal Standards*, 28 *HAMLIN J. PUB. L. & POL'Y* 141, 176 (2006).

<sup>206</sup> Bohl, *supra* note 157, at 325.

<sup>207</sup> *AD*, 151 P.3d at 1109-1110.

than an order for continuing uncertainty and trauma if there is no permanent placement for the child once the order is entered.

Ultimately, particularly in the case of older children, permanent removal from their home, without an adoptive family waiting in the wings to take them, does little to “improve their lot” or to provide stability.<sup>208</sup> This places a heavy burden on judges, as they know that while they are removing children from a perilous situation, they could simultaneously be sentencing the children to a potentially indefinite period of foster care while they await adoption.<sup>209</sup>

The court reasoned that someone else other than the biological parents would do a better job at raising the children; thus its ruling was erroneous.<sup>210</sup> Only when the interests of the children in question directly collide with the parents’ rights should the court remove the children from the parents’ care.<sup>211</sup> In this case, the court chose to put the children into foster care rather than return them to their mother.<sup>212</sup> While she could not achieve perfection, she nevertheless made serious efforts to rehabilitate and provide a decent home for her family.<sup>213</sup> The court could have ordered DFS to remain involved with the family and continue to offer assistance to the mother and the children.<sup>214</sup> It is not reasonable to expect a family that has a background of negative history to reach DFS’ ideal standard within such a brief time period.<sup>215</sup> In spite of the court’s claim to be extremely tentative to terminate parental rights, in this case the court did not take the children’s actual fate into serious consideration when deciding their future, making no effort to ensure permanency for them after the termination.<sup>216</sup>

### *The Problem of “Legal Orphans”*

Only the court has the authority to terminate the parent-child relationship.<sup>217</sup> Therefore, the court is in a position to extend its influence and authority beyond the

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<sup>208</sup> *Id.* at 1112 (Hill, J., dissenting).

<sup>209</sup> *See id.* (Hill, J., dissenting).

<sup>210</sup> *See X*, 607 P.2d at 922.

<sup>211</sup> *AD*, 151 P.3d at 1109.

<sup>212</sup> *Id.* at 1110.

<sup>213</sup> *Id.* at 1111-12 (Hill, J., dissenting).

<sup>214</sup> *See* 45 C.F.R. § 1357.15(n) (2007). Such assistance could include emergency caretaker and homemaker services; day care; crisis counseling; individual and family counseling; procedures and arrangements for access to available emergency financial assistance; arrangements for the provision of temporary child care to provide respite to the family for a brief period. *Id.* *See also* WYO. STAT. ANN. § 14-3-403 (2007) (giving courts the authority to order any party in a termination case, including DFS, to perform any act it deems necessary).

<sup>215</sup> Gail Vida Hamburg, *An Act of Compassion May Require Some Decisive Actions to Make it Work*, CHI. TRIB., Jan. 4, 1998, § 13, at 1.

<sup>216</sup> *AD*, 151 P.3d at 1110.

<sup>217</sup> *See* Bohl, *supra* note 157, at 324.

termination hearing to assist those children who can no longer safely remain with their parents.<sup>218</sup> Simply claiming to act in the child's best interest lacks sufficient judicial and agency effort if the reality is that the child will go on to spend the remainder of his or her adolescence in foster care or in a state institution.<sup>219</sup>

Currently, court decisions that sever children's legal relationship with their parents create vast amounts of "legal orphans."<sup>220</sup> Thus the court system, in conjunction with family service agencies, must decide children's fate.<sup>221</sup> Nationwide, 126,000 children in foster care await adoption.<sup>222</sup> Over half of these children have already reached the age of eleven.<sup>223</sup> Generally, adolescents lack options in this "system."<sup>224</sup> Every year, approximately 20,000 children who have reached the age of majority leave the foster care system with nowhere to go and no place to call home.<sup>225</sup> Many foster children who age out of the system experience numerous difficulties while attempting to make their way in the world.<sup>226</sup> Adolescents who leave foster care without permanent family or family-like connections are more likely to have problems with unemployment and unplanned pregnancies, to have legal problems, to have substance abuse issues, and difficulties obtaining health care.<sup>227</sup> Additionally, these legal orphans are also less likely than their peers to have a high school diploma or postsecondary education, or to earn enough to support themselves.<sup>228</sup> These issues show that it is undesirable for children to spend their adolescence in foster care with no permanent family or family-like relationships.<sup>229</sup>

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<sup>218</sup> Michael Compitello, *Parental Rights and Family Integrity: Forgotten Victims in the Battle Against Child Abuse*, 18 PACE L. REV. 135, 140 (1997).

<sup>219</sup> Margaret Beyer & Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L.Q. 233, 246 (1986).

<sup>220</sup> Kristin Andreason, *Eliminating the Legal Orphan Problem*, 16 J. CONTEMP. LEGAL ISSUES 351, 351 (2003). These legal orphans are children who may no longer live with their parents, and cannot live with another relative. *Id.* at 351.

<sup>221</sup> Amy Wilkinson-Hagen, Note, *The Adoption and Safe Families Act of 1997: A Collision of Parens Patriae and Parents' Constitutional Rights*, 11 GEO. J. ON POVERTY L. & POL'Y 137, 146 (2004).

<sup>222</sup> ACHIEVING PERMANENCY FOR ADOLESCENTS IN FOSTER CARE: A GUIDE FOR LEGAL PROFESSIONALS 39 (Claire Chimulera & Sally Inada eds., American Bar Association 2006).

<sup>223</sup> *Id.* at 39.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 23.

<sup>226</sup> Bussiere, *supra* note 191, at 231.

<sup>227</sup> *Id.* at 232.

<sup>228</sup> *Id.*

<sup>229</sup> *See id.*

Unfortunately, social workers and adoptive families usually dismiss adoption as an option for adolescents.<sup>230</sup> Once a child has reached the age of twelve, the chances of adoption become extremely slim.<sup>231</sup> Federal law provides a role for the courts by requiring states to obtain a court determination that the court and other agencies made reasonable efforts to place foster children in a permanent placement in a timely manner.<sup>232</sup> The federal government requires this determination regardless of the child's age at the time he or she enters foster care.<sup>233</sup> In fact, if states do not meet the requirement in a number of cases, the law may disqualify any state from receiving federal financial awards for that case, and could even face sanctions.<sup>234</sup> In 2004, no state achieved substantial conformity with the permanency goals put in place by the federal government.<sup>235</sup> This evidences that Wyoming is not alone in failing to provide permanency for "legal orphans."<sup>236</sup>

Federal law encourages permanency for children.<sup>237</sup> In *In re AD*, the desire to create permanency for the three children motivated the Wyoming Supreme Court's decision.<sup>238</sup> The court ruled as though simply terminating the parental rights and freeing the children for adoption amounted to an accomplishment of that goal.<sup>239</sup> While a child with living parents cannot be adopted without termination of the natural parents' rights, terminating parental rights does not itself accomplish the goal of permanency.<sup>240</sup> When the State takes a child into foster care, it takes complete control over that child's family situation.<sup>241</sup> Such a responsibility is immense; the state should not limit its influence to the mere provision of continued foster care for legal orphans that result from the termination of parental rights proceedings.<sup>242</sup>

The court should not intervene to the extent that it does in these cases without actually providing a better situation for the children in question.<sup>243</sup> Termination of parental rights exists to protect and rescue children who are subjected to

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<sup>230</sup> Chimulera, *supra* note 222, at 6.

<sup>231</sup> Bussiere, *supra* note 191, at 236. It is difficult to find families willing to adopt older children. *Id.*

<sup>232</sup> *Id.* at 237.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> Bussiere, *supra* note 191, at 237.

<sup>237</sup> ASFA, PL 105-89 (1997).

<sup>238</sup> *AD*, 151 P.3d at 1110.

<sup>239</sup> *Id.*

<sup>240</sup> Andreason, *supra* note 220, at 351.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *See id.* at 351-52.

horrible abuse by their own parents, and to provide for them when their natural parents neglect them.<sup>244</sup> For many children, foster care constitutes a refuge, a place where they will be safely taken care of, decidedly better than remaining with or returning to their natural parents.<sup>245</sup> Placing children in foster care when such abuse or neglect exists is absolutely the proper function of the foster care system and by extension of termination of parental rights.<sup>246</sup> Because the children in *In re AD* are already adolescents, and their mother was not herself abusive towards them, the foster care system will likely not provide a better situation than the one they would have had with their mother.<sup>247</sup> She made significant progress in her attempts to ameliorate her lifestyle and create a better home for her family.<sup>248</sup> In this situation, the court ruled to terminate her parental rights without actually ensuring that the children's lives would truly be better as a result. To remove the children only to send them into foster care, unlikely to be adopted, with a future then possibly complicated by homelessness, lack of education, lack of livelihood or legal troubles is unacceptable.<sup>249</sup>

### *Moving Forward in Wyoming*

Other states have set an example for Wyoming, by enacting programs to help families and children involved in termination proceedings.<sup>250</sup> Such programs offer recruitment strategies to find families interested in adopting older children.<sup>251</sup> Specific strategies for older children's adoption must be in place because adolescents' adoptions differ from those of younger children.<sup>252</sup> For example, families are more likely to want to adopt an adolescent once they get to know the individual teenager.<sup>253</sup> Emotional connection seems to be the key; successful adolescent adoptions have shown that families wanted to adopt when they made a connection with a specific child, or when they learned of a specific adolescent in need of a home.<sup>254</sup>

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<sup>244</sup> Young & Lee, *supra* note 181, at 47.

<sup>245</sup> *Id.*

<sup>246</sup> Joleen Okun, *Sixth Annual Review of Gender and Sexuality Law: V. Family Law Chapter: Termination of Parental Rights*, 6 GEO. J. GENDER & L. 761,763 (2005).

<sup>247</sup> See Bussiere, *supra* note 191, at 231.

<sup>248</sup> *AD*, 151 P.3d at 1112 (Hill, J., dissenting).

<sup>249</sup> See Bussiere, *supra* note 191, at 231.

<sup>250</sup> *Id.* at 237.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* It can simply be more difficult to find families who want to adopt an older child. *Id.* Additionally, negative attitudes of social workers about the importance of permanency for older foster youth and adoptability of older children and children with special needs plays a role in hindering adoption for those adolescents. *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> Bussiere, *supra* note 191, at 237-38.

Some successful programs in other states focus on finding permanent connections for the adolescents rather than focusing purely on finding adoptive placements.<sup>255</sup> These programs result in the legal formality of adoption evolving naturally out of the relationships that form.<sup>256</sup> Such programs require flexibility and persistence to succeed, and often the youths themselves turn out to be the best resources for identifying individuals in their lives, or from their pasts, who might want to adopt them.<sup>257</sup> The attitude of child welfare professionals also constitutes an important component in the success of these programs.<sup>258</sup> The dissent in *In re AD* suggested that DFS had no interest in continuing to work with the family or the children beyond the conclusion of the termination hearing.<sup>259</sup> The programs that succeed in making a positive difference in advancing permanency, however, rely heavily on staff members who really believe in the possibility of finding families for adolescents.<sup>260</sup>

Even before a termination hearing, Wyoming could consider alternative procedures in child protection situations. Frequently, child protection litigation can be a very adversarial process; damaging to families and children.<sup>261</sup> Often, such litigation fails to provide appropriate and timely resolution of problems.<sup>262</sup> Child protection mediation programs can alleviate some of the damaging results of adversarial litigation involving children's fates.<sup>263</sup> Mediation can occur at any time in a child protection case.<sup>264</sup> These programs seek to empower the different participants in the situation, and to encourage the family to work together to create an individualized and personal solution to the problems facing the family.<sup>265</sup> Such programs provide more direct assistance to families who may be facing serious problems leading to a termination hearing.<sup>266</sup> Perhaps families and agencies would find more effective solutions to serious problems if they paid more attention to the individual circumstance of every family's situation.<sup>267</sup> Massive power imbalances exist between parents and the caseworkers who dictate the parents' time with their children and, ultimately, have the power to take children

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<sup>255</sup> *Id.* at 238.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *AD*, 151 P.3d at 1110 (Hill, J., dissenting).

<sup>260</sup> Bussiere, *supra* note 191, at 238.

<sup>261</sup> Kelly Browe Olson, *Lessons Learned from a Child Protection Mediation Program: If At First You Succeed and Then You Don't* . . . , 41 FAM. CT. REV. 480, 480 (2003).

<sup>262</sup> *Id.* at 480.

<sup>263</sup> *Id.* at 481.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> Olson, *supra* note 261, at 481.

<sup>267</sup> *Id.* at 484.



away if termination is in question.<sup>268</sup> With mediation, it also becomes possible to spend more time examining and understanding the personal, cultural, familial and/or environmental stresses, patterns, and deprivations that parents face and how these factors relate to neglectful or abusive situations.<sup>269</sup> Conventional wisdom would dictate that agencies working with families will not find solutions without understanding the root problems and issues.

#### CONCLUSION

The Wyoming court system, as well as agencies such as DFS, should increase or renew efforts to find permanency for children of all ages when courts remove them from their parents because of abuse or neglect, which is, unarguably, good policy.<sup>270</sup> Today, however, a need exists to reform Wyoming's statutes regarding termination and the intertwining roles that the courts, DFS and MDTs purport to play together, as the current system lacks uniform standards and application across the state.<sup>271</sup>

Rescuing children from danger when their parents cannot be entrusted with their care constitutes one of the only acceptable state interferences in family life.<sup>272</sup> Nevertheless, courts must also adopt a policy to ensure, to the greatest extent possible, that a permanent family situation awaits older children after termination of parental rights.<sup>273</sup> If a child stays in foster care or group homes until the age of eighteen, he or she may have difficulties finding a permanent home or positive support system.<sup>274</sup> Many successful programs, implemented by other states, assist in finding positive, permanent situations for adolescents that Wyoming should consider.<sup>275</sup>

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 485.

<sup>270</sup> See *supra* notes 243-249 and accompanying text.

<sup>271</sup> See John M. Burman, *Juvenile Injustice in Wyoming*, 4 WYO. L. REV. 669, 673 (2004).

<sup>272</sup> See *supra* note 31 and accompanying text.

<sup>273</sup> See *supra* notes 179-191 and accompanying text for a discussion of concurrently planning for adoption while attempting the family's reunification.

<sup>274</sup> Chimulera, *supra* note 222, at 39.

<sup>275</sup> Bussiere, *supra* note 191, at 238. Such programs include You Gotta Believe in Brooklyn, New York; Families for Kids in Roxbury, Massachusetts; Project Uplift in Colorado; Catholic Community Services of Western Washington in Tacoma. *Id.* These programs stress the inclusion of the youths themselves in the process of identifying possible permanent families, and provide plenty of support to the adolescents during that process. *Id.* These successful programs also provide opportunities for foster youth and adults in the community to get to know each other by getting the youths involved in programs such as Big Brothers/Big Sisters, Junior Achievement, 4H, Special Olympics, and school service projects. *Id.* In New York City, teens are invited to participate in training sessions for prospective adoptive parents. *Id.*

Judges possess influence in these cases.<sup>276</sup> Their role should be proactive in cases where child abuse or neglect exists.<sup>277</sup> Courts in Wyoming do possess authority over any party in a termination proceeding, including DFS.<sup>278</sup> Wyoming statute dictates that a court may order any party to perform any acts, duties or responsibilities it deems necessary.<sup>279</sup> Thus there should be nothing preventing Wyoming judges from ordering DFS to concurrently plan for adoption while reunification is also attempted in a termination proceeding. Courts and state agencies should make efforts to locate people specifically willing to adopt an older child.<sup>280</sup> Encouraging and advocating for the development of agencies that work specifically to find adoptive parents for adolescents in Wyoming or the greater Rocky Mountain region could make a great difference. These agencies could provide post-adoption expertise for families that face the challenges in adopting older children. Supporting the adoptive parents and the children would foster progress and success in the adoptive relationships. Agencies could also provide a way for older children to become active participants in the recruitment of adoptive parents, giving them a sense of ownership and encouraging them to be an active part of their future that they may not have had in the past.<sup>281</sup>

Courts will continue to face difficult cases that involve abused and neglected children.<sup>282</sup> These children greatly need to find healthy home situations after experiencing the trauma of termination.<sup>283</sup> Judges, lawyers, and state agencies may be able to impact the ultimate fate of these children in an important way, and the Wyoming system should take the initiative to make positive changes.<sup>284</sup> Thus, Wyoming can begin to move away from a culture of eternal foster care for abused and neglected children, and towards a more effective and stable system for all children who come into contact with Wyoming's courts.

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<sup>276</sup> See generally WYO.STAT. ANN. § 14-3-403 (2007) (authorizing courts to order any party in a termination proceeding to perform or refrain from performing any act deemed necessary).

<sup>277</sup> Chimulera, *supra* note 222, at 38.

<sup>278</sup> WYO. STAT. ANN. §§ 14-3-403(a)(ii), (iii) (2007).

<sup>279</sup> *Id.*

<sup>280</sup> Bussiere, *supra* note 191, at 238.

<sup>281</sup> *Id.* at 239.

<sup>282</sup> Lewis, *supra* note 136, at 25.

<sup>283</sup> See *supra* notes 217-249.

<sup>284</sup> See *supra* notes 250-269.