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CASE NOTE

FAMILY LAW—When Circumstances Change, but the Court Does Not; *Kappen v. Kappen*, 2015 WY 3, 341 P.3d 377 (Wyo. 2015)

*Nicholas S. Bjorklund**

“An error does not become truth by reason of multiplied propagation, nor does the truth become error because nobody will see it.”

—*M. K. Gandhi*¹

I. INTRODUCTION

A just society must apply its laws in a uniform way, otherwise it risks devolving into tyranny.² While a court of last resort serves the important function of protecting minority rights in a system of majority rules, it should be careful not to overreach and threaten the principle of majority rule.³ When a court fails to interpret a statute as the legislature intended it to be understood by the people, it violates that principle.⁴

In early 2015, the Wyoming Supreme Court decided the case *Kappen v. Kappen*.⁵ The court held that the modification of custody statute in Wyoming—Wyoming Statute section 20-2-204—requires a showing that a change in circumstances must affect the life of the child before it can be used to justify a modification.⁶ Because the trial court did not discuss how the factors it considered affected the welfare of the child, the court reversed.⁷

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¹ 26 MAHATMA GANDHI, *Notes (26-2-1925)*, in *THE COLLECTED WORKS OF MAHATMA GANDHI* 200, 203 (1967), https://www.gandhiheritageportal.org/cwmg_volume_thumbview/MjY=#page/232/mode/2up.

² See *United States v. United Mine Workers of Am.*, 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring) (“There can be no free society without law administered through an independent judiciary.”).

³ See WILLIAM H. REHNQUIST, *THE SUPREME COURT* 311–13 (1987).

⁴ See *id.* While Chief Justice Rehnquist’s discussion is focused on the invalidation of statutes for unconstitutionality, the principle of respecting majority rule when possible nonetheless holds true. See *id.*

⁵ *Kappen v. Kappen*, 2015 WY 3, 341 P.3d 377 (Wyo. 2015).

⁶ *Kappen*, ¶¶ 15–16, 341 P.3d at 382.

⁷ *Id.* ¶¶ 32–33, 341 P.3d at 386.

At first blush, this case is not particularly remarkable. The court announced a standard of review, stated the rule, cited a string of cases that stated the same rule, and applied the rule to the facts under the applicable standard of review.⁸ However, a review of the cases cited in the opinion indicates a troubling reality in Wyoming case law. The language the court relied on—“a material change in circumstances *affecting the welfare of the child*”—does not appear in the statute.⁹ It is a relic of the pre-statutory common law standard that the court developed.¹⁰ Wyoming courts are required to apply statutes that abrogate the common law without reference to the earlier common law standards.¹¹ Because the legislature enacted a custody modification statute that deviated from the common law, the court should have abandoned its earlier standard.¹² The Wyoming Supreme Court erred when it applied the pre-statutory standard for custody modification in *Kappen*. The court must remedy this error by abandoning its prior case law and interpreting the custody modification statute as the legislature intended.

This case note first discusses the history of custody modification in Wyoming, followed by a discussion of the rules of statutory interpretation.¹³ Next, it provides a summary of the holding and analysis in *Kappen*.¹⁴ Finally, this case note argues that the court erred in *Kappen*, details how the statute should have been interpreted, and proposes an interpretation of the statute that is consistent with the legislature’s intent.¹⁵

II. BACKGROUND

A. *Modification of Custody Orders: A History*

For decades before 2000, custody modification was left largely to the discretion of the courts.¹⁶ The only statute in effect at the time simply granted

⁸ See generally *Kappen*, 2015 WY 3, 341 P.3d 377 (Wyo. 2015).

⁹ Compare *id.*, with WYO. STAT. ANN. § 20-2-204(c) (2015) (emphasis added) (“A court having jurisdiction may modify [a custody order] if there is a showing by either parent of a material change in circumstances since the entry of the order in question . . .”).

¹⁰ See *Kappen*, ¶ 15, 341 P.3d at 382 (citing to cases creating or applying the pre-2000 standard).

¹¹ See *Schlattman v. Stone*, 511 P.2d 959, 961–62 (Wyo. 1973) (“There can be no doubt about the correctness of the general rule . . . that the common law obtains only when not changed by statute, and statutes take precedence where there in [sic] any [i]nconsistency or conflict with the unwritten law.”); see also 15A C.J.S. *Common Law* § 16 (2015). This issue will be covered in more depth below, see *infra* notes 46–52 and accompanying text.

¹² See *Schlattman*, 511 P.2d at 961–62.

¹³ See *infra* notes 16–51 and accompanying text.

¹⁴ See *infra* notes 53–88 and accompanying text.

¹⁵ See *infra* notes 89–150 and accompanying text.

¹⁶ See WYO. STAT. ANN. § 20-2-113 (1999); see also *Laughton v. Laughton*, 259 P.2d 1093, 1095 (Wyo. 1953) (quoting WYO. COMP. STAT. § 3-5915 (1945)).

the district court continuing jurisdiction to modify the custody order “as the circumstances of the parents and the benefit of the children requires.”¹⁷ The Wyoming Supreme Court interpreted this statute to mean that a custody order may not be modified without the movant showing a material change in circumstances that affects the welfare of the child.¹⁸ The cases reciting this rule generally predate the current custody modification statute.¹⁹

The previous statute granted broad discretion to the courts in deciding custody issues.²⁰ The Wyoming Supreme Court responded to this grant of discretion by adopting a rule: The party arguing that custody should be modified had the burden of showing, first, that there was a change in circumstances and, second, that the change warranted modification of the order.²¹ Over time, this rule developed to require a showing of a substantial or material change in circumstances affecting the welfare of the child.²² By early 2000, the rule required the moving party to prove four elements: “[A] substantial or material change in circumstances which affects the child’s welfare,” the change occurred after the original order, “the change warrants modification of the decree, and that the modification will be in the child’s best interests.”²³

Today, child custody is purely a creature of statute.²⁴ A district court may only reopen a custody order if there has been a “material change in circumstances since the entry of the order.”²⁵ Specifically, the custody modification statute states:

A court having jurisdiction may modify an order concerning the care, custody and visitation of the children if there is a showing

¹⁷ WYO. STAT. ANN. § 20-2-113 (1999).

¹⁸ See, e.g., *Kappen v. Kappen*, 2015 WY 3, ¶ 15, 341 P.3d 377, 382 (Wyo. 2015); *Cobb v. Cobb*, 2 P.3d 578, 579 (Wyo. 2000) (citing *Sorensen v. May*, 944 P.2d 429, 432 (Wyo. 1997)).

¹⁹ See, e.g., *Cobb*, 2 P.3d 578 (decided in early 2000); *Sorensen*, 944 P.2d 429 (decided in 1997); *DJG v. MAP*, 883 P.2d 946 (Wyo. 1994) (citing *Goss v. Goss*, 780 P.2d 306, 312–13 (Wyo. 1989)); but see *Kappen*, 2015 WY 3, 341 P.3d 377 (decided in 2015).

²⁰ See WYO. STAT. ANN. § 20-2-113.

²¹ *Laughton*, 259 P.2d at 1095.

²² See, e.g., *Cobb*, 2 P.3d at 579–80; *Sorensen*, 944 P.2d at 432; *Wilcox-Elliott v. Wilcox*, 924 P.2d 419, 421 (Wyo. 1996).

²³ *Cobb*, 2 P.3d at 579–80 (citation omitted).

²⁴ *Hanson v. Belveal*, 2012 WY 98, ¶ 17, 280 P.3d 1186, 1192–93 (Wyo. 2012) (“[I]t is well settled that divorce is purely a statutory process, with courts having no authority in such proceedings other than that provided by statute.” (citation omitted)); see also WYO. STAT. ANN. § 20-2-204(c) (2015); *Arnott v. Arnott*, 2012 WY 167, ¶ 13, 293 P.3d 440, 444 (Wyo. 2012). Custody orders and issues may arise in cases that do not involve a divorce or marriage. See, e.g., *JT v. KD*, 2008 WY 104, ¶ 5, 192 P.3d 969, 970 (Wyo. 2008). The Wyoming Supreme Court treats custody modification as an equally statutory process as divorce. See, e.g., *Hanson*, ¶¶ 17–18, 280 P.3d at 1192–93; *Weiss v. Weiss*, 2009 WY 124, ¶ 13, 217 P.3d 408, 411–12 (Wyo. 2009).

²⁵ WYO. STAT. ANN. § 20-2-204(c).

by either parent of a material change in circumstances since the entry of the order in question and that the modification would be in the best interests of the children pursuant to W.S. 20-2-201(a). In any proceeding in which a parent seeks to modify an order concerning child custody or visitation, proof of repeated, unreasonable failure by the custodial parent to allow visitation to the other parent in violation of an order may be considered as evidence of a material change of circumstances. Any modification under this subsection shall be subject to the limitations and requirements of W.S. 20-2-205.²⁶

The moving parent must also show that the modification would be in the best interests of the child.²⁷ While the welfare of the child is important to a custody modification, Wyoming law requires the district court to find a material change in circumstances before it may consider the best interests of the child.²⁸

Custody modification is exclusively governed by statute, and must be interpreted as such.²⁹ The Wyoming Supreme Court often mentions the statute when discussing custody modification cases, but not always.³⁰ The failure of the court to apply the applicable statutory standard demonstrates the problem; namely that the Wyoming Supreme Court does not always interpret statutes according to its own rules and so ordinary citizens are unable to accurately predict the legal consequences of their decisions.³¹

B. The Wyoming Rules of Statutory Construction

Interpreting statutes is important work, and may be the most common activity engaged in by judges.³² It is important because correctly interpreting statutes is essential to the orderly functioning of a democratic society.³³ The legislature, the elected representatives of the people, enacts statutes and thereby puts people on

²⁶ *Id.*

²⁷ *Id.*

²⁸ See *Kappen v. Kappen*, 2015 WY 3, ¶ 13, 341 P.3d 377, 382 (Wyo. 2015); *Arnott*, ¶ 14, 293 P.3d at 445. Because a finding of a material change in circumstances is required before the best interests of the child can be considered, this analysis will not discuss the best interests of the child. See *Kappen*, ¶ 13, 341 P.3d at 382.

²⁹ See *Hanson*, ¶ 17, 280 P.3d at 1192–93.

³⁰ Compare, *Kappen*, ¶ 13, 341 P.3d at 382, and *Arnott*, ¶ 13, 293 P.3d at 444, and *Hanson*, ¶ 17, 280 P.3d at 1192–93, with *Jackson v. Jackson*, 2004 WY 99, ¶¶ 8–12, 96 P.3d 21, 25–26 (Wyo. 2004) (discussing a custody modification case without citing the governing statute).

³¹ See *infra* notes 103–21 and accompanying text.

³² See ANTONIN SCALIA, A MATTER OF INTERPRETATION 13–14 (Amy Gutmann ed., 1997).

³³ See *id.* at 17.

notice of the law.³⁴ When a court interprets a statute, it is under a duty to interpret that statute in the way that the legislature intended the public to understand it; this is the essence of democracy.³⁵

According to the Wyoming Supreme Court, the principles of statutory construction are “well-known and accepted.”³⁶ A court’s primary goal in interpreting statutes is to give effect to the legislature’s intent.³⁷ The court is restrained, however, in its search for the legislature’s intent by the language of the statute.³⁸ First, the court must determine the “ordinary and obvious meaning of the words employed according to their arrangement and connection.”³⁹ If the statute is susceptible to more than one reasonable interpretation, the court must resort to general principles of statutory construction.⁴⁰ When the statute is unambiguous, however, the court is bound to apply the legislature’s intent as expressed in the statute.⁴¹ The Wyoming Supreme Court’s standard for ambiguity contemplates an objective standard: whether reasonable people can agree on the meaning of the statute consistently and predictably.⁴²

When courts are forced to resort to principles of statutory construction, they “construe the statute as a whole, giving effect to every word, clause, and sentence.”⁴³ They also construe all parts of statutes together *in pari materia*.⁴⁴ Courts look to the purpose of the statute, the historical setting surrounding its enactment, Wyoming public policy, and any other facts or circumstances existing before or at the time of enactment.⁴⁵

³⁴ *See id.*

³⁵ *Id.*

³⁶ *Union Pac. Res. Co. v. Dolenc*, 2004 WY 36, ¶ 13, 86 P.3d 1287, 1291–92 (Wyo. 2004).

³⁷ *See Vineyard v. Jenkins*, 983 P.2d 1234, 1235 (Wyo. 1999); *see also Dolenc*, ¶ 13, 86 P.3d at 1291–92.

³⁸ *See Parker Land & Cattle Co. v. Wyo. Game & Fish Comm’n*, 845 P.2d 1040, 1042 (Wyo. 1993) (quoting *Rasmussen v. Baker*, 50 P. 819, 821 (Wyo. 1897) (As Justice Potter explained: “[T]he intent [of the lawgiver] is the vital part, and the essence of the law . . . Such intent, however, is that which is embodied and expressed in the statute or instrument under consideration.”)).

³⁹ *Dolenc*, ¶ 13, 86 P.3d at 1291–92.

⁴⁰ *Vineyard*, 983 P.2d at 1235.

⁴¹ *Id.* at 1235 (citing *State ex rel. Wyo. Workers’ Comp. Div. v. Bergeron*, 948 P.2d 1367, 1369 (Wyo. 1997)).

⁴² *Parker Land & Cattle*, 845 P.2d at 1043 (“A ‘statute is unambiguous if its wording is such that reasonable persons are able to agree as to its meaning with consistence and predictability.’” (citation omitted)).

⁴³ *Vineyard*, 983 P.2d at 1235.

⁴⁴ *Id.* *In pari materia* means that statutes relating to the same subject are construed together so that ambiguities in one statute are resolved by looking at the other. *In Pari Materia*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁴⁵ *Parker Land & Cattle*, 845 P.2d at 1044.

The legislature is charged with full knowledge of the law and the principles of statutory interpretation when it enacts a statute.⁴⁶ Generally, implied abrogation of the common law is disfavored.⁴⁷ This means that statutes are assumed to be consistent with the common law, unless there is a clear intent by the legislature to change the common law.⁴⁸ The Wyoming Supreme Court will infer intent to change the common law when the language of the statute expressly alters the common law or necessarily implies such alteration.⁴⁹ When a statute covers an entire subject, abrogation of the common law on that subject will be implied.⁵⁰ Child custody is entirely governed by statute, therefore any statute on the subject that differs from the common law must be interpreted as abrogating the common law.⁵¹ Despite the foregoing discussion, the Wyoming Supreme Court has continued to apply the pre-2000 standard, without any discussion of why it believes this is the controlling law, and this outdated standard led the court to error in *Kappen v. Kappen*.⁵²

III. PRINCIPAL CASE

In February 2010, Mr. and Mrs. Kappen divorced.⁵³ The district court granted the mother primary custody of the children and granted the father standard visitation.⁵⁴ Both parents lived in Lingle, Wyoming following the divorce.⁵⁵ In January 2013, the mother was convicted of stealing a cell phone from a coworker and was fired from her job.⁵⁶ The mother remained unemployed at the time of the lower court hearing.⁵⁷ According to the Wyoming Supreme Court, the mother was financially secure despite not being employed.⁵⁸

⁴⁶ *Id.*

⁴⁷ See *Merrill v. Jansma*, 2004 WY 26, ¶ 34, 86 P.3d 270, 285–86 (Wyo. 2004); *Urbach v. Urbach*, 73 P.2d 953, 961 (Wyo. 1937).

⁴⁸ See *Merrill*, ¶ 33, 86 P.3d at 285; *Urbach*, 73 P.2d at 961.

⁴⁹ *Merrill*, ¶ 34, 86 P.2d at 286.

⁵⁰ *In re Roberts' Estate*, 133 P.2d 492, 500 (Wyo. 1943).

⁵¹ See *Hanson v. Belveal*, 2012 WY 98, ¶ 17, 280 P.3d 1186, 1192–93 (Wyo. 2012); see also *In re Roberts' Estate*, 133 P.2d at 500.

⁵² See *infra* notes 53–88 and accompanying text.

⁵³ *Kappen v. Kappen*, 2015 WY 3, ¶ 3, 341 P.3d 377, 380 (Wyo. 2015).

⁵⁴ *Id.* ¶ 3, 341 P.3d at 380, 380 n.1. At the time of the original custody order, the parties had two minor children, but by the time *Kappen* was decided, one of the children was no longer a minor. *Id.*

⁵⁵ *Id.* ¶ 3, 341 P.3d at 380.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

In early 2013, the mother decided to move in with her boyfriend in Denver, Colorado and to take the child with her.⁵⁹ The parties' divorce decree required the mother to consult with the father on certain matters affecting the child.⁶⁰ As the mother began to plan the move and list her home for sale, despite the court order to consult, she did not discuss her plans with the father.⁶¹ In July 2013, the father filed a petition to modify custody of the child on the grounds that the mother's unstable life amounted to a material change in circumstances and that a modification was in the best interests of the child.⁶² The district court set a hearing on the modification for November 25, 2013.⁶³

On August 2, 2013, the mother filed an answer to the petition for modification and gave notice of her move to Denver with the child.⁶⁴ In response to the mother's move to Denver, the father filed a motion for temporary custody and to prevent the removal of the child from Wyoming.⁶⁵ Although the mother knew about the upcoming hearing on temporary custody, the mother moved the child to Arvada and enrolled her in school.⁶⁶ The district court awarded temporary custody to the father.⁶⁷ After the district court awarded temporary custody to the father, the mother moved back to Wyoming in the hope that the move would reflect positively on her at the modification hearing.⁶⁸ Upon realizing that returning to Lingle was a mistake, the mother moved back to Denver.⁶⁹

The district court held a hearing on the modification and awarded custody to the father.⁷⁰ In deciding against the mother, the district court found that there had

⁵⁹ See *id.* ¶ 4, 341 P.3d at 380. The court mentions that at some point prior to the mother's relationship with this man, she had a relationship with another man. *Id.* ¶ 8, 341 P.3d at 381.

⁶⁰ *Id.* ¶¶ 3–5, 341 P.3d at 380; see also Decision Letter at 2–3, *Kappen*, 2015 WY 3, 341 P.3d 377 (No. S-14-0092), <https://efiling.courts.state.wy.us/public/caseView.do?csIID=16646>; Brief of Appellee at 6, *Kappen*, 2015 WY 3, 341 P.3d 377 (No. S-14-0092), <https://efiling.courts.state.wy.us/public/caseView.do?csIID=16646>; Appellant's Opening Brief at 5, *Kappen*, 2015 WY 3, 341 P.3d 377 (No. S-14-0092), 2014 WL 3827869 at *4.

⁶¹ *Kappen*, ¶ 4, 341 P.3d at 380.

⁶² *Id.*; see also Appellant's Opening Brief, *supra* note 60, at 5–6; Brief of Appellee, *supra* note 60, at 5 (the Father did not mention the move to Denver as a grounds for modification, because he was not aware of the move at that time).

⁶³ See Decision Letter, *supra* note 60, at 2; Appellant's Opening Brief, *supra* note 60, at 6; Brief of Appellee, *supra* note 60, at 6.

⁶⁴ *Kappen*, ¶ 5, 341 P.3d at 380.

⁶⁵ See *id.*

⁶⁶ Order on Temporary Custody, Support and Visitation at 1, ¶ 5, *Kappen*, 2015 WY 3, 341 P.3d 377 (No. S-14-0092), <https://efiling.courts.state.wy.us/public/caseView.do?csIID=16646>.

⁶⁷ Order on Temporary Custody, Support and Visitation, *supra* note 66, at 2, ¶ 1.

⁶⁸ *Kappen*, ¶ 7, 341 P.3d at 380.

⁶⁹ *Id.*

⁷⁰ *Id.* ¶ 8, 341 P.3d at 380–81.

been a material change in circumstances based on the following facts: the mother's dismissal from her job for stealing from a coworker, the mother's conviction for larceny, the mother's relationship with one man and subsequent marriage to another, and the mother's multiple moves to and from Denver.⁷¹ Further, the district court determined that it would be in the child's best interest to modify custody and granted custody to the father.⁷²

A. *Majority Opinion*

The Wyoming Supreme Court considered whether the district court erred when it modified a custody order based on a material change in circumstances.⁷³ On appeal, the mother argued that the trial court abused its discretion by modifying custody.⁷⁴ She argued that the district court should have required the father to show how each of the facts affected the welfare of the child.⁷⁵ The mother relied on cases that pre-date the current statutory scheme.⁷⁶

The court began its opinion by discussing the doctrine of *res judicata*.⁷⁷ *Res judicata* bars relitigation of issues that were or could have been presented in an earlier proceeding and is rooted in the doctrine of judicial economy.⁷⁸ In the child custody context, however, society's interest in safeguarding the best interests of children outweighs its interest in judicial economy and the finality of judgments.⁷⁹ New facts and circumstances, then, may justify modifying a previous judgment.⁸⁰

⁷¹ Order Modifying Child Custody, Child Support and Visitation at 2, ¶ 6(i), *Kappen*, 2015 WY 3, 341 P.3d 377 (No. S-14-0092), <https://efiling.courts.state.wy.us/public/caseView.do?csIID=16646>.

⁷² *Kappen*, ¶ 8, 341 P.3d at 381.

⁷³ *See id.*

⁷⁴ *See* Appellant's Opening Brief, *supra* note 60, at 47–48.

⁷⁵ *Id.*

⁷⁶ *See* Appellant's Opening Brief, *supra* note 60, at 47–48; *see also* *Hanson v. Belveal*, 2012 WY 98, ¶ 19, 280 P.3d 1186, 1193 (Wyo. 2012) (quoting *Morris v. Morris*, 2007 WY 174, ¶ 6, 170 P.3d 86, 89 (Wyo. 2007)); *Jackson v. Jackson*, 2004 WY 99, ¶ 8, 96 P.3d 21, 24 (Wyo. 2004) (quoting *Cobb v. Cobb*, 2 P.3d 578, 579 (Wyo. 2000)). It bears mentioning that all the cases cited in *Kappen* by the mother quote or cite to cases that applied the standard that was developed before the 2000 statute was passed. *See* Appellant's Opening Brief, *supra* note 60; *see, e.g., Hanson*, ¶ 19, 280 P.3d at 1193 (quoting *Morris*); *Morris*, ¶ 6, 170 P.3d at 89 (citing *Jackson*); *Jackson*, ¶ 8, 96 P.3d at 24 (quoting *Cobb*); *Cobb*, 2 P.3d at 579 (predating the 2000 statute).

⁷⁷ *Kappen*, ¶¶ 12–14, 341 P.3d at 381–82.

⁷⁸ *See id.* ¶ 12, 341 P.3d at 381. Judicial economy is a policy consideration favoring the efficient use of judicial resources. *See id.* (recognizing the usefulness of *res judicata* in providing “an endpoint to litigation and prevents the legal system from becoming so bogged down that nothing would ever remain decided.” (citation omitted)); *see also* *Judicial Economy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁷⁹ *See Kappen*, ¶ 12, 341 P.3d at 381–82.

⁸⁰ *See id.* ¶ 12, 341 P.3d at 382; *see also* WYO. STAT. ANN. § 20-2-204(c) (2015).

The court recognized that *res judicata* requires the moving party to establish a material change in circumstances before the district court may reopen an existing custody order.⁸¹

The court then discussed whether the father had proved a material change in circumstances outweighing society's interest in applying *res judicata*.⁸² The court stated: "In examining whether there is a material change in circumstances, we have required district courts to establish that the change has, in some way, affected the welfare of the child."⁸³ Next, the court evaluated each of the changed circumstances the district court relied on and concluded that the evidence did not show how any of the changed circumstances affected the child's welfare.⁸⁴ After noting that the relative stability of each parent had not changed since the entry of the original custody order, the court reversed the district court.⁸⁵

B. *Dissenting Opinions*

Two justices—Chief Justice Burke and Justice Davis—dissented from the majority opinion.⁸⁶ Chief Justice Burke argued that the majority had not appropriately applied the standard of review by impermissibly reweighing the evidence and not granting all favorable evidentiary inferences to the father.⁸⁷ Justice Davis agreed with Chief Justice Burke on the standard of review issue and added that the mother's concession that her move to Denver was a material change of circumstances was dispositive.⁸⁸

IV. ANALYSIS

The Wyoming Supreme Court erred in *Kappen* when it applied a standard based on case law that deviated from the statutory scheme and reversed an order granting a custody modification.⁸⁹ Custody modification should be governed exclusively by statute because it is a purely statutory process.⁹⁰ When the legislature

⁸¹ *Kappen*, ¶ 14, 341 P.3d at 382 (alteration in original) (quoting *In re TLJ*, 2006 WY 28, ¶ 8, 129 P.3d 874, 876 (Wyo. 2006)); see also *Arnott v. Arnott*, 2012 WY 167, ¶ 13, 293 P.3d 440, 444–45 (Wyo. 2012).

⁸² *Kappen*, ¶¶ 15–16, 341 P.3d at 382.

⁸³ *Id.* ¶ 15, 341 P.3d at 382.

⁸⁴ *Id.* ¶¶ 17–29, 341 P.3d at 382–85.

⁸⁵ *Id.* ¶¶ 30–33, 341 P.3d at 385–86.

⁸⁶ *Id.* ¶¶ 34–41, 341 P.3d at 386–87 (Burke, C.J., dissenting); *id.* ¶¶ 42–55, 341 P.3d at 387–90 (Davis, J., dissenting).

⁸⁷ *Kappen*, ¶ 39, 341 P.3d at 387 (Burke, C.J., dissenting).

⁸⁸ *Id.* ¶ 42, 341 P.3d at 387 (Davis, J., dissenting).

⁸⁹ See *id.* ¶ 33, 341 P.3d at 386 (majority opinion).

⁹⁰ See *Hanson v. Belveal*, 2012 WY 98, ¶ 17, 280 P.3d 1186, 1192–93 (Wyo. 2012).

enacts a statute that covers an entire subject of the law, if that statute deviates from the common law standard, then the statute controls.⁹¹

A. The Rules of Statutory Interpretation Required the Court to Apply the Statute as Written

The Wyoming Legislature enacted the current statute governing custody modification in 2000.⁹² The statute states that custody may be modified if the moving party proves “a material change in circumstances since the entry of the order in question and that the modification would be in the best interests of the children pursuant to W.S. 20-2-201(a).”⁹³ In *Kappen*, however, the Wyoming Supreme Court applied a common law standard that was in existence before the current statute.⁹⁴ Because the prior common law standard differs from the statutory standard, and custody modification is covered entirely by statute, the court should not have applied the common law standard.⁹⁵

The Wyoming Supreme Court’s goal when interpreting statutes is to give effect to the legislature’s intent.⁹⁶ The court is also clear that it begins its analysis by reading the plain language of the statute and applying the obvious and ordinary meaning.⁹⁷ When the court does not follow its stated interpretive rules, laypeople and their lawyers cannot predict the outcome of their cases with any reasonable certainty.⁹⁸ Predictability in the law, or at least the illusion of predictability, is important to society.⁹⁹ The policy, enshrined in the United States Constitution, of a separation of powers is based in “a government of laws and not of men.”¹⁰⁰ In order for a government based on law to function properly, the people must be able to understand the law and predict its impact on their lives.¹⁰¹

⁹¹ *In re Roberts’ Estate*, 133 P.2d 492, 500 (Wyo. 1943).

⁹² See 2000 Wyo. Sess. Laws 113, 115.

⁹³ WYO. STAT. ANN. § 20-2-204(c) (2015).

⁹⁴ See, e.g., *Kappen*, ¶ 15, 341 P.3d at 382; *Gjertsen v. Haar*, 2015 WY 56, ¶ 29, 347 P.3d 1117, 1126 (Wyo. 2015).

⁹⁵ See *In re Roberts’ Estate*, 133 P.2d at 500.

⁹⁶ See *Vineyard v. Jenkins*, 983 P.2d 1234, 1235 (Wyo. 1999); *Union Pac. Res. Co. v. Dolenc*, 2004 WY 36, ¶ 13, 86 P.3d 1287, 1291–92 (Wyo. 2004); see also SCALIA, *supra* note 32, at 16.

⁹⁷ See *Dolenc*, ¶ 13, 86 P.3d at 1291–92.

⁹⁸ Compare *Arnott v. Arnott*, 2012 WY 167, ¶ 14, 293 P.3d 440, 445 (Wyo. 2012), with *Kappen*, ¶ 15, 341 P.3d at 382. Each of these cases, decided less than three years apart, applies a different standard for custodial modification to similar facts and comes to a different outcome.

⁹⁹ See Drury Stevenson, *To Whom is the Law Addressed?*, 21 YALE L. & POL’Y REV 105, 114 (2003).

¹⁰⁰ See MASS. GEN. LAWS ANN. CONST. pt. I, art. XXX; see also U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1.

¹⁰¹ See SCALIA, *supra* note 32, at 17. Justice Scalia summarized the policy as follows:

And the reason we adopt this objectified version [of legislative intent] is, I think, that it is simply incompatible with democratic government, or indeed, even with

The difficulty of citizens to predict the legal consequences of their actions is illustrated by contrasting *Arnott v. Arnott*, *Kappen v. Kappen*, and *Jackson v. Jackson*.¹⁰² In *Arnott*, the Wyoming Supreme Court decided whether a custodial parent's move out-of-state constituted a material change in circumstances.¹⁰³ The district court denied the father's petition to modify custody by applying a presumption in favor of a custodial parent's right to relocate with her child.¹⁰⁴ The court noted that the statute required the moving party to show a material change in circumstances since the entry of the order, and that modification was in the best interests of the child.¹⁰⁵ Next, the court discussed a previous custody modification case based on the relocation of one parent and rejected the presumption that the district court had applied.¹⁰⁶ The court held that a relocation by a custodial parent, and the issues associated with a relocation, may constitute a material change in circumstances justifying consideration of the child's best interests.¹⁰⁷

In other cases, the Wyoming Supreme Court has not endeavored to apply the language of the statute, but has instead invoked the test that was developed prior to the current statutory framework.¹⁰⁸ In *Jackson*, the court considered whether the district court abused its discretion when it found a material change in circumstances and that it would be in the best interests of the children to modify custody.¹⁰⁹ Rather than interpret, or even cite, the language of the custody modification statute in its consideration of the case, the court quoted and applied the test it developed prior to 2000.¹¹⁰

fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated Government by unexpressed intent is simply tyrannical. It is the *law* that governs, not the intent of the lawgiver.

Id.

¹⁰² See *infra* notes 103–21 and accompanying text.

¹⁰³ *Arnott*, ¶ 11, 293 P.3d at 444.

¹⁰⁴ *Id.* ¶ 1, 293 P.3d at 442.

¹⁰⁵ *Id.* ¶ 14, 293 P.3d at 445 (citing WYO. STAT. ANN. § 20-2-204(c) (2015)).

¹⁰⁶ *Id.* ¶¶ 15–38, 293 P.3d at 445–57.

¹⁰⁷ *Id.* ¶ 40, 293 P.3d at 458.

¹⁰⁸ See, e.g., *Jackson v. Jackson*, 2004 WY 99, 96 P.3d 21 (Wyo. 2004).

¹⁰⁹ *Id.* ¶ 8, 96 P.3d at 24. For a discussion of the facts of *Jackson*, see *infra* notes 111–21 and accompanying text.

¹¹⁰ See *Jackson*, ¶ 8, 96 P.3d at 24. While the test was summarized above, see *supra* note 23 and accompanying text; the precise language of the test may be useful to some readers. The test states:

A party who is seeking to modify the child custody provisions of a divorce decree has the burden of showing that a substantial or material change in circumstances, which affects the child's welfare, occurred subsequent to the entry of the initial decree, that the change warrants modification of the decree, and that the modification will be in the child's best interests.

Jackson, ¶ 8, 96 P.3d at 24 (quoting *Cobb v. Cobb*, 2 P.3d 578, 579 (Wyo. 2000)).

Despite discussing the standard requiring a change in circumstances affecting the welfare of the children, the court found a change in circumstances when the life of the father, who did not have custody, improved, but there was “no real change in [the mother’s] circumstances”¹¹¹ In *Jackson*, the parents were married in 1999, but divorced less than a year later.¹¹² The mother was awarded primary physical custody of the children and the father was granted standard visitation.¹¹³ The parties continued to live together for some time after the divorce and eventually relocated to Nevada.¹¹⁴ The parties separated permanently in 2002 and the mother returned to Wyoming.¹¹⁵ The mother changed jobs multiple times, enrolled in cosmetology school, dropped out and enrolled in a different program, and was unemployed at the time of the hearing.¹¹⁶ Meanwhile, the father’s life improved dramatically.¹¹⁷ The father moved for a modification of custody based on a change in circumstances and won.¹¹⁸ The Wyoming Supreme Court agreed with the district court that an improvement in the non-custodial parent’s circumstances, while the custodial parent’s circumstances remained unchanged, could constitute a change in circumstances sufficient to modify custody.¹¹⁹ The *Jackson* case further illustrates the problem in Wyoming custody modification law.¹²⁰ Wyoming citizens cannot predict the outcome of their custody cases with any reasonable degree of certainty because the court applies varying standards with varying strictness.¹²¹

By interpreting the same statute in varying ways, the Wyoming Supreme Court creates confusion in custody modification that injects uncertainty into decisions that are already difficult for divorced parents. For example, in *Kappen* the

¹¹¹ *Id.* ¶ 9, 96 P.3d at 24–25.

¹¹² *Id.* ¶ 3, 96 P.3d at 23.

¹¹³ *Id.*

¹¹⁴ *Id.* ¶ 4, 96 P.3d at 23.

¹¹⁵ *Id.*

¹¹⁶ *Id.* ¶ 5, 96 P.3d at 23.

¹¹⁷ *Id.*

¹¹⁸ *Id.* ¶ 6, 96 P.3d at 23.

¹¹⁹ *Id.* ¶ 20, 96 P.3d at 26.

¹²⁰ See *supra* notes 79–119 and accompanying text; see also *infra* notes 121–50 and accompanying text.

¹²¹ Compare *Jackson*, ¶¶ 10–12, 96 P.3d at 25 (requiring a change in circumstances which affects the welfare of the child, but modifying custody when the custodial parent’s, and therefore the children’s, circumstances had not changed), and *Arnott v. Arnott*, 2012 WY 167, ¶ 14, 293 P.3d 440, 445 (Wyo. 2012) (not requiring the change in circumstances to affect the welfare of the child and finding that a relocation by a custodial parent standing alone may constitute a material change in circumstances), with *Kappen v. Kappen*, 2015 WY 3, ¶ 15, 341 P.3d 377, 382 (Wyo. 2015) (requiring a change in circumstances which affects the welfare of the child, but denying a modification when the father’s circumstances remained largely unchanged, but the mother had been convicted of a crime, lost her job, and was relocating to another state).

mother was considering an out-of-state move that would affect the father's ability to remain involved in his child's life.¹²² A relocation was considered a material change in *Arnott*, but was not in *Kappen*.¹²³ Because of inconsistent applications of the Wyoming custody modification statute, a custodial parent considering relocating to a new state for better job opportunities cannot know in advance if he or she will lose custody because of the move.¹²⁴ This creates a disincentive for the custodial parent to seek employment out-of-state even though the relocation may be beneficial to the parent, the child, and the community.¹²⁵ If the court adheres to the rules of statutory interpretation, however, citizens can predict the outcome of their case and can plan their lives accordingly.

B. Proposal

This case note proposes an application of the statute that abides by the Wyoming Supreme Court's stated rules of statutory interpretation. A district court may modify custody "if there is a showing by either parent of a material change in circumstances since the entry of the order in question and that the modification would be in the best interests of the children pursuant to W.S. 20-2-201(a)."¹²⁶ While the best interests of the children are paramount in child custody cases, the court has stated that *res judicata* bars consideration of the best interests of the child unless a material change in circumstances is shown.¹²⁷

The Wyoming Supreme Court interprets statutes as a matter of law.¹²⁸ If the statute is susceptible of only one meaning, then it is applied as it is written.¹²⁹ The threshold analysis, then, is whether the language of the custody modification statute is susceptible to more than one meaning.¹³⁰ The statute requires a "material change in circumstances since the entry of the order in question."¹³¹ *Material* has different formulations in different contexts, but all the definitions can be

¹²² See *Kappen*, ¶ 5, 341 P.3d at 380.

¹²³ Compare *Kappen*, ¶¶ 20–23, 341 P.3d at 383–84 (refusing to recognize an interstate relocation as a material change in circumstances), with *Arnott*, ¶ 2, 293 P.3d at 442 (recognizing an interstate relocation, standing alone, as a possible material change in circumstances).

¹²⁴ Compare *Kappen*, ¶¶ 20–23, 341 P.3d at 383–84, with *Arnott*, ¶ 2, 293 P.3d at 442.

¹²⁵ See generally Sue Kilpatrick et al., *Mobile Skilled Workers: Making the Most of an Untapped Rural Community Resource*, 27 J. RURAL STUD. 181, 189 (2011) (discussing a study of integration of mobile skilled workers into rural communities and recognizing a net positive for the community).

¹²⁶ WYO. STAT. ANN. § 20-2-204(c) (2015).

¹²⁷ *Kappen*, ¶¶ 12–14, 341 P.3d at 381–82; *Arnott*, ¶ 13–14, 293 P.3d at 444–45.

¹²⁸ *Vineyard v. Jenkins*, 983 P.2d 1234, 1235 (Wyo. 1999).

¹²⁹ See *Parker Land & Cattle Co. v. Wyo. Game & Fish Comm'n*, 845 P.2d 1040, 1042 (Wyo. 1993).

¹³⁰ *Id.*

¹³¹ WYO. STAT. ANN. § 20-2-204(c) (emphasis added).

reduced to mean *significant, essential, or relevant*.¹³² The ordinary meaning of *material* agrees with this definition.¹³³ So, the statute can be rephrased to require a *significant, essential, or relevant change in circumstances since the entry of the order in question*. This means that any non-trivial change in circumstances may be used to justify modifying custody.

The question still remains whether this is the result intended by the legislature. The legislature is presumed to know the law and how statutes will be interpreted when it enacts legislation.¹³⁴ When it enacted Wyoming Statute section 20-2-204, the legislature omitted the requirement that a change in circumstances affect the welfare of the child before it can justify a custody modification.¹³⁵ So, a change that is very significant—perhaps one parent losing her job and being arrested for larceny—could constitute a material change even if it does not affect the welfare of the child.¹³⁶

While the language of the statute appears unambiguous and does not lead to an absurd result when applied as written, one reaches the same result by applying the canons of statutory construction. One of the instructive principles here is that courts consider what evil the statute is attempting to remedy.¹³⁷ In the case of the custody modification statute, the legislature is attempting to balance society's interest in *res judicata* with society's interest in protecting children.¹³⁸ Because the best interests of the child are paramount in family law issues, changing circumstances may require a change to the custody arrangement.¹³⁹

¹³² See *Gjertsen v. Haar*, 2015 WY 56, ¶ 29, 347 P.3d 1117, 1126 (Wyo. 2015) (stating, for the first time, that a material change in circumstances is one that affects the welfare of the child); *Johnson v. Soulis*, 542 P.2d 867, 872 (Wyo. 1975) (defining a material fact as one that would have some impact on the outcome of the case); *Material*, BLACK'S LAW DICTIONARY (10th ed. 2014). While *Gjertsen* stated, in a child custody context, that a material change is one that affects the welfare of the child, *Arnott* found that an interstate relocation could constitute a material change in circumstances, articulating the standard as "new issues framed by facts differing from those existing when the original decree was entered, which preclude the application of *res judicata*." *Arnott*, ¶ 39, 293 P.3d at 457–58, *but see Gjertsen*, ¶ 29, 347 P.3d at 1126. The diverging views of these two opinions further illustrates the need for a consistent and reasoned approach to the application of this statute.

¹³³ See *Material*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/material> (last visited Dec. 2, 2015).

¹³⁴ *Parker Land & Cattle*, 845 P.2d at 1044.

¹³⁵ See WYO. STAT. ANN. § 20-2-204(c) (containing no language requiring a showing that the change affect the welfare of the child).

¹³⁶ *But see Kappen v. Kappen*, 2015 WY 3, ¶ 25–26, 341 P.3d 377, 384 (Wyo. 2015).

¹³⁷ *Parker Land & Cattle*, 845 P.2d at 1044.

¹³⁸ See *Arnott v. Arnott*, 2012 WY 167, ¶ 13, 293 P.3d 440, 444–45 (Wyo. 2012).

¹³⁹ See *id.*

It is reasonable to impose barriers to custody modification, but the inherent sensitivity of custody issues requires the barriers not be too high. Stability in a child's life is extremely important, and is an underlying policy to be considered in custody modification cases, but stability is only one factor to be considered.¹⁴⁰ A child should not be left with a parent who is less capable of caring for the child simply because stability is important.¹⁴¹ If the court is concerned that not requiring a material change to affect the welfare of the child sets the bar too low, then it can require more proof that the modification is in the best interests of the child.¹⁴² The proper interpretation of the statute, then, is to view the threshold analysis of requiring a material change in circumstances as just what it says: a material change and nothing more.

It is true that most changes that are material will affect the welfare of the child and most changes that affect the welfare of the child will be material, but imposing this restriction above what the legislature has required violates the principles of statutory interpretation. By adding this language, the Wyoming Supreme Court has violated the separation of powers and has gone beyond interpreting the law.¹⁴³

In *Kappen*, the Wyoming Supreme Court should have affirmed the trial court. There was a significant, relevant, or material change in the circumstances in the mother's life.¹⁴⁴ As the district court noted, the mother lost her job for stealing from a coworker, was convicted of larceny, remarried, and relocated out-of-state.¹⁴⁵ Any one of these events was a significant change of circumstances in the mother's life; all of them together were a very significant change.¹⁴⁶ As the court has repeatedly pointed out, a material change in circumstances alone does not end the analysis.¹⁴⁷ If the court, after finding a material change, determines that a custody modification is in the best interests of the child, then it should order a modification.¹⁴⁸ If the court does not believe it is in the best interests of the child to modify custody, then it should not order a modification.¹⁴⁹ But to condition all the analysis on a detailed discussion of how each factor affects the welfare of the

¹⁴⁰ See *Kappen*, ¶ 12, 341 P.3d at 382.

¹⁴¹ See *Jackson v. Jackson*, 2004 WY 99, 96 P.3d 21 (Wyo. 2004).

¹⁴² See WYO. STAT. ANN. § 20-2-204(c) (2015).

¹⁴³ See WYO. CONST. art. II, § 1; see also SCALIA, *supra* note 32, at 17.

¹⁴⁴ See *Kappen*, ¶ 8, 341 P.3d at 380–81; see also *Kappen*, ¶¶ 42–48, 52–53, 341 P.3d at 387–90 (Davis, J., dissenting).

¹⁴⁵ *Kappen*, ¶ 8, 341 P.3d at 380–81 (majority opinion).

¹⁴⁶ See *id.* (it could be argued that none of the circumstances in the mother's life remained the same as they had been at the time of the divorce decree).

¹⁴⁷ *E.g.*, *Arnott v. Arnott*, 2012 WY 167, ¶ 41, 293 P.3d 440, 458 (Wyo. 2012).

¹⁴⁸ See WYO. STAT. ANN. § 20-2-204(c) (2015).

¹⁴⁹ *Id.*

child imposes substantial burdens on the moving, usually non-custodial, parent. This is not what the legislature intended when it enacted the current custody modification statute.¹⁵⁰

V. CONCLUSION

The Wyoming Supreme Court erred when it applied case law, rather than the statute, to deny a custody modification in *Kappen v. Kappen*.¹⁵¹ The case law cited by the court in *Kappen* predates and contradicts the statute and should be considered abrogated.¹⁵² Because the legislature puts people on notice of what the law is when it enacts a statute, the state's highest court is duty-bound to interpret the statute as the legislature intended the people to understand it.¹⁵³ The court's failure to do this prevents laypeople from acting in the way that will produce the desired legal outcomes.¹⁵⁴

¹⁵⁰ Compare *Cobb v. Cobb*, 2 P.3d 578, 579 (Wyo. 2000), with WYO. STAT. ANN. § 20-2-204(c). Unfortunately, in Wyoming, legislative history is nearly nonexistent. One can, however, infer the intent of the legislature from the language of the statute. See SCALIA, *supra* note 32, at 17.

¹⁵¹ See *supra* notes 89–150 and accompanying text.

¹⁵² Compare *supra* notes 24–106 and accompanying text, with *supra* notes 83–84 and accompanying text.

¹⁵³ See SCALIA, *supra* note 32, at 17.

¹⁵⁴ See *supra* note 98 and accompanying text.