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Child Custody Arrangements: Say What You Mean, Mean What You Say

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Comment

CHILD CUSTODY ARRANGEMENTS: Say What You Mean, Mean What You Say

INTRODUCTION

In Wyoming, custody battles place judges and court commissioners in King Solomon's[1] position nearly everyday as they are asked to split children between divorcing parents.[2] Of course, judges and commissioners do not wield swords, but they do use legal terms which are often inadequate and misused.[3] Unfortunately, the modern day result, though not as graphic as that from the Bible, is just as severe.

As many as one in every two marriages will result in divorce.[4] Thirty percent of children today will be the focus of a custody decision.[5] For too many of these children, their lives will be adversely affected by an improper custody arrangement caused by the erroneous use of the term "joint custody."[6]

The law as it stands in Wyoming does not adequately consider the non-legal aspects of custody or give practitioners and judges the guidance necessary to make appropriate custody determinations.[7] *Gurney v. Gur-*

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1. 1 *Kings* 3:23-28.

2. According to Wyoming Vital Records, Wyoming courts granted 3,140 divorces in 1994. Of those, 56.6 percent or 1,778 involved children. Telephone interview with Lucinda McCaffrey, Deputy State Registrar, Wyoming State Department of Health, Office of Vital Records Services (Feb. 22, 1996).

3. "The lack of standard definitions and the courts' tendency to use certain terms interchangeably have created confusion." H. Jay Folberg & Marva Graham, *Joint Custody of Children Following Divorce*, 12 U.C. DAVIS L. REV. 523, 525 (1979).

4. Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 473 (1979).

5. Lenore J. Weitzman, THE DIVORCE REVOLUTION 215 (1985) (cited by Patricia Grove) *Joint Custody: A Concept That Has Come of Age but Needs Refinement*, 1 AM. J. FAM. L. 23 (1987).

6. Folberg & Graham, *supra* note 3, at 525.

7. WYO. STAT. § 20-2-113 (1995). The Wyoming Statute simply states that child custody determinations should be made in the best interest of the child. *Id.* The statute provides for several types of custody without defining the arrangements or setting forth when they are appropriate. *Id.* The statute allows judges great discretion to make determinations which affect the lives of those involved, but offers no guidance as to how such determinations should be made. *Id.* In this comment, we propose legislation which does not eliminate the discretion of judges, but offers guidelines and definitions to aid in their determinations. We encourage the use of specific factors to determine what is in the child's best interest and which custody arrangement is appropriate. The underlying concepts and framework were taken from the Uniform Marriage and Divorce Act and New Mexico and Utah statutes. *See Analysis infra.*

ney,[8] best demonstrates the ill effect of Wyoming's vague child custody laws. Russell and Renae Gurney, of Torrington, Wyoming, were divorced on July 19, 1993.[9] The divorce decree incorporated an agreement stipulating joint custody of their daughter, Laurie Jane Gurney.[10] The stipulation stated that primary custody would alternate between the parents until Laurie started attending school.[11] Almost six weeks after the entry of the divorce, Renae moved with Laurie to Lusk, Wyoming, which is approximately sixty miles from Torrington.[12] After moving, Renae failed to abide by the visitation guidelines set forth in the divorce decree.[13] Russell petitioned the court to modify the joint custody arrangement.[14] Russell alleged that there was a substantial change in circumstances which warranted a change in custody.[15]

The court found a material change in circumstances which warranted modification. The court granted primary custody to Russell finding that it was in Laurie's best interest.[16] Renae appealed the custody decision which the Wyoming Supreme Court affirmed.[17] The court held that to receive a hearing to modify a joint custody arrangement, a party need only assert that the joint custody arrangement is not working or has failed.[18]

Chief Justice Michael Golden stated in a footnote in the court's opinion, "It is unclear from the district court's order if the 'joint custody' ordered includes both physical and legal joint custody. It is important that judges, legislators, and writers clearly define what is meant by 'joint custody' as the lack of a standard definition creates confusion."[19] The court's understandable confusion compels us to write this comment.

This comment addresses the lack of guidance in Wyoming's child custody statutes.[20] In this comment we will trace the historical background of child custody, focusing on the approach Wyoming's courts have taken. In addition, we will examine the four types of custody and the signifi-

8. Gurney v. Gurney, 899 P.2d 52 (Wyo. 1995).
9. *Id.* at 53.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 56.
18. *Id.*
19. *Id.* at n.1.
20. As earlier noted, WYO. STAT. § 20-2-113 merely sets forth the standards and terms to be used when making a custody determination. Wyoming has no provisions for the application or use of these standards.

cance of legal and physical custody. This comment will provide a working definition of joint custody and give direction for the family law or domestic relations practitioner faced with a possible joint custody situation. We focus on joint custody because of its growing popularity.[21] To further aid the practitioner, this comment will provide guidelines in determining when a joint custody arrangement is appropriate and analyze some of the arguments for and against joint custody. Finally, this comment will propose legislation to replace Wyoming's vague child custody statutes. The proposed legislation will specifically define the types of custody and set forth guidelines for consideration.

BACKGROUND

Child custody law has evolved like a pendulum that has swung from one extreme to the other and now rests in the center. The law, which once favored fathers and then mothers, now focuses on the best interest of the child.[22]

The Common Law

Under Roman law, the father had exclusive and absolute control over his children; he could sell his children and even kill them without punishment.[23] At Anglo-American common law, children were seen as their father's property.[24] A father was responsible for their support and upbringing regardless of the effect this had on the child.[25] Mothers were not seen as appropriate guardians for children, since women themselves were believed to require protection.[26] In 1836, Lord Lyndhurst said:

> As the laws now stand, the father of a child born in lawful wedlock was entitled to the entire and absolute control and custody of that child, and to exclude from any share in that control and

21. Although there have been no empirical studies done in Wyoming, research shows that 79 percent of families studied in California have joint custody arrangements. Catherine R. Albiston et al., *Does Joint Legal Custody Matter?*, 2 STAN. L. & POL'Y REV. 167 (1990).

22. MEL MORGENBESSER & NADINE NEHLS, JOINT CUSTODY: AN ALTERNATIVE FOR DIVORCING FAMILIES 19 (1981).

23. Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 425 (1977).

24. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 6 (1994).

25. Henry H. Foster & Doris Jonas Freed, *Life with Father: 1978*, 11 FAM. L. Q. 321, 322 (1978).

26. DEBORAH ANNA LUEPNITZ, CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE 2 (1982).

> custody the mother of that child. The mother might be the most virtuous woman that ever lived, amiable in her manners, fond and attached to her children. The father, on the other hand, might be profligate in character, brutal in manner, living in adultery, and yet would have the right, under the existing law, to the custody of the children of his marriage to the exclusion of even access to them of his wife, their mother.[27]

A Departure From Common Law

As societies' views of women and children changed, few courts strictly applied the common law view.[28] Courts no longer held one parent to have a right which excluded the other parent from custody of a child. Courts began to act on behalf of the child in determining which parent should have custody. In a 1907 case, the Wyoming Supreme Court stated that custody is a joint right that must be severed upon divorce and a custody determination made.[29]

> [The law] permits (of) the exercise of a sound discretion in behalf of the children as to who should have their custody. In theory and in fact they are the ones whose interest are involved, and the writ is primarily issued for their benefit, and the court or judge must of necessity decide the case from the standpoint of their welfare.[30]

Industrialization placed fathers, who previously worked on farms near the home, into factories and plants while mothers remained home and cared for the children.[31] The way women and children were treated by society changed. For instance, Wyoming became the first state to grant women the right to vote in 1890.[32] Society, and Wyoming courts in particular, began to accept theories that viewed children as evolving human beings, not property.[33]

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27. Nugent v. Powell, 33 P. 23, 27 (Wyo. 1893) (citing King v. Greenhill, 4 Adol. & El. 624 (1836)).

28. MASON, *supra* note 24, at 50.

29. Tytler v. Tytler, 89 P. 1 (Wyo. 1907).

30. *Tytler*, 89 P. at 3.

31. Mason, *supra* note 24, at 51.

32. 1890 Wyo. Sess. Laws 80 § 7. "When they possess the other qualifications of an elector, the rights of women to the elective franchise and to hold office shall be the same as those of men." *Id.*

33. "[W]e come to the conclusion that the right of a father with respect to his child is not an absolute paramount proprietary right or interest in or to the custody of the infant, but is in the nature of a trust reposed in him, which imposes upon him the reciprocal obligation to maintain, care for, and protect the infant . . . ." *Nugent*, 33 P. at 28.

The Twentieth Century

At the turn of this century, beliefs about child custody changed. The presumption that mothers should be awarded custody of their children, particularly those of tender years, became the status quo.[34] By the 1960s, ninety percent of all contested custody decisions favored the mother.[35] The movement was shaped by the belief that fathers did not possess the skills necessary to nurture their children, and mothers, who did possess such skills, were awarded custody accordingly.[36] Wyoming adopted the doctrine in an unanimous decision in 1935.[37] The court said that a child "should not be deprived of a mother's care and attention without extremely strong and decisive reasons for doing so."[38] This practice continued until 1977 when the Legislature determined it was improper and unconstitutional[39] to use gender as a criteria in a custody determination.[40]

The Best Interest Standard

Courts began to take a paternalistic view towards children and asserted the doctrine of *parens patriae*.[41] *Parens patriae* allowed judges to consider the best interest of the child. The best interest standard, while recognized by the Wyoming Supreme Court in 1904,[42] was not formally

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34. David J. Miller, *Joint Custody*, 13 FAM. L. Q. 345, 352 (1979).

35. THE COMMITTEE ON THE FAMILY GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, DIVORCE, CHILD CUSTODY AND THE FAMILY, 27 (1981) (citing Robert Drinan, *The Rights of Children in Modern American Family Law*, 2 J. FAM. L. 101(1962)). *See also* Miller, *supra* note 34, at 353; Foster & Freed, *supra* note 25, at 333.

36. LUEPNITZ, *supra* note 26, at 1 (citing Bruno Bettelheim, *Fathers Shouldn't Try to Be Mothers*, PARENT'S MAGAZINE, Oct. 1956, at 124-125). Articles like Luepnitz's and Bettelheim's embraced the misconception that fathers could not nurture their children because they had not carried the child in the womb. "The male physiology . . . is not geared to infant care . . . The relationship between father and child never was and cannot now be built principally around child-care experiences. It is built around a man's function in society: moral, economic, political." Luepnitz, *supra* note 26, at 1 (citing Bruno Bettleheim, *Fathers Shouldn't Try to Be Mothers*, PARENT'S MAGAZINE, Oct. 1956, at 124-125).

37. Burt v. Burt, 41 P.2d 524, 526 (Wyo. 1935).

38. *Id.*

39. WYO. CONST. art. I, § 3 states, "[t]he laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition . . . ."

40. WYO. STAT. § 20-2-113(a) (1995).

41. Black's Law Dictionary defines *parens patriae* as "acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

42. Wyoming first recognized that the welfare of the child should take precedence over the rights of the parents or other relatives in 1904. Jones v. Bowman, 77 P. 439, 441 (1904). In 1907, this notion was upheld, despite a statute granting fathers the right to custody. "The father of the minor . . . , must be entitled to guardianship of the minor." WYO. REV. STAT. 1899 § 4870, as

introduced as a viable and necessary consideration in a custody determination until the standard was adopted and advocated from the Uniform Marriage and Divorce Act of 1970.[43] As of 1982, all but two states had adopted the best interest standard either statutorily or in case law.[44] The standard, however, is applied inconsistently in various jurisdictions.[45] As one commentator stated:

> [T]he language of custody law is so vague that judges often base decisions on their personal beliefs about motherhood, fatherhood, and what the American family should be like. Because most judges are elderly, white men, their opinions are often criticized for being relentlessly conventional.[46]

Before the 1970s, divorcing parents had to prove grounds existed for divorce and courts assigned fault to one party.[47] Often a husband or wife who sought a divorce was forced to give up his or her children to obtain a divorce.[48] Fault was often equated with parental fitness and kept parents from their children.[49] The Wyoming court refused to punish parents in this way.

> The prime if not sole judicial objective respecting custody of a minor child and parental privileges of visitation, where by divorce, a child is deprived of a continuous home with both parents, is to serve the best interests of the child. Court decrees in these matters are neither to punish nor to reward one parent or the other for real or supposed derelictions.[50]

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amended Wyo. 1901 SESS. L. Chap. 84. The court said, "It is clear that in a controversy between parents for the custody of their minor children the court will regard the welfare of the children as the paramount consideration." Tytler v. Tytler, 89 P. 1, 2 (1907). Despite the court's adoption of the tender years doctrine in 1935, in 1940 the court reiterated, "[t]he paramount question at all times, when the custody and control of a minor child is in dispute, is the welfare of such child." Kennison v. Chokie, 100 P.2d 97 (Wyo. 1940).

43. UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1987).

44. LUEPNITZ, *supra* note 26, at 3.

45. In some states, such as Wyoming, the standard is not statutorily defined and therefore cannot be applied with consistency.

46. LUEPNITZ, *supra* note 26, at 3.

47. MORGENBESSER & NEHLS, *supra* note 22, at 15.

48. *Id.* at 16.

49. *Id.* at 16-17.

50. Henson v. Henson, 384 P.2d 721, 723 (Wyo. 1963).

Courts now recognized that both parents are likely to be fit individuals to provide an environment in which children can be raised.[51]

In the last decade, the custody pendulum has moved to the center. Courts favor custody arrangements that truly benefit children.

ANALYSIS

Courts and analysts recognize four distinct types of custody arrangements that are appropriate in different circumstances. In many jurisdictions including Colorado, Idaho, and Utah, legal and physical custody are distinct and will be divided between the parents.[52] Legal custody refers to making decisions regarding the child's health, education, and best interests.[53] "Physical custody describes providing the majority of physical care for the child."[54]

Each custody situation must be analyzed to determine which arrangement is most appropriate to ensure the arrangement's success.[55] The goals of any arrangement should not only include serving the immediate needs of the parties but also minimizing the need for relitigation.[56] Also, parents, attorneys, and courts should pay special attention to custody determinations involving children with special educational, physical, or emotional needs.[57] The practitioner representing the divorcing parent has an obligation to candidly discuss the non-legal obligation of custody with his or her client.[58] This discussion facilitates determining which custody arrangement is appropriate. Such a discussion should focus on the amount of physical contact the parent anticipates having with the child, the parent's attitude and ability to cooperate with the former spouse, and the amount and type of economic support the parent is prepared to provide.[59] This examination must be honest and meaningful, as it lays the foundation

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51. MORGENBESSER & NEHLS, *supra* note 22, at 17.

52. MIMI E. LYSTER, CHILD CUSTODY: BUILDING AGREEMENTS THAT WORK 10/2 (1995).

53. *Id.* at 5/33.

54. *Id.*

55. *See* LYSTER *supra* note 52, at Chapter 5 (a thorough discussion of the factors which should be analyzed and the significance of each).

56. LYSTER, *supra* note 52, at 2/2.

57. *Id.* at 7/8. The author explains that often custody arrangements involving children with special needs stay in place longer than those made involving other children because the need for care extends beyond majority. *Id.*

58. In our research we found two treatises with which every practitioner involved in any type of custody determination should be familiar. We recommend reading Mimi E. Lyster, *Child Custody, Building Agreements That Work* (Nolo Press, 1995) and *Joint Custody and Shared Parenting* (Jay Folberg, ed., BNA, 1984).

59. *See* LYSTER, *supra* note 52, at chapters 2 & 5.

for the custody arrangement and parenting plan that will shape the parent-child relationship for years to come.[60] Many of the issues raised here will often be raised by a guardian *ad litem* in a custody determination.[61] Clients can be empowered by participation in this search as they recognize their abilities and options at the onset of the divorce proceeding.[62] Arrangements made between the parties often are more successful than court ordered arrangements which often do not reflect the parties' needs or desires.[63]

All custody arrangements, whether made by agreement of the parties or ordered by the court, must be reduced to writing.[64] Putting the arrangement in writing serves several purposes. First, a written agreement provides a tangible reference for the parties as to what rights, responsibilities, and obligations each parent possesses.[65] Also any conflict which arises may be more easily resolved when the agreement is in writing. Finally, a written agreement is a necessity for enforcement purposes.[66] Without a written mandate to enforce or modify, a court's hands are tied.[67]

Legal and physical custody are separate entities. Any order for custody must contain two distinct provisions: one which sets forth the physical arrangement and one which addresses the legal aspect of the arrangement.[68] The four types of custody arrangements: sole, divided or alternating, split, and joint, are set out below in terms of both legal and physical custody. The situations in which each type of arrangement is appropriate are outlined as well.

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60. *Id.* at 1/2.

61. Carol Higley Lane, *The Guardian Ad Litem in Divorce Cases, in* FOUNDATIONS OF CHILD ADVOCACY 172 (Donald C. Bross et al. eds., 1987).

62. *See* LYSTER, *supra* note 52, at 1/2. This text, while focusing on arrangements that benefit children, reminds parents that they are not alone and that there are resources available as they face this experience. *Id.*

63. *Id.* at 1/4.

64. WYO. R. CIV. P. 58 requires all orders, whether ratified or entered by a court, to be reduced to writing and presented to the court within 20 days after the court's decision is made known.

65. LYSTER, *supra* note 52, at 2/5.

66. Courts generally treat oral or non-written contracts as unenforceable rather than void. JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 19-35 (3d ed. 1987).

67. WYO. STAT. § 20-2-113 allows a court to enforce or modify a written agreement. Therefore, without a written agreement or order, no modification or enforcement measures can be made.

68. *See* MORGANBESSER & NEHLS, *supra* note 22, at 97-110. This chapter discusses the separation of the physical arrangement from the legal aspects of custody. *Id.*

Sole Custody

In a sole custody arrangement, one parent is given complete physical and legal custody of the child.[69] This entitles the custodial parent to complete control over the child's welfare without the need to consult with the non-custodial parent.[70] The parents, however, can informally agree that the non-custodial parent be informed of major events in the child's life.[71] It is important that teachers, doctors, and other significant persons be made aware of such an informal agreement, so that the noncustodial parent is not completely shut out of the child's life.[72] Additionally, the noncustodial parent may be granted visitation rights.[73] This visitation arrangement must be specific and in writing to ensure that the child is not in the middle of the parents' power struggle.[74]

Appropriateness of Sole Custody

Sole custody is appropriate when the parties agree to such an arrangement due to geographic or other limitations or for economic reasons.[75] By the very nature of this arrangement, cooperation between the parents is helpful but not imperative.[76] Because the decision-making power lies with one parent, sole custody is appropriate in situations where there may not be parental cooperation. Sole custody with liberal visitation to the noncustodial parent is appropriate for young children, especially infants.[77] Research has shown that while children under the age of two can form a number of relationships or attachments to their care providers, they suffer when there are too many differences in the way that care is provided and in the routines that are followed.[78] The emotional effect of sole custody without frequent visitation on the child may be disastrous as the child is not only "deeply pained by one parent's absence, but they interpret it as abandonment . . . ."[79]

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69. *See* Folberg & Graham, *supra* note 3 at 526.
70. *Id.*
71. *Id.*
72. Miller, *supra* note 34, at 355-56.
73. Folberg & Graham, *supra* note 3, at 525.
74. Miller, *supra* note 34, at 356.
75. LYSTER, *supra* note 52, at 5/34.
76. Nadine E. Roddy, *Joint Custody in the 1990s: The Concept in Practice*, 6 DIVORCE LITIGATION 21, 23 (Feb. 1994).
77. *Id.*
78. LYSTER, *supra* note 52, at 7/5.
79. MEL ROMAN & WILLIAM HADDAD, THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY 119 (1978).

If the age of the child is the only reason that a sole custody arrangement is made, at the time the child enters school a different arrangement may be more appropriate.

> A child's sense of time, as an integral part of the continuity concept, requires independent consideration. That interval of separation between parent and child which would constitute a break in continuity for an infant, for example, would be of no or little significance to a schoolage youngster.[80]

If the parties cannot agree to any child custody arrangement, a court may award sole custody. Courts generally maintain that young children are best left in the sole custody of one parent.[81] A court may also award sole custody when one parent is deemed unfit or incompetent or simply does not desire to have custody of the child.[82]

Critics denounce sole custody for being inflexible and unable to adjust to the inevitable changes that occur in custody arrangements.[83] Critics also point to the added stress a sole custodial parent faces. Mothers are often seen as a nurturers, not disciplinarians, while fathers are not seen as nurturers.[84] A parent granted sole custody may have a difficult time handling both roles. Parents going through a divorce face many new responsibilities and feelings as they approach life alone, and the parent granted sole custody has the added burden of meeting the child's changing emotional needs.[85] Finances can also create stress as one household becomes two.[86] For the custodial parent, the standard of living generally decreases, and for the non-custodial parent, child support and visitation expenses are created. Sole custody can exacerbate parental conflict, the consequences of which can be disastrous for the child, especially if the parents use the child as a weapon.[87]

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80. GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 40 (1973).

81. *But see* Folberg & Graham, *supra* note 3, at page 527, n.23. In Lutker v. Lutker, 230 S.W.2d 177 (Mo. Ct. App. 1950) the court affirmed the divided custody award involving a two-year old. The court found that both parents were devoted to the child, both homes fostered the child's growth, and the homes were close to one another. *Lutker*, 230 S.W.2d at 180.

82. MORGENBESSER & NEHLS, *supra* note 22, at 9.

83. Miller, *supra* note 34, at 355.

84. ROMAN & HADDAD, *supra* note 79, at 79-80.

85. *Id.*

86. *Id.*

87. *Id.* at 117.

Divided or Alternating Custody

A divided custody arrangement is one in which both parents are given sole physical and legal custody of the child for set durations during the year, subject to visitation by the non-custodial parent.[88]

Divided custody arrangements are most often confused with joint custody arrangements due to the physical contact both parents have with the child throughout the year.[89] Labeling this arrangement as joint custody, however, is inappropriate.[90] The decision-making power is not shared by the parents, but shifts from one parent to the other as the child moves from one home to the other.[91] This arrangement is used most often with school-aged children.[92] As the Wyoming Supreme Court stated, "As a general rule, divided custody arrangements are not favored absent a good reason therefor, but they are often upheld on appeal when the division places the child with one parent during the school year and with the other parent during summer vacations."[93] Divided custody appropriately defines the arrangement originally set forth in *Gurney*.[94]

Appropriateness of Divided or Alternating Custody

A divided arrangement is most often appropriate in situations which provide for residence of the child with one parent during the school year and the other during summer vacation.[95] A geographical distance between the parents may also indicate an appropriate situation for this form of custody.[96]

Parental cooperation becomes especially important in this form of custody, as the parents need to coordinate custody exchanges and visitation.[97] Maintaining stability for the child is a paramount concern in any custody arrangement.[98] As a child shares with both parents in a divided

88. Folberg & Graham, *supra* note 3, at 526.

89. Carolyn S. Bratt, *Joint Custody*, 67 KY. L.J. 271, 282-283 (1978-1979).

90. *Id.*

91. Folberg & Graham, *supra* note 3, at 526.

92. *Id.* at 527.

93. Ayling v. Ayling, 661 P.2d 1054, n.3 (Wyo. 1983). *See* Annotation: *"Split" "Divided" or "Alternate" Custody of Children*, 92 A.L.R. 2d 695 (1963).

94. Gurney, 899 P.2d at 53. *See supra* notes 9-12 and accompanying text.

95. Folberg & Graham, *supra* note 3, at 527.

96. *Id.*

97. LYSTER, *supra* note 52, at 5/14, 5/26.

98. GOLDSTEIN ET AL., *supra* note 80, at 31. In the book, the authors contend that "continuity of relationships, surroundings, and environmental influence are essential for a child's normal development. Since they do not play the same role in later life, their importance is often underrated by the adult world." *Id.*

custody arrangement, both parents should adopt similar parenting philosophies.[99] This may create the continuity that experts feel children need following a divorce.[100]

A court appropriately awards divided custody in absence of agreement by the parties, especially when such an arrangement serves the child's best interests.[101] A court may ratify an agreement made between the parties for the same reasons. The court should not order or approve this type of arrangement when one parent is deemed unfit or has no desire to be responsible for the control of the child for an extended duration.[102]

Split Custody

Split custody describes an arrangement where there are two or more children who are literally split or divided between the parents.[103] In such an arrangement, each parent receives sole physical and legal custody of one or more of the children and visitation rights to the other children.[104]

Appropriateness of Split Custody

This arrangement is discouraged because courts find that it is not in the best interest of the children to be separated from their siblings.[105] Generally, courts will not separate siblings from one another.[106] The parties can agree to the arrangement if they commit to maintaining the sibling relationships.[107] The parties must recognize that they will have nearly constant contact if only to allow their children to have meaningful relationships with each other, grounded on close and frequent contact with one another.[108]

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99. LYSTER, *supra* note 52, at 5/29-5/31.

100. GOLDSTEIN ET AL., *supra* note 80, at 31.

101. *Id.* at 105.

102. *See* WILLIAM F. HODGES, INTERVENTIONS FOR CHILDREN OF DIVORCE; CUSTODY, ACCESS, AND PSYCHOLOGY, 114 (1991). Because joint custody and divided custody are very similar, indicators of inappropriateness for joint custody apply to divided custody. While Mr. Hodges refers specifically to joint custody these reasons also apply to divided custody if only because divided custody and joint custody are so similar. *Id.*

103. Folberg & Graham, *supra* note 3, at 528.

104. Bratt, *supra* note 89, at 283.

105. Folberg & Graham, *supra* note 3, at 528.

106. *See* Dowdy v. Dowdy, 864 P.2d 439 (Wyo. 1993); Craig v. McBride, 639 P.2d 303 (Alaska 1982); Pennington v. Pennington, 711 P.2d 254 (Utah 1985); and In re Marriage of Moe, 676 P.2d 336 (Or. Ct. App. 1984).

107. LYSTER, *supra* note 52, at 5/34. The author notes that often the bond between siblings is the only reliable support system children have after divorce. Eliminating it can have very serious consequences. *Id.*

108. HODGES, *supra* note 102, at 93.

This arrangement may also be appropriate where the children are of an age to make their preferences known.

> It appears to be the most universal rule that at least when a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgement as to its future welfare, based upon facts and not mere whims, its wishes are one factor which may be considered by the court in determining custody.[109]

Wyoming Supreme Court Justice Charles Brown stated, "the older a child becomes, greater weight should be given his preference; and as a child grows older, it is much more difficult to require him to remain in the custody of a parent he does not prefer."[110] In 1989, Justice Brown set forth factors which should be considered when weighing a child's preference. The factors are: the age of the child; the reason for the preference; the relative fitness of the preferred and the non-preferred parent; the hostility, if any, of the child to the non-preferred parent; the preference of other siblings; and whether the child's preference has been tainted or influenced by one parent against the other.[111]

Split custody can be appropriate when certain circumstances exist. Such circumstances include: a history of conflict between a parent and one of the children; incest;[112] or if the children interact destructively with one another.[113] Even if any of these circumstances lead to split custody, the children still need an opportunity to interact.[114]

A court may ratify an agreement made between the parties or order split custody where it is in the best interests of the children. The effect of separating siblings from each other is just one of several factors courts consider in determining the best interests of the children.[115] In a situation where split custody is considered, it is of utmost importance that the court understand the feelings of the children.

Wyoming recognizes a guardian *ad litem* as an effective means of discovering and conveying the children's feelings.[116] If the judge does not

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109. Yates v. Yates, 702 P.2d 1252, 1256 (Wyo. 1985) (citing D.W. O'Neill, Annotation, *Child's Wishes as Factor in Awarding Custody*, 4 A.L.R. 3d 1396, 1402 (1965)).

110. *Yates*, 702 P.2d at 1256.

111. Roberts v. Vilos, 776 P.2d 216, 219 (Wyo. 1989).

112. LYSTER, *supra* note 52, at 5/34.

113. HODGES, *supra* note 102, at 93.

114. *Id.*

115. Dowdy v. Dowdy, 864 P.2d 439 (Wyo. 1993); *See also* Jay M. Zitter, Annotation, *Child Custody: Separating Children by Custody Awards to Different Parents* - Post-1975 Cases, 67 A.L.R. 4th 354, Section 2[a] (1989).

116. WYO. STAT. §§ 3-1-101 to -6-119 (1977 & Supp. 1995). This is located in the guardian

have a recommendation from a guardian *ad litem*, the judge should conduct an *in camera* meeting with each child to ascertain how each child feels and what reasons exist for those feelings.[117]

Joint Custody

"The distinguishing feature of joint custody is that both parents retain legal responsibility and authority for the care and control of the child, much as in an intact family."[118] Neither parent's rights are superior; both have an equal voice in education, upbringing, and the general welfare of the child.[119]

The term joint custody has two components, joint legal custody and joint physical custody. Joint legal custody refers to the equal rights and responsibilities of the parents to make major decisions affecting the child, while joint physical custody refers to time spent with the child and the parents' participation in the day-to-day upbringing of the child.[120] Proponents of joint custody point to the fact that the least disruptive custody arrangement will be the one which most closely resembles the custody and control exercised during the marriage.[121] In a marriage, parents do not divide or assign authority and responsibility for the children.[122] Parental rights, while once vested in the father, are now distributed equally between the parents.[123] Used in the proper circumstances, which will be set forth below, joint custody actually promotes cooperation between the parents and provides an environment for the child similar to that prior to the divorce.[124]

Joint custody is flexible and can adapt to the changing needs of the family.[125] The child, as well as each parent, is affected by the divorce, and the parent-child relationship may change. Joint custody allows the parents and the children to determine the living schedule of the children.[126] As changes occur, the "family" can work together to find the best

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and ward section of the Wyoming Statutes.

117. *Yates*, 702 P.2d at 1254.

118. Jay Folberg, *Custody Overview*, *in* JOINT CUSTODY AND SHARED PARENTING 2 (Jay Folberg, ed. 1984).

119. Folberg & Graham, *supra* note 3, at 529 (citing WIS. STAT. ANN. § 247.24(b) (West Supp. 1978)).

120. Roddy, *supra* note 76, at 21.

121. Folberg & Graham, *supra* note 3, 536-37.

122. *Id.* at 538.

123. *Id.* at 539.

124. Folberg, *supra* note 118, at 7.

125. Miller, *supra* note 34, at 361.

126. LYSTER, *supra* note 52, at 5/35.

arrangement.[127] Transitions can be made simply and smoothly without judicial intervention.[128]

As with all areas of developing law, arguments against joint custody exist. We feel, however, that the arguments favoring joint custody are most persuasive, and joint custody should be adopted and promoted accordingly by legislatures, courts, and practitioners.

Parental Cooperation

Opponents of joint custody argue that people who cannot agree while they are married will not be able to agree after divorce.[129] Joint custody, however, may actually work to minimize parental conflict because a joint custody arrangement can be tailored to meet the needs of both parents.[130] Divorced parents who were awarded joint custody say that their conflicts reduced and their children are well adjusted.[131] Also, because parents in a joint custody arrangement work together rather than against one another, potential conflicts arise less often.[132] An added incentive for parental cooperation is the knowledge that if the joint custody arrangement does not work, the court can modify the decree to award sole custody to the parent who can serve the child's best interests.[133] Under the proper circumstances which will be set forth below, joint custody actually promotes cooperation between the parents and allows the child to continue living in a situation which mirrors the custody and control established during the marriage.[134]

Best Interest of the Child

Critics of joint custody contend that joint custody does not serve the best interests of the children, but actually is a way to appease a parent's shame or guilt.[135] While the parent may not know what role he or she plays in the child's life, the parent sees anything less than joint custody, appropriate or not, as a form of rejecting the child.[136]

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127. Miller, *supra* note 34, at 362.

128. *Id.*

129. Persia Woolley, *Shared Parenting Arrangements*, *in* JOINT CUSTODY AND SHARED PARENTING 21 (Jay Folberg, ed., 1984).

130. Folberg & Graham, *supra* note 3, at 550 (citing ROMAN & HADDAD, THE DISPOSABLE PARENT 116 (1978).

131. ROMAN & HADDAD, *supra* note 79, at 116.

132. *Id.*

133. Folberg & Graham, *supra* note 3, at 551 (citing Interview with Hugh McIsaac, Director of the Conciliation Court, Los Angeles County, California (Feb. 4, 1979)).

134. Folberg & Graham, *supra* note 3, at 536-37.

135. Richard A. Gardner, *Joint Custody is Not for Everyone*, *in* JOINT CUSTODY AND SHARED PARENTING 63, 68 (Jay Folberg, ed., 1984).

136. *Id.*

Joint custody, however, is often in the best interests of the child because it focuses on contact with both parents, which is generally healthier for both parents and children.[137] "Several recent studies have concluded that 'the best conditions for continued development [of children], require the deep involvement of both parents.'"[138] By examining the effect of joint custody on children at different developmental stages, it becomes apparent that if used in appropriate situations, joint custody does serve the best interest of the children.

Child Development and the Best Interest Standard

Preschool age children view their parents as a unified team, and separation from one parent often creates the fear that the child will lose the other parent as well.[139] Children in this developmental stage are formulating their sexual identities, so contact with members of both sexes is important at this time.[140] Most importantly, preschool age children often believe that they have caused the divorce and need reassurance from both parents to the contrary.[141]

While school age children are better able to understand and deal with the divorce, they need assurance that their schedules will be consistent and that they will have contact with both parents on a regular basis.[142] Children need their parents to be actively involved in their lives, whether it be through school or through other activities or interests.[143] As children form their own identities and value systems, they need guidance from both parents.[144] These children are sensitive to their parents' feelings and will do almost anything to avoid hurting their parents.[145] As a result, some children fear expressing their feelings of dissatisfaction, anger, or fear. Without regular contact, a parent will not recognize that his child is hurting and help him or her express these feelings.[146]

Adolescence may present challenges for children, and divorce injects more confusion and pain into their lives.[147] Parents should allow teens to

137. Miller, *supra* note 34, at 362.
138. *Id.* (citing STANDING COMM. ON CHILD CARE, N.Y. ASSEMBLY, REPORT 21 (Oct., 1978)).
139. LYSTER, *supra* note 52, at 7/6.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 7/7.

participate in making any kind of custody arrangement.[148] Joint custody facilitates not only the child's participation but also allows for flexibility. Arrangements which have worked in the past may be unrealistic at this time as the teen's activities increase and the teen's preferences develop.[149]

Opponents also argue that children in joint custody arrangements are injured by the constant shifting between homes and lack the stability they need.[150] The different lifestyles, disciplinary measures, rules, and socio-economic conditions of the parents can give a child a sense of unpredictability and lack of environmental continuity.[151] "[T]he child will become confused as to where authority lies and as to the different ways of living in the respective homes."[152] This argument, however, should only apply to children under the age of three or four, as older children generally adjust well to these transfers.[153]

Sometimes meeting a parent's needs can be in the best interest of the child. After a divorce, the single parent often experiences burdensome economic responsibilities and emotional strain which were not present before the divorce.[154] Joint custody allows each parent time alone. Such time may be vital in learning to cope with the new situations created by the divorce. A parent who has not yet learned to cope with the divorce will be of little assistance to the child who is also dealing with the changes the divorce precipitated.[155]

Financial Aspects

Some critics also argue that to make the joint custody arrangement work the parties must be financially well off.[156] "One judge has acknowledged that joint custody parents have to have money and that where it has worked, the parties have often been professional people."[157] As both parents in a joint custody arrangement maintain a home for the child, the standard of living after the divorce need not, and often will not, be as it was before the divorce.[158] In fact, studies reveal that when parties di-

148. *Id.*
149. *Id.*
150. Gardner, *supra* note 135, at 65.
151. *Id.*
152. Holley v. Holley, 158 So. 2d 620, 622 (La. Ct. App. 1963).
153. HODGES, *supra* note 102, at 112.
154. Bratt, *supra* note 89, at 301.
155. *Id.*
156. Folberg & Graham, *supra* note 3, at 562-63.
157. *Id.* (citing Justice Bentley Kassal, New York Supreme Court, Remarks at Conference on Current Developments in Child Custody (Dec. 2, 1978) *in* 5 FAM. L. REV. 2141 (1978)).
158. LYSTER, *supra* note 52, at 2/6.

vorce, both the husband and the wife experience a decline in their standard of living.[159]

Financial security is not always necessary, however, as one attorney states, "Interestingly, money was very low on the list of problems or considerations where sharing parents were concerned, and since my sample of interviews covered a broad range of financial situations, I feel it is an honest reflection of sharing parents' attitudes."[160] Joint custody arrangements, because they involve cooperation and are flexible, generally allow the parties to work out financial problems. The non-custodial parent who has more contact with his children is less likely to resent paying for their expenses, and the custodial parent who can rely on his ex-spouse for more than just economic support is more understanding of financial strains that may arise.[161]

Judicial Apprehension

Some critics of joint custody believe that judges do not see joint custody as a viable option.[162] Judges entrenched in litigating contested cases may have difficulty viewing a case where joint custody is agreed upon as a possibility.[163] As one lawyer put it, "I don't want to raise my client's hopes, only to have everything fall apart when His or Her Honor lets out a hoot of dismay and refuses to consider the question further."[164] In states like Wyoming which have no clear definition, and thus no clear guidelines for joint custody, this may be a valid concern. The emphasis joint custody places on cooperation and flexibility, however, may actually reduce the number of contested divorce and modification proceedings.[165]

Logistical Problem

Logistically, some critics feel joint custody is difficult to implement.[166] Problems arise with "clothes or books being left at the wrong

159. The U.S. Bureau of the Census (1977) found that while both parties face a decline in income following divorce, women with children suffer a tremendous blow as their income is only 53 percent of that of intact families. LUEPNITZ, *supra* note 26, at 55.

160. Woolley, *supra* note 129, at 20.

161. *Id.*

162. *Id.* at 22.

163. Folberg & Graham, *supra* note 3, at 548.

164. Woolley, *supra* note 129, at 22.

165. Frederic W. Ilfeld, Jr. et al., *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, *in* JOINT CUSTODY AND SHARED PARENTING 136 (Jay Folberg, ed., 1984). The authors studied 414 custody cases and found that of those which returned to court, the proportion of relitigation for joint custody families was one-half that of exclusive custody families. *Id.*

166. Miller, *supra* note 34, at 368.

residence, or the need for parental communication and discussion on every issue relating to the child."[167] Although problems like this may arise, the effect they have can be minimized through organization. Parents should consider making a check-list of items to transport when moving the children from one residence to the other. Applied appropriately, joint custody facilitates parental communication.[168] Parents, who are willing to cooperate, will view any logistical problems as minor.

Appropriateness of Joint Custody

Some states have adopted a legal presumption favoring joint custody in custody determinations.[169] With this type of statute, joint custody is presumed to be in the best interest of the child.[170] Joint custody, however, should not be created by presumption, but should be tailored to work in situations where it is likely to succeed.[171] Some situations arise which make joint custody an inappropriate custody arrangement. Therefore, joint custody should only be granted when the following criteria are met. Both parents must be committed to making joint custody work.[172] Because of the love they have for their children and their desire to be involved in the lives of their children, the parents are willing to look past their differences and work for a successful joint custody arrangement.[173]

For joint custody arrangements to succeed, parents need to have a good understanding of their respective roles in the arrangement and be willing and able to negotiate their differences.[174] Both parents must be able to allow the other parent to provide care without intruding, and respect the other's parental rights and privacy.[175] The lines of communica-

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167. *Id.*

168. *Id.* at 369-70.

169. *See e.g.*, IDAHO CODE § 32-717B (1983 & Supp. 1995), N.H. REV. STAT. ANN. § 458:17 (1992 & Supp. 1995), and N.M. STAT. ANN. § 40-4-9.1 (Michie 1978) These statutes require joint custody unless the child's best interest or the parent's health or safety would be compromised. Twenty-one other states including Colorado, Montana, Nebraska, South Dakota, and Utah allow joint custody despite the objection of a parent. *See e.g.*, COLO. REV. STAT. § 14-10-124 (1989 & Supp. 1995), MONT. CODE ANN. § 40-4-224 (1995), NEB. REV. STAT. § 42-364(3)(1988 & Supp. 1992), S.D. CODIFIED LAWS ANN. § 25-4-45 (1992 & Supp. 1995), and UTAH CODE ANN. § 30-3-10.2(1)(b) (1995).

170. JoAnne Schulmann & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, *in* JOINT CUSTODY AND SHARED PARENTING 209, 213 (Jay Folberg, ed., 1984).

171. Bratt, *supra* note 89, at 287.

172. HODGES, *supra* note 102, at 113.

173. Meyer Elkin, *Joint Custody: In the Best Interest of the Family*, *in* JOINT CUSTODY AND SHARED PARENTING 11, 13 (Jay Folberg, ed., 1984).

174. *Id.*

175. N.M. STAT. ANN. § 40-4-9.1(B)(5) (Michie 1994).

tion must be open between the parents and both parents must be willing to cooperate.[176] Joint custody will not succeed without parental cooperation.

Parents must be able to give priority to their children's needs and must be willing to arrange their lifestyles to accommodate those needs.[177] Both parents must look out for the best interest of the children, even if it means making personal sacrifices or putting their needs behind those of their children.[178]

Parents must be able to separate their roles as husband and wife, which have ended, from their roles as parents.[179] Research shows that parents who do not like one another may still be able to cooperate in a joint custody arrangement. One researcher found that, "although many sharing parents became friends after they had been sharing for a while, many others did not . . . . It is not necessary to like each other as people even though they trust each other as parents."[180]

Parents with the potential flexibility to make changes in the joint custody arrangements as the developmental needs of their children change see more success in the joint custody arrangement than inflexible parents.[181] Parents must consider the best interest of their children. Because children grow and change, their best interest is not a static notion, and parents must make a commitment to accommodate these changes.

When Joint Custody is Inappropriate

Joint custody is never appropriate and should not be ratified or ordered when any of the following factors apply to a situation. First of all, joint custody is inappropriate when one of the parents is unfit and cannot care for the child whether it be for mental, emotional, or physical inabilities.[182] Such an arrangement should also be avoided when there is a pattern of substance abuse.[183] Joint custody should never be agreed to or ordered when one or both parents have expressed a desire to avoid participation in the arrangement.[184] Joint custody is inappropriate for small children, especially if a great geographical distance divides the parents and if

176. Elkin, *supra* note 173, at 14.
177. *Id.* at 13.
178. *Id.*
179. *Id.*
180. Folberg & Graham, *supra* note 3, at 550-51 (citing Persia Woolley, *Shared Custody*, 1 FAM. ADVOCATE 6 (1978)).
181. Elkin, *supra* note 173, at 13-14.
182. HODGES, *supra* note 102, at 114.
183. *Id.*
184. *Id.*

frequent changes in residence will be unmanageable.[185] Also, if the arrangement causes emotional problems, such as confusion and anxiety for the child, joint custody is inappropriate.[186] Courts should deny joint custody to parents who use their children as weapons or whose anger and hostility cannot be put aside.[187] Courts should not order joint custody in any of the above situations because the risk of failure and continued litigation is great.[188]

Joint custody, because it accommodates the changing needs of parents and children, can be successful. It can only work, however, when the parties commit to the arrangement.[189]

PROPOSED LEGISLATION

We propose repealing Wyoming Statute section 20-2-113[190] which is titled "Disposition and maintenance of children in decree; modification; access to records; payment to court clerk; continuing jurisdiction to modify decree; notice." As the title infers, the current statute is convoluted and difficult to understand. The statute states that the court may "order any arrangement that encourages parents to share in the rights and responsibilities of rearing their children . . . ,"[191] but the statute never defines what the term "arrangement" means. It is no wonder that the Wyoming Supreme Court must ask for guidance in this matter.[192]

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185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Committing to a joint custody arrangement includes "a commitment to parenting, good communication skills, flexibility, the ability to circumscribe marital conflict from the children, and good faith in following the arrangements." HODGES, *supra* note 102, at 113.

190. As the statute stands, it contains language from 1882. "The court in granting a divorce, and also upon pronouncing a decree of nullity of a marriage, may make such disposition of, and provision for, the children as shall appear most expedient under all the circumstances, and most for the present comfort and future well-being of such children; and the court may from time to time afterward on the petition of either of the parents, revise and alter such decree concerning the care, custody and maintenance of such children, as the circumstances of the parents and the benefit of the children shall require." 1882 Wyo. Sess. Laws Ch. 40 § 14. The law remained unchanged until 1977. *See* WYO. STAT. § 20-61 (1957) and 1977 Wyo. Sess. Laws 152. The 1977 recodification of the domestic relations statute reflects the current law. *See* 1977 Wyo. Sess. Laws 152 and WYO. STAT. § 20-2-113 (1977 and Supp. 1995). The current statute reads, "In granting a divorce or annulment of a marriage, the court may make such disposition of the children as appears most expedient and beneficial for the well-being of the children. The court shall consider the relative competency of both parents and no award of custody shall be made solely on the basis of gender of the parent." WYO. STAT. § 20-2-113(a) (1977 and Supp. 1995).

191. WYO. STAT. § 20-2-113(a).

192. *See Gurney*, 899 P.2d 52, at n.1.

In Wyoming Statute section 20-2-113, Wyoming recognizes joint custody. However, the statute provides no definition of joint custody and no criteria for joint custody's appropriate use. We propose legislation[193] modeled after the New Mexico and Utah joint custody statutes.[194] A series of statutes which provide definitions of the four types of custody and guidance for the application of custody will not only lead to uniform decisions throughout the state but also give divorcing parents knowledge of their options, rights, and responsibilities. Finally, we will divide the statute into smaller components making it easier for all to use and understand.

Even if the proposed statute is not adopted, courts still must demand that *both* legal and physical custody are addressed in all custody orders. At the very least, we urge practitioners to use the appropriate custody terms and to describe custody consistently.

CONCLUSION

Practitioners, guardians *ad litem*, judges, and commissioners in Wyoming continue to face the challenge of "splitting" children between divorcing parents. The difficulties associated with this task, as well as the adverse consequences that often follow, can be decreased by ascertaining which legal and physical custody arrangements are appropriate and creating orders which reflect these arrangements.

The legislation we propose will aid those shaping custody determinations with specific definitions of legal and physical custody and guidelines for determining which arrangement is appropriate in a given situation. Parents, attorneys, and judges will know what rights and responsibilities are being assigned to each party, decreasing the need for judicial clarification.[195] Those involved in the decision-making process will also know what factors enter into the custody determination. While the standard remains the best interest of the child and judges retain final discretion, there will be tangible factors on which the court must base its decisions.

Divorcing parents have great responsibility in the custody determination. They must articulate the role they plan to play in their child's life and incorporate such desires into a workable parenting plan. By using standard

193. *See* Appendix 1, Proposed Legislation.

194. *See* N.M. STAT. ANN. § 40-4-9.1 (Michie 1994) and UTAH CODE ANN. § 30-3-10.1 (1995).

195. Parties like those in *Gurney*, where the decree or order lacks specific direction and recourse for failure to abide by the decree, are forced to relitigate the issues, often all the way to the Wyoming Supreme Court.

terms and considerations in custody orders and by requiring parents to play a pro-active role in the custody determination, the need to re-litigate custody and place the child in further turmoil may be eliminated.

DANECE DAY KOENIGS
KIMBERLY A. HARRIS

Appendix I

Proposed Legislation for Child Custody Determinations

§ 20-2-113 (A) **Purpose**

The purpose of this act is to provide uniform definitions and standards in child custody matters.

§ 20-2-113 (B) **General Provisions**

(a) This section is not intended to change or eliminate any related issues, including child support, which shall be determined and ordered by the court.

(b) Notwithstanding any other provisions of law, access to records and information pertaining to a minor child, including but not limited to medical, dental, and school records, shall not be denied to a parent because that parent is not the child's physical custodial parent or because the parent is not a joint custodial parent.

(c) In any proceeding in which the custody of a child is at issue, the court shall not prefer one parent as a custodian solely because of gender, age, race, or religious preference.

(d) If the court finds that an action under this section is filed or answered frivolously and in a manner designed to harass the other party, the court shall assess reasonable attorney's fees as costs against the offending party.

(e) An order of joint legal custody shall be terminated by order of the court if both parents file a motion for termination. At the time of entry of an order terminating joint legal custody, the court shall enter an order of sole, divided, or split legal custody.

(f) The role of Guardians *ad litem*

(i) The court may in its discretion or upon request of one or both of the parties, appoint a guardian *ad litem* to represent the best interest of the child at any point in a custody proceeding.

(ii) The court may order the parties to divide the cost of the guardian *ad litem* if the court finds it is within the parties' means.

§ 20-2-113 (C) **Definitions**

As used in this act:

(a) "Commencement of the proceeding" means the time of the filing of a complaint for divorce, a petition to enforce a custody decree, or a petition to modify a custody decree, whichever is later.

(b) "Custody arrangement" means a written arrangement, either agreed to by the parties or ordered by the court, establishing specific provisions for physical and legal custody.

(c) "Custody determination" means a court order and instructions providing for the custody of a child including visitation rights, but does not include a decision relating to child support or any other support obligation of any person;

(d) "Custody order" or "custody decree" or "child custody decree" means a custody determination contained in a judicial decree made in a custody proceeding. It must provide for physical and legal custody, and it may incorporate any agreement or parenting plan made by the parties which is ratified by the court. The order must be filed with the clerk of court.

(e) "Custody proceeding" includes any proceeding in which a custody determination is made including an action for divorce, enforcement of a custody decree, or modification of a custody decree.

(f) "Divided custody" means a custody arrangement in which both parents are given sole physical and legal custody of the child for set durations of time during the year and the non-custodial parent of the child is entitled to visitation.

(g) "Fitness" means a parent's ability to care for the child's physical and emotional needs.

(h) "Guardian *ad litem*" means an attorney or person authorized by the court to represent the best interest of the child in any custody proceeding.

(i) "Joint custody" means a custody arrangement in which the physical and legal control of the child are shared between the parents as set forth in a parenting plan.

(j) "Joint legal custody" means the power to make decisions regarding the child's health, education, and best interest is shared between the parents.

(k) "Legal custody" means the power to make decisions regarding the child's health, education, and best interests.

(l) "Parenting plan" means an agreement established between the parents or ordered by the court regarding physical and legal custody of the child, visitation arrangements between the child and the parent who does not have physical custody, and decision making authority between the parents.

(m) "Physical custody" means the actual possession and control of a child.

(n) "Sole custody" means a custody arrangement in which one parent is awarded sole legal and physical custody of the child and the other parent may be awarded visitation.

(o) "Split custody" means a custody arrangement involving more than one child where one parent is awarded sole legal and physical custody of one or more children and the other parent is awarded sole legal and physical custody of at least one other child. Both parents are entitled to visitation.

(p) "This act" means W.S. 20-2-113 (A) through 20-2-113 (L).

(q) "Visitation" means periodic visits between the parent who does not have physical custody and child, the arrangements for which must be set forth in a visitation arrangement and incorporated in all custody orders.

(r) "Visitation arrangement" means a written arrangement in which specific dates, times and places of visitation are set forth. It must also include length and type of contact and the assignment of visitation expenses.

§ 20-2-113 (D) **Jurisdiction to Enforce or Modify Child Custody Determinations**

(a) A court which enters a custody decree under WYO. STAT. § 20-2-107 has continuing subject matter jurisdiction to enforce or modify the decree concerning the care, custody, visitation and maintenance of the children as the circumstances of the parents and the benefit of the children requires, subject to the provisions of the Uniform Child Custody Jurisdiction Act WYO. STAT §§

21-5-101 through -5-125. A court which has jurisdiction to enforce or modify a decree under this section may decline to exercise its jurisdiction if it finds it is an inconvenient forum under the circumstances of the case and that another court has jurisdiction as set forth in The Uniform Child Custody Jurisdiction Act.

(b) A court in the county in Wyoming in which the child has resided for six months prior to commencement of the custody proceeding may assert subject matter jurisdiction and adjudicate any proceedings involving the child. Any party seeking to enforce or modify a custody decree pursuant to this paragraph must attach a certified copy of the custody decree to the petition to enforce or modify.

§ 20-2-113 (E) **Determination of Best Interest of Child**

In determining whether a child custody arrangement or custody order is in the best interest of the child, the court shall consider the following factors:

(a) Whether the child has established a close relationship with each parent;

(b) Whether each parent is capable of providing adequate care for the child throughout each period of responsibility, including arranging for the child's care by others as needed;

(c) The fitness of each parent;

(d) Whether each parent is willing to accept all responsibilities of parenting, including a willingness to accept care of the child at specified times and to relinquish care to the other parent at specified times;

(e) How the child can best maintain and strengthen a relationship with both parents;

(f) How the parents interact and communicate with one another;

(g) Whether each parent is able to allow the other to provide care without intrusion, that is, to respect the other's parental rights and responsibilities and his or her right to privacy;

(h) Geographic distance between the parents' residences; and

(i) The current physical and mental ability of each parent to care for the child.

§ 20-2-113 (F) **Custody Consideration**

A court in this state shall consider the best interest of the child when making a child custody determination.

§ 20-2-113 (G) **Sole Custody**

A sole custody arrangement is appropriate when:

(a) the parties agree to such an arrangement; or

(b) the court orders such an arrangement because:

(i) the parents cannot cooperate;

(ii) one parent is deemed unfit;

(iii) the child is young or not emotionally able to handle another type of custody arrangement; or

(iv) if the court determines that the best interest of the child are met by such a custody arrangement.

§ 20-2-113 (H) **Divided Custody**

A divided custody arrangement is appropriate when:

(a) The parties agree to such an arrangement and submit a parenting plan to the court; or

(b) The court orders such an arrangement because:

(i) It facilitates the child's school schedule;

(ii) The parents are able to cooperate; and

(iii) The best interest of the child are met by such an arrangement.

§ 20-2-113 (I) **Split Custody**

A split custody arrangement is appropriate when:

(a) The parties agree to such an arrangement or when it is ordered by the court because:

(i) There is a history of conflict between a parent and a child;

(ii) Incest;

(iii) Destructive interaction between the children; or

(iv) When children, who are of an appropriate age, state a preference for such an arrangement and it is in the children's best interests

§ 20-2-113 (J) **Joint Legal Custody**

(a) In a sole, divided,or split custody arrangement, a court may order the parties to share legal custody of the child if:

(i) It is in the best interest of the child;

(ii) Both parents are fit;

(iii) Both parents agree to an order of joint legal custody; and

(iv) Both parents appear capable of implementing joint legal custody.

(b) In making an order of joint legal custody, the court may specify the circumstances, if any, under which the consent of both legal custodians is required to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent.

(c) To modify a joint legal custody arrangement one or both of the joint custodians may petition the court to, after a hearing, modify an order that established joint legal custody if:

(i) The circumstances of the child or one or both custodians have substantially changed since the entry of the order to be modified, or the order has become unworkable or inappropriate under existing circumstances; and

(ii) A modification of the terms and conditions of the decree would be an improvement for, and in the best interest of, the child; or

(iii) The parents have agreed in writing at the time of the entry of the decree that a specified event constitutes a substantial change of circumstance.

§ 20-2-113 (K) **Joint Custody**

(a) Joint custody is appropriate when the parties agree to such an arrangement and make their willingness to cooperate known by submitting a parenting plan to the court for ratification.

(b) Whenever a request for joint custody is granted or denied, the court shall state in its decision its basis for granting or denying the request. A statement that joint custody is or is not in the best interest of the child is not sufficient to meet the requirements of this subsection.

§ 20-2-113 (L) **Parenting Plan**

(a) A parenting plan shall be established before divided or joint custody is awarded.

(b) The parenting plan shall include a division of responsibility for the child's care and time between each parent including arrangements for:

(i) visitation by the non-custodial parent;

(ii) the child's religion, education, child care, recreational activities and medical and dental care;

(iii) specific decision making responsibilities;

(iv) methods of communicating information about the child, transporting the child, exchanging care for the child and maintaining telephone and mail contact between each parent and child;

(v) future decision making procedures, including procedures for dispute resolution; and

(vi) other statements regarding the welfare of the child or designed to clarify and facilitate parenting under divided custody arrangements.

(c) In the case where necessary aspects of the parenting plan are contested, the parties shall each submit parenting plans. The court may accept the plan proposed by either party, or it may combine or revise these plans as it deems necessary in the child's best interest. A plan adopted by the court shall be entered as an order of the court.