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## Watt's Love Got to Do with It: Relocating the Best Interests of Wyoming's Children in Custodial Parent Relocation Law

Sean M. Larson

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COMMENT

**Editor’s Note:** As this comment was going to press, the Wyoming Supreme Court published its decision in *Arnott v. Arnott*, 2012 WY 167, overruling the aspect of *Watt v. Watt* challenged by this comment. The author has provided a brief addendum, addressing *Arnott*, at the conclusion of this comment.

***Watt’s Love Got to Do with It: Relocating the Best Interests of Wyoming’s Children in Custodial Parent Relocation Law***

*Sean Michael Larson\**

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\* Candidate for J.D., University of Wyoming College of Law, 2013. First and foremost, I thank my parents, Brian and Barb, and my brothers, Craig and Erik. Just as every law review comment requires a solid background, so does every law student; my family and friends are mine. Second, I thank the *Wyoming Law Review* editors, particularly Joshua Eames, Anne Kugler, and Christopher Sherwood, for their endless time and effort in editing this comment. Third, I thank Professor Dona Playton for her assistance. Fourth, I thank Jim Lubing and Leah Corrigan for introducing me to this issue. Finally, I thank everyone else who supported me over these twenty-seven amazing years.

## I. INTRODUCTION

In most states, courts conduct a “best interests of the child” analysis when the custodial parent seeks to relocate with a child.<sup>1</sup> Alone, a custodial parent’s move is not enough to allow Wyoming courts to consider a child’s best interests.<sup>2</sup> *Love v. Love* exemplifies a strong policy favoring the relocation of the custodial parent with a child.<sup>3</sup> In Wyoming, a child’s interest in maintaining a relationship with the non-custodial parent is rarely, if ever, considered.<sup>4</sup> Legal practitioners have searched for the meaning of *Love* for nearly twenty years.<sup>5</sup> The Wyoming Supreme Court has had difficulty explaining *Love*, thus complicating the doctrine.<sup>6</sup>

Wyoming law disregards the interests of the non-custodial parent and the child.<sup>7</sup> Hypothetically, under current Wyoming law, a custodial parent can move with a child from Wyoming to the southern-most tip of Florida, without a court considering the best interests of the child.<sup>8</sup> Each day the application of this doctrine continues, Wyoming’s children are moved across the country without a consideration of their best interests, possibly diminishing or destroying their relationship with an active and loving non-custodial parent.<sup>9</sup>

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<sup>1</sup> See *infra* note 121; see generally Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Numbers of Disputes Increase*, 45 FAM. L.Q. 443, 470–71 (2012) (stating, “[g]enerally the [custodial] parent wishing to move [with the child] must establish by a preponderance of evidence that relocation is in children’s best interests . . .”).

<sup>2</sup> See WYO. STAT. ANN. § 20–2–204(b) (2012) (noting that the parent petitioning the court for modification of the current child custody order must prove there has been a substantial change in circumstances *before* the court can conduct a best interests analysis) (emphasis added); *Love v. Love*, 851 P.2d 1283 (Wyo. 1993).

<sup>3</sup> *Love*, 851 P.2d 1283; see generally David M. Cotter, *Oh, The Places You’ll (Possibly) Go! Recent Case Law on Relocation of the Custodial Parent*, 16 DIVORCE LITIG. 152 (2004) (discussing the complexity of custodial parent relocation disputes and declaring Wyoming law by stating in *Watt*, the Wyoming’s Supreme Court “has gone to the extreme and has found that a parent’s constitutional right to travel may actually serve to trump the best interests of a child in a relocation case”).

<sup>4</sup> See *infra* notes 77–120 and accompanying text.

<sup>5</sup> See *infra* notes 77–120 and accompanying text.

<sup>6</sup> See *infra* notes 77–120 and accompanying text.

<sup>7</sup> *In re Marriage of Ciesluk*, 113 P.3d 135, 143 (Colo. 2005) (rejecting Wyoming’s approach in *Watt*); see Cotter, *supra* note 3, at 152 (commenting in reference to *Watt* that “one court has gone to the other extreme and has found that a parent’s constitutional right to travel may actually serve to trump the best interests of a child in a relocation case”).

<sup>8</sup> *Watt v. Watt*, 971 P.2d 608, 616–17 (Wyo. 1999) (“The custodial parent’s right to move with the children is constitutionally protected, and a court may not order a change in custody based upon that circumstance alone.”).

<sup>9</sup> See Linda D. Elrod, *National and International Momentum Builds for More Child Focus in Relocation Disputes*, 44 FAM. L.Q. 341, n.4 (2010) [hereinafter *National Momentum*] (citing William G. Austin & Jonathan W. Gould, *Exploring Three Functions in Child Custody Evaluation for the Relocation Case: Prediction, Investigation, and Making Recommendations for a Long-Distance Parenting Plan*, 3 J. CHILD CUSTODY 63, 99 (2006)) (commenting that “long distances leave a child outside the ‘dynamic sphere of influence’ of the absent parent, changing the nature of their relationship”).

State legislative and judicial policies favoring relocation of the custodial parent with a child are often based on the parent's constitutional right to travel, deference to the trial court's initial custody order, and a preference for a child's continued relationship with the primary residential parent.<sup>10</sup> This approach supports a custodial parent's freedom to move.<sup>11</sup> Even though this is the strongest argument for Wyoming's current doctrine, its application forecloses a best interests determination in cases where the custodial parent is moving for any reason—even if spiteful. Rigid legal doctrine should not foreclose a fact-specific best interests analysis.<sup>12</sup> Wyoming must eliminate the presumption favoring the relocation of custodial parents without a consideration of a child's best interests. Therefore, Wyoming needs to give up on *Love* and focus on the best interests of the child.

This comment begins by introducing the various interests and rights crucial in analyzing whether to modify a custody order when a custodial parent relocates with a child.<sup>13</sup> The background discusses the two main methodologies courts consider in determining whether the relocation of the custodial parent warrants a child custody modification, which include relocation as a typical modification and relocation as a separate legal doctrine.<sup>14</sup> The background further presents Wyoming's jurisprudence regarding relocation of the custodial parent with a child.<sup>15</sup> Next, the background describes the three main approaches and their reasoning.<sup>16</sup> The three approaches are: (1) a presumption favoring relocation of the custodial parent; (2) a presumption against the relocation of the custodial parent; and (3) no relocation presumption focusing first on conducting a best interests of the child analysis.<sup>17</sup> This comment argues Wyoming's legislature or Wyoming's Supreme Court should change the state's current law to focus on the best interests of Wyoming's children.<sup>18</sup> Conducting a best interests analysis before the potential relocation of the custodial parent with a child would best serve the citizens of Wyoming and their children.<sup>19</sup>

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<sup>10</sup> See *infra* notes 131–40 and accompanying text.

<sup>11</sup> See *infra* notes 131–45 and accompanying text.

<sup>12</sup> *Love v. Love*, 851 P.2d 1283, 1287 (Wyo. 1993) (“Cases involving relocation of parents are fact sensitive; we would be remiss to attempt to define a bright line test for their determination.”); see *Tropea v. Tropea*, 87 N.Y.2d 727, 740 (1996) (“[I]t serves neither the interests of the children nor the ends of justice to view relocation cases through prisms of presumptions and threshold tests . . . .”); see generally Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 515–16 (2001) (characterizing relocation of the custodial parent cases as “fact sensitive and [lacking] uniform standards”).

<sup>13</sup> See *infra* notes 22–59 and accompanying text.

<sup>14</sup> See *infra* notes 60–76 and accompanying text.

<sup>15</sup> See *infra* notes 77–120 and accompanying text.

<sup>16</sup> See *infra* notes 126–63 and accompanying text.

<sup>17</sup> See *infra* notes 126–63 and accompanying text.

<sup>18</sup> See *infra* notes 164–97 and accompanying text.

<sup>19</sup> See *infra* notes 164–97 and accompanying text.

## II. BACKGROUND

### A. *Interests & Rights*

Even absent the difficulties of parental relocation, child custody is an emotionally charged area of law. When a custodial parent moves, it affects important competing interests and rights.<sup>20</sup> There is one legal doctrine and three paramount interests that inform custody relocation law—the doctrine of *res judicata*.<sup>21</sup> The three interests are the custodial parent’s constitutional right to travel, the non-custodial parent’s constitutional right to associate with his or her child, and the child’s best interests.<sup>22</sup> These competing interests make the law even more emotionally charged and leave states with tough decisions regarding the balancing of these interests and rights.<sup>23</sup> All four considerations shape each state’s approach to child custody modification law.<sup>24</sup>

#### 1. *Res Judicata* & the Modification of Child Custody Orders

To modify a current custody order, a material and substantial change must occur and must outweigh the societal interest in supporting the doctrine of *res judicata*.<sup>25</sup> *Res judicata* bars the relitigation of previously litigated causes of action.<sup>26</sup> A current child custody order is a previously litigated cause of action.<sup>27</sup> However, a showing of a material and substantial change in circumstances limits the doctrine of *res judicata* and allows a court to revisit and modify the existing child custody order pursuant to a child’s best interests.<sup>28</sup> This limitation of *res*

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<sup>20</sup> See *In re Marriage of Ciesluk*, 113 P.3d 135, 142–43 (Colo. 2005).

<sup>21</sup> *Watt v. Watt*, 971 P.2d 608, 613 (Wyo. 1999) (“In seeking a modification of the custody provision of the divorce decree, Mr. Watt assumed the burden of establishing that a material and substantial change in circumstances had occurred, following the entry of the initial divorce decree, which outweighed societal interests in supporting the doctrine of *res judicata*.”).

<sup>22</sup> *In re Marriage of Ciesluk*, 113 P.3d at 142 (“Thus, relocation disputes present courts with a unique challenge: to promote the *best interests of the child* while affording protection equally between a *majority time parent’s right to travel* and *minority time parent’s right to parent*.”) (emphasis added).

<sup>23</sup> See *infra* notes 125–62 and accompanying text.

<sup>24</sup> See *infra* notes 125–62 and accompanying text.

<sup>25</sup> WYO. STAT. ANN. § 20-2-204 (2012); *Watt*, 971 P.2d at 613.

<sup>26</sup> *Amoco Production Co. v. Bd. of Cnty. Comm’rs of Cnty. of Sweetwater*, 55 P.3d 1246, 1249–50 (Wyo. 2002) (citing *Eklund v. PRI Envtl. Inc.*, 25 P.3d 511 (Wyo. 2001)) (stating that the following four factors determine whether *res judicata* applies: (1) identity of parties is the same; (2) identity of subject matter is the same; (3) issues are the same and relate to the subject matter; and (4) the capacities of the persons are identical in reference to subject matter and issues between them).

<sup>27</sup> See *Aragon v. Aragon*, 104 P.3d 756, 759–60 (Wyo. 2005).

<sup>28</sup> *DJG v. MAP*, 883 P.2d 946, 947–48 (Wyo. 1994).

*judicata* is due to a court's *parens patriae* power.<sup>29</sup> Some states value the effect of *res judicata* more in relocation cases and require a heightened showing of substantial change in circumstances.<sup>30</sup> States requiring this increased showing want to honor the previous child custody order as decided focusing on the interest of judicial efficiency.<sup>31</sup> Trial courts have wide discretion in determining what constitutes a substantial change in circumstances.<sup>32</sup> Wyoming case law provides guidance on what constitutes a substantial change in circumstances in specific situations, such as relocation.<sup>33</sup>

## 2. The U.S. & Wyoming Constitutional Standard: The Right to Travel

The constitutional right to travel supports a custodial parent's ability to relocate with his or her child.<sup>34</sup> In *Shapiro v. Thompson* the United States Supreme Court articulated the constitutional standard regarding the interstate right to travel.<sup>35</sup> Unless shown to be necessary to promote a compelling governmental interest, any state action restricting the right to travel to another state is unconstitutional.<sup>36</sup>

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<sup>29</sup> Linda D. Elrod, *When Should Custody Orders Be Modified?: Flexibility Versus Stability*, 26 FAM. ADVOC. 40 (2004) ("Res judicata is more limited in child custody actions because of the court's inherent *parens patriae* power."); see also Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1, 17 (2001) (commenting *parens patriae*, meaning "parent of the country," is a doctrine derived from England chancery courts giving the court authority to intervene to protect the country's children); Naomi Cahn, *State Representation of Children's Interests*, 40 FAM. L.Q. 109, 113 (2006) ("[T]he basic precept that the state can act to protect children remains unquestioned . . .").

<sup>30</sup> *Watt*, 971 P.2d at 613; see generally LINDA D. ELROD, CHILD CUSTODY PRAC. & PROC. § 17:28 n.2 (2012) (listing states that require a higher showing of substantial change in circumstances in custodial parent relocation cases) [hereinafter CHILD CUSTODY PRACTICE & PROCEDURE].

<sup>31</sup> See *Evans v. Evans*, 530 S.E.2d 576, 580 (N.C. Ct. App. 2000) (stating relocation alone is not a substantial change of circumstances permitting the reopening of a previous custody order); see generally CHILD CUSTODY PRACTICE & PROCEDURE, *supra* note 30 (listing states requiring a higher showing of substantial change in circumstances in custodial parent relocation cases).

<sup>32</sup> See WYO. STAT. ANN. § 20-2-204 (2012) (providing that Wyoming's statute governing the modification of the previous child custody order permits a "best interests" analysis in a few situations, including, but not limited to, a substantial change in circumstances); *Watt*, 971 P.2d at 613 (citing *DJG*, 883 P.2d at 947) (recognizing an abuse of discretion standard).

<sup>33</sup> See *infra* notes 77–120 and accompanying text.

<sup>34</sup> *Watt*, 971 P.2d at 608–17; see generally David V. Chipman & Mindy M. Rush, *The Necessity of "Right to Travel" Analysis in Custodial Parent Relocation Cases*, 10 WYO. L. REV. 267 (2010) (explaining the importance of analyzing a custodial parent's right to travel in custodial parent relocation cases).

<sup>35</sup> 394 U.S. 618, 634 (1969), *overruled on other grounds* by *Edelman v. Jordan*, 415 U.S. 651 (1974) (holding a constitutional right to travel exists within the Equal Protection Clause of the 14th Amendment to the U.S. Constitution).

<sup>36</sup> *Id.*

Wyoming applies the same standard as the United States Supreme Court for evaluating decisions restricting the right to travel—whether the classification is necessary to promote a compelling governmental interest.<sup>37</sup> In the context of a custodial parent’s relocation, the Wyoming Supreme Court adopted a relocation-specific doctrine.<sup>38</sup> *Watt v. Watt* stands for the proposition that courts do not restrict the custodial parent’s right to relocate by requiring them to prove the move is in a child’s best interests.<sup>39</sup> If the relocation of a custodial parent is within the state of Wyoming, the correct analysis is under the *Watt* holding.<sup>40</sup> If the proposed relocation of a custodial parent is from Wyoming to another state, *Watt* seems to control, but it is not clear exactly how *Watt* applies in interstate relocation cases.<sup>41</sup> Functionally, Wyoming protects the custodial parent’s right to relocate by not forcing the custodial parent to prove the move is in a child’s best interests.<sup>42</sup>

### 3. The U.S. & Wyoming Constitutional Standard: Raising One’s Children

The United States Constitution does not provide the exact level of scrutiny that should be applied regarding the right to raise one’s child.<sup>43</sup> In *Meyer v. Nebraska*, the United States Supreme Court enumerated a parent’s constitutional right to raise his or her child.<sup>44</sup> In *Santosky v. Kramer*, the Court labeled a parent’s right to the “care, custody, and management of [his/her] child” as a “fundamental

<sup>37</sup> *Id.*; see *Watt*, 971 P.2d at 615 (finding the right to intrastate travel is a fundamental right under Wyoming’s constitution); see also *Mills v. Reynolds*, 837 P.2d 48, 53 (Wyo. 1992) (stating the standard of review when a fundamental right is implicated is strict scrutiny and that Wyoming’s strict scrutiny analysis is whether the alleged unconstitutional action is necessary to achieve a compelling state interest).

<sup>38</sup> *Watt*, 971 P.2d at 608–17.

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

<sup>40</sup> *Id.*; see generally *Chipman & Rush*, *supra* note 34 (explaining that the holding in *Watt* recognized the intrastate right to travel).

<sup>41</sup> *Watt*, 971 P.2d at 616. The court stated:

In light of our prior cases, and our concern for the protection of constitutional liberties of the citizens of the State of Wyoming, we hold that an *intrastate* relocation by a custodial parent, taking the children along, cannot by itself be considered a change in circumstances sufficiently substantial and material to justify reopening the question of custody.

*Id.* (emphasis added).

<sup>42</sup> *Id.*; see *Love v. Love*, 851 P.2d 1283 *passim* (Wyo. 1993); see also *infra* notes 77–120 and accompanying text.

<sup>43</sup> *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (agreeing “with the plurality that this Court’s recognition of a fundamental right of parents to direct the upbringing of their children resolves this case[]” but that Justices Kennedy and Souter failed to enumerate the correct standard of review, which Justice Thomas argued should be strict scrutiny).

<sup>44</sup> 262 U.S. 390, 400–03 (1923); see also *Prince v. Mass.*, 321 U.S. 158, 166 (1944) (reiterating the parents’ constitutional right to the “custody, care and nurture of the child”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

liberty interest.”<sup>45</sup> More recently, in *Troxel v. Granville*, the United States Supreme Court restated parents’ constitutional right to make decisions concerning the “care, custody, and control of their children.”<sup>46</sup>

The Wyoming Supreme Court has also recognized a parent’s constitutional right to raise his or her children under the Wyoming Constitution.<sup>47</sup> The Court recognized the United States Supreme Court has stated that “it is cardinal with us that the custody, care and nurture of the child reside first in the parents.”<sup>48</sup> The Wyoming Supreme Court further recognized that governmental restrictions on a parent’s constitutional right to raise his or her child receive strict scrutiny.<sup>49</sup> First, the state must prove a compelling state interest justifying the restriction on the parent’s right to raise his or her child.<sup>50</sup> Second, assuming a compelling state interest, such an interest must be achieved using the least intrusive means possible.<sup>51</sup> However, Wyoming courts have yet to specifically analyze the parents’ right to raise a child in the context of custodial parent relocation with a child.<sup>52</sup>

#### 4. Wyoming Children’s Best Interests

Wyoming courts, except in the relocation context, give paramount consideration to the welfare and needs of a child through a best interests analysis.<sup>53</sup> Trial courts apply a best interests analysis through a factor based test pursuant to Wyoming statutory factors.<sup>54</sup> There are typically two situations in which a court

<sup>45</sup> 455 U.S. 745, 753 (1982).

<sup>46</sup> 530 U.S. at 66 (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

<sup>47</sup> WYO. CONST. art. 1, § 6 (“No person shall be deprived of life, liberty or property without due process of law.”); *KO v. LDH (In re MEO)*, 138 P.3d 1145, 1151–52 (Wyo. 2006) (citing *Troxel*, 530 U.S. at 66); *Michael v. Hertzler*, 900 P.2d 1144, 1147 (Wyo. 1995) (“[A] parent enjoys a fundamental right to raise his [or her] children.”).

<sup>48</sup> *Hertzler*, 900 P.2d at 1147.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1148 (citing *State in Interest of C*, 638 P.2d 165 (Wyo. 1981)).

<sup>52</sup> See generally *Hanson v. Belveal*, 280 P.3d 1186 (Wyo. 2012); *Zupan v. Zupan*, 230 P.3d 329 (Wyo. 2010); *Inman v. Williams*, 205 P.3d 185 (Wyo. 2009); *Testerman v. Testerman*, 193 P.3d 1141 (Wyo. 2008); *Morris v. Morris*, 170 P.3d 86 (Wyo. 2007); *TW v. BM*, 134 P.3d 1262 (Wyo. 2006); *Harshberger v. Harshberger*, 117 P.3d 1244 (Wyo. 2005); *Resor v. Resor*, 987 P.2d 146 (Wyo. 1999); *Watt v. Watt*, 971 P.2d 608 (Wyo. 1999); *Gurney v. Gurney*, 899 P.2d 52 (Wyo. 1995); *Love v. Love*, 851 P.2d 1283 (Wyo. 1993).

<sup>53</sup> *Reavis v. Reavis*, 955 P.2d 428, 431 (Wyo. 1998) (citing *Scherer v. Scherer*, 931 P.2d 251, 254 (Wyo. 1997)); *Rowan v. Rowan*, 786 P.2d 886, 890 (Wyo. 1990).

<sup>54</sup> *Reavis*, 955 P.2d at 431; see also WYO. STAT. ANN. § 20-2-201 (2012) (the factors include: the quality of the relationship each child has with each parent; the ability of each parent to provide adequate care for each child throughout each period of responsibility; the relative competency and



can reach a “best interests” analysis: (1) during an initial custody determination (typically after granting a divorce or establishing parentage);<sup>55</sup> and (2) during modification of a current child custody order due to a substantial change in circumstances.<sup>56</sup> Wyoming’s statutory best interests standard allows trial courts to use more than ten factors to determine a child’s best interests.<sup>57</sup> Considering the substantial deference given to trial courts in determining child custody matters,<sup>58</sup> as long as the trial court discusses some factors and explains its decision, the trial court’s determination will most likely withstand appeal.<sup>59</sup>

### B. *The Two Approaches to Relocation*

Family law is the province of the states and not the federal government.<sup>60</sup> This freedom allows for a wide-array of approaches, but also creates a tension between parents’ and children’s rights and interests.<sup>61</sup> Each state applies its own method to approve a relocation creating large discrepancies in decisions among the states. Nevertheless, there are two main approaches states apply, each with various intricacies and caveats—relocation as a typical modification and relocation as a separate legal doctrine.<sup>62</sup>

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fitness of each parent; each parent’s willingness to accept all responsibilities of parenting; how the parent and each child can best maintain and strengthen a relationship with each other; how the parents and each child interact and communicate with each other and how such interaction and communication may be improved; the ability and willingness of each parent to allow the other to provide care without intrusion, respect the other parent’s rights and responsibilities; geographic distance between the parents’ residences; the current physical and mental ability of each parent to care for each child; and any other factors the court deems necessary and relevant).

<sup>55</sup> See § 20-2-201.

<sup>56</sup> See *id.* § 20-2-204.

<sup>57</sup> § 20-2-201 (the statute lists the ten factors as i–x under subsection (a). Subsections following (a) remove factors from consideration, such as gender under subsection (c) or emphasize the importance of other factors, such as spousal abuse under subsection (d)).

<sup>58</sup> *Rowan*, 786 P.2d at 890 (citing *Bereman v. Bereman*, 645 P.2d 1155 (Wyo. 1982)) (other citations omitted) (“The decision of the trial court with respect to [custody] will not be disturbed by this court unless we can identify a clear abuse of discretion.”); *Gill v. Gill*, 363 P.2d 86 *passim* (Wyo. 1961); *Stirrett v. Stirrett*, 35 Wyo. 206, 248 (1926).

<sup>59</sup> *Zupan v. Zupan*, 230 P.3d 329, 333 (Wyo. 2010) (citing *Hayzlett v. Hayzlett*, 167 P.3d 639, 642 (Wyo. 2007)) (“In every case, the district court must base its child custody determination in the best interests of the children using the factors enumerated in WYO. STAT. ANN. § 20-2-201(a). No single factor is determinative.”); see also *id.* at 333–34 (quoting *Pace v. Pace*, 22 P.3d 861, 865 (Wyo. 2001)) (“The district court must articulate those ‘factors which were considered and how those factors support its conclusions.’”).

<sup>60</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890)) (“[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”).

<sup>61</sup> See *supra* notes 34–59 and accompanying text.

<sup>62</sup> This is an oversimplification of the survey of the laws of each state, but makes the doctrine much more approachable. States have so many different presumptions, burdens, and tests that

## 1. Relocation as a Typical Modification

Relocation as a typical modification maintains the modification analysis in situations involving relocation using two steps: (1) proof of a substantial change in circumstances, followed by (2) a best interests analysis.<sup>63</sup> The crux of this analysis is whether the relocation at issue is a substantial change in circumstances.<sup>64</sup> New Mexico courts find nearly any relocation to be a substantial change in circumstances.<sup>65</sup> States sometimes intertwine presumptions into this analysis, either favoring the relocating parent or favoring the non-custodial parent.<sup>66</sup> State courts and legislatures use these functional presumptions and burdens of proof to further the interests the legislatures and courts consider most important.<sup>67</sup> For example, Wyoming's policy favoring relocation of the custodial parent furthers the freedom of the custodial parent by promoting a custodial parent's right to relocate with a child over an independent analysis of how a move may affect a child's best interests.<sup>68</sup>

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a separation into two categories is helpful in grasping the big picture. *See generally* Fredman v. Fredman, 960 So. 2d 52 (Fla. Dist. Ct. App. 2007) (illustrating the statutory approach used in Florida relocation cases, pursuant to FLA. STAT. § 61.13001: first, the relocating parent must prove by a preponderance that the relocation is in the best interests of the child; after proving that, the opposing parent must prove by a preponderance that the relocation is not in the best interests of the child); *Bodne v. Bodne*, 588 S.E.2d 728 (Ga. 2003) (illustrating Georgia's two-step analysis in relocation cases. The person moving for modification must prove substantial change in circumstances, then the court performs a best interests analysis); *Chipman & Rush*, *supra* note 34 (categorizing states' different approaches to custodial parent relocation as being in one of five categories: (1) an absolute right to travel; (2) pure balancing test; (3) best interests of the child as a controlling state interest; (4) non-custodial parent's right to visitation is controlling; and (5) custodial parent's right to travel not implicated).

<sup>63</sup> *See generally* *Smith v. Padolko*, 955 A.2d 740 (Me. 2008) (illustrating Maine's two-step analysis in relocation cases, pursuant to ME. REV. STAT. ANN. tit.19, § 1657: the person moving for modification must prove a substantial change in circumstances, then the court performs a best interests analysis).

<sup>64</sup> *Bodne*, 588 S.E.2d at 729. In *Bodne*, the Georgia Supreme Court had previously held an interstate move to not be a substantial change in circumstances alone. *Id.* The court overruled the previous holding declaring an interstate move from Georgia to Alabama a substantial change in circumstances. *Id.*

<sup>65</sup> *See Jaramillo v. Jaramillo*, 823 P.2d 299, 309 (N.M. 1991) ("In almost every case in which the change in circumstances is occasioned by one parent's proposed relocation, the proposed move will establish the substantiality and materiality of the change.").

<sup>66</sup> *See generally* *Kaiser v. Kaiser*, 23 P.3d 278 (Okla. 2001) (illustrating application of the statutory presumptive right to change the child's residence); *Barrett v. Alguire*, 35 P.3d 1 (Alaska 2001) (illustrating application of a common law presumptive right to have a hearing on the best interests of a child before allowing relocation).

<sup>67</sup> *See supra* notes 125–62 and accompanying text.

<sup>68</sup> *See Watt v. Watt*, 971 P.2d 608, 613, 616 (focusing on the protection of the custodial parent's right to travel and the doctrine of *res judicata*). *See generally* *Cotter*, *supra* note 3 (stating that Wyoming's Supreme Court "has gone to the extreme and has found that a parent's constitutional right to travel may actually serve to trump the best interests of a child in a relocation case").

## 2. Relocation as a Separate Legal Doctrine

The separate legal doctrine approach to relocation typically involves a statute separating the relocation of the custodial parent from the modification analysis.<sup>69</sup> Under this approach, states will enact a statute that defines the legal analysis applied when a custodial parent is relocating or planning to relocate.<sup>70</sup> Typically, a proposed interstate move or a proposed move of a certain distance triggers the analysis.<sup>71</sup> In Arizona, the custodial parent must petition for relocation before the proposed move.<sup>72</sup> Sometimes the statute requires a best interests analysis before the custodial parent moves with a child, without requiring a showing of substantial change of circumstances.<sup>73</sup> Some statutes place a shifting burden of proof beginning on the custodial parent or vice versa.<sup>74</sup> The mere enactment of a relocation-specific statute does not mean the state avoids the typical modification analysis altogether.<sup>75</sup> States find various ways to defend and further guarantee certain rights and interests, often at the expense of others.<sup>76</sup>

### *C. Relocation of the Custodial Parent: Wyoming's Doctrine*

#### 1. Foundation for Analysis: *Love*, *Gurney*, and *Watt*

Before *Love*, only one Wyoming case had addressed the issue of custodial parent relocation with the child.<sup>77</sup> In *Love*, by the terms of the divorce decree, the mother was awarded primary physical custody of her two children.<sup>78</sup> However, the decree required the father's consent if she moved more than 100 miles from Sheridan, Wyoming.<sup>79</sup> The mother petitioned the trial court to allow her to move

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<sup>69</sup> See FLA. STAT. ANN. § 61.13001(8) (West 2012) (creating a shifting burden of proof in relocation cases); ARIZ. REV. STAT. ANN. § 25-408(B) (West 2012) (requiring advance written notice for a move of 100 miles or a move to another state).

<sup>70</sup> See § 25-408.

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

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

<sup>73</sup> *Id.*

<sup>74</sup> See § 61.13001(8).

<sup>75</sup> IOWA CODE ANN. § 598.21 (West 2012); see also *In re Marriage of Thielges*, 623 N.W.2d 232 *passim* (Iowa Ct. App. 2000) (illustrating the application of the relocation statute in the context of a modification analysis).

<sup>76</sup> See *supra* notes 22–76 and accompanying text; *infra* notes 153–76 and accompanying text.

<sup>77</sup> See *Martin v. Martin*, 798 P.2d 321, 323 (Wyo. 1990) (striking a provision from the divorce decree that restricted the custodial parent's residence to the confines of Laramie, Wyoming and holding the restriction as being a "substitute for complete analysis of all existing circumstances"). Notably, the Court did not discuss the constitutional right to travel, even though the appellant raised the issue. See *id. passim*.

<sup>78</sup> *Love v. Love*, 851 P.2d 1283, 1284 (Wyo. 1993).

<sup>79</sup> *Id.* at 1285.

to Sioux Falls, South Dakota with both of her children, and the court granted the petition.<sup>80</sup> The Wyoming Supreme Court affirmed in part and reversed in part, allowing the mother to move with her eleven year-old daughter, while awarding the primary physical custody of the fifteen year-old son to the father because the son wished to remain with his father in Sheridan.<sup>81</sup> The court's holding now allows the custodial parent to move with a child as long as the reasons for the move are legitimate, sincere, and in good faith; and if reasonable visitation is possible for the noncustodial parent.<sup>82</sup>

In 1995, the court further elaborated on relocation of the custodial parent with a child.<sup>83</sup> In *Gurney v. Gurney*, the court awarded joint physical custody.<sup>84</sup> However, the parents encountered difficulties meeting the terms of the arrangement after the mother moved from Torrington, Wyoming to Lusk, Wyoming.<sup>85</sup> The trial court found a substantial change in circumstances, which warranted a hearing on the best interests of the child.<sup>86</sup> The trial court found it in the daughter's best interests to live with her father.<sup>87</sup> The mother appealed contending there had not been a substantial change in circumstances warranting a modification of the initial award of joint custody.<sup>88</sup> The Wyoming Supreme Court affirmed the trial court's decision by holding that the parties' inability to communicate and agree was a substantial change in circumstances.<sup>89</sup> Even though the court further explained and discussed the doctrine enumerated in *Love*, it did not address whether the mother's relocation was a substantial change in circumstances.<sup>90</sup> The discussion in *Gurney* has led to further confusion in applying *Love* because it is essentially non-binding dictum, upon which *Watt* later relies.<sup>91</sup>

The seminal case in Wyoming regarding relocation of the custodial parent with a child is *Watt v. Watt*.<sup>92</sup> In *Watt*, the court initially awarded the mother primary physical custody of her three children, with one caveat.<sup>93</sup> Pursuant to

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<sup>80</sup> *Id.* at 1285–86.

<sup>81</sup> *Id.* at 1291.

<sup>82</sup> *Id.* at 1288–89.

<sup>83</sup> See *Gurney v. Gurney*, 899 P.2d 52 (Wyo. 1995).

<sup>84</sup> *Id.* at 53.

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

<sup>86</sup> *Id.* at 53–54.

<sup>87</sup> *Id.* at 54.

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

<sup>89</sup> *Id.* at 54–56.

<sup>90</sup> *Id.* at 53–56.

<sup>91</sup> See *id.*; see also *Watt v. Watt*, 971 P.2d 608, 614 (Wyo. 1999) (explicitly discussing *Gurney* as an important elaboration on what constitutes a substantial change in circumstances).

<sup>92</sup> 971 P.2d 608.

<sup>93</sup> *Id.* at 610.

the divorce decree, if she moved fifty miles or more from Upton, Wyoming with the children, the primary physical custody automatically vested in the children's father.<sup>94</sup> The mother, planning to move, filed a petition to modify the divorce decree and the trial court denied her petition awarding primary physical custody to the father.<sup>95</sup> The mother appealed to the Wyoming Supreme Court, arguing the lower court impermissibly infringed upon her constitutional right to travel when it enforced the automatic custody change.<sup>96</sup> In contrast to *Martin*, the *Watt* court, addressing the constitutional issue, held "an intrastate relocation by a custodial parent, taking the children along, cannot by itself be considered a change in circumstances sufficiently substantial and material to justify reopening the question of custody."<sup>97</sup> *Watt* further explained:

Relocation as a substantial and material change in circumstances was foreclosed by the decision in *Love*. Our decision established a strong presumption in favor of the right of a custodial parent to relocate with her children, assuming that the criteria articulated in *Love* are satisfied. . . . *Love* and *Gurney* together capture a rule that a relocation by a custodial parent, where the motivation for the relocation is legitimate, sincere, in good faith, and still permits reasonable visitation by the non-custodial parent, is not a substantial and material change in circumstances.<sup>98</sup>

This confusing articulation adds complexity to the foundation of legal analysis because it describes *Gurney* as being as important as *Love*, even though *Gurney* did not decide whether the mother's relocation was a substantial change in circumstances.<sup>99</sup>

## 2. Application of the Foundational Cases

Less than nine months after *Watt*, the Wyoming Supreme Court once more addressed a relocation of the custodial parent with a child.<sup>100</sup> In *Resor v. Resor*, the trial court awarded the mother primary physical custody.<sup>101</sup> The father appealed, claiming the trial court should have made a determination of whether the mother's proposed move from Teton County, Wyoming to Seattle, Washington was in the

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 610–11.

<sup>97</sup> *Id.* at 616; *see also* *Martin v. Martin*, 798 P.2d 321 (Wyo. 1990)

<sup>98</sup> *Watt*, 971 P.2d at 614.

<sup>99</sup> *See id.*; *Gurney v. Gurney*, 899 P.2d 52, 53–56 (Wyo. 1995).

<sup>100</sup> *Resor v. Resor*, 987 P.2d 146 (Wyo. 1999).

<sup>101</sup> *Id.* at 147–48.

children's best interests.<sup>102</sup> The court held the trial court was precluded from telling the mother where to live pursuant to *Love* and *Watt*, even though *Resor* involved an initial custody determination when *Love* and *Watt* both involved modification of a child custody order.<sup>103</sup>

Nearly six years after *Resor*, the Wyoming Supreme Court decided another relocation of the custodial parent with a child case.<sup>104</sup> In *Harshberger v. Harshberger*, the mother had been awarded primary physical custody of the two children pursuant to the divorce decree.<sup>105</sup> The father petitioned to modify the initial custody order seeking primary physical custody of the children, because of the mother's thirteen relocations throughout the state of Wyoming over the course of five years.<sup>106</sup> The trial court held there had been a substantial change in circumstances since the time of the divorce decree, warranting a best interests analysis.<sup>107</sup> The trial court also found the mother inadequately supervised the children, interfered with the father's parental rights, failed to provide adequate treatment for the youngest daughter until compelled by the court, and attempted to emotionally manipulate the children against their father.<sup>108</sup> The trial court concluded it was in the children's best interests to award their primary physical custody to the father.<sup>109</sup> The mother appealed arguing relocation of the custodial parent with the children cannot constitute a substantial change in circumstances by itself.<sup>110</sup> The Wyoming Supreme Court agreed with the mother, but held the trial court had not abused its discretion in finding the mother failed the *Love* requirements.<sup>111</sup>

Nearly every year after *Harshberger*, the Wyoming Supreme Court decided cases on relocation of the custodial parent with a child relying on *Love* and *Watt*.<sup>112</sup> Some cases involved initial child custody determinations,<sup>113</sup> while others dealt with

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<sup>102</sup> *Id.* at 147.

<sup>103</sup> *Id.* at 150 (discussing the application of *Love* and *Watt* in analyzing the initial custody order).

<sup>104</sup> See *Harshberger v. Harshberger*, 117 P.3d 1244 (Wyo. 2005).

<sup>105</sup> *Id.* at 1246.

<sup>106</sup> *Id.* at 1246–47.

<sup>107</sup> *Id.* at 1248.

<sup>108</sup> *Id.* at 1247–48.

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

<sup>110</sup> *Id.* 1246–48.

<sup>111</sup> *Id.* at 1249 (“A review of our case law reveals that Mother’s characterization of our case law is accurate as far as it goes, but she neglects a limitation and an exception to our teaching.”).

<sup>112</sup> See, e.g., *Hanson v. Belveal*, 280 P.3d 1186 (Wyo. 2012); *Zupan v. Zupan*, 230 P.3d 329 (Wyo. 2010); *Inman v. Williams*, 205 P.3d 185, (Wyo. 2009); *Testerman v. Testerman*, 193 P.3d 1141 (Wyo. 2008); *Morris v. Morris*, 170 P.3d 86 (Wyo. 2007); *TW v. BM*, 134 P.3d 1262 (Wyo. 2006).

<sup>113</sup> See generally, e.g., *Zupan*, 230 P.3d 329 (involving an initial custody determination removing relocation restriction from the divorce decree); *Inman*, 205 P.3d 185 (involving an initial custody determination awarding custody to the father and ordering a \$50,000 bond if father chose

child custody modification.<sup>114</sup> One case involved intrastate relocation,<sup>115</sup> while the others dealt with interstate relocation.<sup>116</sup> Since *Harshberger*, most cases dealt with custodial parent relocation restrictions in the divorce decree.<sup>117</sup> The Wyoming Supreme Court fails to discuss whether a custodial parent's relocation with a child can, in and of itself, be enough for a substantial change in circumstances.<sup>118</sup> The myopic focus on protecting the custodial parent's right to travel and lack of discussion of the non-custodial parent's right to raise his or her child continues.<sup>119</sup> *Love, Gurney*, and *Watt* are the foundational cases to apply whenever a court addresses: (1) restrictions on custodial parent relocation with the child within the divorce decree; and (2) whether a proposed or actual relocation of the parent constitutes a substantial change in circumstances warranting a hearing on the best interests of a child.<sup>120</sup>

#### *D. Getting to Best Interests: Wyoming Versus the Nation*

Thirty-nine states allow courts to conduct a best interests of the child analysis when considering the modification of a child custody order based on the relocation of the custodial parent.<sup>121</sup> Wyoming courts, however, require

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to relocate out of the state); *Testerman*, 193 P.3d 1141 (involving an initial custody determination awarding joint custody restricting the mother's ability to relocate with her child to California).

<sup>114</sup> See generally, e.g., *Hanson*, 280 P.3d 1186 (involving a father who petitioned to modify the custody order due to the custodial parent relocation restriction in the divorce decree); *Morris*, 170 P.3d 86 (involving a father who petitioned to modify the custody order due to the mother's frequent relocation with the children); *TW*, 134 P.3d 1262 (involving a father who petitioned to modify the custody order due to the mother's frequent relocation with the child).

<sup>115</sup> *Zupan*, 230 P.3d at 334 (discussing a divorce decree restriction preventing custodial parent relocation with the child to anywhere outside the five-mile radius of Thermopolis, Wyoming).

<sup>116</sup> See generally, e.g., *Hanson*, 280 P.3d 1186 (involving a mother who relocated with the child from Wyoming to Idaho); *Inman*, 205 P.3d 185 (involving a father who proposed a relocation with the child from Wyoming to South Carolina); *Testerman*, 193 P.3d 1141 (involving a mother who proposed a relocation with the child from Wyoming to California); *Morris*, 170 P.3d 86 (involving a mother who relocated with the children from Wyoming to Kentucky and Washington); *TW*, 134 P.3d 1262 (involving a mother who relocated with the child from Wyoming to Nevada and Montana).

<sup>117</sup> Initial custody determinations under the divorce decrees restricted the relocation of the custodial parents with their children. See generally *Hanson*, 280 P.3d 1186; *Zupan*, 230 P.3d 329; *Inman*, 205 P.3d 185; *Testerman*, 193 P.3d 1141.

<sup>118</sup> See generally, e.g., *Hanson*, 280 P.3d 1186; *Zupan*, 230 P.3d 329; *Inman*, 205 P.3d 185; *Testerman*, 193 P.3d 1141; *Morris*, 170 P.3d 86; *TW*, 134 P.3d 1262.

<sup>119</sup> See, e.g., cases cited *supra* note 118.

<sup>120</sup> See, e.g., cases cited *supra* note 118.

<sup>121</sup> These states are: Alabama, see ALA. CODE § 30-3-169.3 (2012); Alaska, see *Barrett v. Alguire*, 35 P.3d 1 (Alaska 2001); Arizona, see ARIZ. REV. STAT. ANN. § 25-408 (West 2012); California, see *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004); Colorado, see COLO. REV. STAT. ANN. § 14-10-129 (West 2012); *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005); Connecticut, see *Ireland v. Ireland*, 717 A.2d 676 (Conn. 1998); Delaware, see *Morrissey v. Morrissey*, 45 A.3d 102 (Del. 2012); Florida, see FLA. STAT. ANN. § 61.13001 (West 2012); Georgia, see *Bodne v. Bodne*, 588 S.E.2d 728 (Ga. 2003); Hawaii, see *Fisher v. Fisher*, 137 P.3d 355 (Haw. 2006); Idaho, see *Bartosch v. Jones*,

more than relocation before they consider the best interests of a child.<sup>122</sup> After the *Love* standard,<sup>123</sup> subsequent Wyoming Supreme Court decisions further complicated the doctrine.<sup>124</sup> Other states, however, have explicitly overruled or statutorily eliminated any presumptions when dealing with the relocation of the custodial parent.<sup>125</sup>

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197 P.3d 310 (Idaho 2008); Illinois, *see In re Marriage of Dorfman*, 956 N.E.2d 1040 (Ill. App. Ct. 2011); Indiana, *see Baxendale v. Raich*, 878 N.E.2d 1252 (Ind. 2008); Kansas, *see KAN. STAT. ANN.* § 23-3222 (West 2012); Kentucky, *see Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008); Louisiana, *see LA. REV. STAT. ANN.* § 9:355.12 (2012); Maine, *see ME. REV. STAT.* tit. 19, § 1657 (2011); Maryland, *see Braun v. Headley*, 750 A.2d 624 (Md. Ct. Spec. App. 2000); Massachusetts, *see MASS. GEN. LAWS ANN.* ch. 208, § 30 (West 2012); Michigan, *see MICH. COMP. LAWS ANN.* § 722.31 (West 2012); Minnesota, *see MINN. STAT. ANN.* § 518.175 (West 2012); Mississippi, *see Pearson v. Pearson*, 11 So. 3d 178 (Miss. Ct. App. 2009); Missouri, *see MO. ANN. STAT.* § 452.377 (West 2012); Montana, *see In re Marriage of Robison*, 53 P.3d 1279 (Mont. 2002); Nebraska, *see Brown v. Brown*, 621 N.W.2d 70 (Neb. 2000); New Hampshire, *see N.H. REV. STAT. ANN.* § 461-A:12 (2012); New Jersey, *see N.J. STAT. ANN.* § 9:2-2 (West 2012); New Mexico, *see Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991); New York, *see Tropea v. Tropea*, 655 N.E.2d 145 (N.Y. 1996); North Dakota, *see Dunn v. Dunn*, 775 N.W.2d 486 (N.D. 2009); Oklahoma, *see OKLA. STAT. ANN.* tit. 43, § 112.3 (West 2012); Oregon, *see In re Marriage of Fedorov*, 206 P.3d 1124 (Or. Ct. App. 2009); Pennsylvania, *see 23 PA. CONS. STAT. ANN.* § 5337 (West 2012); Rhode Island, *see Westlake v. Westlake*, 874 A.2d 200 (R.I. 2005); South Carolina, *see Latimer v. Farmer*, 602 S.E.2d 32 (S.C. 2004); Texas, *see Echols v. Olivarez*, 85 S.W.3d 475 (Tex. Ct. App. 2002); Utah, *see UTAH CODE ANN.* § 30-3-37 (West 2012); Vermont, *see Hoover v. Hoover*, 764 A.2d 1192 (Vt. 2000); Virginia, *see Sullivan v. Knick*, 568 S.E.2d 430 (Va. Ct. App. 2002); and West Virginia, *see W. VA. CODE ANN.* § 48-9-403 (West 2012).

<sup>122</sup> *See Love v. Love*, 851 P.2d 1283 (Wyo. 1993). In *Love*, pursuant to divorce decree, a mother with primary physical custody petitioned the district court for permission to relocate from Sheridan, Wyoming to Sioux Falls, South Dakota. *Id.* at 1284–85. The Wyoming Supreme Court affirmed her relocation with one of the children, creating a functionally irrebuttable presumption in favor of relocation. *See id.* at 1286–91; *see also Watt v. Watt*, 971 P.2d 608 *passim* (Wyo. 1999) (applying *Love* and practically foreclosing a “best interests of the child” analysis where modification is based on relocation).

<sup>123</sup> *Love*, 851 P.2d at 1288–89 (explaining the custodial parent will be allowed to move with the child as long as the reasons for the move are legitimate, sincere, and in good faith; and reasonable visitation is possible for the noncustodial parent).

<sup>124</sup> *See generally* *Hanson v. Belveal*, 280 P.3d 1186 (Wyo. 2012) (discussing *Watt* and *Love*, but holding on the decree restricting relocation, not on the actual relocation of the custodial parent); *Zupan*, 230 P.3d 329 (discussing *Watt* and *Love* when the facts involved joint physical custody and intrastate restriction); *Testerman*, 193 P.3d 1141 (discussing *Watt* and *Love* when the facts involved an initial child custody order and intrastate restriction); *Morris*, 170 P.3d 86 (analyzing *Watt* and *Love*, yet the relocation issue turned on the non-custodial parent’s repeated relocation); *TW*, 134 P.3d 1262 (addressing *Watt* and *Love*, yet not finding anything in regard to the custodial parent’s relocations and holding on other grounds); *Harshberger v. Harshberger*, 117 P.3d 1244 (Wyo. 2005) (viewing *Watt* and *Love* as restricting interstate relocation when facts were only intrastate relocations); *Resor v. Resor*, 987 P.2d 146 (Wyo. 1999) (discussing *Watt* and *Love*, custody modification cases, extensively even though *Resor* dealt with an initial custody order); *Watt*, 971 P.2d 608 (making a strong statement of the relocating custodial parent’s right to travel, yet explicitly limiting such right to intrastate relocation).

<sup>125</sup> *See, e.g.,* *COLO. REV. STAT. ANN.* § 14-10-129 (West 2012); *FLA. STAT. ANN.* § 61.13001 (West 2012). *See generally In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005); *Bodne v. Bodne*, 588 S.E.2d 728 (Ga. 2003); *Tropea v. Tropea*, 665 N.E.2d 145 (N.Y. 1996).



### *E. The Presumptions and Underlying Policies*

Presumptions are functional tools of law used to promote certain values and make judicial decisions more consistent and predictable.<sup>126</sup> State courts and legislatures use rebuttable presumptions placing the burden of proof on a particular parent to best effectuate the state's underlying policy.<sup>127</sup> States have approached the relocation of the custodial parent in three different ways: (1) presumption favoring relocation of the custodial parent; (2) presumption against the relocation of the custodial parent; and (3) a best interests of the child analysis. Relocation cases are "balancing acts [placing] one parent's upward mobility versus the other's continuing contact with the child."<sup>128</sup> "Cases involving the relocation of a custodial parent 'present some of the knottiest and most disturbing problems that our courts are called upon to resolve.'"<sup>129</sup> One parent's opportunity for a new life is countered by the other parent's interest in continuing a meaningful parental relationship, leaving a child in the middle of a very emotionally-charged domestic battle.<sup>130</sup> This section describes the policies behind each of the three methods.

#### 1. Presumption for Relocation of the Custodial Parent

Presumptions allowing for relocation of the custodial parent are based on the parent's right to travel,<sup>131</sup> deference to the trial court's initial custody order,<sup>132</sup> and preference for a child's relationship with the custodial parent.<sup>133</sup>

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<sup>126</sup> *National Momentum*, *supra* note 9, at 355 (quoting *Tropea*, 665 N.E.2d at 151).

<sup>127</sup> See *infra* notes 131–52 and accompanying text.

<sup>128</sup> Sarah Gottfried, *Virtual Visitation: The Wave of the Future in Communication Between Children and Non-Custodial Parents in Relocation Cases*, 36 *FAM. L.Q.* 475, 476 n.14 (2002).

<sup>129</sup> 125 *AM. JUR. PROOF OF FACTS* 3d 495 § 1 (2012) (quoting *Tropea*, 665 N.E.2d at 148) (other citation omitted).

<sup>130</sup> *National Momentum*, *supra* note 9, at 341.

<sup>131</sup> See generally *Watt v. Watt*, 971 P.2d 608 (Wyo. 1999) (establishing that a custodial parent's right to travel is paramount to the other interests involved); Chipman & Rush, *supra* note 34 (explaining the importance of analyzing a custodial parent's right to travel in custodial parent relocation cases).

<sup>132</sup> Jarica L. Hudspeth, *Stills v. Stills: A Perplexing Response to the Effect of Relocation on Child Custody*, 64 *ARK. L. REV.* 781, 790 (2011) (citing Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 *FAM. L.Q.* 305, 311–312 (1996)); see Chipman & Rush, *supra* note 34, at 267 (stating the *Watt* Court explicitly recognized the best interests of the child analysis had already occurred during the initial custody decision).

<sup>133</sup> Gottfried, *supra* note 128, at n.40.

Like Humpty Dumpty, a family, once broken by divorce, cannot be put back together in precisely the same way. The relationship between the parents and the children is necessarily different after a divorce and, accordingly, it may be unrealistic in some cases to try to preserve the noncustodial parent's accustomed close involvement in the children's everyday life at the expense of the custodial parent's efforts to start a new life or to form a new family unit.<sup>134</sup>

This rationale is often used to illustrate the main argument for the relocation presumption. At least one study has concluded that the relationship between a child and the custodial parent is the most important factor in determining a child's best interests.<sup>135</sup> As compelling as the science and policies are, this presumption often blocks a court from reaching a best interests analysis to the detriment of a child.<sup>136</sup>

Custodial mothers are head of the household for more than ninety percent of children of divorce.<sup>137</sup> Of those mothers, seventy-five percent will relocate at least once, over half of which will do so again.<sup>138</sup> Considering these statistics, if a state does not favor the relocation of the custodial parent with a child, there are many parents, primarily mothers, who have their freedom restricted by the court's power to change custody under a best interests analysis.<sup>139</sup> If the custodial parent can find a better job or a cheaper cost of living, it may seem, on its face, advantageous for a child to move with the custodial parent.<sup>140</sup> In certain situations, a presumption for relocation may be in the best interests of a child. However, if the custodial parent is truly moving for a spiteful reason, this presumption allows the parent to move and sever the relationship between a child and the non-custodial parent.

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<sup>134</sup> *Tropea*, 655 N.E.2d at 151 (N.Y. 1996).

<sup>135</sup> Hudspeth, *supra* note 132, at n.59.

<sup>136</sup> See *supra* notes 131–35 and accompanying text; see also *In re Marriage of Ciesluk*, 113 P.3d 135, 145–46 (Colo. 2005). The *Ciesluk* court stated:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

113 P.3d at 146 (quoting *Jaramillo v. Jaramillo*, 823 P.2d 299, 307 (N.M. 1991)).

<sup>137</sup> Gottfried, *supra* note 128, at 475–76.

<sup>138</sup> *Id.*

<sup>139</sup> See *id.*

<sup>140</sup> Hudspeth, *supra* note 132, at 789.

Some legal scholars anticipate a trend toward allowing more relocation based on today's technological capabilities.<sup>141</sup> If both parents possess communication technologies like Skype, the noncustodial parent can still have regular interaction with a child.<sup>142</sup> Technology is a very important tool the custodial parent can use to his or her advantage. "In a mobile society—with cross-country and even international relocations being prompted by changing economic circumstances, family needs, remarriage, or health concerns—relocation requests are inevitable."<sup>143</sup> Technology is beginning to play a crucial role in determinations favoring relocation.<sup>144</sup> Virtual visitation "will give both [custodial and non-custodial] parents the opportunity not only to speak to children, but to see them as well."<sup>145</sup> This technology can further a traditional court's belief that the best interests of a child are served by remaining with the primary caregiver.

## 2. Presumption Against Relocation of the Custodial Parent

Presumptions against the relocation of the custodial parent focus on the noncustodial parent's right to raise his or her children.<sup>146</sup> Studies have shown it is very important a child maintains a strong relationship with both parents after a divorce.<sup>147</sup> This presumption places the burden on the custodial parent to justify the relocation.<sup>148</sup> For example, the Alabama Legislature enacted a statute specifically protecting the noncustodial parent's relationship with a child, much to the detriment of the custodial parent's ability to move with a child.<sup>149</sup> Under this act, the custodial parent bears the burden of proving the move is in the best interests of a child.<sup>150</sup> The statute directs the trial court to consider sixteen

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<sup>141</sup> Gottfried, *supra* note 128, at 475; *see generally* Elisabeth Bach-Van Horn, *Virtual Visitation: Are Webcams Being Used as an Excuse to Allow Relocation?*, 21 J. AM. ACAD. MATRIM. LAW 171 (2008) (breaking down how virtual visitation methods are affecting custodial parent relocation cases, as well as explaining how statutes address virtual visitation).

<sup>142</sup> Gottfried, *supra* note 128, at 477; *see generally* Bach-Van Horn, *supra* note 141 at 171.

<sup>143</sup> Ruth Sovronsky, *The Relocation Dilemma: In Search of "Best Interests,"* 75 ALB. L. REV. 1075, 1075 (2011–2012).

<sup>144</sup> Gottfried, *supra* note 128, at 477 (citing *McCoy v. McCoy*, 764 A.2d 449 (N.J. Super. Ct. App. Div. 2001)) (involving a trial court finding that the mother's virtual visitation proposal was "creative and innovative"); *see* Bach-Van Horn, *supra* note 141, at 171.

<sup>145</sup> Gottfried, *supra* note 128, at 485. "Virtual visitation involves using tools such as video-conferencing, web-cams and other wired technologies to supplement face-to-face visits and court-ordered phone contacts between a non-custodial parent and a child." *Id.* at 477–78.

<sup>146</sup> Hudspeth, *supra* note 132, at 789.

<sup>147</sup> Kelly Gibbons, *The Ties That Bind: Why Texas Should Adopt a Presumption That Relocation is Not in the Best Interests of the Child*, 12 TEX. WESLEYAN L. REV. 555, 579 (2006) (citing Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83 (2000)).

<sup>148</sup> Hudspeth, *supra* note 132, at 787–90.

<sup>149</sup> ALA. CODE § 30-3-169.3 (2012) (entitled "Alabama Parent-Child Relationship Act").

<sup>150</sup> *Id.*

enumerated factors along with any other factors the court considers material.<sup>151</sup> Even though this statute acts as a presumption against relocation of the custodial parent, the presumption is rebutted by proving the move is in the best interests of a child.<sup>152</sup>

### 3. No Presumption: A Focus on the Best Interests of the Child

The New York Court of Appeals fluently articulated the case against all presumptions in custodial parent relocation law.<sup>153</sup> In *Tropea*, the court stated:

[I]t serves neither the interests of the children nor the ends of justice to view relocation cases through prisms of presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another. . . . [I]n all cases the courts should be free to consider and give appropriate weight to all of the factors that may be relevant . . . .<sup>154</sup>

This quote illustrates the policy behind the current trend in the United States regarding custodial parent relocation law.<sup>155</sup> The trend “seems to be to abandon presumptions and to adopt a ‘best interests of the child’ test that requires both parents to prove that their position is in the child’s best interests.”<sup>156</sup> Historically, courts have not analyzed relocation issues through a children’s best interests lens.<sup>157</sup> Approaching relocation cases with a best interests analysis is advantageous because cases can each be determined on the merits.<sup>158</sup> Courts can take into account the facts and circumstances of each situation, assuring each child is getting a decision

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> See *Tropea v. Tropea*, 665 N.E.2d 145 (N.Y. 1996).

<sup>154</sup> *Id.* at 151.

<sup>155</sup> *National Momentum*, *supra* note 9, at 355; see *Child Custody Practice & Procedure*, *supra* note 30, at n.5 (listing the majority-rule states that allow a hearing on a child’s best interests during a proposed relocation); see also Linda D. Elrod, *A Move in the Right Direction? Best Interests of the Child Emerges as the Standard in Relocation Cases*, 3 J. CHILD CUSTODY 29, 39–40 (2006) [hereinafter *Right Direction*].

<sup>156</sup> *National Momentum*, *supra* note 9, at 356 (citing FLA. STAT. ANN. § 61.13001 (West 2012)) (other citations omitted). See also *In re Marriage of Ciesluk*, 113 P.3d 135, 142 (Colo. 2005) (citing *Jaramillo v. Jaramillo*, 83 P.2d 299 (N.M. 1991)); *Bodne v. Bodne*, 588 S.E.2d 728 (Ga. 2003); *Latimer v. Farmer*, 602 S.E.2d 32 (S.C. 2004); *Right Direction*, *supra* note 155, at 39–40.

<sup>157</sup> *National Momentum*, *supra* note 9, at 350 (citing Janet L. Richards, *Children’s Rights vs. Parent’s Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M. L. REV. 245, 254–55 (1999)) (proposing that courts and legislators should put the focus on the child’s best interests instead of parents’ rights); see generally Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the Right Thing to Do*, 27 PACE L. REV. 869, 874–88 (2007) (discussing rights for children to have lawyers in contested custody cases).

<sup>158</sup> *Hudspeth*, *supra* note 132, at 792.

based on his or her best interests.<sup>159</sup> Even though a best interests approach requires more fact-intensive cases to be heard,<sup>160</sup> the no presumption approach allows for a true determination of a child's best interests.<sup>161</sup> "[S]ome social scientists argue that the pure best interest of the child analysis, devoid of any presumptions, is the appropriate way to evaluate relocation disputes . . . ."<sup>162</sup> There may be more time and resources spent by courts making custody determinations, but focusing on a child's best interests is worth the extra time.<sup>163</sup>

### III. ANALYSIS

Wyoming must eliminate the presumption favoring relocation of the custodial parent with a child so a child's best interests are not subservient to either parent's interests. Wyoming's current doctrine places the custodial parent's rights above a child's best interests.<sup>164</sup> The relocation of a custodial parent involves important interests of both the parents and the child, and many states have found a more appropriate balance than Wyoming's approach.<sup>165</sup> Essentially, many other states view the custodial parent's right to travel and the non-custodial parent's right to raise his or her children as interests that cancel each other out, focusing instead on the best interests of a child.<sup>166</sup>

While there may be good reasons for avoiding a direct route to a best interests analysis,<sup>167</sup> courts should consider the ramifications of not considering a child's best interests during relocation of the custodial parent. This is not a contract case in which examining a document within its "four corners" forecloses fact-specific findings—it is a child who is affected by these determinations for the rest of his or her life. Courts should not use presumptions promoting judicial economy when examining a child's best interests.<sup>168</sup> The judicial time and resources spent under a best interests approach, in the end, benefit society in general.

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<sup>159</sup> *Id.*

<sup>160</sup> *National Momentum*, *supra* note 9, at 355 (quoting *Tropea v. Tropea*, 665 N.E.2d 145, 151 (N.Y. 1996)).

<sup>161</sup> *Hudspeth*, *supra* note 132, at 792.

<sup>162</sup> *Id.* (citing Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 *FAM. & CONCILIATION CTS. REV.* 297, 309 (2000)) ("[C]hildren benefit from extensive contact with both parents . . . .").

<sup>163</sup> *See National Momentum*, *supra* note 9, at 355 (quoting *Tropea*, 665 N.E.2d at 151).

<sup>164</sup> *See In re Marriage of Ciesluk*, 113 P.3d 135, 143 (Colo. 2005) (stating the *Watt* approach ignores the rights of the noncustodial parent and the rights of the child to a relationship with the non-custodial parent).

<sup>165</sup> *See supra* notes 153–63 and accompanying text.

<sup>166</sup> *See In re Marriage of Ciesluk*, 113 P.3d at 142–43; *Chipman & Rush*, *supra* note 34, at 273–76 (listing Colorado, New Mexico, Indiana, Maryland, and Florida as states that use a balancing approach, essentially focusing on the best interests of the child).

<sup>167</sup> *See supra* notes 131–52 and accompanying text.

<sup>168</sup> *See supra* notes 153–63 and accompanying text.

States that do not use presumptions in custodial parent relocation cases better serve their children.<sup>169</sup> Courts and legislatures have been proactive in adjusting this area of law to fit their policies. Wyoming's presumption has received critical treatment from other states.<sup>170</sup> Ultimately, each state may choose how to achieve its own values, but Wyoming's outdated doctrine ignores one of the paramount considerations under Wyoming law in other contexts: a child's best interests.<sup>171</sup>

### A. States Setting an Example for Wyoming

In the relocation context, Colorado and Florida courts focus on a best interests of the child analysis.<sup>172</sup> The Georgia Supreme Court and the New Mexico Supreme Court explicitly overruled a previous holding and declared out-of-state relocation a substantial change in circumstances warranting a best interests analysis.<sup>173</sup> As state courts and legislatures decide to resolve the problems with a presumption analysis, they are finding ways to get to a best interests analysis.

### B. Wyoming Should Take Action: State Statute

The Wyoming Legislature should do something to protect the best interests of our children. Adopting new legislation to change the current doctrine would alleviate the need for the Wyoming Supreme Court to overrule precedent, and would allow the citizens of Wyoming to decide the best approach for themselves and their children. Similar to how Colorado amended its statute section 14-10-131 in September of 2001, our state legislators should amend Wyoming Statute section 20-2-204.<sup>174</sup> The Colorado amendment was drafted specifically in response to a Colorado Supreme Court ruling that established a presumption favoring relocation of the custodial parent with a child.<sup>175</sup>

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<sup>169</sup> See, e.g., COLO. REV. STAT. ANN. § 14-10-129 (West 2012); FLA. STAT. ANN. § 61.13001 (West 2012); *In re Marriage of Ciesluk*, 113 P.3d at 143; *Braun v. Headley*, 750 A.2d 624, 632 (Md. Ct. Spec. App. 2000).

<sup>170</sup> See *In re Marriage of Ciesluk*, 113 P.3d at 143 (determining the *Watt* approach ignores the rights of the noncustodial parent); *Braun*, 750 A.2d at 632 (determining Wyoming is the only jurisdiction elevating the custodial parent's right to travel above all other rights); Cotter, *supra* note 3, at 152 ("[The Wyoming Supreme Court, in *Watt*,] has gone to the extreme and has found that a parent's constitutional right to travel may actually serve to trump the best interests of a child in a relocation case.").

<sup>171</sup> See *supra* notes 53–59 and accompanying text.

<sup>172</sup> See COLO. REV. STAT. ANN. § 14-10-129 (West 2012); FLA. STAT. ANN. § 61.13001 (West 2012).

<sup>173</sup> See generally *Bodne v. Bodne*, 588 S.E.2d 728 (Ga. 2003); *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991).

<sup>174</sup> See WYO. STAT. ANN. § 14-10-129 (2012). See generally *In re Marriage of Ciesluk*, 113 P.3d 135 (elaborating on the construction of the amendment and relationship with previous Colorado case law, which stood for a presumption favoring relocation of the custodial parent with the child).

<sup>175</sup> *In re Marriage of Ciesluk*, 113 P.3d at 139.

The Colorado legislature added a new portion to the statute specifically addressing when a custodial parent intends to relocate to a “different geographical area” with a child.<sup>176</sup> Under the statute, “different geographical area” means “a residence that substantially changes the geographical ties between the child and the party.”<sup>177</sup> If the custodial parent intends to relocate with a child and a substantial change in circumstances has occurred, then each parent must prove custody with them is in the best interests of a child using statutorily defined factors.<sup>178</sup> Best interests of a child is defined using eleven factors under Colorado Statute section 14-10-124(1.5)(a) and nine factors under Colorado Statute section 14-10-129(2)(c).<sup>179</sup> Pursuant to the state’s new legal framework for analyzing cases of custodial parent relocation with a child, the Colorado Supreme Court overruled its holding in *In re Marriage of Francis*, which established a presumption for relocation of the custodial parent.<sup>180</sup>

To alleviate the difficulty and uncertainty of having courts define what constitutes a “different geographical area” under the Colorado statute, the Wyoming Legislature could utilize some of the language of the Colorado statute and explicitly define the distance triggering a hearing on best interests.<sup>181</sup> Alternatively, the Wyoming Legislature could model its trigger for a best interests analysis on the Arizona statute.<sup>182</sup> The Arizona statute defines how Arizona courts deal with the relocation of a custodial parent with a child.<sup>183</sup> The Arizona statute triggers a best interest analysis when: (1) the custodial parent moves out of the state with the child; or (2) the custodial parent moves 100 miles within the state of Arizona with the child.<sup>184</sup> The Wyoming Legislature can use this exact approach or modify the approach as it sees fit.

Arizona and Colorado both use statutory systems that increase certainty and allow for more fact-specific determinations of each state’s children’s best

<sup>176</sup> *Id.* at 140; *see* § 14-10-129(2)(c).

<sup>177</sup> § 14-10-129(2)(c).

<sup>178</sup> *Id.* The factors are: the reasons why the party wishes to relocate with the child; the reason why the opposing party is objecting to the proposed relocation; the history and quality of each party’s relationship with the child since any previous parenting time order; the educational opportunities for the child at the existing location and at the proposed new location; the presence or absence of extended family at the existing location and at the proposed new location; any advantages of the child remaining with the primary caregiver; the anticipated impact of the move on the child; whether the court will be able to fashion a reasonable parenting time schedule if the change requested is permitted; and any other relevant factors bearing on the best interests of the child. *Id.*

<sup>179</sup> *In re Marriage of Ciesluk*, 113 P.3d at 140.

<sup>180</sup> *See In re Marriage of Francis*, 919 P.2d 776 (Colo. 1996); *see also* § 14-10-129(2)(c).

<sup>181</sup> § 14-10-129(2)(c).

<sup>182</sup> ARIZ. REV. STAT. ANN. § 25-408 (West 2012).

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

<sup>184</sup> *Id.*

interests.<sup>185</sup> The Wyoming Legislature should mimic the Colorado and Arizona process by amending its child custody modification statute.<sup>186</sup> This is one way the legislature may require the Wyoming judiciary to focus on what is most important in these types of cases: our children's best interests.

### C. Wyoming Should Take Action: State Common Law

Another approach is for the Wyoming Supreme Court to overrule *Watt* and *Love* holding a relocation, in and of itself, can be a substantial change in circumstances. However, the court is hesitant to overrule precedent due to *stare decisis*.<sup>187</sup> Nevertheless, the Wyoming Supreme Court can depart from precedent when it is necessary "to vindicate plain, obvious principles of law and remedy continued injustice."<sup>188</sup> This is one of several ways the court can correct confusion and injustice under Wyoming custodial relocation law and get to a best interests analysis.

The Wyoming Supreme Court can also find a way around its holdings in *Watt* and *Love* without necessarily overruling precedent. The *Watt* holding explicitly states that it applies to "intrastate" relocation.<sup>189</sup> Any discussion of interstate relocation within *Watt* may only be non-binding dicta.<sup>190</sup> Additionally, the holding in *Watt* could be argued as narrowing the *Love* holding from an interstate move to an intrastate move.<sup>191</sup> The cases after *Watt* have readily distinguishable facts based upon procedural posture and substantive factual differences.<sup>192</sup> The argument for changing the law without directly overruling precedent is viable because *Watt*, *Love*, and the line of subsequent cases can be interpreted in multiple ways.<sup>193</sup>

<sup>185</sup> See *id.*; see also § 14-10-129.

<sup>186</sup> § 14-10-129; ARIZ. REV. STAT. ANN. § 25-408.

<sup>187</sup> *Goodrich v. Stobbe*, 908 P.2d 416, 420 (Wyo. 1995) (citing *Cook v. State*, 841 P.2d 1345, 1353 (Wyo. 1992)); see also *In re ANO*, 136 P.3d 797, 799 (Wyo. 2006) ("When precedential decisions are no longer workable, or are poorly reasoned, we should not feel compelled to follow precedent.").

<sup>188</sup> *Goodrich*, 908 P.2d at 420.

<sup>189</sup> *Watt v. Watt*, 971 P.2d 608, 616 (Wyo. 1999).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*; see generally *Love v. Love*, 851 P.2d 1283 (Wyo. 1993) (involving an interstate relocation from Sheridan, Wyoming to Sioux Falls, South Dakota).

<sup>192</sup> See generally *Hanson v. Belveal*, 280 P.3d 1186 (Wyo. 2012) (holding on the decree restricting relocation, but not on an actual relocation); *Zupan v. Zupan*, 230 P.3d 329 (Wyo. 2010) (involving joint physical custody and intrastate restriction); *Testerman v. Testerman*, 193 P.3d 1141 (Wyo. 2008) (involving an initial child custody order and intrastate restriction); *Morris v. Morris*, 170 P.3d 86 (Wyo. 2007) (involving a noncustodial parent who moved as often as the custodial parent); *TW v. BM*, 134 P.3d 1262 (Wyo. 2006); *Resor v. Resor*, 987 P.2d 146 (Wyo. 1999) (involving an initial child custody order).

<sup>193</sup> See *supra* notes 77–120.



Practically, the court could work through the case law without overruling precedent and hold an interstate relocation, in and of itself, can be considered a substantial change in circumstances. This is a logical way the court could decide when to trigger a best interests analysis because it is doubtful the court would create a certain mileage minimum to trigger a best interests analysis. An out-of-state distinction would not be a perfect solution because cities are often close to each other, yet across state borders. A move from Torrington, Wyoming to Scottsbluff, Nebraska is only thirty-three miles. A thirty-three mile relocation alone should not rise to a substantial change in circumstances requirement. Even though not perfectly effective, the court could hold an interstate relocation, in and of itself, is a substantial change in circumstances, thus allowing more trial courts to consider whether the relocation of the custodial parent with a child is in that child's best interests.

Perhaps the easiest way for the court to fix the law with regard to relocation of the custodial parent with a child is to create a threshold distance where reasonable visitation is not possible for the noncustodial parent.<sup>194</sup> In *Love*, the court held the custodial parent will be allowed to move with a child as long as the reasons for the move are legitimate, sincere, in good faith; and *if reasonable visitation is possible for the non-custodial parent*.<sup>195</sup> The court has not defined what would constitute "unreasonable visitation."<sup>196</sup> The court can define what constitutes "unreasonable visitation," essentially forcing trial courts to perform a best interests analysis by declaring that a move of a certain distance will not provide for a child's reasonable visitation with the noncustodial parent.

These are a few of the ways the Wyoming Supreme Court can fix the complex and confusing process of applying *Love*, *Gurney*, and *Watt*.<sup>197</sup> Wyoming's law regarding the relocation of the custodial parent with a child is out-of-date, ignores a child's best interests, and needs to be changed immediately.

#### IV. CONCLUSION

The law in Wyoming regarding relocation of the custodial parent needs immediate change.<sup>198</sup> Wyoming is foreclosing a best interests of the child analysis in cases where the custodial parent may be irreparably harming a child's relationship

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<sup>194</sup> See *Love*, 851 P.2d 1283.

<sup>195</sup> *Id.* at 1288.

<sup>196</sup> See generally *Hanson*, 280 P.3d 1186; *Zupan*, 230 P.3d 329; *Inman v. Williams*, 205 P.3d 185 (Wyo. 2009); *Testerman*, 193 P.3d 1141; *Morris*, 170 P.3d 86; *TW*, 134 P.3d 1262; *Harshberger v. Harshberger*, 117 P.3d 1244 (Wyo. 2005); *Resor*, 987 P.2d 146; *Watt v. Watt*, 971 P.2d 608 (Wyo. 1999); *Gurney v. Gurney*, 899 P.2d 52 (Wyo. 1995).

<sup>197</sup> See *supra* notes 188–96 and accompanying text.

<sup>198</sup> See *supra* notes 1–19, 77–125, 153–97 and accompanying text.

with the noncustodial parent.<sup>199</sup> This foreclosure is often contrary to a child's best interests, and a child should be part of the decision to modify a child custody order.<sup>200</sup> A presumption favoring the relocation of a custodial parent or favoring a change in primary custody during relocation of a custodial parent ignores the heart of the issue: the best interests of a child.<sup>201</sup> A rigid legal doctrine should not bar trial courts from determining how the relocation will affect a child.<sup>202</sup> Trial courts should be free to use discretion when determining whether a move of a certain distance, under certain circumstances, will be in the best interests of a child.<sup>203</sup> Wyoming can justify a best interests approach by understanding the right to travel and the right to raise one's children are interests that cancel each other out; leaving the best interests of a child as paramount.<sup>204</sup>

Wyoming should change its law through statute or modification of case law, much like other states have done.<sup>205</sup> States have created statutes explicitly overruling legal precedent with which legislatures and citizens disagreed.<sup>206</sup> Appellate courts have explicitly overruled cases that complicate the doctrine and move away from the best interests of their state's children.<sup>207</sup> Wyoming should make a change by putting the best interests of its children before the interests of judicial efficiency and tradition, while still protecting the constitutional rights of Wyoming parents.

There is no reason to ignore a child's best interests when the important noncustodial parental relationship hangs in the balance. Love should be the basis of a best interest analysis during a substantial relocation of the custodial parent. Ironically, *Love* is the reason the best interests of a child and the rights of the non-custodial parent are disregarded in favor of the right of a custodial parent to travel. With regard to custodial parent relocation law, Wyoming's doctrine leaves other states' courts and legal scholars wondering *Watt* the heck we are doing here.<sup>208</sup>

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<sup>199</sup> See *supra* notes 77–120 and accompanying text.

<sup>200</sup> See *supra* notes 153–63 and accompanying text.

<sup>201</sup> See *supra* notes 153–63 and accompanying text.

<sup>202</sup> See *supra* notes 153–63 and accompanying text.

<sup>203</sup> See *supra* notes 172–97 and accompanying text.

<sup>204</sup> See *supra* notes 153–63 and accompanying text.

<sup>205</sup> See *supra* notes 172–97 and accompanying text.

<sup>206</sup> See *supra* notes 172–86 and accompanying text.

<sup>207</sup> See *supra* notes 7, 173 and accompanying text.

<sup>208</sup> See *supra* notes 164–71 and accompanying text.

ADDENDUM: *ARNOTT V. ARNOTT*

Recently, in a landmark decision, the Wyoming Supreme Court overruled *Watt v. Watt*.<sup>209</sup> Wyoming trial courts are now allowed to consider a custodial parent's relocation, in and of itself, as a substantial change in circumstances warranting consideration of a child's best interests.<sup>210</sup>

In *Arnott*, the Wyoming Supreme Court discussed the competing interests and rights<sup>211</sup> involved in custodial parent relocation cases and explained the *Watt* court had misinterpreted *Love v. Love*, inappropriately "elevating the right to travel over competing interests."<sup>212</sup> The *Arnott* court recognized unfavorable treatment of the *Watt* opinion in multiple jurisdictions and declared its myopic focus on the right to travel as "not [being] supported by [the court's] earlier precedent."<sup>213</sup>

By overruling *Watt*, the Wyoming Supreme Court changed the law in Wyoming to best serve its citizens' children.<sup>214</sup> This comment suggests other pathways the court could have taken, but primarily advocates for a substantively identical result.<sup>215</sup> This comment and the *Arnott* standard both focus on the paramount consideration in Wyoming's child custody decisions: the best interests of the child.<sup>216</sup> Thus, this comment agrees with the result in *Arnott* and applauds the Wyoming Supreme Court for crafting the law to best serve the state's citizens, especially its children.

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<sup>209</sup> *Arnott v. Arnott*, 2012 WY 167, No. S-12-0089, 2012 WL 6720889, at \*21 (Wyo. Dec. 28, 2012) ("[W]e hereby overrule *Watt*."); see also *Watt v. Watt*, 971 P.2d 608 (Wyo. 1999).

<sup>210</sup> *Arnott*, 2012 WL 6720889, at \*21 ("With this decision, we explicitly recognize that a relocation by the primary physical custodian, as well as 'factors that are derivative of the relocation' . . . may constitute a material change in circumstances sufficient to warrant consideration of the best interests of the children.").

<sup>211</sup> See *id.* at \*15–17. The competing interests and rights are the custodial parent's right to travel, the noncustodial parent's right to parent, the child's right to family association, and the state's paramount concern: the best interests of the child. *Id.*

<sup>212</sup> *Id.* at \*20; see also *id.* at \*9–12, 17 (discussing the *Watt* court's interpretation of *Love* and explaining the difference between the *Love* holding and the *Watt* interpretation).

<sup>213</sup> *Id.* at \*20.

<sup>214</sup> See *id.*

<sup>215</sup> See *supra* notes 1–19, 164–208 and accompanying text.

<sup>216</sup> See *Arnott*, 2012 WL 6720889, at \*16 ("[T]he state has a compelling interest in promoting the best interests of the children."); *supra* notes 1–19, 198–208 and accompanying text.