CASE NOTE

FAMILY LAW—Blood as Best Interests: The Wyoming Supreme Court Expands Associational Rights and the Preference for Kinship Placement; *In re JW*, 226 P.3d 873 (Wyo. 2010)

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Introduction

In 2007, the Wyoming Department of Family Services (DFS) filed a neglect petition in state district court against the mother of two young children.[1] Under court order, DFS took custody of the children and ultimately placed them with a local married couple (foster parents).[2] The appointed multi-disciplinary team (MDT) formulated an initial plan for family reunification predicated upon the mother overcoming her drinking problem.[3]

In light of the mother's ongoing alcohol abuse, the MDT ultimately recommended terminating her parental rights.[4] The mother did not contest the MDT's recommendation and the district court scheduled a hearing to arrive at a permanent placement decision for the children.[5] The foster parents in Casper had by this time bonded with the children and indicated a desire to adopt them.[6]

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* Candidate for J.D., University of Wyoming, 2012. I would like to thank Professor John M. Burman for alerting me to this case and for his thoughtful guidance. Thank you also to the attorneys for both DFS and the mother for sharing general information with me about the case as I had no access to the confidential record. Last but not least, thanks to Anne Ashley, Jean Day, Stacey Obrecht, Anne Reiniger, the 2010–2011 *Wyoming Law Review* Editorial Board (especially Justin Hesser), and Bradley Adams and Cheryl and Bill Schwartz for the helpful thoughts, edits, and encouragement.

[1] *In re* JW, 226 P.3d 873, 875 (Wyo. 2010). Pursuant to state statute, the juvenile courts in Wyoming are part of the district court system. Wyo. Stat. Ann. § 5-8-101 (2010). Accordingly, every district court judge is also a juvenile court judge. John M. Burman, *Wyoming's New Payment and Practice Standards for Guardians ad Litem in Juvenile Court*, Wyo. Law., Aug. 2005, at 34.

[2] *In re JW*, 226 P.3d at 875.

[3] *Id.* at 876. An MDT must be created within ten days of filing a neglect petition. Wyo. Stat. Ann. § 14-3-427(b). At the outset, the team must include the child's parent, a school district representative, a DFS representative, the child's mental health professional, the district attorney, the child's guardian ad litem, the volunteer child advocate, and any foster parent. *Id.* § 14-3-427(c). The team may also include the child and other family members in its meetings. *Id.* § 14-3-427(d). The purpose of the multi-disciplinary team is to formulate an initial recommendation for the court and to monitor the progress of the parent and child at regular meetings. *Id.* § 14-3-427(f). The statute expressly instructs the team to consider the best interests of the child involved as well as the best interests of the family in formulating its recommendations. *Id.*

[4] *In re JW*, 226 P.3d at 876.

[5] *Id.*

[6] *Id.* at 877.

The mother, however, opposed adoption by the foster parents and contended DFS should instead place the children with her brother and sister-in-law who lived in Montana and who expressed a willingness to adopt.[7] In fact, the Montana relatives hired their own attorney, received leave to intervene by the district court, and actively participated in the proceedings.[8] The district court recognized the uncle and aunt presented a good placement option but ultimately concluded maintaining custody with the foster parents was in the children's best interests.[9] The court based its decision largely on the strength of the bonds the children formed with their foster family during the preceding eighteen months.[10]

On appeal, the mother contended the district court erred by placing the children with the foster parents rather than with her relatives in Montana.[11] She argued the court's custodial determination violated the constitutionally-based "fundamental right to association of family," as well as the "preference for kinship placement" found in various expressions of federal and state law and policies.[12] In a 3-2 decision, with two separate dissenting opinions, the Wyoming Supreme Court agreed with the mother.[13] In overriding the district court's "best interests" determination, the majority concluded there "exists a compelling preference that what is 'best' for a child . . . is placement with nuclear or extended family members."[14] Accordingly, the court directed DFS to transfer the children immediately from the foster parents in Casper to the children's uncle and aunt in Montana.[15]

This note posits *In re JW* marks a notable departure from the child-centered approach historically followed in Wyoming custodial determinations.[16] The majority opinion confuses blood with best interests, transforms matters of preference into matters of law, and overlooks the deference traditionally given district judges in making determinations concerning children.[17] Moreover, the opinion creates a landscape of uncertainty around the procedural issues

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[7] *Id.* at 876–77.

[8] *Id.* at 877. Intervention is available to a non-party with a significantly protectable interest at stake in the litigation. WYO. R. CIV. P. 24(a)(2).

[9] *In re JW*, 226 P.3d at 875, 877. Judge Scott W. Skavdahl presided over the permanency hearing. *Id.*

[10] *Id.* at 877.

[11] *Id.* at 874.

[12] *Id.* at 875.

[13] *Id.* at 881.

[14] *Id.*

[15] *Id.*

[16] *See infra* notes 29–36 and accompanying text.

[17] *See infra* notes 241, 248, 250 and accompanying text.

of standing and the standard of review in appeals of placement decisions.[18] In addition, the majority appears to have greatly expanded the kinship preference and the associational rights of extended family members, leaving the current force of the best interests standard in doubt.[19] While the precedential value of *In re JW* remains uncertain, the decision raises troubling questions for practitioners regarding the direction of child welfare law in Wyoming.[20]

BACKGROUND

The Rights of Parents and Children

American case law and tradition have long recognized the sanctity of the family unit.[21] Before family law even existed by name, political leaders and the judiciary sought to preserve and protect families from governmental interference.[22] In the early cases of *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, the United States Supreme Court described family autonomy as an interest of constitutional magnitude.[23] Eventually, the Court established the right to associate with one's family as a "fundamental" element of personal liberty under the First and Fourteenth

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[18] *See infra* notes 125–73 and accompanying text.

[19] *See infra* notes 174–265 and accompanying text.

[20] *See infra* notes 266–348 and accompanying text.

[21] *See* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (stating the Supreme Court has regularly found the Constitution protects the sanctity of the family because the institution is deeply rooted in the nation's history and tradition); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (noting the history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children and that this concern is established beyond debate as an enduring American tradition); Ginsberg v. New York, 390 U.S. 629, 639 (1968) (stating constitutional interpretation has consistently recognized parents' claim to authority in their own household as basic in the structure of society); Griswold v. Connecticut, 381 U.S. 479, 495–96 (1965) (stating the traditional relation of the family is a relation as old and as fundamental as our entire civilization and that the absence of an express prohibition on interference does not show the government was meant to have the power to do so); Poe v. Ullman, 367 U.S. 497, 551–52 (1961) (stating the integrity of family life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted constitutional right).

[22] *See* Naomi Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1192–94 (1999) (discussing the first White House Conference on the Care of Dependent Children, in which participants, including Jane Addams, Booker T. Washington, and Theodore Dreiser, proposed making payments to poor parents so that children could stay at home, rather than be taken into the state's custody).

[23] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 401–03 (1923). These cases charter the respective rights of parents to direct the educational and religious upbringing of their children.

Amendments.[24] Modern state statutes, case law, and administrative policies reflect this deep-seated recognition of the "associational rights" of families.[25]

Situations involving children and their welfare frequently test the traditional deference to family autonomy.[26] For almost as long as the United States Supreme Court has recognized the sanctity of the family, the Court has also emphasized the state's duty to protect children—its most vulnerable citizens.[27] Accordingly, the state in exercise of its *parens patriae* powers, may intervene in the family sphere whenever the welfare of minor children is called into question.[28] In such cases, the state's interest in protecting children may temper, and even supersede,

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[24] *See* Troxol v. Granville, 530 U.S. 57, 65 (2000) (describing parents' right to determine the custody, care, and control of their children as "perhaps the oldest of the fundamental liberty interests recognized"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder); WYO. DEP'T FAMILY SERVS. POLICY § 5.19, TERMINATION OF PARENTAL RIGHTS (2006) (noting reasonable efforts must be made towards family reunification).

[25] *See, e.g.*, COLO. REV. STAT. § 19-3-508(5)(b)(I) (2011) ("If the court finds that placement out of the home is necessary and is in the best interests of the child and the community, the court shall place the child with a relative, including the child's grandparent, if such placement is in the child's best interests."); MO. REV. STAT. § 210.565 (2010) ("Whenever a child is placed in a foster home and the court has determined that foster home placement with relatives is not contrary to the best interests of the child, the children's division shall give foster home placement to relatives of the child."); Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (establishing the need for clear and convincing evidence to support the termination of parental rights); *Yoder*, 406 U.S. at 233 (holding the First and Fourteenth Amendments prevent the state from compelling public school attendance when parents prefer home school); Aristotle v. Johnson, 721 F. Supp. 1002, 1005 (N.D. Ill. 1989) (illustrating the validity of a freedom of association claim filed by plaintiff siblings placed in two separate foster homes); *State Policies at a Glance: Statutory Preferences for Relative Placement*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/placement.authcheckdam.pdf (last visited Apr. 23, 2011) (listing the statutes articulating the kinship preference in all fifty states).

[26] *See* Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 637–38 (2006) (noting the debate between parents' rights and children's rights is particularly vociferous in the context of the child welfare system).

[27] *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981) ("[T]he state has an urgent interest in the welfare of the child."); Stanley v. Illinois, 405 U.S. 645, 652 (1972) (acknowledging the state's duty to protect minor children); *Prince*, 321 U.S. at 165 (asserting the state may restrict the parent's control in order to guard the general interest in the youth's well-being).

[28] *Parens patriae* literally means "parent of the country." BLACK'S LAW DICTIONARY 1221 (10th ed. 2010). The doctrine grants the state power to protect the interests of its populace. *See, e.g.*, Snapp v. Puerto Rico, 458 U.S. 592, 607 (1982) (concluding the state has a legitimate interest in the general "health and well-being" of its residents); Louisiana v. Texas, 176 U.S. 1, 19 (1900) (acknowledging the state may seek relief because of "matters affecting its citizens"); Mormon Church v. United States, 136 U.S. 1, 57 (1890) (establishing the state's ability to protect those who cannot protect themselves).

a family's associational rights.[29] Scholars sometimes describe the dialog around these competing interests as a debate between "parents' rights" and "children's rights."[30] Other times, the discussion centers on "family preservation" versus "child protection."[31] This process of weighing the competing interests of family autonomy and child welfare is very much alive in Wyoming.[32]

Termination of Parental Rights Cases as Compared to Custody Cases

Wyoming courts are sensitive to the idea that the state's goal of protecting children may sometimes conflict with the constitutional liberties enjoyed by families.[33] Accordingly, in cases where a parent's right to associate with his or her children is called into question, the Wyoming Supreme Court applies strict scrutiny and will not uphold a lower court's decision unless it is supported

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[29] *See* Blair v. Supreme Court of State of Wyo., 671 F.2d 389, 390 (D. Wyo. 1982) (acknowledging the State's interest in the welfare of minor children in Wyoming); *see also* Annette Appell & Bruce Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 64 (1995) (noting the state's initial goal must be to ensure the child's needs are met by the parent; after a parent's care falls beneath minimally adequate standards, however, child protectionist objectives move to the forefront).

[30] *See* Huntington, *supra* note 26, at 637–38 (noting the central debate between parents' rights and children's rights in family law); *see also* Charles D. Gill, *Essay on the Status of the American Child, 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen?*, 17 OHIO N.U. L. REV. 543, 548 (1991) (discussing the falsity of any discussion of "children's rights" and pointing out the need for a constitutional amendment specifically stating children in fact possess constitutional rights). The Wyoming Supreme Court stated that children have the right to "live in an environment free from filth, health hazards and danger" and to be "properly nourished and educated." *In re* MLM, 682 P.2d 982, 990 (Wyo. 1984).

[31] *See* Huntington, *supra* note 26, at 639 (stating it is more accurate to reframe the debate as between family preservation and child protection because the removal of a child from her biological parent is as much a violation of her rights as the rights of her parent). Proponents of family preservation are critical of state intervention with a bias toward removal. *Id.* Proponents of child protection, in turn, favor state intervention, even if it leads to a child's removal from the home. *Id.*; *see also* Barbara B. Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1044 (1992) (discussing an alternative understanding of the combined rights of parent and child as stemming from the historic understanding of children as the property of their parents).

[32] *See, e.g.*, *In re* SRJ, 212 P.3d 611, 612 (Wyo. 2009) (noting there is a "fundamental liberty of familial associations" and a "compelling state interest in protecting the welfare of children"); *In re* ANO, 136 P.3d 797, 799 (Wyo. 2006) (acknowledging the tension between the "fundamental liberty of familial association" and the "compelling state interest in protecting the welfare of children").

[33] *See, e.g.*, *In re SRJ*, 212 P.3d at 612; *In re* A.D., 151 P.3d 1102, 1105 (Wyo. 2007); *In re ANO*, 136 P.3d at 799 (acknowledging the greater protections afforded parents in termination of parental rights cases because of the fundamental rights involved); *In re* MLM, 682 P.2d 982, 991 (Wyo. 1984) (stating Wyoming courts have carefully guarded the rights of parents); *see also In re* LB, 933 P.2d 1126, 1129 (Wyo. 1997) ("Due to the fundamental nature of the rights affected by a termination action, the procedures involved must satisfy due process and the evidence supporting a termination must be clear and convincing.").

by clear and convincing evidence.[34] Similarly, Wyoming DFS holds itself to a higher standard in termination of parental rights cases.[35] Before recommending termination, DFS policy requires in almost all instances that reasonable efforts be made towards reunifying parent and child.[36] In other words, when a possibility exists that parents may be prevented from associating with their children, the scales of justice are tilted in favor of protecting their fundamental rights.[37] Any parent on the losing side of a termination proceeding possesses legal standing to contest the decision on appeal.[38]

Wyoming courts, however, have followed a notably different approach in cases involving custodial disputes between parents or other guardians.[39] Because the termination of parental rights is typically not at issue in these cases, the law

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[34] WYO. STAT. ANN. § 14-2-309(a) (2010) (providing the requirement of clear and convincing evidence to terminate the parent-child relationship); *In re A.D.*, 151 P.3d at 1105 (stating strict scrutiny requires the state to show by clear and convincing evidence that termination is appropriate). Clear and convincing evidence is the kind of proof that would persuade a trier of fact that the truth of the contention is highly probable. *In re A.D.*, 151 P.3d at 1105.

[35] *See* WYO. DEP'T FAMILY SERVS. POLICY § 5.19, TERMINATION OF PARENTAL RIGHTS (2006) (stating reasonable efforts must be made towards family reunification).

[36] *Id.*

[37] *See id.* (articulating the need for heightened procedural protections given the high stakes involved in termination of parental rights cases). *But see* Wendy Ross, Note, *Wyoming Courts Continue to Struggle with Termination of Parental Rights Cases: The Problem with Reasonable Efforts*, 9 WYO. L. REV. 697, 703 (2009) (noting while cases involving the termination of parental rights may be subject to strict scrutiny, the Wyoming Supreme Court has rarely held DFS did not make reasonable efforts to preserve the parent/child relationship). This precedent not only shows deference to a lower court's findings of fact but also reveals the Wyoming Supreme Court's great concern with child protection, even in the termination of parental rights context. *Id.* Case law from the Wyoming Supreme Court is rife with examples of this philosophy—better to remove a child from an unfit home than preserve parents' rights and jeopardize a child's well being. *See, e.g.*, *In re SRJ*, 212 P.3d at 612 (noting there is a "fundamental liberty of familial associations" and a "compelling state interest in protecting the welfare of children"); *In re A.D.*, 151 P.3d at 1105 (stating strict scrutiny requires the state to show by clear and convincing evidence that termination is appropriate); *In re ANO*, 136 P.3d at 799 (acknowledging the greater protections afforded parents in termination of parental rights cases because of the fundamental rights involved). These cases all affirm the district court's decision to terminate parental rights.

[38] *See, e.g.*, *In re SRJ*, 212 P.3d at 612 (considering an appeal by the parent whose rights had been terminated); *In re A.D.*, 151 P.3d at 1103 (considering appeals by the parent whose rights had been terminated); *In re ANO*, 136 P.3d at 799 (considering an appeal by a parent whose petition to terminate the other parent's rights was dismissed by the appellate court). The Wyoming statutes do not specify who may petition for termination, but usually DFS takes this action against the parent in question. WYO. STAT. ANN. § 14-2-309(a). As a party to the suit, DFS may also appeal a decision upholding rights. *See In re* ATE, 222 P.3d 142, 143 (Wyo. 2009) (considering an appeal by DFS).

[39] *See, e.g.*, Kennison v. Chokie, 100 P.2d 97, 97–98 (Wyo. 1995) (stating the paramount question whenever the custody and control of a minor child is in dispute is the welfare of the child involved); Fanning v. Fanning, 717 P.2d 346, 352–53 (Wyo. 1986) (noting the interests of the child should be the sole consideration in a custody dispute); Bereman v. Bereman, 645 P.2d 1155, 1160 (Wyo. 1982) (stating the paramount concern of the court in child custody and support proceedings is the welfare of the child involved).

does not afford any special procedural or substantive rights to the adults vying for custody.[40] In such cases, the Wyoming Supreme Court has traditionally shown great deference to the trial court and has applied the abuse of discretion standard upon review.[41] Under this standard, the lower court need only demonstrate the reasonableness of its conclusion in light of the evidence.[42] Further, the weighing of "family preservation" values against "child protection" values is generally not involved in custodial determinations.[43] Instead, the concern is over the children and the placement option that will best serve their interests.[44] This "best interests" approach has long governed Wyoming placement decisions—whether the dispute arises between two parents, a parent and a non-parent, or two non-parents.[45] Accordingly, parties appealing custody decisions most often assert the district court's failure to properly consider the children's best interests.[46] The parties competing for custody, including non-parents, have standing to bring such appeals.[47]

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[40] *See* Blakey v. Blakey, 218 P.3d 253, 254 (Wyo. 2009) (considering on appeal whether the district court gave the welfare of the children paramount consideration, not whether a parent's rights had been violated).

[41] *See id.* (emphasizing the broad discretion enjoyed by the district court in child custody matters); Reavis v. Reavis, 955 P.2d 428, 431 (Wyo. 1998) (stating the best interests of the child is a question for the trier of fact, not to be overturned unless an abuse of discretion occurs).

[42] *See* Roemmich v. Roemmich, 238 P.3d 89, 91 (Wyo. 2010) ("In determining whether the district court has abused its discretion, we must decide whether it could reasonably conclude as it did." (quoting Inman v. Williams, 205 P.3d 185,191 (Wyo. 2009))); Durfee v. Durfee, 199 P.3d 1087, 1089 (Wyo. 2009) (noting the reviewing court will view the evidence in the light most favorable to the district court's determination).

[43] *See* Henson v. Henson, 384 P.2d 721, 723 (Wyo. 1963) (stating the court does not intend to punish or reward parents in balancing their respective abilities to serve a child's best interests). *But see* Dowdy v. Dowdy, 864 P.2d 439, 440 (Wyo. 1993) (quoting Love v. Love, 851 P.2d 1283, 1287 (Wyo. 1993)) (framing the balance instead between the *rights* and affections of each of the parents). It is unclear whether the court refers to the balance of "associational rights" in determining which parent should receive custody. *In re* JW, 226 P.3d 873, 881 (Wyo. 2010). This would make little sense considering both father and mother possess equal rights to associate with their children. *See Fanning*, 717 P.2d at 348–49 ("'[N]o award of custody shall be determined based on the gender of the parent.'"). In other cases employing this language, the court discusses rights in weighing ancillary questions, such as how often one parent will see children in the primary custody of the other parent. *See Love*, 851 P.2d at 1287 (weighing one parent's right to move freely in light of another parent's right to visitation).

[44] *See, e.g.*, sources cited *supra* note 39.

[45] *See* Ross, *supra* note 37, at 703 (discussing the Wyoming Supreme Court's history of not overturning DFS's reasonable efforts towards family reunification); *see also* Jones v. Bowman, 77 P. 439, 441 (Wyo. 1904) (recognizing the singular importance of the child's interests in a custody dispute).

[46] *See, e.g.*, *Blakey*, 218 P.3d at 254 (considering on appeal whether the district court gave the welfare of the children paramount consideration); *Reavis*, 955 P.2d at 429 (stating the issue on appeal was whether the district court's action was contrary to the best interests of the children).

[47] *See In re* CF, 120 P.3d 992, 1004–05 (Wyo. 2005) (describing the doctrine of standing as extending to parents only when they have a tangible interest at stake in the litigation, as in child custody cases). The GAL does not have standing to appeal a custody order since the child is not a

PRINCIPAL CASE

On May 9, 2007, DFS filed a neglect petition in district court in Natrona County against the single mother of two young children.[48] DFS obtained physical custody of the children, a seven-year-old girl and an infant boy, and shortly thereafter obtained legal custody.[49] Early on, the district court assigned a guardian ad litem (GAL) and a court appointed attorney to represent the respective interests of the children and the mother.[50] Originally, DFS placed each child in separate foster homes.[51] One month later, DFS briefly returned the children to the mother's physical custody, with DFS retaining legal custody.[52] By July, however, the record indicates the children returned to foster care—this time both children were placed with the same foster parents, a married Casper couple with children of their own.[53]

The MDT formulated its initial plan for reunification hoping the mother would overcome her drinking problem.[54] However, the team also contemplated a contingent permanency plan—placing the children with family relations.[55] In creating this concurrent plan, DFS sought the assistance of the mother to identify possible family, or kinship, placements.[56] DFS first explored the possibility of placement with the children's maternal grandmother but dismissed this option

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party to the suit. *See* WYO. STAT. ANN. § 1-1-102 (2010) (outlining the possibility for a "next friend" to appear on behalf of a minor in the narrow context of when the minor is a party—either suing or being sued). Furthermore, in the custody context, a GAL serves a quasi-judicial role and strives to determine the best interests of the child—regardless of whether that determination is aligned with the child's wishes. *See* Clark v. Alexander, 953 P.2d 145, 151–53 (Wyo. 1998) (describing the GAL as an investigative agent who owes primary allegiance to the court).

[48] *In re JW*, 226 P.3d at 875. The identity of the children's respective fathers was known, but neither participated meaningfully in the proceedings. *Id.*

[49] *Id.* at 875–76. Legal custody is created by court order and vests in a custodian the right to have physical custody of a minor; the right and duty to protect, train, and discipline a minor; the duty to provide him with food, shelter, clothing, transportation, ordinary medical care, and education; and in an emergency, the right and duty to authorize surgery or other extraordinary medical care. WYO. STAT. ANN. § 14-3-402(a)(x).

[50] *See generally* WYO. STAT. ANN. § 14-3-208 (outlining the steps the local department of family services must take in response to a neglect allegation). A guardian ad litem is a lawyer appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party. BLACK'S LAW DICTIONARY, *supra* note 28, at 847.

[51] *In re JW*, 226 P.3d at 875.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 875–76.

[55] *Id.* at 875.

[56] *Id.* A concurrent plan is developed in addition to the child's main case plan in consideration of other possible outcomes so as to assure a child's safety and permanency. 049-240-001 WYO. CODE R. § 4(j) (2011) (Child Protection Rules issued by Dep't of Family Servs.).

due to the mother's objections.[57] In June of 2007, the mother shared the name of her married brother in Montana as a potential kinship option.[58] However, because the primary objective of the MDT was reunification, the children remained with the foster parents in Casper while the mother attempted to recover from her alcoholism.[59]

Unfortunately, over the next year, the mother was not successful in her efforts to combat her drinking problem and in August of 2008 the MDT recommended terminating her parental rights.[60] The mother did not contest the MDT's recommendation and the district court scheduled a hearing to determine a permanent placement for the children.[61]

By the time of the MDT's termination recommendation, the children had bonded with the foster family in Casper and the couple sought to formally adopt them.[62] But, at this point, the children's uncle and aunt in Montana also began to actively pursue custody of the children; they hired their own attorney and received leave to intervene in the district court's proceedings where they filed an affidavit describing their relationship with the children and a willingness to take them into their home.[63] The court—faced with two potential options for permanent placement—ordered a "bonding study," which confirmed that the children had bonded with the foster parents, but they could also potentially bond with their uncle and his wife in Montana.[64]

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[57] *In re JW*, 226 P.3d at 876. Neither the majority nor dissenting opinions discuss the dismissal of the grandmother as a potential kinship option.

[58] *Id.* at 875.

[59] *Id.* at 876. The mother likely signed a consent decree, outlining the terms by which she could regain custody of her children. *See* WYO. STAT. ANN. § 14-3-428 (2010) (describing consent decrees).

[60] *In re JW*, 226 P.3d at 876. The record does not state the specific grounds for the termination recommendation. *Id.* However, it is likely the MDT determined the children's health and safety would be jeopardized if they were returned to their mother. *See* WYO. STAT. ANN. § 14-2-309(a)(iii) (stating the parent/child relationship may be terminated if "the child has been abused or neglected by the parent and reasonable efforts by an authorized agency or mental health professional have been unsuccessful in rehabilitating the family . . . and it is shown that the child's health and safety would be seriously jeopardized by remaining with or returning to the parent").

[61] *In re JW*, 226 P.3d at 875–76. While it is unclear whether an order terminating parental rights was formally entered, both the juvenile court and the Wyoming Supreme Court describe the mother's rights as having been effectively terminated because it was a "given" that this would occur. *Id.* at 875.

[62] *Id.* at 877.

[63] *Id.* at 876–77.

[64] *Id.* at 877. A bonding study is an evaluative procedure used to consider the relationship between a child and actual or potential caretakers. John C. Stokes & Linda J. Strothman, *The Use of Bonding Studies in Child Welfare Permanency Planning*, 13 CHILD & ADOLESCENT SOC. WORK J. 347, 348 (1996).

As a result of the inconclusive nature of the bonding study, the court held an evidentiary hearing to determine which permanent placement would be in the best interests of the children.[65] The hearing lasted an entire day and well into the evening hours.[66] The court heard testimony from and questioned a counselor, teachers, the foster parents, one of the foster siblings, a DFS caseworker, the expert who conducted the bonding study, the uncle, and the supervisor of the Montana Parenting and Family Resource Center.[67]

The district court subsequently issued a seventeen-page *Order on Permanency Hearing* determining that maintaining custody with the foster parents was in the children's best interests.[68] In response to the mother's argument during the hearing, alleging DFS failed to adequately consider placement with the uncle and aunt, the court noted any failure by DFS to follow its policies was immaterial to the outcome of the case.[69] The court noted that, because reunification remained the ongoing goal for many months, DFS had no choice but to place the children in Casper in close proximity to their mother.[70] During this time, the children bonded with their foster parents and siblings, becoming a "family."[71] Therefore, by the time the MDT abandoned the goal of reunification, the court determined the children would experience substantial loss if removed from their new home environment and the Casper community.[72] The district court expressly recognized a "preference for kinship placement" as articulated in Wyoming Statutes section 14-3-429 as well as in dicta from the case of *In re CF*.[73] But the district court decided that the "preference" does not give family members an absolute right to custody[74] and reasoned the "best interests of the children" must remain the central question in placement decisions.[75] In light of the evidence, the district court determined that rather than uprooting the children to live with their

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[65] *In re JW*, 226 P.3d at 877.

[66] *Id.*

[67] *Id.* at 884 (Burke, J., dissenting).

[68] *Id.* The author's understanding of the district court's proceeding and order is based on a lengthy quotation provided in Justice Burke's dissent. *See* WYO. STAT. ANN. § 14-3-214 (mandating the confidentiality of all records concerning reports and investigations of neglect).

[69] *In re JW*, 226 P.3d at 884–86 (Burke, J., dissenting).

[70] *Id.* at 884–85.

[71] *Id.* at 885–86.

[72] *Id.* The court also noted the seven-year-old girl was attending school in Casper. *Id.* at 886.

[73] *See id.* at 885 (citing *In re* CF, 120 P.3d 992, 1002 (Wyo. 2005) ("In general, preference should be given to family placements.")).

[74] *Id.*

[75] *Id.*

uncle and aunt in Montana, keeping the children in the custody of the foster parents in Casper—with whom they had already bonded—was in the children's best interests.[76]

The mother appealed the decision to the Wyoming Supreme Court.[77] Notably, the brother and sister-in-law did not join in the mother's appeal, even though the object of her appeal was to vest custody in them.[78]

Majority Opinion

Justice Hill delivered the majority opinion.[79] At the outset, the majority acknowledged two suitable and loving families existed as placement options for the children.[80] The court noted this put the district court in a "Solomonic" position, and its efforts in reaching a thorough and thoughtful decision were worthy of commendation.[81] Nevertheless, after applauding the district court's thoughtful analysis and careful process, the majority proceeded to reverse the district court's placement decision.[82]

Initially, the majority summarily dismissed the contention that the mother lacked standing to contest the district court's custodial decision because her parental rights had been terminated.[83] Even though the majority agreed that the mother's parental rights had been "effectively terminated," it reasoned the mother nevertheless had various "residual parental rights and duties" as outlined in Wyoming Statutes section 14-3-402.[84] That statute provides certain rights and duties that remain with a parent after legal custody has been transferred to another.[85] These include, but are not limited to, the duty to provide financial support and care, the right to consent to adoption, the right to reasonable visitation, the right to determine the minor's religious affiliation, and "the right to

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[76] *Id.* at 885–86.

[77] *Id.* at 874–75 (majority opinion).

[78] *Id.* at 875.

[79] *Id.* at 873.

[80] *Id.* at 877.

[81] *Id.*; *see* Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 272–73 (2009) (articulating the biblical story of King Solomon who determined the real mother of a contested child by suggesting to divide the baby in half and grant custody to the woman who protested).

[82] *In re JW*, 226 P.3d at 875, 877.

[83] *Id.* at 877–78.

[84] *Id.*

[85] WYO. STAT. ANN. § 14-3-402(a)(xvi) (2010).

petition on behalf of the child."[86] The majority pointed out the statutory rights and duties in section 14-3-402 remain with a parent even after legal custody vests in another.[87] Although the dissenting opinions of both Justices Golden and Burke opined the mother was not asserting *her* rights on appeal but those of *her brother*, the majority sidestepped that distinction without analysis.[88] The court concluded that the residual rights collectively outlined in Wyoming Statutes section 14-3-402 provided the mother with a "'legally protectable and tangible interest at stake in the litigation.'"[89]

The majority next turned to the standard of review.[90] It expressed difficulty in "pinpointing a standard" given the constitutional issues in the case.[91] Because the majority concluded that the district court's decision implicated the *fundamental associational rights of family members*, it implied that the case fell into the category of decisions, such as parental termination cases, which could be sustained on appeal only if supported by "clear and convincing" evidence.[92] But having made the suggestion that heightened scrutiny was appropriate, the majority failed to expressly identify the standard of review it actually applied.[93] However, the majority *did not* apply the "abuse of discretion" standard typically employed in the review of custody determinations, nor did it explain why that standard was

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[86] *See id.* The statute provides:

> "Residual parental rights and duties" means those rights and duties remaining with the parents after legal custody, guardianship of the person or both have been vested in another person, agency or institution. Residual parental rights and duties include but are not limited to:
>
> (A) The duty to support and provide necessities of life;
> (B) The right to consent to adoption;
> (C) The right to reasonable visitation unless restricted or prohibited by court order;
> (D) The right to determine the minor's religious affiliation; and
> (E) The right to petition on behalf of the minor.

Id.

[87] *In re JW*, 226 P.3d at 878; *see* WYO. STAT. ANN. § 14-3-402(a)(xvi) (providing parents with "residual parental rights and duties" after custody or guardianship has been vested in another person, agency, or institution).

[88] *See In re JW*, 226 P.3d at 881 (Golden, J., dissenting) (pointing out the mother's associational right was not at issue); *id.* at 885 (Burke, J., dissenting) (quoting the mother's claim that placement was a "violation of her birth family's fundamental rights").

[89] *Id.* at 877 (majority opinion) (quoting Olsten Staffing Servs., Inc. v. D.A. Stinger Servs., Inc., 921 P.2d 596, 599 (Wyo. 1996)).

[90] *Id.* at 878.

[91] *Id.*

[92] *Id.* at 878–81.

[93] *See id.* at 878–80 (citing 42 U.S.C. § 671(a)(19) (2006), various sections of Wyoming Statutes title 14, and the Wyoming Family Services Manual).

inapplicable.[94] In fact, the court failed to even mention the existence of the abuse of discretion standard, notwithstanding Justice Burke's argument in dissent that it was the appropriate standard of review for the case.[95]

While the majority directed praise toward the district court for its process and thoughtfulness, it found fault with DFS for placing the children with non-relations.[96] It admonished the agency for viewing the kinship preference as merely "recommended" and as a policy only for "consider[ation]."[97] The kinship preference, the majority asserted, is much more than a recommendation, and DFS's failure to pursue the "preferred" result of family placement was unacceptable.[98] The majority made no reference to the district court's determination that ongoing placement with the foster parents was in the children's best interests.[99] Instead, the majority in effect reached its own best interests determination, concluding as a matter of law and fact that "there exists a compelling preference that what is 'best' for a child in circumstances such as those presented here, is placement with nuclear or extended family members."[100] The majority supported its "best interests" determination by highlighting the fundamental right of *adults* to associate with related children.[101]

Justice Golden's Dissenting Opinion

Justice Golden wrote one of the two dissenting opinions.[102] Justice Burke joined in Justice Golden's dissent and also wrote his own separate dissenting opinion.[103] Because the mother's parental rights were on the brink of termination, Justice Golden first reasoned she had no legal stake in the outcome of the case and therefore lacked standing to challenge the district court's custodial determination.[104] Next, Justice Golden took issue with the majority's apparent acceptance of the aunt and uncle's constitutional right to familial association.[105]

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[94] *See* Steele v. Neeman, 206 P.3d 384, 386 (Wyo. 2009) (applying an abuse of discretion standard to determine modification of child support); Durfee v. Durfee, 199 P.3d 1087, 1089 (Wyo. 2009) (describing the proper inquiry in custody cases as an abuse of discretion standard).

[95] *See In re JW*, 226 P.3d at 878–81.

[96] *See id.* ("[T]here exists a compelling preference that what is 'best' for a child in circumstances such as those presented here, is placement with nuclear or extended family members.").

[97] *Id.* at 881.

[98] *Id.*

[99] *Id.* at 880–81.

[100] *Id.* (noting the larger conception of family entitled to constitutional protections).

[101] *See id.* (describing the bonds extended family have with the nuclear family and their importance).

[102] *Id.* at 881 (Golden, J., dissenting).

[103] *Id.*

[104] *Id.*

[105] *See id.* at 882 (noting Wyoming has never recognized extended family possess a constitutional right to familial association).

Returning to Wyoming Statutes section 14-3-208, Justice Golden contended that the preference for kinship placement represents a *preference* only and that the best interests of the children must remain the controlling consideration.[106] Furthermore, Justice Golden reminded the majority that the district court concluded the children were better off with the foster parents after many hours of careful deliberation of the testimony and other evidence provided at the hearing.[107] In reviewing the district court's custodial determination, Justice Golden stated the abuse of discretion standard should apply.[108] Accordingly, the Supreme Court had no basis to second-guess the lower court's best interests determination and even less cause to order outright placement with the uncle and aunt in Montana.[109]

Justice Burke's Dissenting Opinion

Justice Golden joined Justice Burke's dissent.[110] According to Justice Burke, the majority failed to identify the standard of review in its decision.[111] Justice Burke asserted the proper standard should have been abuse of discretion, the same standard applied in child custody cases.[112] Elaborating on the statutory preference for kinship placement, Justice Burke echoed Justice Golden, reiterating that the preference for placement with biological relations is not controlling.[113] Justice Burke disagreed with the majority's apparent, albeit unexpressed, conclusion that the preference for family placement amounts to a vested right in non-nuclear family members to receive custody in disputed cases.[114] The fundamental goal in custody cases, Justice Burke asserted, must always be the "[children] and their best interests."[115] Justice Burke pointed out the evidence amply supported the district court's determination that the children were better off with the foster parents.[116] Accordingly, under an abuse of discretion standard, the majority lacked any grounds for reversal.[117]

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[106] *Id.*

[107] *Id.* at 883.

[108] *See id.* (stating the record of the district court contained no evidence of error).

[109] *Id.*

[110] *Id.* (Burke, J., dissenting).

[111] *Id.* at 883–84.

[112] *Id.* at 884.

[113] *Id.*

[114] *Id.* at 886.

[115] *Id.*

[116] *Id.* at 884–86.

[117] *Id.* at 886.

ANALYSIS

The Wyoming Supreme Court's reversal of the district court's order placing the children with the foster parents poses three issues.[118] First, by granting the mother standing to appeal the district court's placement order, the court appears to have relaxed traditional standing requirements for parents whose rights have been terminated, in contravention of pre-existing Wyoming case law.[119] Second, by failing to adhere to the abuse of discretion standard of review, the court circumvented the deference it has historically given to the fact-finding province of the district court in custodial cases.[120] And third, by holding that the "associational rights of families" mandated placement with the uncle and aunt, the court called into question the continued applicability of the "best-interests" approach traditionally followed in Wyoming permanency decisions.[121] The majority's decision prioritized the rights of the adults over of the rights of the children, seemingly requiring courts to base placement decisions—at least in cases pitting relatives against non-relatives—upon a determination of whose blood rights to the children are superior.[122] *In re JW* thus marks a noted, and troubling, departure from the child-centered approach traditionally followed in Wyoming custodial decisions.[123]

Standing

The basis for the majority's decision to find the mother had standing to appeal is unclear.[124] The general rule in Wyoming requires that a party must have a "legally protectable interest" at stake in the litigation in order to have standing.[125] Here, no issue raised on appeal could affect the mother's legal interests; the district

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[118] *See infra* notes 119–23 and accompanying text.

[119] *See infra* notes 124–53 and accompanying text.

[120] *See infra* notes 154–72 and accompanying text.

[121] *See infra* notes 249–64 and accompanying text.

[122] *See infra* notes 258–64, 298–316 and accompanying text.

[123] *See infra* notes 317–47 and accompanying text.

[124] *See In re* JW, 226 P.3d 873, 877–78 (Wyo. 2010) (analyzing whether the mother had standing).

[125] *See, e.g.*, Ultra Res. v. Hartman, 226 P.3d 889, 911 (Wyo. 2010) (stating the rule of standing requires "perceptible" harm from the action); Halliburton Energy Servs. v. Gunter, 167 P.3d 645, 649 (Wyo. 2007) (stating the rule of standing requires both a legally protectable and tangible interest at stake in the litigation). The children in *In re JW* arguably possessed a legally protectable interest in the decision of their placement, but neither could sue on their own behalf in Wyoming. *See* WYO. STAT. ANN. § 1-1-102 (2010) (stating a person must be over the age of fourteen in order to sue or be sued); Ball v. Ball, 269 P.2d 302, 309 (Wyo. 1954) (denying a minor the right to sue his parents because a child should not be taught to "bite the hand that feeds it"). *But see* WYO. STAT. ANN. § 20-4-142 (noting the exception in which a minor parent may maintain a proceeding on behalf of his or her child); WYO. STAT. ANN. § 14-1-203 (noting the additional exception of emancipation proceedings).

court adjudicated that she neglected her children and her parental rights had been effectively terminated long before the appeal.[126] On appeal, the mother did not seek review of these findings, nor did she contest any actions taken by the MDT with respect to the then imminent termination of her rights.[127] Instead, on appeal, the mother challenged the district court's decision to deny custody to the children's uncle and aunt.[128] While such an appeal could have undoubtedly been brought by the uncle and aunt themselves—because they were the parties whose "associational rights" were actually impacted by the district court's order—they chose not to contest the lower court's placement decision.[129]

Despite the apparent absence of an identifiable legal interest in the mother, the majority seemingly found she had standing on alternative grounds—namely, the right to appeal on behalf of her children.[130] As noted by the majority, the mother possessed "residual" parental rights and duties at the time of the permanency hearing.[131] Defined by Wyoming statute, these rights include the right "to petition on behalf of one's children."[132] This ground for representative standing allows parents with no direct interest in a case to assert the interests of their minor children who might otherwise be powerless to voice their arguments.[133] In light of this representative standing mechanism, the mother could have conceivably brought the appeal in her children's stead.[134]

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[126] *See In re* CF, 120 P.3d 992, 1005 (Wyo. 2005) (stating in order for a party to satisfy standing she must evidence how the district court's actions prejudiced her); *see also In re* DG, 825 P.2d 369, 373 (Wyo. 1992) (emphasizing that a termination of parental rights proceeding is separate and isolated from other proceedings involving child protection); *In re* MKM, 792 P.2d 1369, 1374 (Wyo. 1990) (correcting a mother for her mischaracterization of an action as a termination of parental rights proceeding rather than a neglect proceeding).

[127] Even if the mother had asserted a violation of her rights on appeal, this would have been difficult. *See In re* DG, 916 P.2d 991, 998 (Wyo. 1996) (emphasizing a mother could not contest the termination of her parental rights for the first time on appeal absent plain error).

[128] *In re JW*, 226 P.3d at 874–75.

[129] *Id.*; *see* WYO. STAT. ANN. §§ 14-6-201(a)(xxi), -229 (stating an interested relative of a neglected child may become a party in a proceeding and thus may be granted custody); *In re MKM*, 792 P.2d at 1376 (holding an interested relative of a neglected child may become a party and vie for custody); UNIF. MARRIAGE & DIVORCE ACT § 401(d)(2) (2010) (laying out the general grounds under which an uncle and aunt can petition for custody).

[130] *See In re JW*, 226 P.3d at 877–78 (listing the residual parental rights and duties possessed after a parent loses legal custody of his or her child).

[131] *See id.* (recognizing the mother possessed residual parental rights because DFS took physical and legal custody of the children after the neglect petition was filed).

[132] WYO. STAT. ANN. § 14-3-402(a)(xvi).

[133] *See* Dye v. Fremont Cnty. Sch. Dist. No. 24, 820 P.2d 982, 985 (Wyo. 1991) (noting a minor has no procedural capacity to sue or be sued but that Rule 17(c) of the Wyoming Rules of Civil Procedure allows a "representative, such as a general guardian, committee, conservator, or other like fiduciary" to act on a minor's behalf).

[134] *Id.*

Under a theory of representative standing, parents may only assert the interests of their children.[135] But in this instance, it appears the standing interest asserted by the mother belonged to someone other than the children.[136] Had the majority engaged in a representative standing analysis, it would have determined that neither of the two questions raised by the mother on appeal asserted her children's interests.[137] As noted, the mother contended the district court erred in placing the children with the foster parents because of the statutory and policy preference for kinship placements.[138] Conceivably, this could have been posited as a basis of representative standing, as minor children would appear to have a legally protectable interest in the child welfare system operating according to its directives and policies.[139] But, given the district court's specific determination after hearing the evidence that the foster parents were better custodians for the children than the available kin, it is hard to see how the mother could have identified any specific harm suffered by the children as a result of the alleged denial of the kinship preference.[140] And, it is harder still to see how a mother, whose parental rights have been effectively terminated for neglect, is in a proper position to either identify or assert such harm on appeal.[141]

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[135] *See id.* at 985–86 (recognizing a parent may not adequately represent the interests of his or her child and that the minor's interests should be protected in such cases).

[136] *See* Elliot v. Carcieri, 608 F.3d 77, 92 (1st Cir. 2010) (considering the reasons that move the person suing on the child's behalf to pursue litigation and her ability to do so); N.D. v. West, 22 F. Supp. 2d 1343, 1353 (M.D. Fla. 1998) (stating a parent may not sue on behalf of a child where a parent's interests are not aligned with those of the child); Bullock v. Dioguardi, 847 F. Supp. 553, 560–61 (N.D. Ill. 1993) (noting a parent may sue on behalf of his or her minor child but only under a finding that the parent has no interests that conflict with those of the child).

[137] *In re JW*, 226 P.3d at 875–78.

[138] *Id.*

[139] Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestion for Reform*, 45 ARIZ. L. REV. 629, 674 (2003) (describing the child's right to be heard in custody proceedings as a function of that child's entitlement to basic human rights); Christina Dugger Sommer, *Empowering Children: Granting Foster Children the Right to Initiate Parental Rights Termination Proceedings*, 79 CORNELL L. REV. 1200, 1254–55 (1994) (arguing a child should have a right to initiate a termination of parental rights proceeding to help remedy some of the negative results of a faulty foster system).

[140] JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, IN THE BEST INTERESTS OF THE CHILD 66–67 (1986) (stating the role of the "psychological parent" may be fulfilled by "any caring adult—but never an absent, inactive adult, whatever his biological or legal relationship to the child may be."); David J. Herring, *Kinship Foster Care: Implications of Behavioral Biology Research*, 56 BUFF. L. REV. 495, 496 (2008) (observing the level of parental investment is what truly correlates with positive child development, not merely the nature of the relationship between foster parent and child).

[141] *See* Justine A. Dunlap, *What's Wrong with Children's Rights: Still a 'Slogan in Search of a Definition,'* 11 U.C. DAVIS J. JUV. L. & POL'Y 181, 191 (2007) (noting that a determination of neglect is the first step in a determination of parental unfitness); Alexis T. Williams, *Rethinking Social Severance: Post-Termination Contact Between Birth Parents and Children*, 41 CONN. L. REV. 609, 615 (2008) (noting that the child's interest is obviously divergent from a parent who has harmed or failed to protect the child, at least in the short term).

Indeed, by virtue of the majority's failure to expressly recognize that the mother had representative standing for her children, and its dominant discussion of the associational rights enjoyed by "extended family members,"[142] it seems evident its decision to vest standing in the mother was based not on her assertion of the interests of the children but on the "associational rights" belonging to the uncle and aunt.[143] As Justice Golden pointed out in his dissent, however, such a basis for standing is contrary to Wyoming case law.[144] In the 2005 case of *In re CF*, the Wyoming Supreme Court held a mother whose parental rights had been terminated (but who was also in possession of statutory residual parental rights) did not have standing to bring suit contesting a denial of the maternal grandfather's visitation rights.[145] Like the mother here, the mother in *In re CF* was concerned with preserving the relationships between her children and their relatives.[146] Nevertheless, the court held the mother in *In re CF* did not have a legal stake in contesting the district court's placement order.[147] Despite the direct similarity between the cases identified by Justice Golden, the majority failed to distinguish, or even mention, *In re CF* in its standing analysis.[148]

Whether deliberate or accidental, the majority's standing decision in *In re JW* represents an expansion of the residual liberties vested in terminated parents under Wyoming statute and an implicit reversal of *In re CF*.[149] *In re JW* appears to stand for the proposition that a parent deemed unfit and whose rights have been actually or effectively terminated may assert the associational rights of relatives by bringing a lawsuit or appeal.[150] Such a proposition communicates an unrelenting deference

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[142] *In re JW*, 226 P.3d at 880–81 (citing Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)) (stressing the importance of extended family and the constitutional recognition that should be afforded to grandparents, uncles, aunts, cousins, etc.).

[143] *See id.* The reasoning employed by the court is the only insight into the motives and logic underpinning the arguments of both the mother and the State. Because the children in *In re JW* were both minors at the time of the proceedings, none of the submitted briefs are available to the general public. The record of the permanency hearing is also sealed.

[144] *Id.* at 881 (Golden, J., dissenting).

[145] *In re* CF, 120 P.3d 992, 1005 (Wyo. 2005).

[146] *Id.*

[147] *Compare In re JW*, 226 P.3d at 877–78, *with In re CF*, 120 P.3d at 1005 (noting that while the "mother may be concerned about preserving a relationship between CF and her family, she does not have a personal interest in [the] Grandfather's petition for visitation").

[148] *See In re JW*, 226 P.3d at 877–78 (citing only to the definition of standing from *Halliburton v. Gunter*, 167 P.3d 645, 649 (Wyo. 2007), and the definition of residual parental rights and duties under WYO. STAT. ANN. § 14-3-402 (2010)).

[149] *See id.*; *see also* Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 86–87 (1994) (noting the law permits adults to speak for children in court but only when the child's position mirrors that of the adult standing in his or her stead).

[150] *See In re JW*, 226 P.3d at 878 (granting standing to the mother but subsequently resolving the issues in light of the rights possessed by extended family members).

to adults' rights over those of the children.[151] The prioritization of parental rights may be justified before the break-up of the parent/child relationship.[152] However, the ongoing prioritization of parental rights—after a court has deemed a parent undeserving of those very rights—offends the interests of children and potentially subjects them to further control by an unfit parent.[153]

Standard of Review

As noted above, the majority failed to identify the specific standard of review it applied in its opinion.[154] It expressed uncertainty in this regard, stating that *In re JW* involves a "unique" convergence of issues involving constitutional rights and statutory interpretation.[155] But it is difficult to identify how the issues presented in *In re JW* are unique in Wyoming jurisprudence, or why the appropriate standard of review should be so elusive.[156] The fundamental issue confronted by the district court in *In re JW* was determining the placement option that would best serve the interests of the children.[157] Custody determinations of this sort have always been

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[151] *See* SD v. Carbon Cnty. Dep't of Family Servs., 57 P.3d 1235, 1241 (Wyo. 2002) (observing that when the rights of parents and the rights of children diverge, the rights of the parents must yield).

[152] *See In re* A.D., 151 P.3d 1102, 1105 (Wyo. 2007) (acknowledging there are greater protections afforded to parents in termination of parental rights cases because of the fundamental rights involved); *In re* MLM, 682 P.2d 982, 991 (Wyo. 1984) (stating Wyoming courts have carefully guarded the rights of parents); *see also In re* LB, 933 P.2d 1126, 1129 (Wyo. 1997) ("Due to the fundamental nature of the rights affected by a termination action, the procedures involved must satisfy due process and the evidence supporting a termination must be clear and convincing.").

[153] *See* Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal*, 28 STAN. L. REV. 623, 638–39 (1976) (asserting the needs of children must be prioritized at this stage, especially in light of the reality that many abusing parents were abused as children); *see also* Williams, *supra* note 141, at 615 (describing post-termination contact between parent and child to be appropriate only in some circumstances).

[154] *See In re JW*, 226 P.3d at 880 (citing R.L.A. v. State, 215 P.3d 266, 268 (Wyo. 2009)) ("In applying our standard of review, we keep in mind the right to associate with one's family is fundamental and strictly scrutinize petitions to terminate a parent's rights.").

[155] *See id.* at 878 (stating "it is difficult to pinpoint the standard").

[156] *See, e.g.*, SLB v. JEO, 136 P.3d 797, 799–800 (Wyo. 2006) (applying strict scrutiny in reviewing statutory application in termination of parental rights case due to the associational rights at stake); SJL v. Dep't of Family Servs., 104 P.3d 74, 79–80 (Wyo. 2005) ("[A]pplication of statutes for termination of parental rights [cases] is a matter for strict scrutiny."); *In re* CF, 120 P.3d 992, 999–1000 (Wyo. 2005) (stating adoption statutes should be strictly construed when the proceeding is against a non-consenting parent, in recognition of the fundamental rights of parents).

[157] *In re JW*, 226 P.3d at 885–86. (Burke, J., dissenting).

governed by the "best interests" standard and reviewed on appeal under the abuse of discretion standard.[158]

Yet instead of embracing this orthodox view of the case and its linked standard of review, the majority analogized *In re JW* to a termination of parental rights case in which the State must show its efforts to preserve the associational rights at stake and prove that termination is supported by clear and convincing evidence.[159] A fundamental flaw with this analogy is that prior to *In re JW*, the Wyoming Supreme Court had never determined that a family relative, such as an uncle, enjoys a constitutional right to associate with the children of his relatives.[160] Failure to explicitly recognize these rights—while apparently basing its conclusion on their assumed existence—seems to lie at the heart of the court's difficulty in identifying the appropriate standard of review.[161]

In his dissent, Justice Burke had no difficulty identifying the proper standard of review.[162] He opined that, just as in other cases involving the appeal of custody determinations, the proper standard is abuse of discretion.[163] Though associational rights may be at stake in custody cases, the command to the district court is not to defer to family autonomy.[164] Rather, the district court is charged in custody cases with comparing the custodial options and determining which one is in the best interests of the children.[165] Given the factual nature of the best

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[158] *See, e.g.*, *SLB*, 136 P.3d at 797, 799–800; *SJL*, 104 P.3d at 79–80 (acknowledging the fundamental liberty of familial association and the attending application of state statute in termination of parental rights cases); Reavis v. Reavis, 955 P.2d 428, 431 (Wyo. 1998) (stating the decision of the trial court will not be overturned in custody matters unless the appellate court is persuaded of an abuse of discretion).

[159] *See In re JW*, 226 P.3d at 880 (citing the termination of parental rights case of *R.L.A.*, 215 P.3d 266).

[160] *Id. But see* Michael v. Hertzler, 900 P.2d 1144, 1150 (Wyo. 1995) (recognizing the limited availability of associational rights to a relative other than a biological parent).

[161] *See supra* notes 233–48 and accompanying text.

[162] *In re JW*, 226 P.3d at 884 (Burke, J., dissenting).

[163] *Id.*; *see, e.g.*, *Reavis*, 955 P.2d at 431; Blakey v. Blakey, 218 P.3d 253, 254 (Wyo. 1992) (recognizing the consistent broad discretion enjoyed by a district court in child custody matters).

[164] KES v. CAT, 107 P.3d 779, 785 (Wyo. 2005) ("[B]ecause each custody case involves unique parties and circumstances, the parties or the district court may fashion any procedure that effectively protects the parents' due process rights and minimizes the stress and trauma to the child. In doing so, the balance must weigh in favor of the child's best interests.").

[165] *See* Hayzlett v. Hayzlett, 167 P.3d 639, 642 (Wyo. 2007); *Reavis*, 955 P.2d at 431; *Blakey*, 218 P.3d at 255. These cases describe the comparative factors considered by the district court in a child custody proceeding, pursuant to Wyoming Statutes section 20-2-201 and state that the resolution of these factors must be in the best interests of the children involved.

interest determination, the Wyoming Supreme Court has always found an abuse of discretion standard appropriate on review, granting deference to the trial judge who viewed the witnesses and heard the testimony.[166]

Justice Burke correctly noted the similarities between routine custody cases and cases, like *In re JW*, where the district court must make a placement decision following an MDT's recommendation to terminate parental rights.[167] In both instances, the district court's proper focus is on the application of statutory factors in reaching a best interests finding.[168] After a parental rights termination, concern for safeguarding the associational rights of the adult parent (or her relatives) should no longer be of prime import.[169] The district court's charge to make a best interests determination in custodial cases naturally means that the placement of children can *never* be a question of law; each case necessarily requires special attention and analysis by the district court due to the unique circumstances involved in every placement decision.[170] The majority opinion stands in marked contrast with Justice Burke's view of the adjudicative reality of custodial disputes and how they are properly reviewed on appeal.[171] At least where the contest is between a relative and a non-relative, the majority implied (1) that the district court's discretion is severely circumscribed (if not non-existent), (2) that it must award custody to the relative as a matter of law, and (3) that its determination will not be subject to an abuse of discretion standard on review, but will instead be reviewed de novo.[172]

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[166] *See In re* K.L.S., 94 P.3d 1025, 1033 (Wyo. 2004) (quoting *In re* KRA, 85 P.3d 432 (Wyo. 2004)) (stating the appellate court will defer to the findings of the trial court unless they are unsupported by the record or erroneous as a matter of law because the trial judge is in the best position to "assess the credibility of witnesses and weigh their testimony"); *see also* Fanning v. Fanning, 717 P.2d 346, 352 (Wyo. 1986) (expressing particular concern, given the best interests standard, in showing discretion to the trial court).

[167] *In re JW*, 226 P.3d at 884 (Burke, J., dissenting).

[168] *Reavis*, 955 P.2d at 431; *Blakey*, 218 P.3d at 254.

[169] *See In re* S.B., 207 P.3d 525, 528 (Cal. 2009) (stating the focus shifts away from family reunification and toward the selection and implementation of a permanent plan for the child when a parent is deemed unfit). This is true in custody cases as well because the mother and father most often possess equal associational rights. Stanley v. Illinois, 405 U.S. 645, 648 (1972).

[170] *See Reavis*, 955 P.2d at 431 (recognizing that, depending on the case, the factors involved in reaching a custody determination will be weighed differently); *Blakey*, 218 P.3d at 255.

[171] *See In re JW*, 226 P.3d at 880 (illustrating the majority's concern with whether associational rights have been violated); *see also Blakey*, 218 P.3d at 257 (describing custody awards as matters of comparative proposition based on multiple factors, not matters of law).

[172] *See* Durfee v. Durfee, 199 P.3d 1087, 1089 (Wyo. 2009) (describing the proper inquiry under an abuse of discretion standard as the "reasonableness of the district court's decision in light of the evidence presented"). The Wyoming Supreme Court's decision to reverse is confusing even under the stricter standard of review apparently adopted. As applied in termination of parental rights cases, the strict scrutiny standard provides that DFS has the obligation to establish by clear

The Preference for Kinship Placements in Wyoming Statutes and Policy

The majority based its reversal of the district court on the denial of constitutional "associational rights" of family and also upon the existence of a "kinship preference" in Wyoming.[173] The existence of this preference is well established in DFS policy and referenced in various Wyoming statutes, yet the majority's interpretation of those policies and statutes overstates their force, transforming the kinship "preference" into a kinship "requirement" of undetermined scope.[174]

As in other states, the preference for kinship placements in Wyoming state law derives from provisions of the Social Security Act, which condition federal benefits upon states giving "consideration" to kinship preference in placement decisions.[175] The Social Security Act does not specify the form this "consideration" must take,

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and convincing evidence that termination is appropriate. SLJ v. Dep't of Family Servs., 104 P.3d 74, 79–80 (Wyo. 2005). If the court applied the same burden here, DFS would presumably need to establish by clear and convincing evidence that *placement* was appropriate. Given the Wyoming Supreme Court's disinterest in reversing the findings of the district court in termination of parental rights cases, it is confusing why the determinations of the lower court would not be similarly upheld in this context. *See* Ross, *supra* note 37, at 703. Reversal can only suggest the court felt DFS's actions were not justified by clear and convincing evidence here. *See In re JW*, 226 P.3d at 881 (emphasizing the court's unwillingness to accept the conclusions and characterizations made by DFS). One would think DFS's conduct would accordingly be more central to the majority opinion if this were the sole basis for reversal. *See id.* (briefly mentioning the errors made by DFS, and even then, only at the opinion's end).

[173] *In re JW*, 226 P.3d at 878–79.

[174] *See id.* (citing eight discrete statutory and policy sources articulating the existence of a kinship placement preference in Wyoming). *But see Summary Memo: State Policies at a Glance*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/summary_memo.authcheckdam.pdf (last visited Apr. 23, 2011) [hereinafter *Summary Memo*] (noting Wyoming has no explicit statutory enumeration of a kinship placement preference). Other state statutes feature express kinship preference provisions. *Id.*; *see, e.g.*, COLO. REV. STAT. § 19-3-508(5)(b)(I) (2010) ("[T]he court shall place the child with a relative . . . , if such placement is in the child's best interests."); S.C. CODE ANN. § 20-7-764(E)(1) (2010) ("[I]n the absence of good cause to the contrary, preference must be given to placement with a relative . . . .").

[175] *See* Tori R.A. Kricken, *Child Support and Social Security Dependent Benefits: A Comprehensive Analysis and Proposal for Wyoming*, 2 WYO. L. REV. 39, 42 (2002) (discussing the impact of the Social Security Act amendments to the Wyoming Statutes under Title 14, relating to children). The Social Security Act instructs states to consider giving preference to an adult relative over a non-related caregiver in order to be eligible for federal programs funding. 42 U.S.C. § 671(a)(19) (2006). Accordingly, all states mandate in some way, by statute, policy, or practice, that child welfare agencies give preference to adequate kinship placements. *Summary Memo*, *supra* note 174.

nor does it mandate how state law should define or express this "preference."[176] Not surprisingly, states have interpreted this vague mandate in many different ways.[177]

The majority thus correctly points out that a "preference" for kinship placements is built into Wyoming statutes in a variety of places, specifically citing Wyoming Statutes sections 14-3-208 and 14-3-429.[178] But these statutes plainly do not purport to impose a mandatory kinship placement rule.[179] Nor does the Social Security Act purport to require such a mandatory rule.[180] Instead, the best interests of the child always remain of overriding importance, regardless of the existence of kinship placement options.[181] Wyoming Statutes section 14-3-201 makes this clear by stating: the "child's health, safety and welfare *shall be of paramount concern* in implementing and enforcing this article."[182] This statutory language illuminates a legislative understanding that a child's "best interests" and placement with "extended family" are not always aligned and that, when they are not, the best interests of the child prevail.[183]

Wyoming Statutes sections 14-3-208 and 14-3-429 are the only statutes addressing the preference for kinship placement in Wyoming.[184] The majority also cites Wyoming Statutes sections 14-3-201, 14-3-431, and 14-3-440 in support

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[176] *See* 42 U.S.C. § 671(a)(19). The lack of clear instruction under the Social Security Act is reflected in the diverse requirements in state statute and policy across the nation. *Summary Memo*, *supra* note 174. Some states require an active search for kin upon a parental adjudication of abuse or neglect. *Id.* Others specifically list which relatives should be considered as placement options. *Id.* Furthermore, even in those states with similar requirements, statutory language dictating the way in which the agency should consider the kinship preference is far from uniform. *Id.* "Shall attempt to place," for example, has a very different meaning than "shall place" or "shall recommend." *Id.*

[177] *See Summary Memo*, *supra* note 174.

[178] *See* WYO. STAT. ANN. § 14-3-208(a)(iii) (2010) (addressing temporary protective custody); *id.* § 14-3-429(b)(iii) (addressing situations involving adjudications of neglect).

[179] *In re JW*, 226 P.3d at 885 (Burke, J., dissenting); *see* WYO. STAT. ANN. § 14-3-208(a)(iii) (addressing temporary custody only and even then only articulating a kinship placement preference when in the best interests of the child); *id.* § 14-3-429(b)(iii) (outlining placement with a relative as one of many placement options the court may elect when a child is neglected).

[180] *In re JW*, 226 P.3d at 885 (Burke, J., dissenting).

[181] WYO. STAT. ANN. § 14-3-201. Some states extend the "preference" approach to cases involving biological parents as well. *See* CAL. FAM. CODE § 3040(a) (West 2010) (articulating a preference, rather than a presumption, that biological or adoptive parents should prevail over nonparents in child custody matters).

[182] WYO. STAT. ANN. § 14-3-201 (emphasis added).

[183] *See id.* § 14-3-208(a)(iii) (stating the department shall place the child with extended family *when* it is in the best interests of the child not *because* it is in the best interests of the child); *id.* § 14-3-429(b)(iii) (featuring the permissive language "may transfer" in describing placement with family or other suitable adults).

[184] *See In re JW*, 226 P.3d at 878–79. The district court, in turn, cites section 14-3-429(b) as the only statute discussing relative placement, not choosing to include section 14-3-208. *Id.* at 885 (Burke, J., dissenting).

of the existence of a kinship preference,[185] but these statutes merely acknowledge and account for the involvement of relatives in child protective services.[186] For example, section 14-3-431 sets forth a twenty-two-month deadline within which DFS must file a petition to terminate parental rights after a child has been placed in foster care.[187] If a child is placed in the care of a relative instead, this deadline does not exist.[188] Characterizing the absence of a deadline in relative placement cases as evidence of a kinship preference seems overstated.[189] A statutory deadline for termination petitions where a foster family is involved is appropriate because reunification may not be desirable once a child is in the foster system for an extended period.[190] Thus, the legislature has determined that after twenty-two months have passed, DFS must develop a plan for permanency other than reunification.[191] Section 14-3-431 does not compel placement with family but simply allows for greater flexibility in working towards parent/child reunification when a child is placed with family members and not at risk of remaining in the foster system, with the attendant costs to the state, indefinitely.[192]

Similarly, the majority appears to inflate the extent of kinship preference found in Wyoming Statutes section 14-3-440.[193] This section directs DFS to make "reasonable efforts . . . to preserve and reunify the family" by eliminating the

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[185] *Id.* at 879.

[186] *See* WYO. STAT. ANN. § 14-3-431(m)(i) (setting a twenty-two month deadline by which the State must petition for parental rights, unless the child is placed in the care of a relative); *id.* § 14-3-440(a) (stating reasonable efforts must be made to preserve the family); *id.* § 14-3-201 (articulating one of the primary purposes of child protective services as the preservation of family life).

[187] *Id.* § 14-3-431(m).

[188] *Id.* § 14-3-431(m)(i).

[189] *In re JW*, 226 P.3d at 878–79.

[190] *See In re* A.D., 151 P.3d 1102, 1110 (Wyo. 2007) (stating section 14-3-431 incorporates elements of the Adoption Assistance and Child Welfare Act with a specific goal of expediting permanency decisions so that children will not remain in foster care indefinitely); Child Welfare Info. Gateway, *Foster Parents Considering Adoption*, U.S. DEPARTMENT OF HEALTH & HUM. SERVICES, http://www.childwelfare.gov/pubs/f_fospar.cfm (last visited Apr. 23, 2011) (stating foster parent adoptions account for no more than half of the adoptions of children adopted from foster care each year).

[191] *See In re A.D.*, 151 P.3d at 1110 (noting the need to expedite permanency decisions so that children will not remain in foster care indefinitely).

[192] *See* Wald, *supra* note 153, at 697 (arguing there is no need for termination when the relative is willing to care for the child because the child's needs for stability and attachment will be satisfied until the parents resume custody).

[193] *See In re JW*, 226 P.3d at 878. Wyoming Statutes section 14-3-440 reads,

> Except as provided in W.S. 14-2-309(b) or (c), reasonable efforts shall be made to preserve and reunify the family:
>
> (i) Prior to placement of the child outside the home, to prevent or eliminate the need for removing the child from the child's home; and
>
> (ii) To make it possible for the child to safely return to the child's home.

WYO. STAT. ANN. § 14-3-440(a).

need to "[remove] the child from the child's home" and making it possible for "the child to safely return to the child's home" when possible.[194] The statute appears directed at preserving nuclear families, specifically the preservation of the parent/child relationship existing within the family home.[195] But the majority evidently reads the statute to require efforts be made to preserve an extended family unit.[196] Such an expansion begs the question of what relations qualify as "family" under the majority's interpretation.[197] The majority's holding in *In re JW* certainly suggests a requirement that DFS make efforts to preserve the relationship of uncles with their nieces and nephews.[198] But must it also make efforts to preserve relationships between grandparents and grandchildren? between cousins? between second cousins? When it comes to tracking down answers to these questions, the majority's analysis leaves no trace.[199]

The majority cites a clause from section 14-3-201 for the proposition that the purpose of child protective services is to "preserve family life whenever possible."[200] But the majority failed to place the purpose of "the preservation of family" in the context of the rest of the statute.[201] In keeping with the various interests involved in child welfare, the Wyoming Legislature has identified multiple "purposes" that DFS must strive to achieve.[202] Section 14-3-201, as noted, mandates the first purpose is to "protect the best interests of the child."[203] In comparison, the statute lists the goal of family preservation last.[204] Moreover, the language stating "the child's health, safety and welfare shall be of *paramount* concern" leaves little doubt of the legislature's intention that the best interests of children are the primary goal of Wyoming's child welfare system.[205]

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[194] WYO. STAT. ANN. § 14-3-440(a).

[195] *Id.* Wyoming Statutes section 14-3-440 is conditioned with a list of exceptions, all of which relate to the actions a parent might take that would permit the State to abandon "reasonable efforts" towards reunification. *See id.* § 14-2-309.

[196] *See In re JW*, 226 P.3d at 878 (by implication).

[197] *Id.*

[198] *Id.*

[199] *See id.* at 880 (generally describing the constitutional protections afforded extended family members, but failing to identify which relationships qualify under the table of consanguinity).

[200] *Id.* at 879. Again, the majority does not attempt to define "family" in referencing this section but simply implies by its holding that it must include an uncle and his nieces and nephews. *Id.* at 880.

[201] *See* WYO. STAT. ANN. § 14-3-201 (2010); *see, e.g.*, Anderson v. State, 245 P.3d 263, 266 (Wyo. 2010) ("In determining whether a statute is ambiguous . . . '[w]e construe the statute as a whole, giving effect to every word, clause, and sentence . . . .'" (quoting Ball v. State *ex rel.* Wyo. Workers' Safety & Comp. Div., 239 P.3d 621, 629 (Wyo. 2010))).

[202] WYO. STAT. ANN. § 14-3-201.

[203] *Id.*

[204] *Id.*

[205] *Id.* (emphasis added).

The Wyoming DFS manual more clearly notes the preference for kinship placements.[206] As cited by the majority, item "F" of the manual states, "By law, relative/kinship families are the placement of preference for children."[207] Again, DFS describes kinship placements as a preference only, but stated policy does ascribe affirmative duties to caseworkers to uphold the preference.[208] Specifically, a DFS caseworker "is responsible for conducting an initial and ongoing diligent search for relatives . . . until permanency is achieved."[209] The manual provides further that DFS shall consider relative/kinship families as both temporary and permanent resources for children who are unable to safely live with a parent.[210]

In reaching its decision to reverse, the majority pointed to a general failure of DFS to perform its stated duties under these policies, suggesting DFS did not adequately consider placement with the uncle and aunt.[211] Assuming *arguendo* this is correct, while an administrative agency is bound to follow its own rules and regulations, no administrative violation will be deemed reversible error unless that violation affects a fundamental right or "materially impact[s]" the result.[212] In this case, the question therefore is whether DFS's alleged failure to adequately pursue placement with the uncle and aunt materially impacted the result—that is, the permanent placement with the foster parents.[213] According to the district court, whatever mistakes DFS made in considering and pursuing kinship placement with the uncle and aunt did not significantly alter the outcome of the case.[214] Because the mother and children were all located in Casper, it was not feasible for DFS to place the children in Montana with their uncle while attempting to preserve the parent/child relationship.[215] From the point the mother began her

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[206] WYO. DEP'T FAM. SERVS., PROTECTIVE & JUVENILE SERVICES: PLACEMENT & PERMANENCY 5.7: DILIGENT SEARCH FOR RELATIVE/KINSHIP CARE—FAMILY FINDING (2010), *available at* http://dfsweb.state.wy.us/about-us/dfspolicyPSD.html.

[207] *Id.*

[208] *See id.* (describing affirmative duties in searching for relatives and duly considering kinship options).

[209] *Id.*

[210] *See id.*

[211] *See In re JW*, 226 P.3d at 879–81.

[212] *See id.* at 884 (Burke, J., dissenting) (citing *In re* MN, 78 P.3d 232, 239 (Wyo. 2003)) (holding that a deviation from rules was harmless and did not violate the mother's fundamental rights or impact the ultimate decision).

[213] *See id.*

[214] *See id.* at 885.

[215] *See id.* at 884–85 (quoting the district court's *Order on Permanency Hearing*); *In re* IH, 33 P.3d 172, 183 (Wyo. 2001) (finding no fault with DFS's decision to place the children involved in foster care in the neglectful mother's hometown in Wyoming, even though the father was being considered as the primary custodian and resided in Idaho). The majority did not mention the additional requirements imposed on DFS in connection with out-of-state placement orders. WYO. STAT. ANN. § 14-3-201(v)(a)–(c) (2010). These requirements amount to an in-state placement

treatment, the children began to bond with the foster family in Casper, which ultimately led the district court to its conclusion that maintaining custody with the foster parents was in the children's best interests.[216] Not only did the majority fail to discuss the district court's conclusion that DFS's actions were immaterial to the outcome of the case, it also gave little indication of what specific actions or omissions constituted the violation of DFS's kinship preference policy.[217] The majority merely stated DFS did not evaluate the kinship option in good faith and that it gave only nominal consideration to the kinship preference.[218]

In conclusion, the majority's construction of the preference for family placement under Wyoming law seems overly broad.[219] Courts have routinely held that the preference for kinship placement in various child welfare laws is only one factor considered and by no means the controlling one.[220] Here, the district court issued a seventeen-page decision in which it expressly found DFS properly considered the preference for family placement but nevertheless determined not to place the children with kin because (1) the goal of reunification with the mother necessitated initial placement in Casper, and (2) the subsequent bonding between the children and foster parents created a situation in which transferring custody would again subject the children to harm.[221] The majority did not challenge these findings but nevertheless concluded DFS failed to act in good faith.[222] The reversal of the district court's findings on the basis of DFS's perceived missteps in executing its family preference policy is troubling.[223] Even if the kinship preference carries the force described by the majority, it would seem Wyoming statutes provide DFS with leeway in determining just how family placement options will factor into

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preference, which would further justify DFS's choice to keep the children in Casper. *See id.* It is unclear how the preference for in-state placement works in conjunction with the preference for kinship placement. *See* Vivek Sankaran, *Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children*, 40 FAM. L.Q. 435, 442 (2006) (noting the complications that arise when an agency considers out-of-state placement due to the provisions of the Interstate Compact on the Placement of Children).

[216] *In re JW*, 226 P.3d at 884–85 (Burke, J., dissenting).

[217] *See id.* at 881 (majority opinion).

[218] *See id.*

[219] *See id.* at 878–81.

[220] *See In re* Bernard A., 77 P.3d 4, 9–10 (Alaska 2003) (granting permanency to the foster family given the continuity of care they provided despite the existence of a kinship option); *In re* C.D., 729 N.E.2d 553, 560 (Ill. App. Ct. 2000) (noting the preservation of family ties is only one factor courts consider in determining permanency); *In re* B.O., 177 P.3d 584, 588 (Okla. Civ. App. 2008) (granting permanency to the foster family despite the existence of a kinship option based on the consideration of statutory factors).

[221] *See In re JW*, 226 P.3d at 886 (Burke, J., dissenting). The district court also noted another move would result in the children's loss of the broader Casper community. *Id.*

[222] *Id.* at 881 (majority opinion).

[223] *See id.*

complicated case plans.[224] If this leeway is not available, the Wyoming Supreme Court should clearly articulate what actions DFS must perform in conjunction with a good faith consideration of the kinship preference.[225]

The Associational Rights of Extended Family Members

The right to associate with one's family is well established in Wyoming, yet this right has historically been confined to the parent/child relationship.[226] However, in *In re JW* the majority appears to expand dramatically the boundaries of existing precedent by implicitly holding that non-parents also possess these associational rights.[227]

Before *In re JW*, most Wyoming cases relating to the associational rights of family members arose in the context of a parent's right to associate with his or her child.[228] The notable exception lies in the case of *Michael v. Hertzler*, in which the Wyoming Supreme Court found the right to associate "could be available" to grandparents.[229] The court made this statement when analyzing the constitutionality of Wyoming Statutes section 20-7-101, which allows grandparents to institute an action to establish visitation rights with a minor grandchild.[230] The recognition of the right of visitation between grandparents and grandchildren within this context served to trigger strict scrutiny of the State's actions.[231] The court did not, however, give any indication in *Michael* that a grandparent's right to associate extended beyond the context of the grandparent visitation statute.[232] Furthermore, the court emphasized the limits attaching

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[224] *See* Ross, *supra* note 37, at 704 (noting the Wyoming Supreme Court's unwillingness to define actions required of DFS in connection with "reasonable efforts").

[225] Megan K. Holbrook, Case Note, *The Wrong Side of the Coin—Policy, Permanency and the Problem of Legal Orphans in Wyoming;* In re A.D., D.D., K.D. v. Wyoming Department of Family Services*, 151 P.3d 1102 (Wyo. 2007)*, 8 WYO. L. REV. 139, 161 (2008) (advocating the need for situation-specific responses in child protection litigation in Wyoming).

[226] *See* Hall v. Hall, 708 P.2d 416, 421 (Wyo. 1985) (specifying a right to associate with one's immediate family); *In re* MEO, 138 P.3d 1145, 1152 (Wyo. 2006) (citing the constitutional origins of parents' rights to control their children in the Fifth and Fourteenth Amendments to the United Sates Constitution and article one, section six of the Wyoming Constitution, which provides "no person shall be deprived of life, liberty or property without due process of law").

[227] *See In re JW*, 226 P.3d at 880–81.

[228] *See, e.g.*, *In re* ANO, 136 P.3d 797, 799–800 (Wyo. 2006); SJL v. Dep't of Family Servs., 104 P.3d 74, 79–80 (Wyo. 2005); *In re* CF, 120 P.3d 922, 1000 (Wyo. 2005) (stating all termination of parental rights cases acknowledge the fundamental liberty of familial association).

[229] 900 P.2d 1144, 1150 (Wyo. 1995).

[230] *Id.* at 1144.

[231] *Id.* at 1151.

[232] *See id.*

to a grandparent's visitation rights.[233] A grandparent cannot bring a successful visitation action until the district court determines (1) visitation is in the best interests of the child, and (2) the parent's rights are not substantially impaired.[234] Consequently, describing a grandparent's visitation opportunities as a "right" may be too strong a word because, as emphasized in the *Michael* opinion, the safeguarding of the grandparent/grandchild relationship is only one of several interests to be balanced by the district court in weighing visitation requests by grandparents.[235]

In re JW appears to mark a dramatic expansion of any extended family associational rights recognized in *Michael*.[236] First, the rights discussed in *In re JW* belong to an uncle and aunt, relations for which there is no statute creating even a claim to visitation.[237] Second, the majority grants *custodial* rights to the uncle and aunt, without any balancing of the relative interests stressed in *Michael*, most particularly the best interests of the children.[238] Citing the United States Supreme Court decision of *Moore v. City of East Cleveland*, the majority draws a connection between the right to associate with one's family and the interests of relatives other than parents—including uncles, aunts, cousins, and grandparents.[239] In *Moore*, the United States Supreme Court determined a city ordinance limiting occupancy of apartment units to members of a single family was invalid based on the city's arbitrary definition of "family."[240] Though never explicit in its declaration, the *In re JW* majority's emphasis of *Moore* suggests its understanding of a broader "tradition" of family that must be included in a discussion of familial associational rights.[241] But in the context of determining custody, the majority's reliance on

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[233] *Id.*

[234] *See id.*

[235] *See id.*

[236] *See id.*

[237] *See* WYO. STAT. ANN. § 20-7-101 (2010) (establishing a means for grandparents—and grandparents alone—to petition for visitation rights).

[238] *See* Jennifer Gould, Comment, *California Move-Away Law: Are Children Being Hurt by Judicial Presumptions that Sweep Too Broadly?*, 28 GOLDEN GATE U. L. REV. 527, 548 (1998) (discussing the need for courts to focus on the potential realities facing children—regardless of the associational rights possessed or not possessed by their caregivers); Huntington, *supra* note 26, at 638 (criticizing a rights-based approach to child welfare law).

[239] *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977). The Court reasoned a limited definition of family would conflict with the tradition of bonds extending beyond members of the nuclear family. *See id.* Such bonds, the Court noted, are equally deserving of constitutional protection. *See id.* at 496, 505; Gould, *supra* note 238, at 511.

[240] 431 U.S. at 511.

[241] *In re JW*, 226 P.3d at 880–81. While academic leaders support broadening the focus of child welfare proceedings to include extended family members, most do not support assigning rights to these individuals. *See* Donald N. Duquette, *Looking Ahead: A Personal Vision of the Future of Child Welfare Law*, 41 U. MICH. J.L. REFORM 317, 339 (2007).

Moore misses the mark.[242] An extended family member's protected right against arbitrary exclusion from an apartment must surely be viewed differently than his or her right to legal custody of a child of a relative.[243] Rather than operating to serve *adult relatives*, the paramount policy underlying statutory and administrative kinship preference is meant to advance the best interests of *children* in the system.[244] Plainly, placement with relatives would serve the best interests of many of these children.[245] But just as plainly, in some cases, better options outside the family may be available.[246] Here, the district court, after hearing the evidence, concluded *In re JW* was such a case.[247] The majority's reversal of the district court's determination can thus only be seen as an unprecedented expansion of extended relatives' associational rights.[248]

The Best Interests Standard

The majority's decision in *In re JW* raises questions concerning the continuing applicability of the best interests standard in custody cases pitting relatives against non-relatives.[249] The majority did not expressly reject the best interests standard but instead concluded that blood and best interests are one and the same.[250] Specifically, the court stated, "What is 'best' for a child in circumstances such as those presented here, is placement with nuclear or extended family members."[251]

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[242] *See* Michael v. Hertzler, 900 P.2d 1144, 1150 (Wyo. 1995) (supporting extended-family associations with evidence children should maintain meaningful relationships to build healthy psyches); *see also* Telephone Interview with Anne Ashley, Family Law Attorney & GAL, Law Offices of Anne Ashley (Jan. 26, 2011).

[243] Telephone Interview with Anne Ashley, *supra* note 242.

[244] *Id.* (noting that the majority did not consider how and why kinship was in the children's best interests); *see also Michael*, 900 P.2d at 1148.

[245] *See* Herring, *supra* note 140, at 506 (noting some studies indicate children placed with relatives face less disruption in their placement than those placed with non-kin).

[246] *Id.* at 502–10 (noting the potential drawbacks of kinship placement in some cases).

[247] *In re JW*, 226 P.3d at 877.

[248] *See In re* AD, 151 P.3d 1102, 1110 (Wyo. 2007) (highlighting the particular need to recognize the children's rights to stability and permanency after a parent has proven unfit over an extended period); *In re* MEO, 138 P.3d 1145, 1160 (Wyo. 2006); *In re* MKM, 792 P.2d 1369, 1375 (Wyo. 1990) (noting the child's interests should be elevated above all else after an adjudication of neglect or abuse).

[249] *See infra* notes 298–347 and accompanying text.

[250] *See In re JW*, 226 P.3d at 881 (concluding it is in a child's best interests to be placed with family relations); *see also* Sasha Coupet, *Neither Dyad nor Triad: Children's Relationship Interests Within Kinship Caregiving Families*, 41 U. MICH. J.L. REFORM 77, 80–81 (2007) (citing JAMES DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN (2006)) (noting that because the best interests standard is so broadly defined, it may enable decisions to be made based on the rights and/or interests of people other than the children involved). The result is the standard can actually serve to harm the same population it strives to protect. Coupet, *supra*.

[251] *In re JW*, 226 P.3d at 881.

In other words, so long as a kinship option such as that presented in *In re JW* is available, the majority indicates placement with family, as a matter of law, is in the children's best interests.[252]

The Wyoming Supreme Court might have looked to its own recent precedent in the case of *In re DMW* for an alternative application of the kinship preference in conjunction with the best interests standard.[253] In that case, the district court faced a guardianship decision pitting a stepmother against biological grandparents.[254] In *In re DMW*, the district court determined placement with the non-biological relation would best serve the children's interests (due to factors such as the level of attachment), and the Wyoming Supreme Court affirmed—even though a viable kinship placement existed.[255] Though the guardianship statutes differ somewhat from the statutes at issue in *In re JW*, they each mandate that the district court protect the children's best interests.[256] As the Wyoming Supreme Court emphasized in *In re DMW*, "this is true even if it means placing the children with someone who is not related to them by blood."[257]

Holding otherwise dictates that in certain cases children's custodial futures will be dependant not upon what is in their best interests, as determined by family practice professionals and the sound discretion of trial courts, but upon the mere outlines of a family tree.[258] It further assumes, without support, that the hoped-

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[252] *See* Huntington, *supra* note 26, at 638 (framing children's interests as a matter of competing rights of adults fails to adequately contemplate the complex relationships between children and those in their lives). A full discussion of how DFS should determine whether a kinship option is adequate is beyond the scope of this note. However, the majority in *In re JW* gives very little indication as to how a relative may be deemed inadequate, thereby nullifying the kinship preference. *See* 226 P.3d at 876 (accepting the notion that the mother's objections to placement with the maternal grandmother were sufficient grounds to declare that option inadequate); *see also In re* D.H., 173 P.3d 365, 369 (Wyo. 2007) (dismissing a kinship placement option based on the child abuse conviction of the grandmother's domestic partner).

[253] *See In re* DMW, 214 P.3d 996, 1003 (Wyo. 2009) (affirming an order placing the children with their stepmother, rather than with their biological parents, based on the statutory mandate to the court to protect the children's best interests).

[254] *Id.* at 997–98.

[255] *See id.* at 1000–03 (noting the lower court's decision included significant findings as to the relative qualifications of the stepmother and grandparents to serve as guardians).

[256] *See* WYO. STAT. ANN. § 3-2-104 (2010) (omitting a discussion of the primacy of best interests); *id.* § 3-2-107(b)(ix) (concluding the list of potential guardians to be considered with "any other person whose appointment would be in the best interests of the minor"); *In re DMW*, 214 P.3d at 1000 (stating "the 'best interests of the children' is a touchstone in awarding guardianship of minors"); *In re* MEO, 138 P.3d 1145, 1161 (Wyo. 2006) (stating a finding of parental unfitness triggers a best interests inquiry in a guardianship proceeding).

[257] *In re DMW*, 214 P.3d at 1003.

[258] *See* Bruce Boyer, *Jurisdictional Conflicts Between Juvenile Courts and Child Welfare Agencies: The Uneasy Relationship Between Institutional Co-Parents*, 52 MD. L. REV. 377, 402–03 (1995) (noting the way in which bright-line rules can interfere with the safeguarding of children's welfare).

for benefits of kinship placements, such as a child's heightened sense of identity, belonging, and long term connection will automatically follow along DNA lines.[259] But as recognized by the United States Supreme Court in *Smith v. Organization of Foster Families for Equality & Reform*, the importance of "family" stems from the strength of the bonds existing between family members; these bonds can exist within biological families, but they can also exist in "families" devoid of any blood ties.[260] The diverse and unpredictable makeup of biological and non-biological families only underscores the need for an approach to placement decisions that contemplates the actual substance of children's relationships with the adults in their lives.[261] Wyoming's district courts have long employed the best interests standard in order to engage in this substantive evaluation.[262] However challenging the standard may be in application, the mandate to protect a child's best interests demands that courts and family law professionals fully engage in the complexities of a given case without robotically applying bright-line rules that are largely designed to protect the associational rights of adults rather than children.[263] Put simply, a best interests approach to placement decisions acknowledges there are no shortcuts when it comes to determining the future of children.[264]

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[259] *See* James G. O'Keefe, *The Need to Consider Children's Rights in Biological Parent v. Third Party Custody Disputes*, 67 CHI.-KENT L. REV. 1077, 1095–96 (1991) (arguing "family" should not be defined as an "ephemeral entity" but should instead be expanded to consider whether the parent-child relationship in fact exists); Barbara Bennett Woodhouse, *"Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 340–41 (1994) (arguing for an increased attention to children's perspectives in custody cases).

[260] *See* 431 U.S. 816, 843–44 (1977) (reiterating the foster family cannot be dismissed as a mere collection of unrelated individuals); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 98 (1973) (emphasizing the importance of the "psychological parent" rather than focusing on the biology of parentage).

[261] *See* O'Keefe, *supra* note 259, at 1081, 1090 (defining the "psychological parent" as that "individual the child perceives, on a psychological and emotional level, to be his or her parent," and noting that these individuals are often not duly evaluated by courts as placement options); Gould, *supra* note 238, at 548 (discussing the need for courts to focus on daily interactions and psychological attachments between child and caregiver—no matter the biological connection).

[262] *See, e.g.*, Fanning v. Fanning, 717 P.2d 346, 352–53 (Wyo. 1986) (stating the interests of the child should be the sole consideration in a custody dispute); Bereman v. Bereman, 645 P.2d 1155, 1160 (Wyo. 1982) (stating the paramount concern of the court in child custody and support proceedings is the welfare of the child involved); Kennison v. Chokie, 100 P.2d 97, 97–98 (Wyo. 1940) (stating the paramount question whenever the custody and control of a minor child is in dispute is the welfare of the child involved).

[263] *See* Wald, *supra* note 153, at 640–41, 650 (warning that vague standards can result in arbitrary treatment depending on the whims of a particular judge and that specific factors should be adopted to avoid such results).

[264] *See* O'Keefe, *supra* note 259, at 1095–96. *But see* Wald, *supra* note 153, at 650 (observing the best interests standard itself may allow for decisions to be made according to judges' own "folk psychology" and individual value judgments). Some states have at least articulated the specific factors to be applied in conjunction with the best interests standard. *See generally* Child Welfare Info. Gateway, *Determining the Best Interests of the Child: Summary of State Laws*, U.S. DEPARTMENT OF HEALTH & HUM. SERVICES, http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm (last visited Apr. 23, 2011).

Implications for Practitioners [265]

In re JW is now the controlling authority in Wyoming for cases involving conflicting relative and non-relative placement options.[266] The full implication of its holding is currently unclear, but the decision has provoked a number of difficult questions for trial judges and practitioners.[267]

How Will the Apparent Associational Rights of Non-Parent Relatives Alter the Practices of DFS and Wyoming Lawyers?

Prior to *In re JW*, Wyoming family law limited the concept of associational rights to the parent/child context.[268] This narrow scope of associational rights mirrored the United States Supreme Court's seminal family law holdings, which pertain almost entirely to the parent/child relationship.[269] *In re JW* seemingly extends constitutionally protected associational rights to at least certain relatives.[270]

Wyoming family law practitioners have already identified several issues regarding *In re JW*'s apparent expansion of associational rights.[271] First, while the case indicates that uncles and aunts enjoy associational rights with their nieces and

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[265] Assistance for this section was provided by the following Wyoming attorneys: Anne Ashley, family law attorney and GAL, Law Offices of Anne Ashley, Jackson; John M. Burman, Carl M. Williams Professor of Law & Ethics and Faculty Supervisor, Legal Services Program, University of Wyoming College of Law, Laramie; Jean Day, family law attorney and GAL, Jean Day Law Office, Jackson; Anne Reiniger, family law attorney and GAL, The Reiniger Law Firm, Jackson; and Cheryl Schwartz, family law attorney and GAL, Ranck & Schwartz, Jackson. Additional insight was provided by Stacey Obrecht, Attorney Director, Wyoming Guardians Ad Litem Program, Cheyenne.

[266] P. Craig Silva, *Court Summaries*, WYO. LAW., June 2010, *available at* http://digital.ipcprintservices.com/publication/?i=39573 (last visited Apr. 23, 2011) (recognizing the court's holding is subject to differing interpretations). The Wyoming Supreme Court has yet to issue another opinion on the topic of kinship preference since March of 2010, when it decided *In re JW*.

[267] These questions were formulated with the assistance of Anne Ashley, Jean Day, Stacey Obrecht, Anne Reiniger, and Cheryl Schwartz.

[268] *See, e.g.*, *In re* ANO, 136 P.3d 797, 799–800 (Wyo. 2006); SJL v. Dep't of Family Servs., 104 P.3d 74, 79–80 (Wyo. 2005); *In re* CF, 120 P.3d 922, 1000 (Wyo. 2005) (stating all termination of parental rights cases acknowledge the fundamental liberty of familial association).

[269] *See* Troxol v. Granville, 530 U.S. 57, 65 (2000) (describing parents' rights to determine the custody, care, and control of their children as "perhaps the oldest of the fundamental liberty interests recognized"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("[C]ustody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

[270] *See In re JW*, 226 P.3d at 880–81 (concentrating on the constitutional basis for the kinship preference).

[271] Telephone Interview with Anne Ashley, *supra* note 242; E-mail from Anne Reiniger, Family Law Attorney & GAL, The Reiniger Law Firm, to author (Dec. 19, 2010, 5:22 MST) (on file with author); Interview with Cheryl Schwartz, Family Law Attorney & GAL, Ranck & Schwartz, in Jackson, Wyo. (Dec. 28, 2010).

nephews, it offers no guidance concerning the scope of those rights or how they may differ from the rights of parents or other family relations.[272] What is clear is that after *In re JW*, district courts may no longer defer to findings or recommendations by DFS and GALs that a non-relative option is preferable to a relative option.[273] Rather, if placement with a non-relative is sought, the courts will evidently require DFS and GALs to rebut an effective presumption announced in *In re JW* that kinship placement is in the child's best interests—at least until proven otherwise by clear and convincing evidence.[274] This presumption will likely place significant pressure on DFS and GALs to identify and evaluate all possible kinship placement options, regardless of the location of the kin, or the relationship of that kin to the child.[275] *In re JW* instructs that placement decisions potentially implicate the rights of extended family members and that their interests and input should be carefully sought and considered whenever a custodial placement beyond the bonds of the parents is at stake.[276] Even a faraway, estranged relative may possess a constitutionally based right to custody that cannot be properly discounted based upon considerations of practicality.[277] Practitioners are already voicing concerns regarding the additional complications and extraordinary costs that will naturally flow from this principle.[278]

Second, *In re JW*'s focus on upholding the supremacy of the rights of adult family members rather than the "best interests of the child" as determined by DFS and the district court, may undermine DFS's historic allegiance to the child in cases where parental rights have been terminated.[279] In light of *In re JW*, rather than simply focusing upon placing children with the "best" available custodian, DFS must now seemingly acknowledge and attempt to properly prioritize the rights of grandparents, siblings, aunts and uncles, and potentially even more distant relatives who may have a claim.[280] It may also mean MDTs will need to expand

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[272] Telephone Interview with Anne Ashley, *supra* note 242 (questioning whether the rights of non-custodial parents would remain superior to the rights of family members).

[273] *Id.* Just as the State is required to demonstrate by clear and convincing evidence that reasonable efforts were made to preserve the parent/child relationship in termination of parental rights cases, so too then would DFS's actions be subject to strict scrutiny in any case in which a relative was not granted placement. *Id.*

[274] *Id.*; E-mail from Stacey Obrecht, Attorney Dir., Wyo. Guardians Ad Litem Program, to author (Dec. 28, 2010, 12:21 MST) (on file with author).

[275] Telephone Interview with Anne Ashley, *supra* note 242; E-mail from Anne Reiniger, *supra* note 271.

[276] E-mail from Anne Reiniger, *supra* note 271.

[277] *Id.*

[278] *Id.*; Telephone Interview with Anne Ashley, *supra* note 242; Interview with Cheryl Schwartz, *supra* note 271 (describing the potential for ongoing nation-wide searches).

[279] Interview with Cheryl Schwartz, *supra* note 271.

[280] *Id.*; *see In re* JW, 226 P.3d 873 (Wyo. 2010) (generally describing the constitutional protections afforded extended family members but failing to identify which relationships qualify as family).

their mission; what was formerly a focused exercise directed towards securing the best placement for a child should now apparently include active efforts to ensure that the constitutional rights of the child's relatives are also identified and protected.[281]

Third, it is unclear from *In re JW* how family law professionals and district courts will evaluate the claims of competing relatives.[282] Because *In re JW* does not delineate the scope of associational rights of family members, practitioners and judges lack direction in ranking the relative claims of family members.[283] One practitioner questions, for example, how *In re JW* will apply in a case involving two grandmothers vying for placement.[284] Presumably, she surmises, both grandmothers will be entitled to hearings based on their equal rights to the children, after which the court will engage in a comparative "best interests" evaluation.[285] It is less clear, however, whether a "best interests" question would arise in a case involving relatives of different degrees.[286] Will grandparent rights always trump those of an uncle or cousin based on the degree of relation indicated under the table of consanguinity?[287]

The *In re JW* opinion does not consider such conflicts.[288] In fact, in *In re JW*, DFS initially identified the children's maternal *grandmother* as a potential placement option, but this placement option was summarily dismissed "due to the mother's objections."[289] Based upon the identified existence of a placement option with the grandmother, as well as the uncle in Montana, a remand to the district court to determine the best placement of the children might have seemed a logical extension of *In re JW*'s recognition of non-parental associational rights.[290] Notably, though, *In re JW* does not even discuss the grandmother's rights, leaving practitioners to wonder if the associational rights of a particular relative may be ignored if, as in *In re JW*, they are "vetoed" by one of the parents.[291]

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[281] Interview with Cheryl Schwartz, *supra* note 271.

[282] Telephone Interview with Anne Ashley, *supra* note 242; Telephone Interview with Jean Day, Family Law Attorney & GAL, Jean Day Law Office (Dec. 10, 2010).

[283] Telephone Interview with Anne Ashley, *supra* note 242.

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] *Id.*; *see Table of Consanguinity*, D.C. COURTS (2009), *available at* http://www.dccourts.gov/dccourts/docs/probate/adm/FormsForDeathsFromJan1_1981ToJune30_1995/TableOfConsanguinity.pdf.

[288] Telephone Interview with Anne Ashley, *supra* note 242.

[289] Interview with Cheryl Schwartz, *supra* note 271 (emphasizing the concerns in allowing an unfit parent to effectively dictate the actions of the MDT).

[290] *Id.*

[291] *Id.*

Fourth, practitioners have asked whether an expansion of the "associational rights" now apparently belonging to relatives may negatively impact the foster system.[292] Specifically, if a relative may step forward at any time and claim custody of a foster child as a matter of constitutional right, they speculate that the already difficult job of locating qualified and loving foster parents may become even more challenging.[293] In the experience of one practitioner, many foster parents are drawn to foster parenting because of the potential for adoption.[294] She worries *In re JW* may create new disincentives for such people to enter the system and also discourage other foster parents from forming close attachments.[295] It is hard to imagine, for example, that the foster couple in *In re JW* will be eager to welcome more children into their home after bonding with the young boy and girl in that case, being deemed their best option by the district court, and then being forced to part with them despite their best efforts to provide them with a real home.[296] The same practitioner points to a potential chilling effect on foster families flowing from *In re JW* in a rural state like Wyoming (where some counties have only a single foster home).[297]

If a Fit Relative Exists as a Placement Option, Must a Child be Placed with that Relative Regardless of Other Factors?

Until *In re JW*, the answer has been no, the existence of a kinship option has never been determinative in Wyoming placement decisions.[298] Instead, under the "best interests" model, courts considered all relevant factors, with no single factor dictating placement outcomes.[299] For example, a court could evaluate a father's level of attachment against a mother's superior home environment.[300] The court could also evaluate a placement option in the child's current home against one that allows for sibling reunification elsewhere.[301] The court could likewise balance options requiring a move out of state versus continuity in the community.[302]

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[292] Telephone Interview with Anne Ashley, *supra* note 242.

[293] *Id.*

[294] *Id.*

[295] *Id.*

[296] *Id.*

[297] *Id.* (providing the example of Teton County, which has just one foster family).

[298] *Id.*; Interview with Cheryl Schwartz, *supra* note 271; E-mail from Anne Reiniger, *supra* note 271; Telephone Interview with Jean Day, *supra* note 282.

[299] Telephone Interview with Anne Ashley, *supra* note 242; Interview with Cheryl Schwartz, *supra* note 271; Telephone Interview with Jean Day, *supra* note 282.

[300] Interview with Cheryl Schwartz, *supra* note 271.

[301] *Id.*

[302] *Id.*

Plainly, in every case the factors will vary, and until *In re JW*, pre-determined placements made without the consideration of all the circumstances did not occur.[303]

In re JW indicates there may now be a single determinative factor in all best interests evaluations—that is, the availability of placement with a family member.[304] According to the majority, DFS and GALs may not merely "consider" kinship placement (both at the outset and in creating permanency plans), but practitioners *must* place children with relatives, at least "in circumstances such as those presented here."[305] It is unclear what "circumstances" in *In re JW* could serve to limit the general application of the court's holding requiring placement with relatives.[306] Presumably, the overall fitness of the Montana relatives was an important circumstance in the facts of the case.[307] If the uncle was unfit to care for his niece and nephew, DFS and the district court would surely have been justified in refusing him placement.[308] Beyond that, however, it is unclear what additional circumstances, if any, might justify the placement of children with non-family members.[309] Plainly, after *In re JW*, a determination that placement with non-family members is in the best interests of the children is no longer enough to override the competing claims of family relatives.

Despite the potential that *In re JW* may be interpreted as a fact-specific ruling, many practitioners are interpreting *In re JW* to stand for the proposition that children must be placed with "fit" relatives over non-relatives in most all circumstances.[310] They point out that the facts of *In re JW* appear to suggest a broad application of the kinship preference.[311] If the Wyoming Supreme Court requires that children in a pre-adoptive placement after more than a year of successful bonding and stabilization with qualified local foster parents must be transported to another community to live with a largely unknown uncle and aunt, it is difficult to identify circumstances in which the rule would not apply.[312]

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[303] *Id.*

[304] *Id.*; Telephone Interview with Anne Ashley, *supra* note 242.

[305] *In re* JW, 226 P.3d 873, 875 (Wyo. 2010).

[306] Interview with Cheryl Schwartz, *supra* note 271.

[307] E-mail from Stacey Obrecht, *supra* note 274; Interview with Cheryl Schwartz, *supra* note 271; E-mail from Anne Reiniger, *supra* note 271.

[308] Interview with Cheryl Schwartz, *supra* note 271.

[309] *Id.*

[310] Telephone Interview with Anne Ashley, *supra* note 242; E-mail from Stacey Obrecht, *supra* note 274; Interview with Cheryl Schwartz, *supra* note 271; E-mail from Anne Reiniger, *supra* note 271; Telephone Interview with Jean Day, *supra* note 282.

[311] Interview with Cheryl Schwartz, *supra* note 271.

[312] *Id.*

In re JW has thus effectively transformed the kinship preference into a kinship mandate, with no currently known exceptions.[313] Such a dramatic departure from prior law, without any explicit acknowledgement of that departure by the majority, has naturally sparked some question as to the precedential force of the *In re JW* opinion.[314] One practitioner speculates *In re JW* may reveal more about the majority's displeasure with the actions of DFS in this particular situation than its fundamental views concerning the kinship preference and the associational rights of relatives.[315] Another GAL, however, believes *In re JW* will directly control in cases to which she has been assigned, the district judge having already passed out a hard copy of the opinion to all the lawyers involved in one of her cases with instructions to commit it to memory.[316]

How Will a Kinship Mandate Operate to Serve (or Not Serve) Children's Best Interests?

The required placement of children with relatives raises several best interests concerns.[317] Wyoming practitioners do not deny the wisdom underlying a general kinship preference; there is wide acceptance of the view that family members often do represent the best option for children in need of permanency.[318] However, GALs in particular are aware of the reality that family members may not always be a child's best option.[319] They point out that abusive or neglectful parents commonly come from similarly abusive or neglectful homes.[320] In such cases, placing a child with grandma or sister may be no better than leaving the child with mom.[321] Further, kinship placements, by their nature, often allow the terminated parent to remain thick "in the mix" of a child's day-to-day life.[322] Certainly, in many cases, the MDT may deem ongoing post-termination contact

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[313] *Id.*; Telephone Interview with Anne Ashley, *supra* note 242; Telephone Interview with Jean Day, *supra* note 282.

[314] Telephone Interview with Anne Ashley, *supra* note 242; Telephone Interview with Jean Day, *supra* note 282 (observing *In re JW* appears to be a results-driven case).

[315] Telephone Interview with Jean Day, *supra* note 282.

[316] Telephone Interview with Anne Ashley, *supra* note 242.

[317] *Id.*; Interview with Cheryl Schwartz, *supra* note 271; E-mail from Anne Reiniger, *supra* note 271; Telephone Interview with Jean Day, *supra* note 282.

[318] Telephone Interview with Anne Ashley, *supra* note 242; E-mail from Stacey Obrecht, *supra* note 274; Interview with Cheryl Schwartz, *supra* note 271; Telephone Interview with Jean Day, *supra* note 282.

[319] Telephone Interview with Anne Ashley, *supra* note 242; Interview with Cheryl Schwartz, *supra* note 271; Telephone Interview with Jean Day, *supra* note 282.

[320] Interview with Cheryl Schwartz, *supra* note 271.

[321] *Id.*

[322] Telephone Interview with Anne Ashley, *supra* note 242.

desirable.[323] But to presume, as the majority in *In re JW* seemingly does, that such post-termination contact by a parent is always beneficial might expose a certain number of children to damaging contacts and control by the terminated parent.[324] Such concerns over post-termination influence would plainly not exist to nearly the same degree with non-family placements.[325]

Further, unlike foster parents, who receive significant state resources and financial support in providing for children placed in their homes, extended relatives are largely left to their own devices in raising related children within their own families.[326] In addition, children placed with relatives often receive less attention and follow-up evaluation from DFS.[327] But as a result of the kinship mandate of *In re JW*, these realities are not proper considerations for the professionals seeking to place children from troubled homes in the best environment for their future well-being.[328]

Of What Value Are the Best Interests Recommendations of DFS and GALs Moving Forward?

When presented with two non-parental placement options, one unrelated and one related, DFS caseworkers and GALs now face a question with no real answer in light of *In re JW*: How should blood factor into my recommendation?[329] And, if I conclude it is *not* in a child's best interests to be placed with an adequate but inferior kinship option, should I disregard my professional judgment?[330] GALs are particularly troubled by the way in which *In re JW* appears to limit, if not eliminate, their role in identifying and advocating for the best interests of children.[331] So long as a family relative demonstrates some unspecified degree of fitness, *In re JW* appears to dictate placement with that relative.[332] In such cases, there is no need for a GAL to conduct a comparative evaluation of various

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[323] *Id.*

[324] *Id.*

[325] *Id.* (citing a real example of the continued inappropriate involvement of a terminated parent in her child's life due to a kinship placement).

[326] *Id. See generally* Note, *The Policy of Penalty in Kinship Care*, 112 HARV. L. REV. 1047 (1999).

[327] Telephone Interview with Anne Ashley, *supra* note 242.

[328] *Id.*

[329] *Id.*; Telephone Interview with Jean Day, *supra* note 282.

[330] Telephone Interview with Anne Ashley, *supra* note 242; Telephone Interview with Jean Day, *supra* note 282.

[331] Telephone Interview with Anne Ashley, *supra* note 242; Interview with Cheryl Schwartz, *supra* note 271.

[332] E-mail from Stacey Obrecht, *supra* note 274; E-mail from Anne Reiniger, *supra* note 271.

placement options.[333] There is no need to interview teachers, social workers, caseworkers, psychologists, friends, or even the children themselves.[334] The rule from *In re JW* seemingly mandates placement with the fit relative, regardless of the number of people who may express a belief that a non-relative option is superior.[335]

Accordingly, the GAL's role as best interests advocate may soon be rendered obsolete—at least in cases involving relative and non-relative placement options.[336] Presumably, GALs and MDTs will still play a role in informing courts as to the relative merits of competing options when all adults involved possess equal rights to the children (i.e., parent v. parent, grandmother v. grandmother, or foster parent v. step-parent).[337] But *In re JW* suggests that only in those cases where a rights-based result is not achievable must a court consider which placement option is in a child's best interests.[338] In every other situation, a GAL's participation in placement hearings is seemingly superfluous since the court's determinations will, under *In re JW*, be governed by blood ties, not best interests.[339]

GALs may continue to be of some use to courts in evaluating whether a particular relative demonstrates a certain minimum degree of fitness.[340] Just what makes a family member *unfit*, however, is up for debate.[341] In termination of parental rights cases, the State must demonstrate by clear and convincing evidence that placement with a parent is not appropriate and that reasonable efforts have been made towards reunification.[342] Because relatives now evidently possess associational rights similar to those possessed by parents, the State may be required to demonstrate a particular relative is not appropriate by clear and convincing evidence and, perhaps, that reasonable efforts were made to make that relative placement successful.[343] Wyoming case law suggests certain facts may

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[333] Telephone Interview with Anne Ashley, *supra* note 242; Interview with Cheryl Schwartz, *supra* note 271; Telephone Interview with Jean Day, *supra* note 282.

[334] Interview with Cheryl Schwartz, *supra* note 271.

[335] Telephone Interview with Anne Ashley, *supra* note 242; Interview with Cheryl Schwartz, *supra* note 271; Telephone Interview with Jean Day, *supra* note 282.

[336] Telephone Interview with Anne Ashley, *supra* note 242; Interview with Cheryl Schwartz, *supra* note 271.

[337] Telephone Interview with Anne Ashley, *supra* note 242; Interview with Cheryl Schwartz, *supra* note 271.

[338] Telephone Interview with Anne Ashley, *supra* note 242; Interview with Cheryl Schwartz, *supra* note 271; Telephone Interview with Jean Day, *supra* note 282.

[339] Telephone Interview with Anne Ashley, *supra* note 242; Interview with Cheryl Schwartz, *supra* note 271.

[340] E-mail from Stacey Obrecht, *supra* note 274.

[341] Telephone Interview with Jean Day, *supra* note 282.

[342] Telephone Interview with Anne Ashley, *supra* note 242.

[343] *Id.*; E-mail from Stacey Obrecht, *supra* note 274.

be enough to establish prima facie unfitness; documented illicit drug use in the household, for example, will undoubtedly constitute conclusive evidence that a relative placement is inappropriate.[344] Yet it is easy to imagine a myriad of other facts and circumstances that might pose more difficult questions.[345] For example, what if the relative seeking placement already has eight children, is struggling with substance abuse, or is living below the poverty line?[346] While best interests may no longer control in cases like *In re JW*, GALs may nevertheless continue to serve an instrumental role in making recommendations to courts on the threshold question of fitness.[347]

CONCLUSION

The implications of the *In re JW* decision have yet to be fully determined, yet family law practitioners in Wyoming should be troubled by its holding.[348] The decision can be read to mark a shift in Wyoming law governing placement decisions away from the traditional child-centered "best interests" approach towards a more adult-centered "rights" approach.[349] Consistent with the great weight of precedent, however, Wyoming district courts and practitioners will hopefully continue to follow the best interests standard wherever possible.[350] This standard has always been the lodestar of Wyoming child welfare law, particularly after an adjudication of abuse or neglect, and the simple application of a DNA rule is a poor alternative to determining the best outcome for children in need.[351] After all, those children often appear in the system as a result of ill-treatment from those with whom they share the strongest blood ties.[352]

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[344] Granzer v. State, 239 P.3d 640, 644–45 (Wyo. 2010).

[345] Interview with Cheryl Schwartz, *supra* note 271.

[346] *Id.*

[347] *Id.*

[348] *See supra* notes 265–74 and accompanying text.

[349] *See supra* notes 233–75 and accompanying text.

[350] *See supra* notes 330–45 and accompanying text.

[351] *See supra* notes 257–71 and accompanying text.

[352] *See supra* notes 48–80 and accompanying text.