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I. INTRODUCTION

Montana law provides that custody of minor children can be awarded to both parents in a final decree of dissolution.[1] Custody arrangements which recognize equal custody rights and responsibilities in both parents are called "joint custody" arrangements.[2] Joint custody was originally offered as an additional alternative to traditional custody arrangements which specified the rights of parents after a dissolution of marriage.[3] Before joint custody, courts had traditionally granted sole custody to one parent and visitation to the other.[4] Joint custody was intended to supplement but not completely replace traditional arrangements.[5]

Ideally, joint custody allows children of divorced parents to enjoy the benefits of a *de facto* nuclear family.[6] The Montana legislature has attempted to realize this ideal by declaring that the public policy of joint custody in Montana is, "to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing."[7] To implement this policy the Montana legislature has allowed courts to award joint or separate custody in disputes involving both parents of a minor child. Both sole and joint custody awards remain subject to the best interests of the child.[8] For joint custody, however, the legislature has allowed a presumption that, if one or both divorced parents apply for joint custody, it is in the best interests of the child for the court to award joint custody.[9]

The benefits of joint custody have proven difficult to realize. Joint custody has not enabled divorced parents to maintain a nuclear family by legislative fiat. Furthermore, the statutory pre-

1. MONT. CODE ANN. § 40-4-223 (1985).
2. Courts and agencies in Montana and elsewhere use different names to describe child custody arrangements other than custody to one parent and visitation to the other. *See generally* Miller, *Joint Custody*, 13 FAM. L.Q. 345, 359-61 (1979).
3. Bratt, *Joint Custody*, 67 KY. L.J. 271, 280-88 (1978-79).
4. Miller, *supra* note 2, at 350.
5. MONT. CODE ANN. § 40-4-211 to -221 control traditional sole custody arrangements.
6. Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C. DAVIS L. REV. 523, 536-39 (1979). *See also* Miller, *supra* note 2, at 363.
7. MONT. CODE ANN. § 40-4-222 (1985).
8. MONT. CODE ANN. § 40-4-223 (1985).
9. MONT. CODE ANN. § 40-4-224(1) (1985).

sumption that joint custody is in the best interests of the child whenever one parent applies for it creates significant problems for courts trying to award custody in the child's best interests. Courts cannot favor joint custody because of a statutory presumption and still guarantee that the best interests of the child will be served.[10] Joint custody cannot replace sole custody and visitation for all custody awards. Indeed, joint custody has not even proved a guarantor of equal parental rights like proponents predicted.

This comment analyzes current Montana statutes and cases as they have developed the concept of joint custody. It criticizes Montana's joint custody statutes because they include a presumption which could hold unacceptable and potentially dangerous consequences for some divorced parents and children. The comment concludes with recommendations for attorneys, the 1987 Montana Legislature, and the Montana Supreme Court.

II. CUSTODY OF CHILDREN AFTER DIVORCE

A. *Background*

Custody arrangements for minor children of divorced parents have long created thorny problems for lawyers and judges, vindictiveness and misery for parents dissolving their marriages, and trauma and uncertainty for children. If divorce means the end of a traditional two-parent family,[11] then the parent who retains custody becomes especially important to the children. The custodial parent will continue to influence their everyday lives without substantial contribution from a non-custodial parent.

Historically, courts recognized a father's natural right to the custody of his children. At common law, a father's right to custody was recognized as a property right.[12] That is, fathers had a right to the value of their children's services.[13] Later, courts recognized a father's right to custody based on his reciprocal responsibility to support his children financially. In *People ex rel. Nickerson*, New York Supreme Court Chief Justice Nelson stated in 1837:

In this country, the hopes of the child in respect to its education

10. Despite the statutory presumption, the standard for awarding joint custody is whether it is in the best interests of the child. *See* MONT. CODE ANN. § 40-4-212 (1985).

11. Folberg & Graham note that "divorce does not end relationships in post-divorce families, it changes them." Folberg & Graham, *supra* note 6, at 552. However, divorce often ends families of two natural parents and their children.

12. The notion of paternal supremacy was based in Roman law and persisted in Anglo-American common law. *See* Miller, *supra* note 2, at 351. *See also* Folberg & Graham, *supra* note 6, at 530-36.

13. Taussig & Carpenter, *Joint Custody*, 56 N.D. L. REV. 223, 224 (1980).

> and future advancement, is mainly dependent on the father; for this he struggles and toils through life; the desire of its accomplishment operating as one of the most powerful incentives to industry and thrift. The violent abruption of this relationship would not only tend to wither these motives to action, but necessarily in time, alienate the father's natural affections; and if property should be accumulated, the child under such circumstances could hardly expect to inherit it.[14]

By the twentieth century, the presumption of a mother's rights to custody had replaced the presumption favoring the father's rights. The "tender years" doctrine[15] recognized the theory that, other things being equal, infants and young children were best left to their mothers' care.[16] Some courts continued to recognize fathers as the preferred custodian for children who were of an age to require education and preparation for labor or business.[17] However, judicial recognition and acceptance of the tender years doctrine eventually enabled courts to routinely award permanent custody to mothers.[18]

B. *Sole Custody*

For many years courts awarded sole custody to one of the parents after a divorce.[19] Sole custody consists of an award of custody to one parent, usually the mother, with visitation rights to the other parent.[20] The parties may agree to modify the custody agreement and share responsibilities for the children's care and decisions about their lives to a limited extent. However, the custodial parent makes the final decisions when the parties disagree.[21] The court usually orders, or the parties agree upon, a specific visitation schedule for the non-custodial parent.[22]

Critics of sole custody with visitation have argued that awarding sole custody often does not serve the best interests of the

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14. People ex rel. Nickerson, 19 Wend. 16, 19 (N.Y. Sup. Ct. 1837).

15. For a discussion of the "tender years" doctrine, *see* Comment, *California's Presumption Favoring Joint Child Custody: California Civil Code Sections 4600 and 4600.5*, 17 CAL. W. L. REV. 286 (1981).

16. Miller, *supra* note 2, at 352. *See, e.g.*, REVISED CODES OF MONTANA (1947) § 94-4515(2). *See also* Trudgen v. Trudgen, 134 Mont. 174, 176, 329 P.2d 225, 226 (1958).

17. Miller, *supra* note 2, at 352.

18. *Id.*

19. *See* Folberg & Graham, *supra* note 6, at 525-26.

20. *See* Miller, *supra* note 2, at 355.

21. *See* Folberg & Graham, *supra* note 6, at 526.

22. During visitations the non-custodial parent normally makes day-to-day decisions. *See* Miller, *supra* note 2, at 360.

child.[23] For example, awarding sole custody to a mother does not guarantee she will continue to be a full-time parent after the divorce. This is especially true if she must work to support her children because their father ignores his support obligations.[24] As one commentator has noted, "the sole custody award often isolates children from their fathers and forces mothers into the work force."[25] Critics have also charged that sole custody awards often turn children into pawns at the center of the divorce itself.[26] In many cases custody of children is the spoils of victory, because one parent "wins" and the other "loses" the custody battle.[27] These critics conclude that sole custody may subordinate the best interests of the child to the interests of vindictive or hostile divorced parents.[28]

C. *The Effect of Sole Custody on Fathers*

In many divorce cases, sole custody restricted the father's opportunity to remain an integral part of his children's lives. Fathers were usually designated as non-custodial parents. Consequently, many fathers' contact with their children after divorce was limited to visits specified in the final divorce decrees. This undermined their relationships with their children. [29]

Moreover, courts often penalized fathers who sought custody because fathers traditionally provided the family's financial support. Thus fathers were often rejected as custodial parents because they spent so much time away from home, working to support the children.[30] On the other hand, fathers, as non-custodial parents, were forced to relinquish their rights to participate in decisions concerning their children's lives, decisions they were often bound to accept. Some critics have suggested sole custody diminishes a father's incentive to pay support payments.[31]

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23. Bratt, *supra* note 3, at 274.
24. *Id.* at 274-75. *See also* Miller, *supra* note 2, at 356.
25. Bratt, *supra* note 3, at 274.
26. Miller, *supra* note 2, at 355-58.
27. *Id.*
28. *Id.*
29. *Id.*
30. Bratt, *supra* note 3, at 276.
31. *See* Montana Support Advisory Council; Child Support, Custody, and Visitation: A Report to State Child Support Commissions (July, 1985).

III. JOINT CUSTODY

A. *The Nature of Joint Custody*

In recent years, critics of sole custody have offered joint custody as an alternative to custody for one parent and visitation for the other. Joint custody has also been called joint parenting, co-custody, shared custody, or co-parenting.[32] The Montana Child Support Advisory Council refers to joint custody as "dual parenting responsibility."[33]

Commentators who favor joint custody over sole custody with visitation have argued that recent changes in American society require a reassessment of relationships between parents and children.[34] Changes in women's roles, men's roles, and parents' roles have combined to make sole custody and visitation arrangements unacceptable in many cases.[35] These commentators also argue joint custody best recognizes these changes for divorced parents and their children. Joint custody allows both parents to legally remain influential in their children's lives. Proponents of joint custody claim it offers a means to guarantee the parental rights of both parents, and especially those of traditional non-custodial fathers.[36] They argue joint custody would allow and ultimately encourage fathers to remain a vital part of their children's lives after divorce.[37] This concern is misplaced where it conflicts with or replaces the best interests of the child.

Proponents of joint custody distinguish it from sole custody and visitation because of the legal rights of both parents under joint custody to affect their children's lives after divorce.[38] These rights, they argue, include reciprocal benefits for the children because they are able to maintain natural attachments with both parents after divorce.[39] Joint custody is also distinguishable from two other custody arrangements, divided custody and split custody.[40] Each alternative provides for different measures of parental control for different periods of time.

Divided custody allows parents to divide custodial responsibilities between themselves. One parent has what amounts to sole

32. Folberg & Graham, *supra* note 6, at 528.
33. *See* Montana Support Advisory Council, *supra* note 31.
34. Bratt, *supra* note 3, at 276-80.
35. *Id.*
36. *See* Bratt, *supra* note 3, at 296-97.
37. *Id.*
38. Folberg & Graham, *supra* note 6, at 529.
39. Miller, *supra* note 2, at 362-363.
40. *See id.* at 360-361.

custody for a specified period of time, while the other parent enjoys visitation.[41] Then the parents switch roles; the visiting parent becomes the custodian and vice versa. Often the parties will alternate as custodian and visitor several times during a year.[42]

Split custody occurs when each parent has sole custody of different individual children.[43] In each case the non-custodial parent may have visitation for the children whose custody he or she has relinquished. Split custody can occur when divorced parents have several children and each parent wants custody of at least one child.[44]

Courts have awarded divided or split custody if a case involves circumstances that leave them no choice.[45] However, neither divided nor split custody is commonly awarded in courts today.[46] Instead, courts have turned to joint custody arrangements as an alternative to divided custody, split custody, or sole custody and visitation.

B. *The Elements of Joint Custody*

In *Beck v. Beck*,[47] the Supreme Court of New Jersey characterized joint custody and distinguished it from divided or split custody in the following manner:

> Properly analyzed, joint custody is comprised of two elements- legal custody and physical custody. Under a joint custody arrangement legal custody - the legal authority and responsibility for making "major" decisions regarding the child's welfare - is shared at all times by both parents. Physical custody, the logistical arrangement whereby the parents share the companionship of the child and are responsible for "minor" day-to-day decisions, may be alternated in accordance with the needs of the parties and the children.[48]

The trial court in *Beck* awarded joint custody *sua sponte* to the divorced parents of two adopted children.[49] The Appellate Division reversed and held for the wife, who had applied for sole cus-

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41. Folberg & Graham, *supra* note 6, at 526.
42. *See id.*
43. *Id.* at 528.
44. *See id.*
45. *See* Annot., *Comment Note- "Split," "divided," or "alternate" custody of children* 92 A.L.R.2D 695 (1963).
46. Folberg & Graham, *supra* note 6, at 526-528.
47. 86 N.J. 480, 432 A.2d 63 (1981).
48. *Id.* at 486-487, 432 A.2d at 65-66.
49. *Id.* at 489, 432 A.2d at 67.

tody.[50] The Supreme Court of New Jersey reversed the Appellate Division and allowed the joint custody award.[51] However, the court remanded the case to the trial court for further fact finding because more than two years had passed since the original custody award.[52]

The *Beck* court established several prerequisites to joint custody and applied those prerequisites to the facts of the case. For joint legal custody, the court required a prior determination that the children had established relationships with both parents which would benefit from joint custody.[53] The court also required both parents to be physically and psychologically capable of fulfilling their roles as parents, and willing to accept custody after divorce.[54] Finally, the court determined the parents must be able to put aside their differences for the benefit of their children.[55]

For joint physical custody, the court considered "the financial status of the parents, the proximity of their respective homes, the demands of parental employment, and the age and number of the children involved."[56] The court held that considering these factors, the joint custody award was proper in this case.[57] The court also held that if joint custody was feasible on some if not all of these considerations, it could include legal custody for both parents and physical custody to one parent with visitation for the other.[58]

The court's analysis reflected its concern with the best interests of the children. The court considered many of the same elements Montana courts are required by statute to consider.[59] The court also perceived the necessity of flexibility to accomodate individual cases. In a strong dissent, Justice Sullivan argued joint custody could be appropriate under some circumstances. He was unwilling to concede, however, that joint custody was "the 'preferred disposition' in custody cases, as the majority opinion, despite some restrictive language, seems to suggest."[60] Sullivan was concerned that joint custody would be used to replace sole custody in child custody dispositions. He was also unwilling to concede that the best interests of the children were realized by awarding joint cus-

50. *Id.* at 494, 432 A.2d at 69.
51. *Id.*
52. *Id.* at 501-502, 432 A.2d at 73.
53. *Id.* at 497-498, 432 A.2d at 71.
54. *Id.* at 498, 432 A.2d at 72.
55. *Id.*
56. *Id.* at 500, 432 A.2d at 72.
57. *Id.*
58. *Id.* at 500, 432 A.2d at 72-73.
59. *See infra* note 68.
60. *Id.* at 502, 432 A.2d at 73 (Sullivan, J., dissenting).

tody in this case.[61]

C. *The Best Interests of the Child*

The *Beck* court analyzed the factors involved in the joint custody award in terms of the best interests of the children.[62] This standard for awarding custody developed through case law.[63] In many jurisdictions, like Montana, the best interests standard is also controlled by statute.[64]

The best interests standard has been characterized as a general approach to custody decisions rather than a fixed formula for awarding custody.[65] It requires courts to consider the psychological, economic, and social factors present in each case. Because of the diverse facts of each case coming before the courts, "there can be no one custody arrangement which is, as a matter of law, in the best interests of the child."[66] On the other hand, skeptics contend the standard is merely a cloak for judicial discretion and intuition.[67]

Montana courts have applied the best interests standard to determine the appropriateness of custody awards. Section 40-4-212 of the Montana Code Annotated lists five factors that the court shall consider: the parents' wishes, the child's wishes, the child's interaction with others in his world, the child's adjustment to his environment, and the physical and mental health of everyone involved.[68] The best interests of the child is also the standard used

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61. *Id.*

62. *Beck*, 86 N.J. 480, 501, 432 A.2d 63, 72.

63. *See* Folberg & Graham, *supra* note 6, at 532.

The enunciation of the "best interests test" is usually credited to Justice Brewer in an 1881 Kansas decision which awarded custody of a 5-year-old girl to her grandmother who had raised her rather than to her father. The judge wrote that though the father had a natural right to custody, the paramount consideration was the welfare of the child.

Chapsky v. Wood, 26 Kan. 650 (1881).

64. *Id.*

65. *Id.*

66. Bratt, *supra* note 3, at 287.

67. Miller, *supra* note 2, at 354.

68. MONT. CODE ANN. § 40-4-212 (1985) states:

Best interest of the child. The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child's parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school, and community; and

for awarding joint custody.

IV. Joint Custody in Montana

In Montana, courts must also use the "best interests" test to overcome the presumption under Montana law that, upon application of one parent, joint custody is in the best interests of the child.[69] Courts must use the "best interest" test if they want to avoid joint custody. But because the presumption is statutory, Montana courts are called upon to justify awarding or denying joint custody in all cases where one party applies.[70] The courts and not the parties must overcome the presumption when they deny joint custody.

Another significant difference between joint, divided, and split custody arises when joint custody is accompanied by a presumption that it is in the best interests of the child to award joint custody. At first, joint custody was encouraged primarily as a voluntary alternative arrangement for "relatively stable, amicable parents behaving in a mature, civilized fashion."[71] But in Montana, the joint custody statutes include a presumption favoring joint custody in all cases where at least one party applies. Add to this presumption a broad judicial discretion to determine custody arrangements, like the *Beck* court exercised, and joint custody takes on a life of its own.

A. *Montana's Joint Custody Statutes*

In 1981, Montana joined a growing number of states which had passed laws allowing joint custody of children for divorced

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(5) the mental and physical health of all individuals involved.

69. Mont. Code Ann. § 40-4-224 (1985).

70. Mont. Code Ann. § 40-4-223 (1985) states:

Award of joint or separate custody.

(1) In custody disputes involving both parents of a minor child, the court shall award custody according to the best interests of the child as set out in 40-4-212:

(a) to both parents jointly; the court shall inquire whether a joint custody agreement was made knowingly and voluntarily; or

(b) to either parent. In making an award to either parent, the court shall consider, along with the factors set out in 40-4-212, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent and may not prefer a parent as custodian because of the parent's sex.

(2) In making an award, the court shall require the submission of a plan for the implementation of the custody order.

(3) In making an award, the court shall state in its decision the reasons and factors considered in making the award.

71. Braiman v. Braiman, 44 N.Y.2d 584, 585, 407 N.Y.S.2d 449, 451, 378 N.E. 2d 1019, 1021 (N.Y. 1978).

parents. The joint custody statutes were part of a national response to common concerns loosely termed "fathers' rights."[72] One commentator has also observed that in states which have enacted constitutional guarantees of equal protection, an unquestioned preference for awarding custody to mothers has been eliminated.[73] The Montana Constitution of 1972 contains an equal protection provision in Article II, sec. 4. [74]

Section 40-4-222 of Montana Code Annotated is the declaration of legislative intent for joint custody.[75] Section 40-4-223 of Montana Code Annotated provides the standard for determining whether courts should award joint or sole custody in a given case.[76] The latter statute requires that a custody arrangement accord with the best interests of the child. If a judge concludes joint custody passes the "best interests" test, he or she may award custody of the children to the parties jointly.[77]

B. *Montana Case Law on Joint Custody*

The Montana Supreme Court cases in which joint custody is an issue usually involve a party trying to modify an existing joint custody arrangement.[78] When the Montana Supreme Court considers modification of a custody award, Montana's modification statute requires it to consider the modification in terms of the best interests of the child in each case.[79] Many cases involve attempts to modify joint custody awards in favor of sole custody with visitation. However, in these cases, the court has declined to consider any presumption that joint custody was in the best interests of the child when it was originally awarded.

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72. *See generally* Folberg, *supra* note 6, at 533-536.

73. Robbins, *Joint Custody Awards: Toward the Development of Judicial Standards*, 48 FORDHAM L. REV. 105, 107 (1979). *See also* Bratt, *supra* note 3, at 288.

74. MONT. CONST. art. II, sec. 4. *See also* Miller, *supra* note 2, at 410.

75. MONT. CODE ANN. § 40-4-222 states:

> Declaration of legislative intent—joint custody. The legislature of the state of Montana finds and declares that it is the public policy of this state to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy. The legislature believes that the district courts of the state of Montana have the authority to award joint custody if the court finds joint custody in the best interests of the children in the case then before the court. The intent of 40-4-222 through 40-4-225 is to establish certain guidelines for resolution of custody disputes.

76. *See supra* note 70.

77. *Id.*

78. *See In Re* B.T.S., ___ Mont. ___, 712 P.2d 1298 (1985).

79. *See* MONT. CODE ANN. § 40-4-219 (1985).

In *Quinn v. Quinn*,[80] a district court disallowed a modification of a decree of dissolution which included joint custody of the parties' children.[81] The mother had asked the court to terminate the father's joint custody of the parties' children.[82] He argued the decree gave him sole custody of the children and he responded with an order to hold her in contempt of court for violating the agreement. The district court held for the father and the mother appealed. The court held that the language in the dissolution decree clearly anticipated joint custody. However, the court reversed the district court and remanded the case for further hearings to determine whether joint custody was in the best interests of the children.[83]

In *Quinn*, the Montana Supreme Court found joint custody in the language of the final decree of dissolution but declined to decide whether that arrangement was in the best interests of the parties' children.[84] However, the language of the opinion was not without direction. The court stated:

> We recognize there are advantages in the joint custody alternative to the single parent custody/non-custodial parent visitation arrangement, but there are also important disadvantages to this alternative. In this case, for example, with the parents living a distance apart, the joint custody arrangement appears only to be fostering antagonism (between the parties) and instability in the children's home environment.[85]

Although the court recognized advantages of joint custody, it was unwilling to concede that the original joint custody award could be presumed to be in the best interests of the children in this case.

In other cases, the Montana Supreme Court has considered whether to modify from a sole custody to a joint custody award. In *Cameron v. Cameron*,[86] a district court granted a mother's petition for divorce but awarded custody of the parties' three-year-old son to his father. The boy had lived with his mother since the parties' separation. In *Cameron*, the parties had agreed to joint custody but could not agree on mutually satisfactory arrangements. The mother appealed the lower court's custody determination.[87] The Montana Supreme Court remanded the case for further findings

80. ___ Mont. ___, 622 P.2d 230 (1981).
81. *Id.* at ___, 622 P.2d at 232.
82. *Id.*
83. *Id.* at ___, 622 P.2d at 232-233.
84. *See id.* at ___, 622 P.2d at 233.
85. *Id.*
86. 197 Mont. 226, 614 P.2d 1057 (1982).
87. *Id.* at 231, 614 P.2d at 1060.

and conclusions because the district court did not record the essential and determining facts upon which its conclusion rested, so the judgment lacked support.[88] The court did not approve of awarding sole custody to the father. Instead, it remanded the case and refused to allow the lower court to award anything other than joint custody without justification. In this case, the court again recognized the advantages of joint custody but was unwilling to conclude without further facts that it would be in the best interest of the child.[89]

In *Schuman v. Bestrom*,[90] the court affirmed a trial court's custody determination in favor of the mother based on the Uniform Parentage Act instead of the "best interests of the child" test.[91] The court reasoned that both statutes lead to the same result because both are "bottomed" in the "best interests" test. Thus, the court denied the father's claim that the district court's holding deprived him of the equal protection of the laws.[92]

In *Schuman* the court affirmed the lower court's refusal to modify the sole custody awarded the mother simply because the father had requested a modification of joint custody. The court declined to consider the presumption that joint custody was in the best interests of the child, which would have changed the outcome. In some cases, the court has affirmed a lower court's refusal to award joint custody in spite of the presumption. These cases raise questions about the relationship between the presumption that joint custody is in the best interests of the child and the application of the best interests standard to individual awards.

In *Nalivka v. Nalivka*,[93] the court affirmed a lower court's decision to reject joint custody. The court held the lower court had fulfilled statutory requirements by explaining why it denied the parties' request for joint custody of their children.[94] In *Nalivka*, the court interpreted the requirements of Section 40-4-224(1) of Montana Code Annotated. The court held that the lower court applied the "best interests of the child" test and concluded in this case joint custody failed the test.[95] The lower court had also pro-

88. *Id.*

89. *But see* Paradis v. Paradis, ___ Mont. ___, 689 P.2d 1263 (1984), where the court vacated a trial court's decision to leave a child with his father and reinstated the joint custody from the divorce decree.

90. Mont. ___, 693 P.2d 536 (1985).

91. *Id.* at 539.

92. *Id.* at 540.

93. ___ Mont. ___, 720 P.2d 683 (1986).

94. *Id.* at ___, 720 P.2d at 686.

95. *Id.*

vided a detailed list of reasons for its decision. The Montana Supreme Court found no error in the lower court's determination.

In *Bergner v. Owens*,[96] the court affirmed a district court's modification of a joint custody award. The trial judge considered the best interests of the children and granted the father sole custody with visitation for the mother.[97] In *Bergner*, the court held the trial judge had considered all the factors in the "best interests" test and therefore correctly modified the custody award in the dissolution petition.

In some cases, the Montana Supreme Court has gone beyond the best interests standard for custody awards. In *In re B.T.S.*,[98] the Montana Supreme Court added a new criteria for awarding joint custody.[99] *B.T.S.* contained unusual facts. The child at the center of the dispute was conceived before the marriage was dissolved and born after the final decree of dissolution. The parties did not know the mother was pregnant at the time. The lower court granted the father joint custody and the child's mother appealed.[100]

The court decided that because the father was absent from the child since its birth, the "best interests" test from Sections 40-4-222 and -223 of Montana Code Annotated was insufficient criteria upon which to base an award of joint custody.[101] The court reversed the district court and required further specific findings about the father's capability and willingness to care for the child before he would be awarded joint custody.[102] The *B.T.S.* court subordinated the presumption that the father's application for joint custody meant it would be in the child's best interests. The presumption was subordinated to the best interests standard applied to the particular facts.

In *Gahm v. Henson*,[103] the court added a further development to joint custody in Montana. In *Gahm*, the court affirmed a lower court's refusal to modify a joint custody decree.[104] The court held that modification or petition to terminate joint custody should be denied unless the moving party could demonstrate "serious endan-

96. ___ Mont. ___, 722 P.2d 1141 (1986).
97. *Id.*
98. ___ Mont. ___, 712 P.2d 1298 (1985).
99. *See id.*
100. *Id.* at ___, 712 P.2d at 1299.
101. *See id.* at ___, 712 P.2d at 1301.
102. *See id.* at ___, 712 P.2d at 1303.
103. ___ Mont. ___, 722 P.2d 1138 (1986).
104. *Id.* at ___, 722 P.2d at 1141.

germent of the child."[105] The trial court found, and the supreme court agreed, that no such endangerment was evidenced by the facts of the case.[106]

V. CONCLUSION

Montana's joint custody statutes have proven much less successful in realizing policy goals than supporters imagined. It is clear that despite the advantages of joint custody, it is not for everyone.[107] Careful consideration of the facts of each case will help courts determine whether to award joint custody, considering the best interests of the children involved. For the most part, this is how the Montana Supreme Court has decided and should continue to decide custody awards cases.[108] It has ignored the statutory presumption and applied the best interests standard directly to the facts of the case. While it is true that most of the custody cases before the Montana Supreme Court have involved modification of existing custody awards, there is nothing to indicate those cases would have been decided differently if the appeal was based on the presumption in the joint custody statute.

It is uncertain whether the presumption would survive a court challenge. Before that happens, however, the Montana legislature should remove the presumption from the statute. The presumption supports a father's rights to custody and counters the "tender years" doctrine favoring mothers. The statute merely substitutes one presumption for another. In fact, neither presumption should control custody awards. Indeed, a presumption on either side may give judges an excuse to avoid difficult decisions in custody awards cases. Removing the statutory presumption and allowing joint custody awards only upon application of both parties would still require courts to apply the best interests standard to determine custody awards. It would also remove a means for abusive or manipulative spouses to continue to exert control after divorce, using the threat of application for joint custody to gain leverage on other issues.

The case law on joint custody is inconsistent. However, if courts continue to ignore the presumption and apply the best interests standards directly to individual cases, a coherent body of

105. *Id.* at ___, 722 P.2d at 1140.

106. *Id.* at ___, 722 P.2d at 1141.

107. Even supporters of joint custody concede that it is not for everyone, nor applicable to every custody case. *See* Folberg & Graham, *supra* note 6, at 576; Miller, *supra* note 2, at 403; Bratt, *supra* note 3, at 303.

108. *See* Ward v. Ward, ___ Mont. ___, ___ P.2d ___, 43 St. Rptr. 1825 (1986).

case law could quickly develop. Practicing attorneys should remain sensitive to the possibility that their individual cases, if properly appealed, could facilitate this development.