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Maximizing Custody Options: Abolishing the Presumption against Joint Physical Custody

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MAXIMIZING CUSTODY OPTIONS: ABOLISHING THE PRESUMPTION AGAINST JOINT PHYSICAL CUSTODY

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I. INTRODUCTION

It is the end of a long day for a North Dakota district court judge. She has retired to her chambers after spending the day presiding over a divorce trial. The parties have stipulated to most of the issues, but have been unable to resolve the issue of custody of their two children, ages seven and ten.

The lawyers for each side spent the day presenting testimony relating to the child custody factors under section 14-09-06.2 of the North Dakota Century Code.[1] The lawyers for each parent argued that it would be in the

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1. The statute states:

> 1. For the purpose of custody, the best interests and welfare of the child is determined by the court's consideration and evaluation of all factors affecting the best interests and welfare of the child. These factors include all of the following when applicable:
>
> a. The love, affection, and other emotional ties existing between the parents and child.
>
> b. The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child.
>
> c. The disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
>
> d. The length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity.
>
> e. The permanence, as a family unit, of the existing or proposed custodial home.
>
> f. The moral fitness of the parents.
>
> g. The mental and physical health of the parents.
>
> h. The home, school, and community record of the child.
>
> i. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
>
> j. Evidence of domestic violence. . . .
>
> k. The interaction and interrelationship or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault, on other persons.
>
> l. The making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in section 50-25.1-02.

best interests of the children to be in the custody of their respective client. Listening to the testimony, it was clear to the judge that this was another case where the children's best interests would be served by granting custody to either parent. The factors weighed equally in both parents' favor; yet the judge has to make a decision that will make one parent the "winner." This will force the losing parent to give up daily physical contact with the children, and that parent will have to find a way to be satisfied with contact consisting of maybe one day a week, a couple weekends a month, and a few weeks during the summer.

Awarding custody of children has been acknowledged as the most difficult decision a judge must make,[2] and this decision becomes even more difficult in a situation where the law views both parents as equally fit.[3] One solution to this problem could be joint physical custody.[4] However, current North Dakota law presents a roadblock for judges inclined to make such an award.

North Dakota has a presumption against awarding joint physical custody.[5] This presumption may be overcome if a district court finds that joint physical custody is in the best interests of the child.[6] But what does that mean? The court has already made its findings on the best interests of the child, and the calculus has come out equally for each parent. The case law

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m. Any other factors considered by the court to be relevant to a particular child custody dispute.

N.D. CENT. CODE § 14-09-06.2(1) (1997 & Supp. 2001).

2. Gravning v. Gravning, 389 N.W.2d 621, 624 (N.D. 1986) (Levine, J., dissenting).

3. *Id.* Justice Levine discussed the criteria that a court must consider when determining custody. *Id.*

4. For purposes of this article, joint physical custody means a child spends significant periods of time in the physical care of each parent. *In re* Marriage of Condon, 73 Cal. Rptr. 2d 33, 46 (Cal. Ct. App. 1998). Those jurisdictions that award joint physical custody acknowledge that there is no requirement that the child spend an equal amount of time with each parent. *Id.* at n.13; Drury v. Drury, 32 S.W.3d 521, 525 (Ky. Ct. App. 2000); Tilley v. Tilley, 968 S.W.2d 208, 213 (Mo. Ct. App. 1998).

The counterpart to joint physical custody is joint legal custody, which means the parents have joint authority to make important decisions affecting their child's welfare. Dickson v. Dickson, 1997 ND 167, ¶ 11, 568 N.W.2d 284, 286, *overruled by* Jarvis v. Jarvis, 1998 ND 163, 584 N.W.2d 84. In North Dakota, the term "joint legal custody" is a "meaningless amorphism" unless the district court provides a definition. *Id.* This article will not address the issue of joint legal custody because it is granted in a majority of cases without any dispute, and in a majority of states, joint legal custody is encouraged or even required. 2 SANDRA MORGAN LITTLE, CHILD CUSTODY AND VISITATION: LAW AND PRACTICE § 13.01[2], at 13-9 & app. 13.05 (1996). North Dakota has legislatively adopted a presumption in favor of joint legal custody by granting each parent certain rights and duties, which include many of the necessary components of joint legal custody. *See* N.D. CENT. CODE § 14-09-28 (Supp. 2001) (listing the various rights and duties of parents, which may only be restricted or excluded if the district court expresses a reason).

5. *See* Peek v. Berning, 2001 ND 34, ¶ 19, 622 N.W.2d 186, 193 (stating that it is generally not in a child's best interests to be in a joint physical custody arrangement).

6. *Id.* ¶ 20.

provides no guidance on what kind of findings would support a conclusion that joint physical custody is in the best interests of a child. If a court simply states that it finds joint physical custody to be in the best interests of the child, will that decision be upheld?

This article will analyze the history of the presumption against joint physical custody in North Dakota and point out its origin and the reasons given to support it. Then it will analyze the flaws in this reasoning, and discuss some of the benefits of joint physical custody. The purpose of this article is to encourage the North Dakota Supreme Court to eliminate the presumption against joint physical custody so that it may be awarded more easily in appropriate circumstances.

II. HISTORY OF THE PRESUMPTION

The first case addressing joint physical custody in North Dakota was decided in 1975.[7] In *DeForest v. DeForest*,[8] the district court created a rotating three-month custody schedule, under which each parent received seven weeks of custody during the summer.[9] On appeal, the North Dakota Supreme Court stated that "[a] finding that a split or alternating custody is in the best interests of a child, when supported by substantial evidence, is not clearly erroneous, nor is it in actuality a finding that all things are equal."[10] The supreme court quoted *Silseth v. Levang*[11] for the proposition that "it is not in the best interests of a child to unnecessarily change custody and bandy the child back and forth between parents. Stability is desirable."[12]

The significance of the court's use of *Silseth* is that *Silseth* was not a joint physical custody case.[13] The father in *Silseth* had sole custody of his daughter for approximately three years before the mother petitioned the court for sole custody.[14] The court stated that it was rarely appropriate to

7. DeForest v. DeForest, 228 N.W.2d 919, 923-25 (N.D. 1975).

8. 228 N.W.2d 919 (N.D. 1975).

9. *DeForest*, 228 N.W.2d at 922.

10. *Id.* at 925.

11. 214 N.W.2d 361 (N.D. 1974).

12. *DeForest*, 228 N.W.2d at 925 (quoting *Silseth*, 214 N.W.2d at 364).

13. *See generally Silseth*, 214 N.W.2d 361 (evaluating a case in which the father had been given custody in the divorce settlement).

14. *See id.* at 362-63 (stating that the father had custody of his daughter from approximately May 1970 through the date of the court's decision on March 16, 1973). The mother had exercised visitation with her daughter during this time. *Id.* at 362.

change "custody when a child has been living happily in one place for a substantial period."[15]

The language that the court relied on in *Silseth* and *DeForest* came from a Nebraska case, which stated:

> We do not believe it is in the best interests of a child to unnecessarily change custody and bandy the child back and forth between parents. Stability is desirable. There has not been such a change of circumstances here as would justify a finding that the best interests of the child again require a change in custody. "An original decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action."[16]

DeForest extended the rule previously used for sole custody situations where the custodial relationship had been stable for several years, to a custody situation where each parent had physical custody of the child for a period not lasting longer than four months.[17] With *DeForest*, the North Dakota Supreme Court announced its first basis for a presumption against joint physical custody—children should not move back and forth between their parents.[18]

Five years later, in 1980, the North Dakota Supreme Court had its second opportunity to deal with the issue of joint physical custody.[19] *Lapp v. Lapp*[20] contains the most extensive discussion to date on the subject of joint physical custody in North Dakota.[21] The court acknowledged that there was "no general agreement among courts, lawyers, psychologists, behavioral scientists, social workers, or other professionals in the family

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15. *Id.* at 364. In support of this common sense assertion, the court quoted the following passage from *American Jurisprudence*: "Where young children have been placed in one home and have remained there for a substantial period of time and the situation seems satisfactory, there is a reluctance to uproot the children from familiar surroundings and place them in a strange home with a parent who hardly knows them." *Id.* (quoting 24 AM. JUR. 2D *Divorce and Separation* § 820 (1973)).

16. Scripter v. Scripter, 208 N.W.2d 85, 86 (Neb. 1973) (quoting Packett v. Packett, 172 N.W.2d 86, 87 (Neb. 1970)).

17. *Compare Silseth*, 214 N.W.2d at 362-63 (stating that the father had sole custody of his daughter from approximately May 1970 to March 1973), *with DeForest*, 228 N.W.2d at 922 (quoting the district court's custody order, which granted the defendant custody from January 12, 1975, to Memorial Day 1975, and each party seven weeks of custody during the summer of 1975).

18. *DeForest*, 228 N.W.2d at 925 (quoting *Silseth*, 214 N.W.2d at 364).

19. *See* Lapp v. Lapp, 293 N.W.2d 121, 124 (N.D. 1980) (quoting the trial court's order granting physical custody of the child to each parent in alternating six month periods).

20. 293 N.W.2d 121 (N.D. 1980).

21. *Lapp*, 293 N.W.2d at 130-31.

law field as to the wisdom and desirability of joint custody arrangements."[22] As an example of the disadvantage of a joint physical custody arrangement, the court quoted the following passage from the *American Law Reports*:

> A frequent shifting of a child from home to home exposes it to changes of discipline and habits, and may invite lax discipline and obedience. Stability in the human factors affecting a child's emotional life and development is essential, and it may be argued that this stability can best be attained with such an undivided custody as will prevent the child from being shunted back and forth between homes.[23]

The court also noted the important advantages and benefits to this "Solomonic"[24] arrangement.[25] For example, joint physical custody provides the child with the needed interaction and interrelationship with both parents, siblings, and "other persons who may significantly affect the child's best interests."[26]

Despite recognizing the lack of a consensus regarding joint physical custody, the court again decided to side with the view that joint physical custody is generally not in the best interests of children.[27] Notably, in *Lapp*, the supreme court upheld, with some reservation,[28] the district court's award of joint physical custody.[29] After the parties separated, the mother maintained sole custody of the child under a temporary custody order that

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22. *Id.* at 130.

23. *Id.* (quoting M. L. Cross, Annotation, *Split, Divided, or Alternate Custody of Children*, 92 A.L.R. 2D 695, 698-99 (1963)). In 1963, the literature related to joint custody was "egregiously inadequate." *See* W. Glenn Clingempeel & N. Dickon Reppucci, *Joint Custody After Divorce: Major Issues and Goals for Research*, *in* JOINT CUSTODY AND SHARED PARENTING 87, 88 (Jay Folberg ed. 1984) (stating that in 1969 the research on child custody adjudication and joint custody was sparse). Even in 1982, "[m]ethodologically defensible studies focusing directly on advantages and disadvantages of joint versus single-parent custody [were] virtually nonexistent." *Id.*

24. While the court referred to joint physical custody as being a decision born of Solomon's wisdom, Justice Levine later commented that joint physical custody is the "antithesis" of "Solomonic." Kaloupek v. Burfening, 440 N.W.2d 496, 501-02 (N.D. 1989) (Levine, J., dissenting). She noted that King Solomon

> did not offer the contestants who appeared before him divided custody of the sought-after child and I assume he refrained from doing so for obvious reasons. It may have provided an easy out but it would have resolved neither the underlying contest of parenthood nor the source of continuing upheaval in the continuity of the child's life.

Id. at 502.

25. *Lapp*, 293 N.W.2d at 130.

26. *Id.*

27. *See id.* at 128 (stating "[w]e have recognized that it is not in the best interests of a child to unnecessarily change custody and bandy the child back and forth between the parents").

28. *See id.* at 129 (stating that if it had sat in the place of the trial court, "the outcome may have been different").

29. *Id.* The district court awarded the parents alternating six-month periods of custody. *Id.* at 124.

also granted the father visitation "at least one day each week."[30] Because the mother had only given the father short visits on Saturdays, the trial court awarded joint physical custody.[31] The trial court also stated that joint physical custody was "the least detrimental alternative" in the case.[32]

With *Lapp*, the court provided an explanation for its concern about a child moving back and forth between parents.[33] The complete proposition can be summarized as follows: It is generally not in the best interests of a child to move between parents[34] because there are changes in discipline and habits between the two parents, which "may invite lax discipline and disobedience," and a sole custody arrangement arguably provides the type of stability necessary for a child's emotional life and development.[35]

The next joint physical custody case was in 1989.[36] While the majority opinion did not change the state of the law, Justice Levine discussed an important concern in her dissent.[37] She mentioned a study conducted by Dr. Judith Wallerstein and Susan Steinman that analyzed joint physical custody where the parents were involved in an ongoing dispute with each other.[38] Based upon their study, Wallerstein and Steinman were opposed to "encouraging or mandating joint custody or frequent access when parents are in ongoing disputes."[39]

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30. *Id.* at 129.

31. *Id.* The supreme court noted several other options that it could have imposed instead of joint physical custody. *Id.* It suggested that the court could have awarded sole custody to one parent and given the noncustodial parent liberal and extensive visitation rights. *Id.* Another option could have been an award where one parent had custody during the school months with the other party having custody for a substantial part of the summer vacation. *Id.* As a third possibility, the court suggested alternating custody from school year to school year with the opposite parent having custody for the summer vacations. *Id.*

However, the court did not reverse the trial court and impose any of its suggestions because it was limited by the "clearly erroneous" standard of review. *Id.* The supreme court may only set aside a trial court's findings of fact if it is "left with the definite and firm conviction that a mistake has been made." *Id.* at 125 (quoting Nastrom v. Nastrom, 284 N.W.2d 576, 580 (N.D. 1979)) (addressing the clearly erroneous standard of review). Because the court was not left with a definite and firm conviction that the trial court made a mistake, it upheld the joint physical custody award. *Id.* at 129.

32. *Id.* at 129-30. The supreme court noted that it would have preferred a statement from the trial court that joint physical custody was "in the best interests of the child" but "least detrimental alternative" was close enough. *Id.*

33. *Id.* at 129-31.

34. DeForest v. DeForest, 228 N.W.2d 919, 925 (N.D. 1975) (quoting Silseth v. Levang, 214 N.W.2d 361, 364 (N.D. 1974)).

35. Lapp v. Lapp, 293 N.W.2d 121, 130 (N.D. 1980) (quoting Cross, *supra* note 23, at 698-99).

36. Kaloupek v. Burfening, 440 N.W.2d 496, 497 (N.D. 1989). The trial court awarded six months alternating custody to each parent. *Id.*

37. *Id.* at 500 (Levine, J., dissenting).

38. *Id.*

39. *Id.* (citing C. Rick Chamberlin, *Joint Custody*, TRIAL, Apr. 1989).

This concern about awarding joint physical custody when the parents cannot get along was discussed in the 1998 case *Jarvis v. Jarvis*.[40] The court adopted the following position: "Legal writers and child development professionals are in general agreement that a joint custody arrangement can work only if the parents are able to cooperate."[41] The trial court found that a joint physical custody arrangement would require the parents to communicate "a lot."[42] Because the parents communicated "very little," the trial court did not award joint physical custody.[43]

While the supreme court did not make a connection between the parents' severe anger toward each other and its effect on the best interests of a child, implicit in its decision was the theory that a custody arrangement that will increase the tension in an already volatile relationship between the parents is not in the best interests of a child.[44] In *Jarvis*, the trial court specifically found that the plaintiff had feelings of anger and hostility toward the defendant.[45] The plaintiff was "very angry" that his ex-wife remained in their marital home.[46] The trial court stated that a joint legal and physical custody arrangement would only continue the animosity between the two parties.[47] To avoid this continued animosity, the court awarded sole custody to the mother with the father receiving "regular quality time."[48] Because a court's custody decision is based on the best interests of the child,[49] it must have been concerned that a custody arrangement that would contribute to the animosity between the parents would not be in the best interests of the children.[50]

Also in 1998, the supreme court added one final rule to its joint physical custody jurisprudence. In *In re Lukens*,[51] the court again relied on the treatise it used in *Jarvis* for the following statement: "Infants and preschool children have special needs, generally commanding special attention from

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40. 1998 ND 163, 584 N.W.2d 84. The court did not mention Justice Levine's dissent from *Kaloupek* where she addressed the same issue. *Jarvis*, ¶ 36, 584 N.W.2d at 92.

41. *Id.* (quoting 2 JOHN P. MCCAHEY ET AL., CHILD CUSTODY & VISITATION LAW AND PRACTICE § 13.01[1] (1998)).

42. *Id.* ¶ 37.

43. *Id.*

44. *Id.* ¶ 36.

45. *Id.* ¶ 37.

46. *Id.*

47. *Id.*

48. *Id.* The court did not expound on what constituted "regular quality time."

49. *See* Silseth v. Levang, 214 N.W.2d 361, 363 (N.D. 1974) (stating that the district courts must award custody based on what is in the best interests of the child).

50. *See* Jarvis v. Jarvis, 1998 ND 163, ¶ 37, 584 N.W.2d 84, 92 (noting the repeated references in the district court's opinion to anger, hostility, and animosity between the parents).

51. 1998 ND 224, 587 N.W.2d 141.

the courts. Awards rotating the residence of a very young child are presumptively not in the child's best interests and absent some justification will be reversed."[52]

This review of the case law on joint physical custody reveals three general rules. First, it is generally not in the child's best interests for a court to award joint physical custody[53] because of the possibility of lax discipline and stunted development.[54] Second, there is an even stronger presumption that joint physical custody is not in the best interests of a child if the parents have a volatile relationship.[55] Third, there is a similar strong presumption against joint physical custody in the case of very young children.[56] These presumptions may be overcome if a court finds that joint physical custody is in the best interest of a child.[57]

III. THE FLAWS IN THE ARGUMENT AGAINST JOINT PHYSICAL CUSTODY

While North Dakota has only expressed two justifications[58] for its general presumption against joint physical custody, other commentators have identified additional concerns with joint physical custody. Some

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52. *Lukens*, ¶ 15, 587 N.W.2d at 145 (quoting LITTLE, *supra* note 4, § 13.06[4], at 13-45). The court did not explain what "special needs" of very young children make the presumption against joint physical custody even stronger. *Id.* The treatise also did not explain what it meant by special needs. LITTLE, *supra* note 4, at § 13.06[4], at 13-45. The following quote may provide some insight into special needs:

> Joint custody of very young children requires an extraordinary degree of cooperation and communication between estranged parents. They must be able to discuss daily details of naptime, runny noses, toilet training, teething, diaper rash, and so on. Each parent must set up routines and schedules to coincide with day care arrangements.

JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 263 (1989).

53. Peek v. Berning, 2001 ND 34, ¶ 19, 622 N.W.2d 186, 193; Kasprowicz v. Kasprowicz, 1998 ND 68, ¶ 15, 575 N.W.2d 921, 924; *see also* Wetzel v. Wetzel, 1999 ND 29, ¶ 11, 589 N.W.2d 889, 894 (stating "we have clearly noted our disfavor with shared custody arrangements in which a child is bandied back and forth between parents"); Kaloupek v. Burfening, 440 N.W.2d 496, 497 (N.D. 1989) (stating "we have recognized that it is not in the best interests of a child to unnecessarily change custody or to bandy the child back and forth between parents . . .").

54. Lapp v. Lapp, 293 N.W.2d 121, 130 (N.D. 1980) (quoting Cross, *supra* note 23, at 698-99).

55. *Jarvis*, ¶¶ 36-37, 584 N.W.2d at 92.

56. *Lukens*, ¶ 15, 587 N.W.2d at 145 (quoting LITTLE, *supra* note 4, § 13.06[4], at 13-45).

57. *Wetzel*, ¶ 11, 589 N.W.2d at 894 (stating "the trial court must make specific findings demonstrating shared custody is in the best interests of the child"); *Kasprowicz*, ¶ 15, 575 N.W.2d at 924; *see also Peek*, ¶ 20, 622 N.W.2d at 193 (stating "[r]otating physical custody is not clearly erroneous when supported by a district court's findings that alternating custody is in the best interests of a child"); *Kaloupek*, 440 N.W.2d at 497-98; *Lapp*, 293 N.W.2d at 128.

58. The argument is that children should not be bandied back and forth between parents because of a concern for lax discipline and a concern that they will not develop properly unless they have the kind of stability provided by a sole custody situation. *Lapp*, 293 N.W.2d at 130 (quoting Cross, *supra* note 23, at 698-99).

argue that joint physical custody increases the parents' attachment to each other,[59] prolongs the conflict between parents,[60] and can be used as a coercive tool in divorce negotiations.[61] Anecdotal evidence also demonstrates the problems parents can have with joint physical custody when each household has drastically different lifestyles and rules.[62]

A. THE FLAWS IN NORTH DAKOTA'S PRESUMPTION

The main problem with North Dakota's presumption is that it was created by extending a concept with roots in the law of *change* of custody, which is a different area of law than an *original* custody decision.[63] In order to change custody, the court must find that there is a "compelling" or "significant reason" for doing so.[64] "In a modification proceeding, the best interests of the child must be gauged against the backdrop of the stability of the child's relationship with the custodial parent."[65] In an original custody decision there is no custodial parent, so the best interest factors do not have that "backdrop."[66] Unlike a modification proceeding, an original custody decision is solely concerned with the best interests of the child and does not require a "compelling" or "significant" reason.[67]

By applying the law of change of custody to joint physical custody awards, the supreme court has imputed the false idea that somehow the child's current "stable" situation will be changed by an award of joint physical custody. In the case of a divorcing couple,[68] no matter what kind of original custody award is made, it will be different from the child's current living situation, which allows the child to spend significant time with both parents. The fact that the parents are getting divorced has

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59. *See, e.g.*, Stephanie N. Barnes, Comment, *Strengthening the Father-Child Relationship Through a Joint Custody Presumption*, 35 WILLAMETTE L. REV. 601, 615 (1999) (citing Clingempeel & Reppucci, *supra* note 23, at 95).

60. *See, e.g.*, Elizabeth Scott & Andre Derdeyn, Symposium, *The Parent-Child Relationship and the Current Cycle of Family Law Reform: Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 494 (1984).

61. *See, e.g.*, Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 515-16 (1988).

62. *See* WALLERSTEIN & BLAKESLEE, *supra* note 52, at 263-64 (discussing the problems of different bedtimes, rules about sleeping with parents, and rules about watching television).

63. Blotske v. Leidholm, 487 N.W.2d 607, 610 (N.D. 1992).

64. *Id.* at 609. In 1997, the legislature codified the supreme court's approach to change of custody proceedings. Anderson v. Resler, 2000 ND 183, ¶ 8, 618 N.W.2d 480, 484. This codification is found at section 14-09-06.6(6) of the North Dakota Century Code. *Id.*

65. *Blotske*, 487 N.W.2d at 610.

66. *Id.*

67. *Id.*

68. For purposes of this discussion, an unmarried couple who has been living together with a child would also be in the same position as a divorcing couple.

eliminated the possibility of maintaining stability because no custody award can create a situation where the child will continue to live in the same household with both parents.[69]

Coupled with this false idea of stability is the idea that a child should not be unnecessarily bandied back and forth between parents.[70] By borrowing this idea from the change of custody law, this concept is flawed when applied to an original award of joint physical custody. Unlike a change of custody case, the child has not been living for a long period of time with one parent.[71] When the court discusses bandying the child back and forth between parents, it is referring to changing sole custody after the child has been with one parent for a substantial period of time.[72] In an original custody decision, it is not likely that the child has been in either parent's sole custody for a substantial period of time.

Even applying this concept of moving the child back and forth frequently between parents outside the change of custody area, the court's expressed aversion to this practice in a joint physical custody situation ignores the reality of a typical sole custody with visitation arrangement.[73] In a sole custody with visitation arrangement, the child will be moving back and forth between parents several times a month in order to satisfy a typical two weekends a month visitation schedule. In the case of a "liberal visitation" or "reasonable visitation" award, this moving back and forth between households becomes even more frequent.

If there is a concern with frequently moving the child back and forth between homes, then joint physical custody actually reduces the frequency of these transitions. On a two-week or monthly alternating schedule, the

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69. It has been argued that only a joint physical custody award can most closely approximate the child's prior living arrangement because it continues giving the child significant periods of time with each parent. Jo-Ellen Paradise, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L. REV. 517, 576 (1998). In that way, if the courts are truly concerned with stability in a child's life, a joint physical custody award would be the preferred custody award. "Birdnesting," which allows children to stay in the home, WALLERSTEIN & BLAKESLEE, *supra* note 52, at 256-57, is arguably the most stable joint physical custody award because the children do not have to move between two different residences.

70. DeForest v. DeForest, 228 N.W.2d 919, 925 (N.D. 1975) (quoting Silseth v. Levang, 214 N.W.2d 361, 364 (N.D. 1974)).

71. *Cf. Silseth*, 214 N.W.2d at 363 (stating that the child had been living with her father for approximately three years).

72. *Id.*; *see also* Blotske v. Leidholm, 487 N.W.2d 607, 609 (N.D. 1992) (stating that the district court ordered a change in sole custody approximately three years after the original custody award).

73. *See* Muller Davis & Jody Meyer Yazici, *Best Interest of the Child: The Case for Joint Custody Even in Contested Divorce*, 84 ILL. B.J. 348, 351 (1996) (stating that shifting children back and forth between parents is present in both joint custody arrangements and sole custody with visitation arrangements).

number of exchanges between households is less than with a typical weekend visitation schedule or a liberal visitation schedule. With a two-week or monthly alternating schedule, the number of face-to-face meetings between the parents is also reduced, which would reduce the potential for conflict.

Another reason North Dakota has been opposed to joint physical custody is based on a concern that it will stunt a child's development.[74] The first problem with this theory is that it is contrary to North Dakota's presumption that it is in the best interests of a child to spend time with both parents.[75] An arrangement allowing a child to maximize his or her time with both parents would seem to better suit the presumption in favor of the child spending time with both parents.

The second problem with this development theory is that there are studies that have shown no discernable negative or positive impact on a child's development when comparing sole custody to joint custody.[76] One study, entitled the Stanford Custody Project, followed approximately 1100 families in California, and the researchers interviewed children between the ages of ten and eighteen for their perceptions about their family environments.[77] The study found that there were very few differences in the children's development when comparing sole custody arrangements with joint physical custody arrangements.[78]

The final problem North Dakota has identified is that joint physical custody may create lax discipline.[79] However, this problem is not unique to a joint physical custody arrangement. If the noncustodial parent has a different approach to discipline, the child will be exposed to that approach

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74. *See* Lapp v. Lapp, 293 N.W.2d 121, 130 (N.D. 1980) (quoting Cross, *supra* note 23, at 699, which stated, "Stability in the human factors affecting a child's emotional life and development is essential . . .").

75. *See Blotske*, 487 N.W.2d at 610 (citing Dschaak v. Dschaak, 479 N.W.2d 484, 487 (N.D. 1992)) (stating that visitation between a child and her noncustodial parent is presumed to be in the best interests of the child). North Dakota's presumption is supported by a substantial body of research that has found continued contact with both parents is beneficial to children. Scott & Derdeyn, *supra* note 60, at 488; *see also* WALLERSTEIN & BLAKESLEE, *supra* note 52, at 257 (stating that her research "consistently shows that good father-child relationships can be critically important to the psychological well-being and self-esteem of children of divorce").

76. *See* CHRISTY M. BUCHANAN ET AL., ADOLESCENTS AFTER DIVORCE 71 (1996) (stating that children in dual-residence arrangements had relationships with their parents that were similar to relationships children in sole-residence arrangements had with their parents); WALLERSTEIN & BLAKESLEE, *supra* note 52, at 266-67 (stating that children in joint physical custody arrangements were similar developmentally to children in sole custody arrangements).

77. BUCHANAN ET AL., *supra* note 76, at 8-9.

78. *See id.* at app. B, Tbls. B.6 & B.9 (noting very few significant differences between sole custody residences and dual custody residences on a variety of factors, including depression, school grades, antisocial behavior, and relationship with parents). The authors also commented on their surprise at finding that the children living in joint physical custody arrangements had "somewhat better functioning" than children living in sole custody arrangements. *Id.* at 78.

79. *Lapp*, 293 N.W.2d at 130 (quoting Cross, *supra* note 23, at 698-99).

whenever the noncustodial parent is exercising his or her visitation, possibly several times per month. The only difference with joint physical custody is that the child is exposed to that different living and discipline style for a continuous period.

The nature of visitation actually contributes to this discipline problem more than a joint physical custody arrangement. The noncustodial parent often takes on the role of a "favorite babysitter" and tries to fill visitation periods with as many "fun" activities as possible to maximize the quality of the limited time the noncustodial parent has with the child.[80] This situation promotes the possibility of lax discipline because the noncustodial parent may be less likely to reprimand the child or enforce rules because that would ruin the fun environment. With a joint physical custody arrangement, both parents have significant blocks of time to spend with the child. Therefore, both parents can more closely approximate a daily living schedule without worrying about making every minute fun for the child.

Beyond the general presumption against joint physical custody, there is one other specific presumption to address. North Dakota has adopted a presumption against joint physical custody in the case of very young children.[81] The rationale behind this presumption is not clear,[82] and the literature on joint physical custody rarely addresses any special concern with very young children,[83] which makes this a difficult issue to address.

In support of this presumption, the North Dakota Supreme Court has explained that very young children have special needs.[84] These special needs probably include naptime, toilet training, and day care.[85] However, with a two-week or monthly rotating custody schedule, a child would spend

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80. Barnes, *supra* note 59, at 619; *see also* Davis & Yazici, *supra* note 73, at 350 (stating that the New Jersey Supreme Court refers to noncustodial fathers as "zoo daddies"); Paradise, *supra* note 69, at 551 (noting that fathers with visitation have been described as "Disneyland Daddys [*sic*]").

81. *In re* Lukens, 1998 ND 224, ¶ 15, 587 N.W.2d 141, 145 (quoting LITTLE, *supra* note 4, § 13.06[4], at 13-45).

82. *See id.* (quoting LITTLE, *supra* note 4, § 13.06[4], at 13-45) (stating that infants and preschool children have special needs). The North Dakota Supreme Court has never explained how these "special needs" militate against an award of joint physical custody.

83. Only the CHILD CUSTODY AND VISITATION: LAW AND PRACTICE treatise by Sandra Morgan Little appears to address this issue. LITTLE, *supra* note 4, § 13.06[4], at 13-45. The treatise only cites to one case in its discussion about joint physical custody of very young children. *Id.* (citing generally *In re* S.M.H., 531 So. 2d 228 (Fla. Ct. App. 1988)). *In re S.M.H.* did not make any special rule about very young children. *In re S.M.H.*, 531 So. 2d at 231. The court only stated a general presumption against rotating the physical residence of a child. *Id.* That case involved custody of a child under the age of one. *See id.* at 229 (stating "[t]his is a dispute between an unwed 15-year-old mother (appellant) and the 16-year-old father (appellee/cross-appellant) over custody of their five-month-old baby daughter").

84. *Lukens*, ¶ 15, 587 N.W.2d at 145 (quoting LITTLE, *supra* note 4, § 13.06[4], at 13-45).

85. WALLERSTEIN & BLAKESLEE, *supra* note 52, at 263.

substantial, consistent time with one parent, which would allow that parent to maintain a continuous schedule. This continuity would alleviate the problems associated with a more frequent rotation schedule.

While North Dakota has identified some legitimate problems with joint physical custody, these problems are not significantly different from a custody arrangement where both parents are still involved in the child's life. As will be discussed later, there are several positive aspects to a joint physical custody arrangement that should be balanced against any negative aspects.

B. A RESPONSE TO THE OTHER ARGUMENTS

Some commentators point to the negative impact joint physical custody may have on the parents by increasing their attachment to each other.[86] The answer to this argument is that child custody decisions are not concerned with how the arrangement will affect the parents because the court is only concerned with the best interests of the child.[87] "Divorced parents must recognize that the disturbing situation was brought about by them."[88] If a joint physical custody arrangement increases the parents' attachment to each other, then they must learn to live with the situation they created.[89]

Another concern regarding parents is that a joint physical custody arrangement may prolong conflict between them.[90] While this concern relates to the negative impact on the parents, it also has an effect on the children. Several studies have found a detrimental impact on children who are exposed to significant levels of interparental conflict.[91] However, concern for continuing conflict between parents is still primarily an argument focused on the parents. It is unfortunate that commentators recommend punishing children[92] based on their parents' behavior. Because it is the parents who have created the traumatic situation, they should be the ones who have to learn to cooperate for the best interests of their child. If the focus were truly on the best interests of children, then a better solution

86. Barnes, *supra* note 59, at 615; *see also* Clingempeel & Reppucci, *supra* note 23, at 95 (speculating that if joint custody increases the amount of continued contact between parents, it may make the "emotional divorce" more difficult).

87. *See* N.D. CENT. CODE § 14-09-06.2 (1997) (stating that a court must consider the best interests of a child when making a custody decision).

88. Lapp v. Lapp, 293 N.W.2d 121, 130 (N.D. 1980).

89. *See id.* at 130-31 (stating that the parents caused the divorce, and they must do everything possible to reduce the negative consequences).

90. Scott & Derdeyn, *supra* note 60, at 494.

91. *Id.* at 490-91.

92. Because it is in the child's best interests to have substantial contact with both parents, removing that contact punishes the child. *See id.* at 488 (stating that a large body of evidence demonstrates that frequent contact with both parents after divorce is beneficial to children).

would be a court-ordered parental cooperation course as the first step, instead of forcing children to lose out on substantial contact with both parents.

Even when the court awards sole physical custody, there is no guarantee that parental conflict will end or be reduced. One group of researchers investigated the "nature and magnitude of postdivorce turbulence involving children."[93] The researchers discovered that thirty-one percent of the studied cases found "evidence of repeated and intensive interaction between the divorced couples."[94] One reason for this increased conflict may result from the fact that there is no longer any reason for the parents to compromise once the marriage has ended.[95]

Some commentators also argue against joint custody because some parents use the threat of a custody battle to coerce financial concessions from the other parent during divorce negotiations.[96] The main flaw with this argument is that it is not uniquely addressed to the debate over joint physical custody. Even in jurisdictions where there is no presumption in favor of joint physical custody, one parent can threaten to seek sole physical custody to extract financial concessions. Because this article does not advocate a presumption in favor of joint physical custody, this argument holds even less weight. The real solution to the problem of parents who use custody as a coercive tool is formulating methods to eliminate that potential.[97]

A final problem attributed with joint physical custody is the practical difficulties parents will experience because of differences in the lifestyles between the two households.[98] For example, if parents have different bedtimes for children, they often report that the children will "come home tired and red-eyed from one home and cannot fall asleep in the other."[99] Another example relates to rules about television. Parents reported being upset if the other parent allowed the child to watch certain shows or allowed the child to watch a lot of television.[100]

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93. Clingempeel & Reppucci, *supra* note 23, at 94.

94. *Id.*

95. Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 717 (1985).

96. Singer & Reynolds, *supra* note 61, at 515-16.

97. *See* Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 39-40 (1985) (stating "[t]he solution to these problems, if joint custody is found to be otherwise desirable, is not to reject joint custody but to examine possibilities for improving its implementation that do not perpetuate or worsen the effects of traditional gender role arrangements").

98. WALLERSTEIN & BLAKESLEE, *supra* note 52, at 263-65.

99. *Id.* at 263.

100. *Id.* at 263-64.

These complaints are concerned with difficulties the parents experience as opposed to any recognized detriment to the child.[101] These differences in households will also be problems for parents where liberal visitation, reasonable visitation, or just two-weekends-a-month visitation is awarded. Whenever a child returns from a noncustodial parent's household, if there were any significant differences in lifestyle, the custodial parent will experience frustration getting the child readjusted to the custodial parent's household. Because there is no recognized detriment to the child, and these same problems exist whenever there is a visitation award, these practical difficulties do not provide a persuasive argument against awarding joint physical custody.

IV. THE ARGUMENT TO ELIMINATE NORTH DAKOTA'S PRESUMPTION AGAINST JOINT PHYSICAL CUSTODY

In the only North Dakota case to analyze the pros and cons of joint physical custody, the North Dakota Supreme Court acknowledged that there was no general agreement among professionals in the family law area regarding the desirability of joint physical custody.[102] Despite making this comment, the court sided with the theory that joint physical custody is not beneficial for a child.[103] Since the presumption against joint physical custody was introduced in 1975,[104] the supreme court has not revisited the topic. The following section enumerates and discusses some of the benefits of joint physical custody as those benefits relate to the best interests of the child.

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101. *Id.* at 262-66. The researchers did not discover any harm to the children resulting from the different lifestyles at the two households. *See id.* at 266-67 (stating that the joint custody children resembled children raised in traditional sole custody households). Two other researchers hypothesized that very dissimilar homes may cause stress to the child, but they also pointed to two studies suggesting that "school-age, preadolescent children adjust well to alternating between very dissimilar . . . homes as long as there is a predictable schedule of alternations and cooperation between the parents." Clingempeel & Reppucci, *supra* note 23, at 98.

102. Lapp v. Lapp, 293 N.W.2d 121, 130 (N.D. 1980). The reasoning in *Lapp* relied heavily on a 1963 article from the *American Law Reports*. *Id.* (quoting Cross, *supra* note 23, at 698-99). Since 1963, the claim that "bandying the child back and forth between homes" is somehow harmful to children has been debunked. *See* Susan Steinman, *The Experience of Children in Joint Custody Arrangement: A Report and Study*, 51 AM. J. ORTHOPSYCHIATRY 403, 414 (1981) (stating that the result of her study found "most of the children were able to master the practical problems of joint custody, and this, combined with a sense that both parents loved and wanted them, enhanced their self-esteem").

103. *See Lapp*, 293 N.W.2d at 128 (stating that it was not in the child's best interests to bandy the child back and forth between the parents).

104. DeForest v. DeForest, 228 N.W.2d 919, 925 (N.D. 1975); Silseth v. Levang, 214 N.W.2d 361, 364 (N.D. 1974).

A. BENEFITS OF JOINT PHYSICAL CUSTODY

One of the most significant benefits of a joint physical custody arrangement is that it more closely approximates the family situation the child had before the parents divorced or stopped living together.[105] Studies have shown that substantial contact with both parents after a divorce has a positive effect on children.[106] Correlated with this principle, studies have also consistently shown a negative impact on children if there is an absence of contact with noncustodial parents after a divorce.[107]

One researcher found three major areas where children benefit from joint physical custody:

> First, they received the clear message that they were loved and wanted by both parents. Second, they had a sense of importance in their family and the knowledge that their parents made great efforts to jointly care for them, both factors being important to their self-esteem. Third, they had physical access to both parents, and the psychological permission to love and be with both parents. This protected them from the crippling loyalty conflicts often seen in children who are caught in the crossfire of their parents' ongoing battles.[108]

Other benefits for children from continued substantial contact with both parents include demonstrating less aggression and stress and functioning "more effectively in work and in social relations with peers."[109] Another benefit of joint physical custody is that it "potentially offers a larger array

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105. *See* BUCHANAN ET AL., *supra* note 76, at 71 (stating that adolescents in a dual-residence arrangement maintained relationships with each parent at a level consistent with what one would find if the child was in a sole-residence arrangement with each parent).

106. *See* Scott & Derdeyn, *supra* note 60, at 489 (stating that several researchers have found that frequent contact with both parents is associated with positive adjustment in children); *see also* Clingempeel & Reppucci, *supra* note 23, at 91 (noting that "[i]n the majority of cases, frequent interaction with the noncustodial parent has been found to have a positive effect on children's adjustment to divorce"). Researchers have reported benefits such as children experiencing fewer negative effects of divorce, less aggression and stress, better functioning in work and social relations with peers, and less trauma as a result of the divorce. Scott & Derdeyn, *supra* note 60, at 489.

107. *See* Scott & Derdeyn, *supra* note 60, at 489 (stating that studies have shown that the absence of the father, the noncustodial parent, is correlated with increased delinquency and antisocial behavior in children); *see also* WALLERSTEIN & BLAKESLEE, *supra* note 52, at 257 (stating that their studies revealed that adolescents' psychological well-being and self-esteem were particularly vulnerable when the children were deprived of relationships with their fathers, the noncustodial parents).

108. Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications, in* JOINT CUSTODY AND SHARED PARENTING 111, 115 (Jay Folberg ed. 1984).

109. Scott & Derdeyn, *supra* note 60, at 489.

of positive characteristics" for the child to model, and the child has a "greater variety of cognitive and social stimulation."[110]

A joint physical custody arrangement creates substantial contact with both parents, which lessens the losses that accompany a divorce.[111] By more closely approximating the situation a child was in before the divorce, the child's best interests are served because meaningful relationships with both parents are maintained.[112] A joint physical custody arrangement allows children to reap the benefits of continued significant contact with both parents,[113] and the children are in a better position to avoid the negative impact created by the absence of one parent.[114]

Another benefit of joint physical custody is a higher incidence of paying child support.[115] In a study published in 1998, researchers found a correlation between higher child support payments and joint physical custody arrangements.[116] The researchers believed this correlation was supported by the monitoring theory,[117] which states that when a parent making financial contributions to the other parent is able to see how the money is spent, the payor will be more inclined to make the child support payments.[118]

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110. Clingempeel & Reppucci, *supra* note 23, at 92-93; *see also* Schepard, *supra* note 95, at 705 (stating that regular contact with both parents increases the quality of parenting the child receives).

111. WALLERSTEIN & BLAKESLEE, *supra* note 52, at 257.

112. *See* Scott & Derdeyn, *supra* note 60, at 489 (discussing studies that found a positive impact on children who had frequent contact with both parents after divorce).

113. *See id.* (stating that several researchers have found that frequent contact with both parents is associated with positive adjustment in children).

114. *See id.* (stating that studies have shown that the absence of the father, the noncustodial parent, is correlated with increased delinquency and antisocial behavior in children); *see also* WALLERSTEIN & BLAKESLEE, *supra* note 52, at 257 (stating that their studies revealed adolescents' psychological well-being and self-esteem were particularly vulnerable when the children were deprived of relationships with their fathers, the noncustodial parents).

115. *See* Margaret F. Brinig & F. H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393, 423 (1998) (stating "[o]ur joint-custody dummy variable was also significantly and positively correlated with child-support ratios, as predicted by monitoring theories"); *see also* Schepard, *supra* note 95, at 706-07 (discussing a study that found fathers who regularly visited their children paid their child support more consistently than fathers who visited less or not at all). At the time of this writing, North Dakota's child support guidelines did not provide a method for calculating child support in joint physical custody arrangements. Knutson v. Knutson, 2002 ND 29, ¶ 20, 639 N.W.2d 495, 502. To determine child support, a court must determine "the needs of the child and the ability of the parent to pay." *Id.* However, a current amendment to the child support guidelines will address the issue of joint physical custody. *Proposed* N.D. ADMIN. CODE § 75-02-04.1-08.2 (2002).

116. Brinig & Buckley, *supra* note 115, at 423.

117. *Id.*

118. *Id.* at 393. When the payors do not have frequent access to their children, they assume that some of their financial contributions are being misspent. *Id.*

Increased frequency in child support payments is in a child's best interests for a number of reasons. It raises a child's standard of living.[119] It can also reduce or eliminate anxiety over financial matters, which negatively impact everyone, including the child. Reliable child support payments also provide stability for the child.

Two other advantages to joint physical custody relate to the individual problems associated with the dynamic between a sole custody parent and a noncustodial parent. A sole custody parent has increased child-rearing demands, which can impair the parent's social and recreational life.[120] This situation can detrimentally impact a child by impairing the quality of the custodial parent's relationship with the child.[121] Also, the noncustodial parent can often feel significant emotional distress as a result of becoming marginalized as a parent and losing contact with the child.[122] Because an emotionally distraught parent is unable to completely engage with a child, this situation is detrimental to children.[123] Joint physical custody can alleviate both these problems by giving each parent a more balanced life, which is in a child's best interests because it improves the quality of each parents' relationship with the child.

Based on the important benefits of joint physical custody that are in the best interests of a child, this article argues that it is not in the best interests of a child to perpetuate the legal presumption against joint physical custody.[124] The following section summarizes the various aspects of this article's proposal.

B. SUMMARY

The current custody scheme in North Dakota requires a court to consider the best interests of a child when deciding which parent shall be awarded custody.[125] It is only when a court finds that both parents are equally fit under the best interest factors that joint physical custody is an option. Because domestic violence is taken into account in the best interest factors, joint physical custody would never be awarded when either parent has committed domestic violence.[126] Another premise of this proposal is

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119. *See* Barnes, *supra* note 59, at 624 (stating that failure to pay child support increases poverty among single parent families).

120. Clingempeel & Reppucci, *supra* note 23, at 95.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. N.D. CENT. CODE § 14-09-06.2(1) (1997).

126. *Id.* § 14-09-06.2(1)(j).

that the issue of joint physical custody would only be before the court if both parents wanted sole custody or if one parent wanted sole custody and the other parent recommended joint custody. Therefore, court-ordered joint physical custody would never be forced upon a parent who does not request custody of a child.

Frequently throughout this article, the example of a rotating custody arrangement of every two weeks or every month has been used.[127] This is primarily to eliminate any force in the argument that frequently moving a child between parents is detrimental.[128] Also, a schedule that only requires moving the child a few times a month between households is probably more appropriate in a court-ordered joint physical custody arrangement because neither parent or only one parent requested joint physical custody. Less moving between the parents makes it easier to comply with the arrangement. A joint physical custody arrangement that moves the child more often between the parents, such as a day-to-day rotation, has a greater chance of success only when the parents agree to it. In a voluntary situation, the parents have contemplated the greater amount of communication needed in a day-to-day rotation and have voluntarily committed themselves to make it successful.

Considering the advantages of joint physical custody,[129] this article proposes eliminating the presumption against it. This would also eliminate the need for the judge to "bite the bullet," which requires making a choice between two equally fit parents.[130] Because North Dakota law currently presumes that joint physical custody is not in the best interests of a child, the following section provides a roadmap for a lawyer to argue for joint physical custody under that presumption.

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127. Clingempeel & Reppucci, *supra* note 23, at 96. Two researchers have noted that the duration of stay with each parent and the frequency of shifting between households "are probably important influences that mediate the effect of joint custody on children." *Id.*

128. Mosley v. Figliuzzi, 930 P.2d 1110, 1112 (Nev. 1997). One court has noted that the most extensive study addressing this issue has demonstrated that alternating children between households does not have "the degree of adverse impact on children that is predicted by" the critics of joint physical custody. *Id.* at n.1.

129. Clingempeel & Reppucci, *supra* note 23, at 91; Scott & Derdeyn, *supra* note 60, at 489.

130. *See* Kaloupek v. Burfening, 440 N.W.2d 496, 499 (N.D. 1989) (Levine, J., dissenting) (referring to a situation where the trial court had to decide between two equally fit parents as having to "bite the bullet").

V. MAKING A CASE FOR JOINT PHYSICAL CUSTODY UNDER CURRENT NORTH DAKOTA LAW

Until North Dakota eliminates its presumption against joint physical custody, a lawyer must prove that joint physical custody is in the best interests of a child.[131] How does a lawyer prove this when the current law states that joint physical custody is not in the best interest of a child?[132] To answer this question, it is helpful to give the rule a more accurate definition. While the North Dakota Supreme Court has uniformly required courts to state that joint physical custody is in the "best interests" of a child, a more accurate phrase for the rule is that a court may grant joint physical custody in "exceptional circumstances."[133]

A review of the joint physical custody cases where the supreme court has either affirmed or reversed the award[134] demonstrates that it will approve the award only if certain exceptional circumstances exist. Viewing the case law from an "exceptional circumstances" perspective combines the varying strength presumptions into one cohesive rule.[135]

One exceptional circumstance that a lawyer must demonstrate is that the parents are able to cooperate.[136] In the only case with a definitive ruling

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131. Peek v. Berning, 2001 ND 34, ¶ 20, 622 N.W.2d 186, 193.

132. *See* Knutson v. Knutson, 2001 ND 238, ¶ 19, 639 N.W.2d 495, 502 (citing *Peek*, ¶ 19, 622 N.W.2d at 192) (stating "[i]t is not generally in the best interest of a child to be bandied back and forth between parents in a rotating physical custody arrangement").

133. When both parents come out equal under the best interests analysis of section 14-09-06.2 of the North Dakota Century Code, then a joint physical custody arrangement should be in the best interests of a child because both parents meet the child's best interests. The North Dakota Supreme Court has never identified the additional factors that a trial court should look at to determine whether joint physical custody is in the best interests of a child. Some states have held that joint physical custody should only be awarded in exceptional circumstances. *See* Ruffridge v. Ruffridge, 687 So. 2d 48, 50 (Fla. Ct. App. 1997) (stating that a court should only award rotating custody in an exceptional case); *In re* Marriage of Divelbiss, 719 N.E.2d 375, 383 (Ill. Ct. App. 1999) (quoting Davis v. Davis, 380 N.E.2d 415, 418-19 (Ill. Ct. App. 1978)) (stating that courts should only make alternating custody awards in exceptional situations); Brauer v. Brauer, 384 N.W.2d 595, 598 (Minn. Ct. App. 1986) (stating that joint physical custody is appropriate only in exceptional cases).

134. For this purpose, this article only uses *Jarvis*, *Kaloupek*, *Lapp*, and *DeForest* because the other joint physical custody cases were remanded for the district court to determine whether the award was in the child's best interests. *See generally* Jarvis v. Jarvis, 1998 ND 163, 584 N.W.2d 84; Kaloupek v. Burfening, 440 N.W.2d 496, 497 (N.D. 1989); Lapp v. Lapp, 293 N.W.2d 121 (N.D. 1980); DeForest v. DeForest, 228 N.W.2d 919 (N.D. 1975). The remanded cases could not provide any guidance regarding whether the unique facts of those situations were appropriate for joint physical custody because the supreme court neither approved nor disapproved of joint physical custody in those situations. While *Knutson v. Knutson* was brought to the supreme court on a motion to vacate instead of a direct appeal, it nevertheless provides some guidance, so it is discussed later as well. Knutson v. Knutson, 2002 ND 29, ¶ 1, 639 N.W.2d 495, 497.

135. *See* discussion *supra* Part II.

136. *See Jarvis*, ¶ 36, 584 N.W.2d at 92 (quoting LITTLE, *supra* note 4, § 13.01[1], at 13-7).

on the subject, the father was very angry with his former spouse, and the trial court noted the animosity between the parents and the fact that the parents communicated "very little."[137] Therefore, if the parents are at war, a court will not award joint physical custody. With this extreme situation as a guidepost, it is difficult to recognize the outer boundaries.

Other jurisdictions provide some guidance for this factor. The focus for whether parents can cooperate is based upon whether the parents will be able to communicate regarding their children with the primary concern being the parents' ability to give priority to the children's best interests.[138] When the record reflects only "minor skirmishes" between the parents and they were otherwise generally able to make decisions about their children, joint physical custody may be awarded.[139]

Another difficult issue with the parental cooperation factor is determining to what degree the parties would truly be in conflict with each other. When engaged in a divorce, parents are usually at a higher level of conflict than normal. "The parties are upset by their failed marriage, by the presence of third parties, by the need for or unwillingness to pay support, by disagreements over the allocation of property, and by the gamut of emotions that accompany divorce proceedings."[140] A lawyer will want to ensure that the district court is not unduly swayed by the lower level of cooperation that usually accompanies child custody proceedings.

A second exceptional circumstance is that the children should not be very young.[141] Children who are "very young" include infants and preschool children,[142] so once a child is five years old or older, the exceptional circumstance of age would likely be met. Even before the North Dakota Supreme Court announced the age requirement, its cases were implicitly recognizing this requirement, with one exception.[143]

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137. *See id.* ¶ 37. In a Minnesota case, a court refused to award joint custody where the animosity between the parents was so intense that the court prohibited them from communicating with each other. Greenlaw v. Greenlaw, 396 N.W.2d 68, 74 (Minn. Ct. App. 1986).

138. LITTLE, *supra* note 4, § 13.06[1], at 13-38 to 13-39.

139. Nolan v. Nolan, 486 N.Y.S.2d 415, 419 (N.Y. App. Div. 1985) (stating that the parents' relationship was not "fraught with severe antagonism or hostility," and the parents had been able to cooperate on matters involving their children, so joint physical custody was appropriate).

140. Davis & Yazici, *supra* note 73, at 349.

141. *See In re* Lukens, 1998 ND 224, ¶ 15, 587 N.W.2d 141, 145 (quoting LITTLE, *supra* note 4, § 13.06[4], at 13-45).

142. *Id.* (quoting LITTLE, *supra* note 4, § 13.06[4], at 13-45).

143. *See* DeForest v. DeForest, 228 N.W.2d 919, 921 (N.D. 1975) (reversing a joint physical custody award when the child was only four years old); Lapp v. Lapp, 293 N.W.2d 121, 123 (N.D. 1980) (affirming a joint physical custody award when the child was six years old). *But see* Kaloupek v. Burfening, 440 N.W.2d 496, 497 (N.D. 1989) (affirming a joint physical custody award when the child was only two years old). Because *Kaloupek* was decided prior to *In re Lukens*, to the extent the supreme court did not consider the child's young age in *Kaloupek*, that

A third exceptional circumstance is that the parents must live in a fairly close geographic location.[144] While the North Dakota Supreme Court has never explicitly acknowledged this factor, it is arguably one borne of common sense.[145] If a trial court has awarded joint physical custody on a biweekly or monthly alternating basis, it is simply a matter of logistics that the parents should live close together to facilitate this arrangement. This factor also fits with the requirement that the children be of school age. The parents should live in the same geographical area to allow the child to attend the same school regardless of which parent is exercising custody.[146]

In order to argue a successful case for joint physical custody under current North Dakota law, a lawyer must first have a situation where the children are at least five years old. Then, if the parents are able to cooperate regarding their children and the parents live within the same geographical area, a trial court is more likely to grant joint physical custody.

VI. CONCLUSION

Numerous legal scholars have argued for a presumption in favor of joint physical custody,[147] and some states have legislatively adopted such a presumption.[148] This article does not make such an argument.[149] However,

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portion of the opinion is possibly overruled. *See Lukens*, ¶ 15, 587 N.W.2d at 145 (stating that rotating custody in the case of very young children is not preferred).

144. *See* Knutson v. Knutson, Civ. No. 00-0100, slip op. at 2 (E.C.N.D. Aug. 10, 2001), *aff'd*, Knutson v. Knutson, 2002 ND 29, ¶ 22, 639 N.W.2d 495, 502 (affirming a joint physical custody award when both parents lived in Fargo); *DeForest*, 228 N.W.2d at 921 (reversing a joint physical custody award when the mother lived in Grand Forks and the father lived in Bismarck); *Lapp*, 293 N.W.2d at 123 (affirming a joint physical custody award when the mother and father both lived in Bismarck); *Kaloupek*, 440 N.W.2d at 497 (affirming a joint physical custody award when the mother and father both lived in Grand Forks).

145. Steinman, *supra* note 102, at 411. Other courts have recognized this as an important consideration. *See, e.g.*, Kelly v. Kelly, 926 P.2d 1168, 1169 (Alaska 1996) (stating that divided physical custody is typically awarded to parents who live in the same community); Doyle v. Doyle, 955 S.W.2d 478, 481 (Tex. Ct. App. 1997) (stating that the proximity of the parents' residences is an important consideration).

146. *See* Jasper v. Jasper, 351 N.W.2d 114, 117 (S.D. 1984) (quoting Langerman v. Langerman, 336 N.W.2d 669, 672 (S.D. 1983)) (stating "frequent shifting of schools can greatly interfere with the education and proper rearing of children and [may] not be in their best interest"). *But see* Flora v. Flora, 707 S.W.2d 793, 794 (Ky. Ct. App. 1986) (affirming a yearly joint physical custody award that required the children to change school districts annually).

147. Brian J. Melton, Note, *Solomon's Wisdom or Solomon's Wisdom Lost: Child Custody in North Dakota—A Presumption that Joint Custody is in the Best Interests of the Child in Custody Disputes*, 73 N.D. L. REV. 263, 295-96 (1997); Barnes, *supra* note 59, at 617-18; Davis & Yazici, *supra* note 73, at 352; Paradise, *supra* note 69, at 576.

148. *See, e.g.*, IDAHO CODE § 32-717B (Michie 2002); LA. CIV. CODE ANN. art. 132 (West 1999); LA. REV. STAT. ANN. § 9:335 (West 1997); MISS. CODE ANN. § 93-5-24 (2002); MO. REV. STAT. § 452.375 (1997).

149. This article has only analyzed joint physical custody from the perspective of the best interests of the child because that is the standard in North Dakota. Others have advanced further benefits of joint physical custody that do not relate to the best interests of the child. *See, e.g.*,

after having a presumption against joint physical custody for over twenty-five years, it would be just as drastic to institute a presumption in favor of joint physical custody as it was to create one against it in 1975. Also, all of the studies used in this article that have found either benefits or no harm resulting from joint physical custody have argued that more research is needed before their results can be considered definitive.[150]

If there is to be a presumption in favor of joint physical custody, that decision should come from the legislature. It would be for that body to decide whether the policy of North Dakota should be to favor joint physical custody. The legislature could embrace benefits of joint physical custody beyond those discussed in this article.[151] Its deliberations could also encompass more studies on the benefits of joint physical custody.[152]

The most important point is that custody awards should always be individualized decisions. Every family is different, and custody awards should fit each particular situation. Some of the social science studies used in this article do not provide a universal prediction for how particular people will act. For example, some noncustodial parents suffer significant emotional distress, but that is not true in every case. Therefore, some of the benefits of joint physical custody will not apply in every situation.

As a general principle, it is undisputed that children benefit from significant continuous contact with both parents after a divorce. This factor alone should give parents and courts pause when determining an appropriate custody award. To continue a presumption against joint physical

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Davis & Yazici, *supra* note 73, at 352 (stating that a presumption in favor of joint physical custody would eliminate most of the custody litigation, which would reduce the strain on the court system); Frederic W. Ilfeld, Jr. et al., *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, 139 AM. J. PSYCHIATRY 62, 65 (1982) (concluding that there was less relitigation of the custody decision in joint custody arrangements as opposed to exclusive custody arrangements).

150. *See* Brinig & Buckley, *supra* note 115, at 394 (stating "[m]ore research is needed on the relation between joint-custody laws, child support, and divorce"); Steinman, *supra* note 102, at 414 (stating that more research needs to be done before "embracing joint custody as a broadly applicable policy"); WALLERSTEIN & BLAKESLEE, *supra* note 52, at 270 (stating that larger studies are needed to assess the effects of joint custody); *see generally* Clingempeel & Reppucci, *supra* note 23 (describing the gaps in the research on joint custody).

151. *See, e.g.*, Ilfeld et al., *supra* note 149, at 65 (concluding that joint custody arrangements are not relitigated as often as exclusive custody arrangements); Brinig & Buckley, *supra* note 115, at 423 (arguing that a presumption in favor of joint physical custody might reduce divorce rates); Davis & Yazici, *supra* note 73, at 352 (stating that a presumption in favor of joint physical custody would reduce the strain on the court system).

152. Even someone trained in the relevant social sciences can easily overlook important studies on joint physical custody. *See* Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 124 (1987) (stating that people can be aware of the important studies on a social science topic only if they have diligently kept current with the literature on that particular topic).

custody only makes it more difficult to choose it as the appropriate custody award in the proper case.