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LOVED AND LOST: BREATHING LIFE INTO THE RIGHTS OF NONCUSTODIAL PARENTS

*Life is pleasant. Death is peaceful. It's the transition that's troublesome.*¹

I. INTRODUCTION

Imagine the following scenario:² Clifford was a seven-year-old boy. His parents, Charlie and Amy, divorced when he was five years old. While Amy had full legal custody of Clifford, she and Charlie shared physical custody. Clifford lived with Amy, but Charlie had visitation, which he routinely utilized.

One day, while riding his bicycle, Clifford was hit by a car. Although he was rushed to the hospital, Clifford sustained severe brain damage, and he failed to regain consciousness. Unable to breathe or eat on his own, Clifford was placed on life-support machines in order to keep him alive. A month after the accident, Clifford's doctors approached Amy to give her the medical news she had been dreading. The doctors believed Clifford was not going to regain consciousness, and they told Amy she needed to consider removing him from life-support. Amy refused. However, Charlie agreed with Clifford's doctors, believing that keeping Clifford on life-support would only prolong his son's pain and suffering. Charlie threatened that he would take Clifford's case to court to remove him from the life-support machines. Fearing a long and expensive legal battle, Amy consented to disconnect Clifford's life-support.

Forced to take Clifford off life-support, Amy was furious with Charlie for not supporting her decision. As Amy was planning Clifford's funeral, she maintained her anger towards Clifford's father. She made all of the burial decisions without allowing Charlie to participate. He believed that his son should have been cremated, not buried. On the day of the funeral, she refused to permit Charlie to enter the funeral home or attend his child's funeral.

The above scenario is entirely possible under the current legal system. Statistics reveal that nearly half of all marriages end in divorce, and forty percent of all children have divorced parents.³ The high

¹ The Quotations Page, www.quotationspage.com (last visited Oct. 11, 2005) (quoting Isaac Asimov).

² The scenario is entirely hypothetical and not based on real persons.

³ Stephen J. Bahr, *Social Science Research on Family Dissolution: What It Shows and How It Might Be of Interest to Family Law Reformers*, 4 J. L. FAM. STUD. 5, 5 (2002); see also William V.

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divorce rate and number of children who have divorced parents increases the likelihood of the above scenario because at present, the parent who has legal custody has total authority to make life-support and burial decisions for his child.⁴ Giving the custodial parent the sole right to make end-of-life decisions leaves the parent without legal custody, despite being regularly involved in the child's life, unable to participate. Additionally, while state statutes generally define who has the authority to make end-of-life decisions, the statutes fail to distinguish between parents who are married and parents who are divorced.⁵ The statutes' failure to distinguish between married parents and divorced parents has led to contradictory court decisions and confused parents.⁶

This Note proposes a model life-support and a model burial rights statute to address the decision-making authority problem and to provide a clear standard for courts and parents to follow in life-support and burial disputes.⁷ Part II of this Note discusses the rights of parents in different custody arrangements, how life-support and burial decisions are generally made, and how the courts have dealt with disputes

Fabricius & Sanford L. Braver, *Separated and Unmarried Fathers and the Courts: Non-Child Support Expenditures on Children by Nonresidential Divorced Fathers: Results of a Study*, 41 FAM. CT. REV. 321 (2003) (calling the increase in the divorce over the last half-century the "divorce revolution"); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers To Parent*, 153 U. Pa. L. Rev. 921, 924 (2005) (stating that each year approximately one million children have parents who divorce or separate).

⁴ See *infra* notes 28-30 and accompanying text. End-of-life disputes may be even more likely for the children of divorced parents because they are more likely to have "poorer physical health." Heather Crosby, *The Irretrievable Breakdown of the Child: Minnesota's Move Toward Parenting Plans*, 21 HAMLINE J. PUB. L. & POL'Y 489, 505 (2000) (quoting Diane N. Lye, Ph.D., *What the Experts Say: Scholarly Research on Post-Divorce Parenting and Child Well-Being*, in REPORT TO THE WASHINGTON STATE GENDER AND JUSTICE COMMISSION AND DOMESTICS RELATIONS COMMISSION 10 (June 1999)).

⁵ See, e.g., ALA. CODE § 22-8A-11 (2004) (listing "one of the patient's parents" as a potential surrogate decision-maker for incompetent patients); IND. CODE ANN. § 25-15-9-18 (West 2001) (listing the decedent's surviving parents as a class of interment decision-makers); KY. REV. STAT. ANN. § 311.631 (Michie 2004) (listing the parents of the child as surrogate decision-makers); TEX. HEALTH & SAFETY CODE ANN. § 166.035 (Vernon 2001) (listing the patient's parents as the persons who may make a health care directive for those under the age of eighteen); TEX. HEALTH & SAFETY CODE ANN. § 711.002 (Vernon 2005) (declaring that either parent may make the interment decisions). *But see* MO. ANN. STAT. §§ 194.119(2)(3)(a)-(c) (West 2004) (distinguishing between married and divorced parents in allocating interment decision-making authority).

⁶ Compare *Tully v. Pate*, 372 F. Supp. 1064 (D.S.C. 1973) (applying custody case law to determine which parent had burial decision-making authority), *with In re Admin. of K.A.*, 807 N.E.2d 748 (Ind. Ct. App. 2004) (using the state's interment statute to allocate decision-making power between divorced parents).

⁷ See *infra* Part IV.

between parents over burial and life-support decision-making power.⁸ Next, Part III of this Note analyzes how traditional custodial decision-making power is allocated and how the distribution methods are inapplicable and unwise once the child is deceased or unable to sustain life other than by artificial means.⁹ Finally, Part IV proposes two model statutes to change and clarify the allocation of end-of-life decision-making power for the children of divorced parents.¹⁰ The goals of the proposed statutes are to give both parents equal rights when making end-of-life decisions if both want to be involved and to provide methods for avoiding or resolving any disputes that may arise when the parents cannot agree during the decision-making process.¹¹

II. BACKGROUND

Parents have the right to participate in the decision-making process due to the parent-child relationship.¹² Part.II.A begins with a discussion of the rights inherent in the parent-child relationship and how courts divide these rights when the parents divorce.¹³ Next, Part.II.B reviews the rights of loved ones in making decisions concerning life-support and the disputes that can arise when parents of divorced children have to make life-sustaining treatment decisions.¹⁴ Finally, Part.II.C examines the burial decision-making process and how disputes can occur between family members, specifically between divorced parents, over the right to bury their child.¹⁵

A. *Parental Rights and Child Custody*

Parents have the special right to make decisions regarding their children, and a court divides these rights between parents when it enters a custody order.¹⁶ The court determines custody and allocates decision-making power between parents by applying the best interests test when creating the custody order.¹⁷ Despite the specificity of the custody

⁸ See *infra* Part II.

⁹ See *infra* Part III.

¹⁰ See *infra* Part IV.

¹¹ See *infra* Part IV.B.

¹² See *infra* notes 19–24 and accompanying text.

¹³ See *infra* Part II.A.

¹⁴ See *infra* Part II.B.

¹⁵ See *infra* Part II.C.

¹⁶ See *infra* Part II.A.1.

¹⁷ See *infra* Parts II.A.2, II.A.3.

orders, disputes still arise between parents over certain decision-making rights.¹⁸

1. Parental Decision-Making Rights

Parents possess both inherent and legally created rights regarding their children because of the parent-child relationship.¹⁹ Included in the rights that arise from the parent-child relationship is the right of parents to make decisions regarding their children.²⁰ Parents have the right to

¹⁸ See *infra* Part II.A.4.

¹⁹ See CONN. GEN. STAT. ANN. § 45a-606 (West 2004) (stating that the parents are the natural joint guardians and both the mother and father have equal power over their children); MISS. CODE ANN. § 93-13-1 (2004) (stating that the father and mother have natural joint custody over their children); OHIO. REV. CODE ANN. § 2111.08 (2003) (“The wife and husband are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare, and education and the care and management of their estates.”); R.I. GEN. LAWS § 33-15.1-1 (1995) (stating that the husband and wife are joint guardians of their minor children and are charged equally with their care, nurture, welfare, and education); TENN. CODE ANN. § 34-1-102(a) (2005) (stating that parents have a natural and legal duty to provide an education for their children); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981) (stating that parents have the right to “companionship, care, custody, and management” of their children); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (stating that parents have a natural and legal duty to provide an education for their children); 59 AM. JUR. 2D *Parent and Child* § 22 (2002) (stating that common law, statutory law, and natural law require parents to care for their children); LYNN D. WARDLE & LAURENCE C. NOLAN, *FUNDAMENTAL PRINCIPLES OF FAMILY LAW* 504 (William S. Hein & Co. 2002) (stating that parents are their children’s natural and legal guardians); Katherine Connell-Thouez, *Comparative Developments in Alimentary Obligations and Parental Authority: Linking Traditional Rights and Responsibilities To Create an Integrated Structure for Solving the Child Care Dilemma*, 60 TUL. L. REV. 1135, 1136 (1986) (“Parental authority involves the exercise of rights and obligations by parents in the care, both moral and material, of their children.”); Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 807 (1985) (stating that the parent-child relationship gives parents the “right to supervise, care for, and educate their child, the child has a right to receive support and maintenance from his parents, and both have rights to inherit from one another and to recover for injury tortiously inflicted on the other”). Included in the duties of the parent-child relationship is the requirement to pay for the child’s funeral expenses. 59 AM. JUR. 2D *Parent and Child* § 72 (2002). Generally, if the parents have joint custody, the funeral costs are split between the parents. *Id.*

²⁰ *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); see also *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (declaring that the interest parents have to control and care for their children is possibly the “oldest of the fundamental liberty interests”); 59 AM. JUR. 2D *Parent and Child* § 26 (2002) (stating that custody includes the right to make decisions for the child); WARDLE & NOLAN, *supra* note 19, at 579 (stating that the parental right to make decisions is part of the fundamental right to privacy); see also, e.g., TEX. FAM. CODE ANN. § 151.001 (Vernon 2004) (stating that the parent of a child has the right to make medical, legal, religious, and educational decisions for the child). The Supreme Court of the United States has stated that the Fourteenth Amendment protects the parents’ right to determine their child’s upbringing. *Glucksberg*, 521 U.S. at 719. The Court stated that:

make decisions for their children because the law views children as incompetent and thus unable to make decisions for themselves.²¹ Parents retain the right to make decisions so long as their decisions do not cause physical or emotional harm to their children.²² While they are married, parents share decision-making power over their child.²³

The Due Process Clause guarantees more than fair process, and the “liberty” it protects includes more than the absence of physical restraint. . . . The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. . . . [W]e have held that, in addition to the specific freedoms protected by the Bill of Rights, the “liberty” specially protected by the Due Process Clause includes the rights to . . . direct the education and upbringing of one’s children.

Id. at 719–20. There are three potential situations in which the parents’ right to make decisions for their children may be superseded. WARDLE & NOLAN, *supra* note 19, at 504. First, public policy favors allowing someone else, or a surrogate, to make a decision for the child when obtaining a parent’s consent would harm the best interests of the child. *Id.* Second, if the child becomes legally emancipated, the child can make decisions for him or herself without the need for the parent’s support. *Id.* Third, parental consent is not needed in emergency situations when waiting for the parent would cause the child “immediate and irreparable harm.” *Id.* If it is not an emergency, a physician who treats a minor without parental consent is guilty of battery against the child. DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW DOCTRINE, POLICY, AND PRACTICE 762 (West 2003).

²¹ Parham v. J.R., 442 U.S. 584, 603 (1979) (stating that children need parents to make certain decisions for them, such as medical treatment decisions, because children are not yet mature enough to make informed decisions for themselves); WARDLE & NOLAN, *supra* note 19, at 503 (stating that parents have the right to make the decisions for their children because children are considered immature and incapable of making informed decisions until they reach the age of maturity); Jennifer L. Rosato, *The End of Adolescence: Let’s Get Real: Quilting a Principled Approach to Adolescent Empowerment in Health Care Decision-Making*, 51 DEPAUL L. REV. 769, 771 (2002) (stating that children do not have the right to make their own decisions because they lack the “capacity and experience” to make informed decisions). Before they reach the age of majority, children are considered to be “incompetent.” WARDLE & NOLAN, *supra* note 19, at 503. In addition, at a more basic level, parents are the natural decision-makers for their children because they wish to keep them safe and teach them how to take care of themselves, which preserves the human species. See Connell-Thouez, *supra* note 19, at 1138.

²² 24A AM. JUR. 2D *Divorce and Separation* § 930 (1998) (“The essence of custody is the companionship of the child and the right to make decisions regarding his care, control, education, . . . health care, and religious training, without involvement by the court, unless there is danger to the child’s physical health or emotional development.”).

²³ See, e.g., CONN. GEN. STAT. ANN. § 45a-606 (West 2004) (stating that the parents, regardless of gender, have equal power over their children); OHIO REV. CODE ANN. § 2111.08 (2003) (“The wife and husband have equal powers, rights, and duties and neither parent has any right paramount to the right of the other concerning the parental rights and responsibilities for the care of the minor.”); S.C. CODE ANN. § 20-7-100 (Law. Co-op. 1985) (stating that parents have a joint natural custody with equal rights and power).

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However, when parents divorce, a court is responsible for dividing the power to make major life decisions for the child.²⁴

2. Custody Arrangements and Decision-Making Rights

A court divides the parents' decision-making power by creating a new custody arrangement.²⁵ Through a custody decree, the court allocates physical and legal custody between the parents.²⁶ If a parent has physical custody, that parent has the ability to make the day-to-day decisions concerning the child as well as the duty to care for the child while the child is in his physical custody.²⁷ In addition, a court can divide legal custody between the parents.²⁸ If a parent has legal custody, he has the complete right to make all major life decisions for the child.²⁹ Usually, the parent without legal custody does not have any power to

²⁴ Wexler, *supra* note 19, at 807 (stating that when parents divorce, it breaks up the family unit, and any rights or obligations that are a part of the parent-child relationship are divided between the parents); *see also* 59 AM. JUR. 2D *Parent and Child* § 20 (stating that the parents have equal custody until the court divides the custody through a decree).

²⁵ Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 60-61 (1984); *see also* James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 855 (2003) (stating that after a marriage dissolves, the court must determine whether a parent will continue to have the same rights and duties as he had when he was married or if he will only retain the right of visitation); Holly L. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27, 30 (1985) (stating that although parents have equal decision-making power before they divorce, once the marriage dissolves the court reallocates decision-making power between the parents).

²⁶ *See, e.g.,* Shenk v. Shenk, 860 A.2d 408, 412 (Md. App. 2004) (ordering joint legal custody to both parents and primary physical custody to the mother); *see* Danece Day Koenigs, Comment, *Child Custody Arrangements: Say What You Mean, Mean What You Say*, 31 LAND & WATER L. REV. 591, 595 (1996) (stating that custody orders must include provisions addressing physical and legal custody).

²⁷ *See, e.g.,* MINN. STAT. § 518.003 (2004) (defining the physical custodian as the parent who provides "routine daily care" and "control"); WIS. STAT. § 767.001(5) (1983) (defining physical placement as "the right to have a child physically placed" with the parent, and stating that the parent "has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody"); *In re Wesley J.K.*, 445 A.2d 1243, 1247 n.8 (Pa. Super. Ct. 1982) ("Examples of these minor matters are what and when to eat, when to do chores, and when to go to bed.").

²⁸ WARDLE & NOLAN, *supra* note 19, at 865; 2-10 *Child Custody and Visitation* § 10.03 (2004), available at LEXIS File CCVLWP; *see also, e.g.,* Shea v. Metcalf, 712 A.2d 887 (Vt. 1998). In *Shea*, the family court divided legal custody between the parents, but it gave only the father the right to make medical and educational decisions for the children. *Id.* at 888.

²⁹ WARDLE & NOLAN, *supra* note 19, at 865; *see, e.g.,* MINN. STAT. § 518.003 (stating that the parent who has legal custody is entitled to determine the child's upbringing, including education, health care, and religious training); WIS. STAT. § 767.001 (defining legal custody as the "right and responsibility" to make all of the child's major life decisions except for those otherwise allocated by the custody decree).

make major decisions.³⁰ However, the noncustodial parent does retain some rights, such as the right to access the child's medical records and the right to make day-to-day decisions for the child while the child is in his physical custody.³¹

The different types of custody—sole custody and joint custody—allocate physical and legal custody between the parents differently.³² Generally, in a sole custody arrangement, one parent has full legal custody of the child, essentially retaining the same decision-making power he had while the parents were married.³³ The parent with sole custody may also retain physical custody, the parent with sole custody may share custody with the noncustodial parent, or the noncustodial parent may have physical custody of the child.³⁴

³⁰ *Divorce and Separation*, *supra* note 22, § 930 (stating that the essence of custody is the right to make decisions regarding the child and that the court should not become involved unless the decision hurts the child physically or emotionally); *see also, e.g.*, IND. CODE ANN. § 31-17-2-17 (1999) (declaring that the custodial parent determines the child's upbringing, including the child's education and medical care, unless it would hurt the child physically or emotionally); MO. ANN. STAT. § 452.405 (West 2003) (stating that the parent who maintains legal custody has the right to make decisions unless those decisions would hurt the child).

³¹ 2-10 *Child Custody and Visitation*, *supra* note 28, § 10.03. The noncustodial parent is permitted to make the day-to-day decisions for the child in order to avoid interference with his right to visitation. *Id.*; *see also, e.g.*, S.C. CODE ANN. § 20-7-100 (Law. Co-op. 1985) (stating that both the custodial and noncustodial parents have the right to access school records, medical records, and to participate in school activities); TENN. CODE ANN. § 36-6-110(a) (2001) (asserting that the noncustodial parent has the right to have phone conversations at least twice per week; send mail; receive notice of relevant information as soon as practicable but within twenty-four hours of any event of hospitalization, major illness, or death of the child; and to receive the child's medical and school records); WYO. STAT. ANN. § 20-2-201 (Michie 2003) (declaring that a noncustodial parent has the right to access medical and school records and to attend teacher's conferences).

³² *See* Jovana Vujovic, *Family Law Chapter: Child Custody and Visitation*, 5 GEO. J. GENDER & L. 477, 488 (2004) ("Courts may award joint or sole custody.").

³³ WARDLE & NOLAN, *supra* note 19, at 865; *see, e.g.*, ALA. CODE § 30-3-151(4) (2004) (stating that the parent that has sole legal custody has complete "rights and responsibilities to make major decisions concerning the child, including, but not limited to, the education of the child, health care, and religious training"); GA. CODE ANN. § 19-9-6 (2004) (stating that the parent "awarded sole custody of a child shall have the rights and responsibilities for major decisions concerning the child, including the child's education, health care, and religious training"); WIS. STAT. § 767.001(5) (1983) (defining sole legal custody as the "the condition under which one party has legal custody").

³⁴ WARDLE & NOLAN, *supra* note 19, at 865; *see, e.g.*, CAL. FAM. CODE § 3007 (West 2004) (stating that the child resides with and is "under the supervision" of the parent who has sole custody).

However, in a joint custody arrangement, the parents may simultaneously share the physical and legal custody of the child.³⁵ In this type of arrangement, both parents have equal decision-making power regarding the child.³⁶ Because joint custody allocates the power to make decisions concerning the child equally between the parents, courts regularly require that the parents are able to cooperate and communicate with each other effectively.³⁷ The parents need not always agree, but they must be able to make decisions for their children together when necessary.³⁸ Even if the court finds that both parents are dedicated

³⁵ WARDLE & NOLAN, *supra* note 19, at 865. Jurisdictions vary over whether they award joint custody. *Divorce and Separation*, *supra* note 22, § 940. In addition, joint custody may be awarded as joint legal custody only or joint physical custody only. *See, e.g.*, ALA. CODE § 30-3-151 (2004) (defining joint custody as including joint legal and joint physical custody, joint legal custody as allowing both parents equal decision-making power over their children, and joint physical custody as shared physical custody between the parents in order to promote “frequent and substantial contact with each parent”); IND. CODE ANN. § 31-9-2-67 (1999) (stating that parents who have joint legal custody have equal decision-making authority, including decisions concerning education, medical care, and religion); VA. CODE ANN. § 20-124.1 (Michie 2004) (defining joint custody as joint legal custody, joint physical custody, or any combination of joint legal and joint physical custody); *see also In re Wesley J.K.*, 445 A.2d 1243, 1247 n.8 (Pa. Super. Ct. 1982). In *Wesley*, the court stated that:

There are two basic versions of joint custody: joint “legal” custody and joint “physical” custody. The former consists exclusively of the shared decision making function. The latter has the additional component of shared residence. That is, under joint physical custody the children live with each parent on an equal or split-time basis. Thus, in a sense, minor as well as major decisions are made by both parents where there is joint physical custody.

Id.

³⁶ Vujovic, *supra* note 32, at 488 (stating if the parents have joint physical custody, the child “spends a significant amount of time with each parent”).

³⁷ WARDLE & NOLAN, *supra* note 19, at 865; *see also* Leary v. Leary, 627 A.2d 30, 34 (Md. Ct. Spec. App. 1993) (stating that it was most important that the parents could communicate well with each other and then asked the mother whether she and the father could make decisions together concerning the child’s religious upbringing and education); Waller v. Waller, 754 So. 2d 1181, 1184 (Miss. 2000) (stating that the most important factor in determining whether to award joint custody is the parents’ ability to communicate with each other); Anderson v. Anderson, 791 P.2d 116, 117 (Okla. Ct. App. 1990) (stating that courts should only award joint custody if parents are likely to cooperate, if they are able to provide a healthy home, and if it will not disrupt the child’s life).

³⁸ 2-13 *Child Custody and Visitation*, *supra* note 28, § 13.06; *see also* Barton v. Hirshberg, 767 A.2d 874, 881 (Md. Ct. Spec. App. 2001); Rosenfeld v. Rosenfeld, 529 N.W.2d 724, 726 (Minn. Ct. App. 1995) (stating that although the parents often did not get along, they were able to put aside their differences when needed). In *Barton*, the parents practiced two different religions: the father was Jewish and the mother was Christian. 767 A.2d at 878. The father filed for sole legal and physical custody because the mother had not raised the son according to the Jewish faith, failed to consult with him on issues of health, and did not follow the visitation schedule. *Id.* at 878-79. The mother then filed suit stating that she wanted sole custody of their son. *Id.* at 879. Even though the mother accused the father of

to their children and are model parents, they still must have a basic ability to communicate in order for the court to award joint custody.³⁹

Increasingly, courts have found that ordering joint custody is in the child's best interests as well as the parents' best interests.⁴⁰ Joint custody arrangements have been found to give parents a greater sense of connection with their child and can also help boost the parents' feelings of self-worth and dignity.⁴¹ However, some courts do not believe that

abuse and the father fought for sole custody, the court found that they should still have joint custody because, in general, they could communicate. *Id.* at 881.

³⁹ See *Leary*, 627 A.2d at 34 (holding that the mother should have sole custody although the father was a loving parent); see also *In re Wesley J.K.*, 445 A.2d 1243, 1249 (Pa. Super. Ct. 1982) (stating that the parents do not need to have an "amicable relationship," but must be able to put aside their personal conflicts in order to make decisions for their children). In *Leary*, the court refused to award joint custody. 627 A.2d at 34. Originally, the trial court awarded sole custody to the mother, but later she wanted the court to award joint custody between herself and the father. *Id.* at 32. The trial court held that the mother should have sole custody, even though it said that both parents were "dedicated and devoted" and "sincerely love[d] their children." *Id.* at 35. The court gave the mother sole custody because the mother was "more mature" than the father, "more sincere, more realistic in her approach to life and [was] better equipped to plan for the future best interests of the minor children." *Id.* The court also acknowledged that there were many examples of the parents' inability to communicate with each other. *Id.*

⁴⁰ See 2-12 *Child Custody and Visitation*, *supra* note 28, § 12.06 (stating that joint custody benefits the parents and the children). Many states statutorily presume that joint custody is in the best interest of the child. *Vujovic*, *supra* note 32, at 488. Also, more parents are trying to obtain joint custody. Katherine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 8 (2002). But see Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 502 (1998) (arguing that joint custody may not be the best situation for children or parents, especially if the court forces the parents into a joint custody agreement). Singer and Reynolds instead believe that a custody arrangement where one parent has full decision-making power and the other parent has a large amount of visitation rights could achieve the same goals as a joint custody arrangement. *Id.*

⁴¹ 2-12 *Child Custody and Visitation*, *supra* note 28, § 12.06; see also *Burchell v. Burchell*, 684 S.W.2d 296, 300 (Ky. Ct. App. 1984) (stating that joint custody benefits the parents, the children, and society in general, and that "the continued involvement of both parents in the vital decisions to be made have been extolled in the popular media as well as legal treatises"); *Wesley*, 445 A.2d at 1247 (stating that the child is less likely to be used as a weapon against the parent in a joint custody arrangement because "in sole custody, the custodial parent can frustrate the visiting rights of the non-custodial parent, and short of going back to court, the visitor has no way of enforcing his or her rights"). In *Wesley*, the court stated that the parent with sole custody has a better opportunity to portray the noncustodial parent in a negative light. 445 A.2d at 1247. However, in a joint custody arrangement, "neither parent has a superior legal advantage and is therefore less likely to take unfair advantage of the other." *Id.* The court reasoned that both parents have a recognized right to make decisions concerning their children, and therefore "neither parent can obtain concessions by threatening to prevent the other from seeing the child; nor can one make a major decision without consulting the other." *Id.* The court also explained that

ordering a joint custody arrangement is appropriate.⁴² For example, one court has stated that it is not in the best interests of the child to “shunt” them back and forth between homes.⁴³ However, whether the parents receive joint or physical custody depends upon the factors the court uses to determine custody.⁴⁴

3. Approaches to Determining Custody

The approach courts use to determine whether to award parents joint or sole custody is the best interests standard.⁴⁵ Under this standard,

in not allowing the non-custodial parent to have any decision-making power, it assigns them a “second-class status.” *Id.*

⁴² Bartlett, *supra* note 40, at 21. Bartlett states that joint custody is really not as popular as it seems. *Id.* at 21–22. She uses Oregon as an example, which requires parents to agree to the terms of a custody order before a court may award the custody order and indicates that other states discourage joint custody. *Id.* at 24–25.

⁴³ Brauer v. Brauer, 384 N.W.2d 595, 598 (Minn. Ct. App. 1986). In *Brauer*, the court stated that, “[r]egularity in the daily routine of providing the child with food, sleep, and general care, as well as stability in the human factors affecting the child’s emotional life and development, is essential, and it is difficult to attain this regularity and stability where a young child is shunted back and forth between two homes.” *Id.* In this case, the court did not award joint custody. *Id.* at 599.

⁴⁴ See *infra* Part II.A.3.

⁴⁵ See Vujovic, *supra* note 32, at 486 (stating that all fifty states require courts to apply the best interests standard when making a custody or visitation decision); see also, e.g., CAL. FAM. CODE § 3040 (West 2004) (declaring that child custody shall be awarded in accordance with the best interests of the child); IND. CODE ANN. § 31-17-2-8 (West 2004) (stating that the court shall determine custody based on the best interests of the child). At English common law, only the father had the right to custody of the child. Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 695 (1985). The child was the property of the father, and he had complete control over the child’s life and death. Crosby, *supra* note 4, at 492. In addition, courts viewed fathers as more able than mothers to provide financially for their children. Vujovic, *supra* note 32, at 480. Then, at the end of the nineteenth and beginning of the twentieth centuries, the industrial revolution changed the courts’ views about awarding custody only to the father. *Id.* In the new industrial-based economy, men began to work outside the home to earn wages, leaving mothers responsible for raising the children and managing the home. Schepard, *supra* at 696. At the same time, courts began to view children as more than property, and courts became concerned instead with the children’s best interests. Crosby, *supra* note 4, at 492–93. Because mothers had more contact with their children than the fathers, courts deemed that favoring mothers when awarding custody was in the best interests of the child. Vujovic, *supra* note 32, at 480. Known as the tender years doctrine, the courts presumed mothers to be more capable of nurturing young children and gave mothers complete legal and physical custody and fathers limited visitation. Schepard, *supra* at 696–97. In the 1960s, ninety percent of custody cases gave the mother custody of the children. Koenigs, *supra* note 26, at 595. Because the courts had an automatic presumption in favor of awarding custody to mothers, they failed to truly evaluate what custody arrangement was in the best interests of the child. Crosby, *supra* note 4, at 495. Beginning in the 1970s, more women began to enter the workforce, and courts moved away

a court is most concerned with establishing a custody order that furthers what is in the best interests of the child.⁴⁶ Generally, courts have found that stability and continuity are in the child's best interests.⁴⁷ Therefore,

from the presumption that awarding custody to the mother was in the child's best interest, instead applying a more neutral best interests test. Vujovic, *supra* note 32, at 480.

⁴⁶ 59 AM. JUR. 2D *Parent and Child* § 30 (2002) (stating that in determining the best interests of the child, the court considers "only those facts that directly affect the child's well-being, and must avoid assigning too much weight to any one particular factor in determining child custody"); WARDLE & NOLAN, *supra* note 19, at 863.

⁴⁷ See, *In re Alexander C.*, 760 A.2d 532, 534 (Conn. App. Ct. 2000) (stating that continuity and stability of the child's environment are important in determining the best interests of the child); *In re Paternity of M.J.M.*, 766 N.E.2d 1203, 1210 (Ind. Ct. App. 2002) (stating that when a court makes a custody determination, continuity and stability are important factors); *Ketchum v. Ketchum*, 882 So. 2d 631, 637 (La. Ct. App. 2004); *Bower v. Bower*, 758 So. 2d 405, 410 (Miss. 2000) (stating that the best interests of the child include determining which parent was the primary custodian of the child before the parents separated as well as stability of the home environment); *Jasper v. Jasper*, 351 N.W.2d 114, 117 (S.D. 1984). Stability and continuity are just two common factors among many that state statutes include in the best interests analysis. See Vujovic, *supra* note 32, at 481-85. Some common factors used in the best interest analysis include:

- (1) the child's physical, emotional, mental, and religious and social needs;
- (2) each parent's ability and desire to meet those needs;
- (3) the child's preference, provided that the child is of sufficient age to articulate and comprehend such a preference;
- (4) the parents' preferences;
- (5) the child's interaction with her parents and siblings;
- (6) whether one parent was the primary caretaker;
- (7) the bond between the child and each parent;
- (8) the suitability of the existing custody and visitation arrangement, including whether it has provided a stable environment to which the child is well-adjusted;
- (9) the parent's ability and willingness to encourage the child's relationship with the other parent and cooperate in decisions regarding the child's welfare;
- (10) any history of domestic violence, child abuse, or child neglect;
- (11) substance abuse by a parent or member of household;
- (12) each parent's criminal record;
- (13) the mental and physical health of all involved;
- (14) parent's bad-faith, coercion or duress in negotiating the custody agreement;
- (15) the child's age and sex;
- (16) each parent's moral fitness and
- (17) the child's cultural background.

Id. For example, Indiana's custody statute declares that the following factors must be considered to determine the best interests of the child:

- (1) The age and sex of the child.
- (2) The wishes of the child's parent or parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with: (A) the child's parent or parents; (B) the child's sibling; and (C) any other person who may significantly affect the child's best interests.
- (5) The child's adjustment to the child's: (A) home; (B) school; and (C) community.
- (6) The mental and physical health of all individuals involved;
- (7) Evidence of a pattern of domestic or family violence by either parent.
- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

when making a custody determination, courts examine the relationship each parent had with the child during the parents' marriage.⁴⁸

Despite its wide-spread use, critics argue against the best interests approach because they claim it is only a "policy goal and not an administrable legal standard."⁴⁹ Therefore, reforms in allocating custody have been designed to guide parents toward better decision-making for their children.⁵⁰ For example, courts increasingly allow, and some require, parents to define their own custody arrangement for their children.⁵¹ In creating their own custody order, parents are forced to

IND. CODE ANN. § 31-17-2-8; *see also, e.g.*, CAL. FAM. CODE § 3011 (West 2004) (listing the factors that the court must take into consideration as the "health, safety and welfare of the child"; whether there were any allegations of abuse; whether one parent had primary care taking responsibility; "the nature and amount of contact with both parents"; and whether either parent used alcohol or drugs); MINN. STAT. § 257.025 (Supp. 2004) (listing the wishes of the parties; the child's preference; the primary caretaker relationship; the child-parent relationship with each parent; the "child's adjustment to home, school, and community"; the length of time the child has spent in their current surroundings; the mental and physical health of the parents and the child; the ability of the parents to love and care for the child; and the child's cultural background as best interests factors).

⁴⁸ 2-10 *Child Custody and Visitation*, *supra* note 28, § 10.09. Although the parents' past involvement with the child is not the only consideration, it is used in several best interests custody statutes. Bartlett, *supra* note 40, at 16. However, in West Virginia, the parents' prior relationship with the child is the sole determining factor when a court awards custody. *Id.* Known as the primary caretaker approach, it reasons that all else being equal, custody should go to the person who has taken responsibility for the child by doing things like cooking, cleaning, and making the medical care decisions. 2-10 *Child Custody and Visitation*, *supra* note 28, § 10.09.

⁴⁹ Bartlett, *supra* note 40, at 15-16. In addition, the belief that parents can be trusted to make wise decisions for their children is gaining more credence. Andrew Kaplan, *The Advantages of Mediation in Resolving Child Custody Disputes*, 23 RUTGERS L. REC. 5 (1999), available at <http://www.lawrecord.com> (follow "Archives" to volume 23).

⁵⁰ Bartlett, *supra* note 40, at 5. ("Parents are increasingly able to determine their own arrangements after divorce, with the state's role directed toward facilitating parental-decisionmaking rather than bringing about its own preferred outcomes."). In this article, the author points to several different methods that have grown in popularity recently. *See generally* Bartlett, *supra* note 40. The purpose of parenting plans is "to focus parents' attention on their children when financial or emotional issues might otherwise direct their attention elsewhere." *Id.* Courts are also requiring mandatory parenting education classes. *Id.* In addition, parents are seeking more involvement in their children's lives. *Id.* at 8.

⁵¹ *Id.* at 6; *see also, e.g.*, ALA. CODE § 30-3-153 (2004) (stating that parents must submit a parenting plan if they are seeking joint custody); ARIZ. REV. STAT. ANN. § 25-403 (Supp. 2004) (requiring a parenting plan before awarding joint custody to the parents); COLO. REV. STAT. ANN. § 14-10-124 (West 2005) (stating that parents may provide the court with a parenting plan, allocating decision-making rights); MASS. GEN. LAWS ANN. ch. 208, § 31 (Supp. 2004) (stating that if there is a custody dispute or the parents want joint custody, they must submit a parenting plan); MO. ANN. STAT. § 452.375 (Supp. 2004) (stating that the court shall consider the parenting plan submitted by the parents when making its custody decision); MONT. CODE ANN. § 40-4-234 (2003) (stating that in all custody proceedings

provide greater specificity in allocating exact decision-making power.⁵² Through the creation of a parenting plan, parents specifically allocate their decision-making rights and designate a method for resolving future disputes.⁵³

4. Parental Disputes Over Decision-Making Rights

Although the court allocates different powers between the parents when it issues a custody decree, disputes may still arise between the parents over the right to make certain decisions.⁵⁴ If brought to court, custody disputes tend to be expensive, time-consuming, contentious, and damaging to the long-term needs of the family.⁵⁵ Alternatively, there is a growing trend towards the use of mediation in custody and visitation disputes because it is considered to be in the best interests of the child.⁵⁶ Proponents claim that mediation helps resolve divorce

parents must submit a parenting plan); WASH. REV. CODE ANN. § 26.09.181 (West 2005) (stating that parents must submit a parenting plan to the court).

⁵² See Bartlett, *supra* note 40, at 5.

⁵³ Crosby, *supra* note 4, at 510. A parenting plan is “[a] plan that allocates custodial responsibility and decision-making authority for what serves the child’s best interests and that provides a mechanism for resolving any later disputes between parents.” BLACK’S LAW DICTIONARY 1147 (8th ed. 2004).

⁵⁴ Priscilla Day, *When Parents Can’t Agree: Representing the Parent Who Shares Legal Custody*, 11 J. CONTEMP. LEGAL ISSUES 532, 532 (2000). Although the court may have specifically delineated decision-making authority over certain areas, such as education and health, there may be changes that create unforeseen disagreement. *Id.* For example, parents may form new attitudes toward religion or the type of education their children should receive. *Id.*

⁵⁵ 2-10 *Child Custody and Visitation*, *supra* note 28, § 10.07; see also, e.g., Kloberdanz v. Kloberdanz, No. 4-596/04-1100, 2004 Iowa App. LEXIS 882, at *7 (2004) (stating that the parties’ custody modification case was “contentious” and “expensive”); see also Kaplan, *supra* note 49, at 4 (stating that, when it comes to custody disputes, the adversarial method is “antiquated,” “ineffective,” and inherently has the potential for conflict); Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 FAM. L.Q. 617, 628 (1999) (stating that custody and other family law disputes are “often time-consuming, expensive, and cumbersome, with some aspects of the dispute being adjudicated more than once”).

⁵⁶ Kaplan, *supra* note 49, at 5 (stating that although mediation may not always solve all issues that arise during the divorce process, “referral to mediation for child custody will make a significant contribution to the restoration of equilibrium in the family and serve the best interests of children”); see also Gary D. Williams, Note, *Weighing the Costs and Benefits of Mediating Estate Planning Issues Before Disputes Between Family Members Arise: The Scale Tips in Favor of Mediation*, 16 OHIO ST. J. ON DISP. RESOL. 819, 819-20 (2001) (declaring that mediation is widely used to resolve family disputes). One-quarter of states require parents to use mediation to resolve custody and visitation disputes. Bartlett, *supra* note 40, at 11. Most states do not allow mediation when there has been domestic violence and some do not allow it when there have been allegations of alcoholism or when previous mediation attempts have been unsuccessful. *Id.* at 13.

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disputes because it encourages parents to create their own solutions to conflicts.⁵⁷ Additionally, mediation allows couples “to address emotional issues; to understand, or at least listen to, each other’s concerns; to build a means for resolving future disputes; and to reach an agreement that meets their unique needs.”⁵⁸ Also, mediation permits parents to address their concerns without having to alter the original custody arrangement.⁵⁹ Similar to parenting plans, mediation allows parents more input into the decisions concerning their child.⁶⁰

However, when disputes do come before a court, the court usually does not make the decision. Instead, it chooses which parent should have the decision-making authority.⁶¹ The court may temporarily or permanently change the custody order to evidence the change in the decision-making power.⁶² For example, a change in the child’s medical condition is one issue that may require modification of the custodial allocation of power or enforcement of the original custody order.⁶³

In *Gorman v. Zeigler*,⁶⁴ the court modified the original custody decree, thereby modifying the medical decision-making power of the parents.⁶⁵

⁵⁷ Williams, *supra* note 56, at 838. See generally Roger C. Clapp, *Family Law Disputes Cry Out for Mediated Settlements*, 53 DISP. RESOL. J. 34 (1998).

⁵⁸ Williams, *supra* note 56, at 838. Mediation is also highly recommended when the parents have joint custody. Gregory S. Forman, *Joint Legal Custody: What Is It? Why Have it?*, 12 S. CAROLINA LAWYER 18, 20 (2000).

⁵⁹ See Forman, *supra* note 58, at 20 (“The key to a well-drafted mediation provision is to allow the parties a meaningful opportunity to resolve their disputes without the necessity of seeking a modification of the joint legal custody arrangement.”).

⁶⁰ Kaplan, *supra* note 49, at 827.

⁶¹ 2-10 *Child Custody and Visitation*, *supra* note 28, § 10.07.

⁶² *Id.* § 10.01; see, e.g., WYO. STAT. ANN. § 20-2-204 (Michie 2005) (stating that parents can petition to modify custody but must show a material change in circumstances).

⁶³ See *Barnes v. Barnes*, 549 N.E.2d 61, 66 (Ind. Ct. App. 1990) (holding that the mother, who was the custodial parent, must consult with the father before making medical expenses); *Senatore v. Senatore*, 58 Pa. D. & C. 4th 564, 564 (Pike Ct. C.P. 2000). The parents in *Senatore* originally shared legal custody of their son. *Id.* The father disagreed with the mother’s decision to give their ten-year-old son antidepressant medication. *Id.* at 565. The court held that under the joint custody agreement, the father should have been consulted before giving the medication to his son and that medical treatment should terminate until the parents could come to an agreement as to his treatment. *Id.* at 569. Medical decision-making is just one example of the many issues that can arise when the decision-making power inherent to the parent-child relationship is divided between the parents through a custody decree. See, e.g., *Andros v. Andros*, 396 N.W.2d 917, 923 (Minn. Ct. App. 1986) (terminating a joint legal custody arrangement and awarding sole legal and physical custody to one parent because the parents disagreed over their child’s religion). In *Andros*, the court held that the parents’ inability to cooperate had created an emotional health problem for their children. *Id.* at 922.

⁶⁴ 690 N.E.2d 729 (Ind. Ct. App. 1998).

After their daughter developed a serious medical condition, both parents were actively involved in making medical decisions for her.⁶⁶ However, after some time, the mother filed an emergency petition for custody because she wanted to take her daughter out of the state for a special treatment program.⁶⁷ The court granted the mother temporary custody of the daughter for the duration of the daughter's medical treatment.⁶⁸ It reasoned that the parents, who normally had the authority to make these decisions together, were unable to make a joint decision quickly enough in this situation.⁶⁹ The daughter's serious illness and the parents' dispute over treatment changed her needs dramatically, affected her best interests, and changed the underlying basis for the custody decree.⁷⁰

As shown in *Gorman*, although a court fully allocates the decision-making authority when it orders joint or sole legal custody, disputes may still arise between parents.⁷¹ Another decision that may cause a dispute between parents is the decision to take their child off life-support.⁷²

⁶⁵ *Id.* at 734. When the parents originally separated, the court granted the mother temporary custody of their children, and the father was granted visitation rights. *Id.* at 731. However, the mother took the children with her when she moved from Indiana to California. *Id.* The father then petitioned the court to have the children returned. *Id.* After the court ordered that the children be returned to Indiana, the parents agreed to a joint legal custody arrangement. *Id.* The father was granted primary physical custody, and the mother received visitation rights. *Id.*

⁶⁶ *Id.* at 731. Doctors discovered that the daughter had a brain tumor shortly after she went to live with her father. *Id.* She had to have brain surgery to have the tumor removed, and both parents met with their child's doctor to discuss her treatment options. *Id.* At the meeting, they came to a joint decision to allow their child to receive a certain type of chemotherapy treatment. *Id.*

⁶⁷ *Id.* After the mother and father made the decision together, the mother formed doubts and did her own research regarding treatment options. *Id.*

⁶⁸ *Id.* at 732. The mother filed the "petition for change of custody," claiming that her daughter's treatment was an "extreme emergency," which was required in order to modify the child's custody. *Id.* at 731-32. The court held that her treatment was an extreme emergency and ordered the mother to return her daughter to Indiana and the father once treatment ended. *Id.* at 732. However, the daughter remained in her mother's custody after the treatment ended. *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 733. The court also found that the mother was better able to care for her daughter during the treatment. *Id.* at 734. Therefore, the court held that the mother would be more able to meet her daughter's emotional and physical needs during treatment. *Id.*

⁷¹ *See supra* Part II.A.4.

⁷² *See infra* notes 92-106 and accompanying text.

B. *Life-Support Decisions and Disputes*

Similar to medical treatment disputes, parents may also disagree over whether to remove their child from life-support.⁷³ Competent adults are legally capable of making the decision to end life-sustaining treatment directly, either through a living will or by appointing a representative as power of attorney.⁷⁴ However, if the patient is legally incompetent, such as a child, then state statutes and courts appoint a surrogate to make decisions for the patient.⁷⁵ Because parents are typically surrogate decision-makers for their children, they may become embroiled in disputes over whether to remove their child's life-support.⁷⁶ If a life-support dispute arises, then courts will make the decision, generally applying one of two methods: the best interests standard or the subjective judgment standard.⁷⁷ In addition, mediation has recently been suggested as an alternative approach to resolve disputes between family members over the course of the incompetent's treatment.⁷⁸

1. The Rights of Patients on Life-Support

The United States Supreme Court has held that competent adults have a recognized liberty interest to decline medical treatment, including life-support.⁷⁹ Competent adults retain the right to deny life-support in order to preserve independence and dignity at the end of life.⁸⁰ By

⁷³ See *infra* notes 92–106 and accompanying text.

⁷⁴ See *infra* notes 79–83 and accompanying text.

⁷⁵ See *infra* notes 84–91 and accompanying text.

⁷⁶ See *infra* notes 92–103 and accompanying text.

⁷⁷ See *infra* Part II.B.2.

⁷⁸ See *infra* notes 117–21 and accompanying text.

⁷⁹ *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997); see also *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (stating that prior decisions support the view that competent adults have the right to refuse life-sustaining treatment); Alicia R. Ouellette, *When Vitalism Is Dead Wrong: The Discrimination Against and Torture of Incompetent Patients by Compulsory Life-Sustaining Treatment*, 79 IND. L. J. 1, 6 (2004) (“[I]n all states, competent patients can refuse any and all treatment.”). In *Glucksberg*, the Court stated that “the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.” 521 U.S. at 725.

⁸⁰ *Glucksberg*, at 716; see also Jennifer L. Rosato, *The Ultimate Test of Autonomy: Should Minors Have a Right To Make Decisions Regarding Life-Sustaining Treatment?*, 49 RUTGERS L. REV. 1, 4 (1996).

Most importantly, life-sustaining treatment decisions shape the definition of one's entire life. These decisions affect one's core values and the way one will live the remainder of one's life. For example, some think it is better to live regardless of the degree of suffering, while others would rather die than be forced to suffer for the remainder of their lives. For others still, living a life of dependency

executing a living will, a competent adult can inform his medical professionals as to his wishes regarding life-sustaining treatment.⁸¹ A living will also reassures the patient that his wishes will be fulfilled should he become incompetent, and it comforts the patient's loved ones who would otherwise be forced to make the decision for the patient.⁸² Adults can also create a health care power of attorney document that specifies the person who will make decisions for the adult if the adult becomes incompetent.⁸³ However, if the patient is legally incompetent, he cannot make life-sustaining decisions for himself.⁸⁴ Instead, state statutes and courts authorize a surrogate, usually a family member, to make decisions for the incompetent patient.⁸⁵

would be intolerable, undermining their core values of independence and autonomy. Failing to allow the patient to make this decision will cause irreparable harm to personhood; therefore, the law should be more respectful of the right to self-determination.

Id. at 13-14.

⁸¹ LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW 290 (Aspen 2002); Albert B. Crenshaw, *Leave a Paper Trail To Save a Ton of Grief*, WASH. POST, May 30, 2004, at F01, available at LEXIS, News & Business, ALLNWS File. Advance medical directives have gained popularity recently. Karen M. Thomas & Michael Precker, *A Living Will Can Help Answer Tough Questions and Avoid Legal Battles*, DALLAS MORNING NEWS, Nov. 20, 2003, available at LEXIS, General News & Information, Dalnws File (stating that since the Terri Schiavo case received widespread media attention, requests at a non-profit organization for living will brochures have increased tenfold). All fifty states recognize advance directives. Lynda M. Tarantino, *Withdrawal of Life Support: Conflict Among Patient Wishes, Family, Physicians, Courts and Statutes, and the Law*, 42 BUFF. L. REV. 623, 634 (1994). However, state statutes that authorize living wills do not allow children to create them no matter how high the child's level of maturity. Rosato, *supra* note 80, at 4; see also, e.g., ARIZ. REV. STAT. ANN. § 36-3261 (West 2003) (stating that an adult may prepare a living will); FLA. STAT. ANN. § 765.302 (West 2005) (stating that only competent adults may make a living will); MINN. STAT. ANN. § 145B.03 (West 2005) (declaring that only competent adults may create a living will); W. VA. CODE § 16-30-4(a) (2004) ("Any competent adult may execute at any time a living will or medical power of attorney.").

⁸² *Directives a Gift to Family*, DESERET MORNING NEWS, Nov. 3, 2003, at A08, available at 2003 WLNR 13520939.

⁸³ HARRIS & TEITELBAUM, *supra* note 81, at 290. A patient is incompetent if he lacks the capacity to make informed decisions. *Id.* A person can lose capacity or may never have had capacity, such as a child or the mentally disabled. *Id.*

⁸⁴ *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 280 (1990). In *Cruzan*, the Court stated that "[a]n incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such a 'right' must be exercised for her, if at all, by some sort of surrogate." *Id.*

⁸⁵ THOMAS L. HAFEMEISTER & PAULA L. HANNAFORD, RESOLVING DISPUTES OVER LIFE-SUSTAINING TREATMENT 10 (1996); see also, e.g., ALA. CODE § 22-8A-11 (2004) (listing those able to make the surrogate decision for patients as a court appointed guardian, a spouse, an adult child, a parent, or an adult sibling); ARK. CODE ANN. § 20-17-214 (Michie 2004) (listing those able to make a decision for a minor or an adult who is incompetent as the legal guardian, parents, spouse, adult child, adult siblings, "persons standing in loco parentis,"

Similar to other incompetent patients, children have the right to refuse medical treatment through a surrogate.⁸⁶ Because a child does not have the ability to decide whether to maintain life-sustaining treatment, the parent makes the decision for the child.⁸⁷ The parental right to act as a surrogate decision-maker stems from the parents' right to make general medical decisions concerning their children.⁸⁸ Parents are in the best position to make that decision because it is presumed that they know and are likely to act in their child's best interest.⁸⁹ The state also

and a majority of the patient's adult heirs at law); DEL. CODE ANN. tit. 16, § 2507 (2003 & Supp. 2004) (listing those able to make decisions in the following order: spouse, adult child, parent, adult sibling, adult grandchild, and adult niece or nephew); IND. CODE ANN. § 16-36-1-5 (West 1999) (also listing a spouse, adult child, parent, adult sibling, adult grandchild, and adult niece or nephew as those able to make decisions); KY. REV. STAT. ANN. § 311.631 (Michie 2004) (listing the patient's judicially-appointed guardian, the person named as durable power of attorney, the patient's spouse, the patient's adult child, the patient's parents, and the patient's nearest living relative). Legislators and courts consider family members to be in the best position to make decisions for the incompetent patient for three reasons. HAFEMEISTER & HANNAFORD, *supra* at 17. First, they are in the best position to know what the patient would have wanted had he been able to decide. *Id.* Second, family members are likely to have the same interests as the patient and therefore they are most likely to promote the patient's interests. *Id.* Third, in general, people would choose a family member to be their surrogate. *Id.*; see also Jennifer L. Rosato, *Using Bioethics Discourse To Determine When Parents Should Make Health Care Decisions for Their Children: Is Deference Justified?*, 73 TEMP. L. REV. 1, 5 (2000) (stating that family members are in the best position to make life-sustaining treatment decisions for their loved ones, and that this is especially true when considering the alternatives).

⁸⁶ ARTHUR S. BERGER, *DYING AND DEATH IN LAW AND MEDICINE* 105 (1993); see also *Parham v. J.R.*, 442 U.S. 584, 600 (1979) ("It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment.").

⁸⁷ HARRIS & TEITELBAUM, *supra* note 81, at 290. This is because minors are not deemed mature enough to make life-support decisions for themselves. *Id.* Children may make the decision for themselves if the court finds that they are mature enough. JAMES M. MORRISSEY & ADELE D. HOFMANN, *CONSENT AND CONFIDENTIALITY IN THE HEALTH CARE OF CHILDREN AND ADOLESCENTS* 15 (1986). According to the mature minor doctrine, a minor is capable of consenting to medical treatment so long as she is "sufficiently mature or intelligent to understand and appreciate the benefits and risks of the proposed treatment." *Id.* The court will look at the age of the patient, the minor's intellectual maturity, and the minor's ability to understand the information needed to make an informed decision. *Id.* at 16. For further discussion on minors making their own decisions concerning life-sustaining treatment, see Rosato, *supra* note 80. The author argues that mature minors should be able to make their own medical decisions. *Id.* at 4. Many states also have statutes that create exceptions to the general parental consent requirement for medical treatment if the medical impairment falls within certain categories, such as treatment for substance abuse, pregnancy, or sexually transmitted diseases. ABRAMS & RAMSEY, *supra* note 20, at 769.

⁸⁸ See *supra* Part II.A.1.

⁸⁹ HAFEMEISTER & HANNAFORD, *supra* note 85, at 35; see also BERGER, *supra* note 86, at 106 (stating that the natural bonds of love and affection guide the parent to make a decision in the best interests of the child).

has an interest in the decision to continue or halt a child's life-sustaining treatment, and it can act as *parens patriae*⁹⁰ if the child's parents do not adequately protect the child's best interests.⁹¹ These three interests are competing and can result in disputes over sustaining the child's life-support.⁹²

For example, in *In re Doe*,⁹³ a thirteen-year-old girl had a degenerative brain disease and was expected to remain incapacitated.⁹⁴ Her parents were married, but they disagreed over whether to end her

⁹⁰ Matthew S. Feigenbaum, Note, *Minors, Medical Treatment, and Interspousal Disagreement: Should Solomon Split the Child?*, 41 DEPAUL L. REV. 841, 855 (1992). *Parens patriae* is "the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

⁹¹ Feigenbaum, *supra* note 90, at 855-56; *see also* *Cruzan v. Dir.*, Mo. Dep't of Health, 497 U.S. 261, 282 (1990) ("[A] State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual."); *Parham*, 442 U.S. at 603 ("Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.").

⁹² *See* Debra Jasper & Spencer Hunt, *Keeping Evan Alive, Barely; Mercy or Hope?*, CINCINNATI ENQUIRER, available at http://www.enquirer.com/extremechoices/loc_extreme_babiesside.html (last visited Sept. 5, 2005) (recounting the story of a two-year-old boy on life support whose parents were arguing over whether the child should receive life-sustaining treatment; the mother wanted to take the child off life-support, but the father wanted everything possible to be done); *see also* *Infant*, CITY NEWS SERVICE, May 15, 2002, available at LEXIS, News & Business, CNS File (describing the ruling in a dispute between a mother and father over whether to remove their child's life-support in which the court held that neither of the parents were fit to make the decision because both were charged with abusing the child). Similarly, there may be disputes between the parents and legally appointed guardians. *See* *Court Rules Boy Must Stay On Life Support*, KANSAS CITY STAR, June 12, 2004, at A8, available at 2004 WL 919470 (describing the dispute between a seven-month-old baby's parents and his court-appointed legal guardian and the court's holding that the boy should remain on life-support during the dispute); *Father Disputes Removal of Son's Life Support*, CANCER WEEKLY, Nov. 9, 2004, at 120, available at 2004 WLNR 4925631 (portraying the dispute between the father of a six-year-old boy who claimed his son had some voluntary movement and a hospital's doctors who pronounced the boy brain-dead, and in which the court ordered a restraining order against the doctors from removing the boy's life-support); Carrie Spencer, *Court: Guardian Can't End Tot's Life Support*, CINCINNATI POST, Dec. 31, 2004, at A3, available at 2004 WLNR 15664261 (describing the dispute between a court-appointed guardian who wanted to remove life-support from a brain-damaged baby and the father who was accused of shaking the baby and causing his injuries).

⁹³ 418 S.E.2d 3 (Ga. 1992).

⁹⁴ *Id.* at 4. Although the girl had medical problems since birth, her doctors believed she would recover. *Id.* However, her condition deteriorated over the following weeks. *Id.* Within one month of entering the hospital, doctors put Jane Doe on a respirator. *Id.* Over the next few months, she had multiple infections and her mental capacity declined. *Id.* Doctors then surgically placed her on breathing and feeding tubes. *Id.*

life-support treatment.⁹⁵ The mother wanted to de-escalate life support treatment while the father did not.⁹⁶ The hospital then sought a declaratory judgment to determine which parent should have the authority to make the decision.⁹⁷ The court held that either parent could revoke the consent for de-escalating life-sustaining treatment if there were two custodial parents who were actively participating in making the medical decisions for the child.⁹⁸

In an unusual case decided by the Superior Court in Georgia, the dispute over whether to keep the child on life-sustaining equipment was between the child's father and the husband of the child's mother.⁹⁹ The life-support was sustaining the mother's body and therefore sustaining the life of the child.¹⁰⁰ The husband of the woman wanted to end the life-sustaining treatment for the mother and the baby.¹⁰¹ However, the father of the child wanted to continue the life-sustaining treatment for the mother in order to keep the child alive.¹⁰² The hospital obtained a court order to keep the woman alive so that the child could survive.¹⁰³ Also, in a recent Iowa case, a court held that it lacked the authority to decide

⁹⁵ *Id.* The doctors discussed signing a do-not-resuscitate order with the parents. *Id.* The mother agreed, but the father did not want to sign the order that would stop the physicians from resuscitating his daughter if she suffered cardiac arrest. *Id.*

⁹⁶ *Id.* The mother then sought a decision from the hospital's ethics committee. *Id.* The committee agreed with the mother that the child's life-support should be de-escalated. *Id.*

⁹⁷ *Id.* The hospital believed that if it continued to aggressively treat Jane Doe it would "[constitute] medical abuse." *Id.* However, it was not asking the court for the power to make the decision for the parents. *Id.* Before the court could render a decision, the mother changed her mind, refusing de-escalation of treatment and disagreeing with the hospital. *Id.*

⁹⁸ *Id.* at 7. The court reasoned that the parents and the medical community were in the best position to make life-sustaining treatment decisions. *Id.* at 6.

⁹⁹ *Ruling by a Court Keeps Fetus Alive*, N.Y. TIMES, July 26, 1986, at 17, available at 1986 WLNR 836059. The wife's husband admitted that he was not the father of his wife's twenty-one-week-old fetus. *Id.*

¹⁰⁰ *Id.* (describing that although the mother was brain dead, she was on life-support because she was five months pregnant).

¹⁰¹ *Id.* At the time the court order was entered, the mother had been on life-support for two months. *Id.* A month after she entered the hospital, her brain stopped functioning and her husband asked hospital officials to discontinue the use of the life-support systems. *Id.*

¹⁰² *Id.* The father of the child asked hospital officials to leave the mother on the respirator and intravenous feeding tube in order to preserve the life of his child. *Id.*

¹⁰³ *Id.* The court held that because the mother was dead, she no longer had a right to privacy and therefore the state could intervene to save the life of the child. *Id.* The state had a paramount interest in protecting the child's life. *Id.* The state's Department of Family and Children Services did not know of any way to determine the custody of the child if the fetus were to survive. *Id.*

whether to remove a divorced couple's daughter from life support.¹⁰⁴ The mother wanted to allow a do-not-resuscitate order to be entered for her daughter.¹⁰⁵ However, the father wanted the child to remain on life-support indefinitely in the hope that she may recover.¹⁰⁶

Although statutory and common law define who may make decisions for the incompetent patient, disputes still arise between family members claiming a right to make decisions for the incompetent patient.¹⁰⁷ Typically, courts are asked to resolve these disputes.¹⁰⁸

2. Approaches to Resolving Disputes

Advances in medical technology, which in turn result in an extension of life, have led to an increase in lawsuits concerning a person's ability to refuse life-sustaining treatment.¹⁰⁹ As shown in the aforementioned cases, family disputes result when family members disagree over a course of treatment for the incompetent patient.¹¹⁰

¹⁰⁴ *Family Debates Future of Baby on Life-Support; Brooklyn's Mother Wants "Do Not Resuscitate Order"*, IOWA CHANNEL, <http://www.theiowachannel.com/news/2039442/detail.html> (last visited Oct. 14, 2005) [hereinafter *Brooklyn Mother*].

¹⁰⁵ *Id.* A do-not-resuscitate order is a "document, executed by a competent person, directing that if the person's heartbeat and breathing both cease while in a hospital, nursing home, or similar facility, no attempts to restore heartbeat or breathing should be made." BLACK'S LAW DICTIONARY 526-27 (8th ed. 2004).

¹⁰⁶ *Brooklyn Mother*, *supra* note 104. However, this case was complicated because the father was the parent at home with the child when the child was in the bathtub and nearly drowned, causing her incapacitation. *Id.*

¹⁰⁷ See *supra* notes 84-106 and accompanying text.

¹⁰⁸ See *infra* Part II.B.2.

¹⁰⁹ See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 270 (1990) (stating that lawsuits over the right to refuse life have "burgeoned" due to important developments in medical technology); see also Robert Gatter, *Unnecessary Adversaries at the End of Life: Mediating End-of-Life Treatment Disputes To Prevent Erosion of Physician-Patient Relationships*, 79 B.U.L. Rev. 1091, 1092 (1999) (stating that disputes over life-support "routinely arise" between patients, family members, and physicians).

¹¹⁰ Martha Bellisle, *End of Life Planning*, RENO GAZETTE-JOURNAL, Nov. 23, 2003, at 1A, available at LEXIS, General News & Information, Reno File; see also Don Colburn & Ashbel S. Green, *Judge Refuses To Reorder Life Support*, OREGONIAN, Nov. 18, 2003, at A01, available at 2003 WL 3837037 (recounting the story of a sister fighting the rest of her family to keep her brother on life support); Bruce Nolan, *Siblings Split Over Ending Life of Mother Stroke Victim's Living Will Does Not Preclude Withholding Food*, TIMES-PICAYUNE, Aug. 12, 2004, at 1, available at 2004 WL 1511429 (narrating the story of an elderly woman on feeding tubes whose children were divided over whether to remove the tubes). The infamous case of Terri Schiavo also illustrates how bitter disputes over ending a loved one's life-sustaining treatment can get. Schiavo was being sustained only through artificial feeding. *Thorny Right-To-Die Case Before Florida High Court*, SEATTLE TIMES, Aug. 31, 2004, at A4, available at 2004 WLNR 1776304. Her husband claimed that she did not want to be on life-support, but her parents refused to remove the feeding tube. *Id.* The dispute went on for six years until

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Courts generally use the following two approaches to resolve disputes regarding life-sustaining treatment when the patient is incompetent: the subjective-judgment standard and the best interests test.¹¹¹ Courts that utilize the subjective judgment standard attempt to determine the patient's preferences if the patient had been able to decide.¹¹² Alternatively, if the patient had never discussed his preferences or the

Florida's Governor Jeb Bush stepped in and ordered, through special legislation, that her feeding tube remain inserted. *Id.* Recently, the Supreme Court of Florida struck down the special legislation, and the governor asked that it reconsider. Jackie Hallifax, *Bush Asks Justices for Rehearing on Schiavo Law*, MIAMI HERALD, Oct. 5, 2004, at 5B, available at 2004 WLNR 6273032. Despite the involvement of both Congress and the President on the side of the parents, Schiavo's husband finally prevailed. William Yardley, *On the Day After, Attending to the Details of Death*, N.Y. TIMES, Apr. 2, 2005, at A8. Terri Schiavo died on March 18, 2005, approximately two weeks after her feeding tubes had been removed. *Id.*

Disagreements between family members may only be a need for time to adjust. HAFEMEISTER & HANNAFORD, *supra* note 85, at 21. Other potential reasons family members may disagree include pre-existing family disagreements; insufficient discussion about the decision; frustration over the patient being sick; and differences in the family members' backgrounds, experiences, culture, ethnicity, and religion. *Id.* at 23. Family members may also disagree because they differ in the ability to understand the medical concepts, "the weight they attach to small probabilities and their relative views on risk taking and risk avoidance; [] their views of the benefits and burdens attached to specific treatments; [] their views about quality of life; or [] their trust in the medical profession." Diane E. Hoffman, *Mediating Life and Death Decisions*, 36 ARIZ. L. REV. 821, 837 (1994). However, in the vast majority of cases, family members are able to agree on a course of treatment for the incompetent patient. HAFEMEISTER & HANNAFORD, *supra* note 85, at 2.

¹¹¹ HAFEMEISTER & HANNAFORD, *supra* note 85, at 18-19; *see also* Melinda T. Derish & Kathleen Vanden Heuvel, *Mature Minors Should Have the Right To Refuse Life-Sustaining Medical Treatment*, 28 J. L. MED. & ETHICS 109, 112 (2000) (stating that courts either use the best-interests test or the subjective judgment approach). *Compare In re Fiori*, 673 A.2d 905, 913 (Pa. 1996) (holding that under the substituted judgment standard a woman could consent to remove her sister from life support), *with In re Guardianship of Myers*, 610 N.E.2d 663, 776 (Ohio 1993) (holding that, under the best interests standard, a minor should be removed from life-support).

¹¹² HAFEMEISTER & HANNAFORD, *supra* note 85, at 18-19. The subjective judgment approach is a "surrogate's good-faith inquiry into the patient's values, beliefs, and lifestyle" to determine what the incompetent patient would have wanted. *Id.* at 18; *see also*, *e.g.*, *In re Roche*, 687 A.2d 349, 352 (N.J. Super. Ct. Ch. Div. 1996) (stating that if a patient is incompetent, the surrogate decision-maker must determine what the incompetent patient would have decided). This approach is further divided into the following two sub-types: the subjective standard and the limited objective standard. Feigenbaum, *supra* note 90, at 865. Using the subjective standard, courts only recognize the "clearly expressed intent" of the individual regarding life-sustaining treatment. *Id.* The court looks only to what that person would choose if the patient were able to choose, even if what the patient would choose is unreasonable. 22A AM. JUR. 2D *Death* § 516 (2003). In contrast, courts that use the limited objective standard consider a substitute judgment if the incompetent patient has not clearly expressed his intent. *Id.* This standard requires some trustworthy evidence that the patient would have decided to withdraw life-sustaining treatment and that the benefits of removing the patient from life support substantially outweigh the burdens of continuing life-sustaining treatment. *Id.*

patient had always been incompetent, such as a child, courts may use the best interests test.¹¹³ Similar to the best interests custody standard courts use when making a custody determination, courts use the life-support best interests test to determine the most beneficial course of treatment for the individual.¹¹⁴ Likewise, courts look at many factors, balancing the possible suffering and pain of the patient against the benefits of keeping the patient on life-support.¹¹⁵ Under this approach, courts do not subjectively judge what the incompetent patient would have wanted.¹¹⁶

In addition to the subjective judgment approach and the best interests test, alternative dispute resolution has been proposed as another method to resolve end-of-life decision-making disputes.¹¹⁷ Alternative dispute resolution is less expensive than litigation because it can proceed more quickly than the judicial system and it takes into account other issues, such as the values and emotions of those involved.¹¹⁸ However, some critics have argued that mediation is not a plausible method for resolving life-support disputes because they believe there are only two sides to the dispute, either terminate life-support or sustain it, and parties on either side are unlikely to acquiesce.¹¹⁹ Nevertheless, proponents claim that mediation will help

¹¹³ Feigenbaum, *supra* note 90, at 866; *see also In re Roche*, 687 A.2d at 352 (stating that if “no reliable evidence of an incompetent’s subjective intent exists, the decision maker should use a pure-objective test, or best interests test”).

¹¹⁴ BERGER, *supra* note 86, at 105 (stating that it is assumed that the patient would have chosen what is in his best interests if he had been able to choose).

¹¹⁵ HAFEMEISTER & HANNAFORD, *supra* note 85, at 19 (finding that courts usually look at objective medical criteria, the amount of enjoyment or suffering the patient will experience, and the likelihood that the patient will recover); *see also In re Roche*, 687 A.2d at 352 (“[T]he net burdens of the patient’s life with the treatment should clearly outweigh the benefits that the patient derives from life, if the guardian is to deny or withdraw treatment.”).

¹¹⁶ Feigenbaum, *supra* note 90, at 867; *see also* BERGER, *supra* note 86, at 105 (stating that the best interests test should be applied when there is not enough information to know what the patient would have wanted in order to utilize the subjective judgment test or when the patient was never competent, such as a child).

¹¹⁷ *See* Glenn Cohen, *Negotiating Death: ADR and End of Life Decision-Making*, 9 HARV. NEGOT. L. REV. 253, 314 (2004) (proposing an alternative dispute resolution model for end-of-life decision-making); Hoffmann, *supra* note 110, at 825 (claiming that mediation is more useful than litigation to resolve termination of life-support disputes).

¹¹⁸ Cohen, *supra* note 117, at 284. Cohen identified six benefits of alternative dispute resolution: (1) it provides a faster resolution to the dispute than litigation; (2) it does not lump solutions into predetermined categories; (2) it allows for confrontation of the values inherent to life-support decisions; (4) it increases “patient autonomy”; (5) it allows those involved in the dispute not only to resolve the dispute but also to address their emotions; (6) alternative dispute resolution has “flexibility in managing multiple parties.” *Id.*

¹¹⁹ *Id.* at 271. The author describes the common criticism of using mediation in end-of-life disputes, that “death and dying decision-making is different; there are only two

family members realize that there really is not a dispute, but only a misunderstanding based on incomplete knowledge of the medical prognosis and views on what the patient would have wanted.¹²⁰ Similar to custody mediation, but unlike litigation, mediation for disputes concerning life-support allows the parties involved to articulate their feelings.¹²¹

Although the courts and statutes have identified who has a superior right to make decisions for incompetent patients on life-support, such as children, disputes still arise. However, disagreements over ending life-sustaining treatment are not the only end-of-life decisions that cause conflicts, as burial decisions are also prone to disputes between family members.¹²²

possible outcomes (discontinue treatment or do not) and the parties are diametrically opposed to one another—there is no place for ADR here.” *Id.*

¹²⁰ *Id.* at 275 (“[C]onflicts [are] often fueled by different perceptions of the medical facts, different understandings of the prognosis, different interpretations of patient behavior . . . and different personal value hierarchies.”). The author also claims that there are not only two options in end-of-life decisions, but a full range of solutions that fall between life and death. *Id.* at 272. The author also states:

ADR does have a role to play even in a dispute as seemingly positional as that of the death and dying context because it may (1) help to resolve “misunderstandings” that the adjudicatory system tends to treat as full-blown “disputes,” (2) identify intermediate options that satisfy both parties and remove the need for rights-oriented dispute resolution, (3) offer a lower form of rights-oriented adjudication when a dispute must be decided, and (4) offer emotional resolution lacking in the typical litigation process. These four benefits will not accrue in every case, but they are important enough and occur often enough to justify implementation of an ADR program that retains litigation as a final step.

Id. at 276. Mediation is based upon the assumption that “there are a variety of solutions to the issues raised all of which are potentially acceptable to the disputants (neither disputant has to lose, both, in fact, can win).” Hoffman, *supra* note 110, at 825. “[F]amily members may disagree about what it is that the patient would have wanted.” *Id.* at 837. Family members may also disagree among themselves as to what is best for the patient. Just as in disputes between providers and family members, this can be due to differences among family members in “(1) their ability to understand important medical concepts; (2) the weight they attach to small probabilities and their relative views on risk taking and risk avoidance; (3) their views of the benefits and burdens attached to specific treatments; (4) their views about quality of life; or (5) their trust in the medical profession.” *Id.* at 837.

¹²¹ Cohen, *supra* note 117, at 276. Allowing family members to air their feelings is especially important because “when feelings are at the heart of what’s going on, they are the business at hand and ignoring them is nearly impossible.” *Id.* at 299. “These cases must include a process for emotional settlement not simply resolution of the ‘legal’ or ‘ethical’ issues.” *Id.* at 825.

¹²² See *infra* Part II.C.

C. *Burial Disputes*

In addition to life-support decisions, interment decisions must be made at the end of a person's life.¹²³ Similar to the life-support statutes, burial right statutes list those who have the right to bury the deceased.¹²⁴ However, disputes often arise between family members, including the parents of divorced children, over the authority to make interment decisions.¹²⁵

1. Burial Decision-Making Rights

Those closest to the deceased generally have the right and duty to ensure that the deceased is buried quickly, properly, and with care.¹²⁶ Many states have statutes that define a hierarchy of decision-making authority over the deceased.¹²⁷ In addition, several states require the

¹²³ See *infra* Part II.C.1.

¹²⁴ See *infra* note 127 and accompanying text.

¹²⁵ See Brian L. Josias, Note, *Burying the Hatchet in Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Interment of Bodies*, 79 NOTRE DAME L. REV. 1141, 1145-46 (2004) (stating that disputes are common and reviewing the several different acceptable methods of interment: burial above ground, burial below ground, cremation, and cryogenic freezing). These decisions will continue to become more difficult as technology advances. *Id.* at 1141. People can also be excluded from the funeral services of the dead. 25A C.J.S. *Dead Bodies* § 6 (2002).

¹²⁶ See *Lum v. Fullaway*, 42 Haw. 500, 516 (1958) (stating that due to public health concerns and respect for the deceased, the next-of-kin have the right and duty to bury a loved one); *Messina v. La Rosa*, 150 N.E.2d 5, 7-8 (Mass. 1958) (stating that a husband has the duty and right to bury his wife); *Caen v. Feld*, 371 S.W.2d 209, 212 (Mo. 1963) (stating that those who have the duty to bury also have a right to bury the deceased, and that a man's daughters had the right and duty to bury their father); *Pettigrew v. Pettigrew*, 56 A. 878, 879 (Pa. 1904) ("When a man dies, public policy and regard for the public health, as well as the universal sense of propriety, require that his body should be decently cared for and disposed of.").

¹²⁷ See, e.g., ARIZ. REV. STAT. ANN. § 36-831 (West Supp. 2004) (declaring that the spouse has the paramount right, followed by parents if the person was a minor, adult children, or any person or organization willing to accept responsibility, and if none of these are available, then the person who is able to pay for the funeral); CAL. HEALTH & SAFETY. CODE § 7100 (West 2004) (listing the order of the persons with right to the deceased's body as the person who has power of attorney, surviving spouse, surviving child or the majority of the surviving children, parents, other next-of-kin, but if there is no family, then the funeral director may make the decisions); MO. ANN. STAT. § 194.119 (West 2004) (listing the hierarchy as the spouse, child if over 18, parent, sibling, next-of-kin, any other relative, any friend that takes the financial responsibility for the deceased's burial, and finally, the county coroner); MONT. CODE ANN. § 37-19-101 (2003) (listing the spouse, majority of adult children, parent, close relative, or someone designated by the deceased in a preneed document); OR. REV. STAT. § 97.130 (2003) (listing the spouse, adult child, either parent, sibling, guardian, or next-of-kin as able to make burial decisions if the deceased did not leave specific written instructions concerning burial); S.C. CODE ANN. § 32-8-320 (Supp. 2004) (declaring that cremation can be ordered by the agent of the estate, then the spouse,

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next-of-kin to follow any interment instructions from the deceased.¹²⁸ The deceased's next-of-kin have the authority to make the interment decisions or carry out the wishes of the deceased because they are considered decisions of trust, and those closest to the deceased are likely to understand that the death affects the many people who were involved in the deceased person's life.¹²⁹ Funeral services provide an outlet for the deceased's loved ones to grieve or to provide comfort to others who are grieving.¹³⁰ Helping to plan the burial or funeral also aids those close to the deceased to come to terms with the death of their loved one, especially when the death is unexpected.¹³¹ However, the interment process can be one that is complex and involves powerful emotions, which may lead to dissension.¹³²

adult children, parents, or the next-of-kin, unless the deceased had designated a method of interment or designated a decision-maker in a preneed document); TEX. HEALTH & SAFETY CODE § 711.002 (Vernon 2004) (listing the order as the person named in a document signed by the deceased, the spouse, the adult children, either parent, any sibling, or the next-of-kin); WASH. REV. CODE ANN. § 68.50.160 (West 2004) (declaring the order as the deceased's spouse, adult children, parents, siblings, or a person designated through a signed document by the deceased).

¹²⁸ See, e.g., CAL. HEALTH & SAFETY CODE § 7100.1 (West 2004) (stating that a person may declare how he wants to be buried in a written instrument or in his will); OR. REV. STAT. § 97.130 (2003)(1) (stating that if an adult prepares a written instrument declaring his preferred method of interment or prearranges an interment method or services, those wishes must be followed); S.C. CODE ANN. § 32-8-320 (2003) (stating that next-of-kin may make interment decisions only if the deceased had not created a preneed document); WASH. REV. CODE ANN. § 68.50.160(1) (West 2004) (stating that people have the right to direct how their remains shall be interred); *In re* Application Pursuant to Article 4200 of Pub. Health Law, 196 Misc.2d 599, 600 (Supreme Court Nassau NY 2003) (stating that although a deceased's next-of-kin usually have the right to make burial decisions, the deceased's wishes are paramount over wishes of the family).

¹²⁹ *S. Life & Health Ins. Co. v. Morgan*, 105 So. 161, 166 (Ala. Ct. App. 1925) (“[T]he right to possession and disposition is in a sense a trust to be exercised for all having affection for the deceased and an interest in seeing the body decently interred.”); *Estes v. Woodlawn Mem'l Park, Inc.*, 780 S.W.2d 759, 762 (Tenn. Ct. App. 1989) (stating that there is a “sacred trust” for the benefit of family and friends who also care about the deceased). Historically, families had the duty to prepare the body for burial because the mortuary industry did not exist until the 1880s. Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 992 (1999).

¹³⁰ Hernandez, *supra* note 129, at 991. By participating in the decision-making process, loved ones of the deceased can show their affection for the deceased, which is “thereby an extension of a caregiver’s role. Furthermore, primary participation in the death ritual is a public acknowledgment of the survivor’s importance to the decedent and vice-versa.” *Id.*; see also *Parker v. Quinn-McGowen Co.*, 138 S.E.2d 214, 215–16 (N.C. 1964) (stating that the next-of-kin have an emotional interest in burying the body of a loved one).

¹³¹ Hernandez, *supra* note 129, at 991.

¹³² Josias, *supra* note 125, at 1145 (stating that making burial decisions places a large amount of pressure on the decision-maker because the decision is usually final); see also Hernandez, *supra* note 129, at 992 (stating that if a deceased’s chosen family bars the

2. Decision-Making Rights and Burial Disputes

Decisions concerning funerals and the disposition of the body are ripe with potential disputes.¹³³ These conflicts can make the loss of a loved one more difficult and can carry on for years after the death.¹³⁴ Typically, interment disputes are resolved in the state court systems.¹³⁵ Courts must make the decisions concerning the funeral and burial for the families, or they must decide who should have the right to make the decision.¹³⁶

Disputes over the interment of the deceased create an even more complicated issue for the divorced parents of a deceased minor child.¹³⁷ Parents may argue over who is allowed to attend the funeral services,¹³⁸ the allocation of the interment costs,¹³⁹ and the method used to dispose

deceased's biological family from attending or participating in the deceased's funeral, it can cause "anguish").

¹³³ See *Enos v. Snyder*, 63 P. 170 (Cal. 1900) (resolving a dispute between wife and the husband's girlfriend over the right to bury the husband's body); Chris Seper, *Widow Finds the Urn Bare, Blames Relatives for Taking Ashes*, PLAIN DEALER (Cleveland), Oct. 27, 2000, at 1B, available at LEXIS, General News & Information, ClevPD File (recounting the family dispute between the wife and the relatives over the cremated husband's remains in which the relatives stole the husband's ashes from the cemetery to scatter in a lake, and the person who took the ashes faced the potential charges of theft and vandalism); Nancy St. Pierre, *Family Dispute Keeps Body at Mortuary; Court Ruling Awaited on Burial Rights*, DALLAS MORNING NEWS, Dec. 4, 1992, at 29A, available at LEXIS, General News & Information, Dalnws File (reporting the story of a husband fighting his wife's parents for the right to bury his wife); *Ted Williams' Daughter Drops Case Against Alcor*, DETROIT FREE PRESS, June 17, 2004, at OE, available at 2004 WLNR 9833374 (stating that Ted Williams' son had a note from his father professing his wish to be cryogenically frozen, but his daughter believed he wanted to be cremated). In addition, the person who has legal custody of the body has legal rights to the body and interference with those rights can create a cause of action. *S. Life*, 105 So. at 167.

¹³⁴ See Seper, *supra* note 133 (reporting a burial dispute that lasted for more than one decade); St. Pierre, *supra* note 133 (reporting that a woman's body was in a funeral home for five months after her death, awaiting either a court order or the woman's family to settle the disagreement over burial arrangement).

¹³⁵ Josias, *supra* note 125, at 1157.

¹³⁶ 22A AM. JUR. 2D *Dead Bodies* § 2 (2003) (stating that courts should be neutral in deciding burial disputes).

¹³⁷ See *infra* notes 138-75 and accompanying text.

¹³⁸ See *Tully v. Pate*, 372 F. Supp. 1064, 1073 (D.S.C. 1973) (holding that the father did not have a right to attend his children's funeral); *Rader v. Davis*, 134 N.W. 849, 850 (Iowa 1912) (holding that the father had no right to attend his son's funeral if the mother did not want him to attend).

¹³⁹ See *Jones v. Jones*, 883 So. 2d 207, 213 (Ala. Civ. App. 2003) (holding that the father was required to pay one-half of the funeral expenses although the mother had full custody); *Peppers v. Smith*, 261 S.E.2d 427, 429 (Ga. Ct. App. 1979) (allowing the mother, the full custodial parent of the deceased child, to bring suit against the father for burial expenses); *Stott v. Stott*, 737 N.E.2d 854, 857 (Ind. Ct. App. 2000) (holding that although the

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of the body.¹⁴⁰ Generally, the parent who has legal custody of the child retains the right to the child's body and to make all decisions concerning the interment.¹⁴¹ For example, Missouri's burial statute states that if a parent has sole custody, then that parent makes all of the decisions concerning the child's burial.¹⁴² If the parents have joint custody, then the parent who lives at the mailing address of the child shall make the decisions.¹⁴³

The court in *Rader v. Davis*¹⁴⁴ resolved a burial dispute between the divorced parents of a deceased child.¹⁴⁵ The father of a young deceased boy brought suit against his ex-father-in-law who did not want the boy's father to attend the funeral.¹⁴⁶ Although the mother had full custody of

mother had full custody of the child, the father had to pay the funeral expenses for his deceased daughter because he had received a settlement from the child's life insurance policy); *Rose Funeral Home, Inc. v. Julian*, 144 S.W.2d 755, 757 (Tenn. 1940) (holding that funeral expenses are a necessity to be paid by the parents, and therefore the father needed to pay one-third of the burial expenses).

¹⁴⁰ See *Tully*, 372 F. Supp. at 1073 (holding that the father had no right to determine how his children should be interred); *Robinson v. Robinson*, 237 S.W.2d 20, 22 (Ark. 1951) (holding that the father had no legal right to control the disposition of the remains of his child); *In re Admin. of K.A.*, 807 N.E.2d 748, 751 (Ind. Ct. App. 2004) (holding that the child's remains should be cremated, agreeing with the father and disagreeing with the mother).

¹⁴¹ *Tully*, 372 F. Supp. at 1073.

¹⁴² Mo. Rev. Stat. §§ 194.119(2)(3)(a)-(c) (2004). The statute states, in pertinent part, that the right of burial belongs to:

- (3)(a) Any surviving parent of the deceased; or
- (b) If the deceased is a minor, a surviving parent who has custody of the minor; or
- (c) If the deceased is a minor and the deceased's parents have joint custody, the parent whose residence is the minor child's residence for purposes of mailing and education

Id.

¹⁴³ *Id.*

¹⁴⁴ 134 N.W. 849 (Iowa 1912).

¹⁴⁵ *Id.* at 850; see also *Robinson v. Robinson*, 237 S.W.2d 20 (Ark. 1951). In *Robinson*, the court held that the custodial parent had the right to possession of the deceased child's body for the purposes of burial. 237 S.W.2d at 22. The father had sole custody, and the mother had visitation rights. *Id.* at 21. However, the custody agreement also stated that if the mother decided to return to California, then she could take the child with her. *Id.* She did so, and the child died in a car accident while in California. *Id.* The court reasoned that the custody decree gave the mother custody of the child once she took the child to California. *Id.* Therefore, the father no longer had custody and no longer had any rights to the possession of his child's body for the purposes of burial. *Id.* at 22.

¹⁴⁶ *Rader*, 134 N.W. at 850. The mother's father owned the home where the child's funeral was held, and he did not want his ex-son-in-law entering his house. *Id.* Therefore, the father could not attend his child's funeral. *Id.*

the small child, the father had regular visitation.¹⁴⁷ The court held that because the mother had full custody of the child, she had the right to make all decisions concerning the child's funeral and burial.¹⁴⁸ The father did not have custody, and thus had no right to attend the child's funeral, to make burial decisions, or to possess his son's body.¹⁴⁹ Reasoning that because the funeral was not held out as a public funeral, the father of the dead child did not have the right to enter his ex-wife's father's home.¹⁵⁰ The court stated that even if the sole reason for barring the boy's father from attending the funeral was to hurt the father, he still would not have a right to attend the funeral.¹⁵¹

Similarly, in *Tully v. Pate*,¹⁵² the court held that the custodial mother had the sole right to make decisions for her children's burial.¹⁵³ In *Tully*, the father of two children was denied attendance at his children's funeral.¹⁵⁴ The mother had a temporary custody order while the parents' divorce was pending.¹⁵⁵ The father brought suit for interference with his

¹⁴⁷ *Id.* at 849. The custody decree stated that the mother was "awarded the full care, custody and control" of her son, and that she had to pay all the expenses of raising her son. *Id.* The decree also gave the father the right to visit his son "at reasonable times and places, without in any manner harassing or annoying the [mother]." *Id.* In a later custody decree, the court recognized that the mother was living with her father and that the home was not "a suitable place" for the boy's father to visit his son. *Id.* Also in this later decree, the father was ordered to pay child support, and if he failed to pay, he would no longer have visitation rights. *Id.* at 850.

¹⁴⁸ *Id.* Although the boy's mother made all of the funeral arrangements for her son, including deciding who should attend the funeral, there was evidence that it was the boy's grandfather who did not want the father in his home. *Id.*

¹⁴⁹ *Id.* The father argued that, although he did not pay child support and had not visited his child since the new decree, the child's illness changed the situation. *Id.* He believed that he should then have been able to visit the child while the child was sick and attend the funeral. *Id.*

¹⁵⁰ *Id.*; see also *Seaton v. Commonwealth*, 149 S.W. 871, 873 (Ky. Ct. App. 1912). In *Seaton*, the extended family of a deceased infant brought suit against the father of the infant because he failed to notify them of the infant's death so that they could be present at the burial. 149 S.W. at 873. The court held that although the relatives may be hurt, they had no legal right to attend the infant's burial. *Id.* The court reasoned that the funeral did not have to be open to the relatives because different customs dictate different types of funerals. *Id.* The court stated that some funerals have been held by strict invitation, some were private, and some were open to the public. *Id.* The court reasoned that only those who had the authority to make the burial decisions had the right to determine who should attend the funeral. *Id.*

¹⁵¹ *Rader*, 134 N.W. at 851.

¹⁵² 372 F. Supp. 1064 (D.S.C. 1973).

¹⁵³ *Id.* at 1073.

¹⁵⁴ *Id.* at 1068. The father also had custody of the three older children from the marriage, and they also were not allowed to attend their sibling's funeral. *Id.*

¹⁵⁵ *Id.* at 1073. Before the mother obtained temporary custody, she took the two children out of state for the Thanksgiving holiday, promising to return a day later. *Id.* at 1067.

burial rights.¹⁵⁶ In its decision, the court reasoned that the mother had sole custody at the time of the children's death and that it was irrelevant if the custody was temporary or permanent.¹⁵⁷ The court reasoned that because divorced parents often already had damaged relationships, they were unlikely to be able to make decisions together concerning a child's burial without inevitably arguing.¹⁵⁸ In the case at hand, the court found this to be true because the parents were prone to disagreeing and the father was probably only pursuing a court case for vindictive reasons.¹⁵⁹ In addition, the court observed that holding otherwise would result in a stalemate where no decision would be reached.¹⁶⁰ Logic dictated that because the custodial parent had the right to make all other decisions, she should also have the right to make this decision.¹⁶¹

Unlike the decision in *Tully*, in *In re Administration of K.A.*,¹⁶² the court held that the custodial parent did not have the sole right to possession of the child's remains.¹⁶³ In this case, the mother of a

However, she did not return and obtained the temporary custody order by telephone. *Id.* at 1067-68.

¹⁵⁶ *Id.* at 1066. The father brought suit against the mother's sister who was making the funeral arrangements while the mother was still in the hospital. *Id.* at 1073. The father brought suit for "malicious, willful, deliberate, and intentional interference with [his] burial rights" and "malicious, willful, deliberate and intentional prevention of attendance" of the father and his other children. *Id.* at 1066.

¹⁵⁷ *Id.* at 1073. The court said that the "question of permanent custody became moot" once the children passed away. *Id.*

¹⁵⁸ *Id.* The court stated:

Given the usual strained relations between divorced or separated parents, the chances are great for disagreement on burial plans. Given the bitterness between the parents in this case, the possibility of agreement between them was extremely remote. In such circumstances one or the other has to make the decisions or else a stalemate would result. The logical conclusion is that the parent having custody should also have the right to make the funeral and burial arrangements.

Id.

¹⁵⁹ *Id.* at 1066.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* The court also stated that awarding the custodial parent the complete right to make all interment decisions was practical:

The courts are saved from extended litigation over dead bodies, and from having the merits or demerits of the causes of the separation and custody re-litigated. The parents are spared having the misfortune of death turned into an instrument for inflicting abuse by one upon the other. The dead are accorded a modicum of respect, rather than being punted from one side to the other.

Id.

¹⁶² 807 N.E.2d 748 (Ind. Ct. App. 2004).

¹⁶³ *Id.* at 751.

seventeen-year-old child had sole legal custody and the father had regular visitation, which was similar to the situation in *Rader*.¹⁶⁴ After their daughter passed away, the parents worked cooperatively, making the funeral arrangements and the decision to have their daughter cremated together.¹⁶⁵ However, the parents could not agree on what to do with their daughter's ashes once she was cremated.¹⁶⁶ The father wanted part of his daughter's ashes.¹⁶⁷ The mother claimed that her daughter wanted her ashes spread in three separate locations.¹⁶⁸ The funeral home refused to release the ashes to either parent until the parents came to a joint decision.¹⁶⁹

The court held that the parents had to split the ashes evenly.¹⁷⁰ Instead of following the decision in *Tully*, the court looked to the state's burial statute and not to the state's child custody laws.¹⁷¹ Because the interment statute did not distinguish between the custodial and non-custodial parents, the court held that they were equally entitled to the

¹⁶⁴ *Id.* at 749. The parties disputed over exactly how much contact he had with his daughter. Ron Browning, *Ashes Split Between Parents*, IND. LAW., May 19, 2004, at 1.

¹⁶⁵ *In re Admin. of K.A.*, 807 N.E.2d at 749.

¹⁶⁶ *Id.* During the parents' original meeting at the funeral home, the mother indicated that she did not want a memorial or headstone for her daughter. *Id.* The mother also stated that she intended to distribute the daughter's ashes in the three locations her daughter had indicated. *Id.* At this time, the father did not object to the mother's decisions. *Id.* However, sometime after this initial meeting, the daughter's stepmother told the mother that she and the father wanted to erect a memorial stone. *Id.* The mother did not object to this idea at the time the stepmother made the statement. *Id.*

¹⁶⁷ *Id.* at 750.

¹⁶⁸ *Id.* The mother claimed that her daughter told her she wanted her ashes spread on the coasts of California, Florida, and North Carolina. *Id.* The father did not believe that those were his daughter's wishes and that even if they were, they would not be binding. *Id.*

¹⁶⁹ *Id.* at 749.

¹⁷⁰ *Id.* at 751.

¹⁷¹ *Id.* The Indiana statute the court used was IND. CODE ANN. § 25-15-9-18 (West 2001):

§ 25-15-9-18. Priority of persons determining final disposition and interment of human remains

Sec. 18. The following persons, in the order of priority indicated, have the authority to designate the manner, type, and selection of the final disposition and interment of human remains:

- (1) The decedent's surviving spouse.
- (2) The decedent's surviving adult child or children. However, if the children cannot agree on the manner of final disposition, the personal representative of the decedent's estate.
- (3) The decedent's surviving parents.
- (4) The personal representative of the decedent's estate.

Id.

remains of their daughter.¹⁷² The court gave half of the girl's ashes to the mother and half to the father.¹⁷³

Similarly, an Illinois court ordered the division of the ashes of a twelve-year-old boy between his parents because the parents could not agree on a form of interment for the child.¹⁷⁴ The mother wanted to bury the child, and the father wanted to have the child cremated.¹⁷⁵ Although the father had full custody, the court did not allow him to have full custody of the child's body.¹⁷⁶ After the court made its decision, the mother backed down because she did not want the child's ashes to be split in half.¹⁷⁷ Therefore, the father was able to bury the child.¹⁷⁸

Although the courts allocate decision-making power when they order a custody decree, disputes still arise between the parents.¹⁷⁹ In addition, while life-support and burial statutes authorize parents to make decisions regarding life-support and burial for their children, parents disagree over the degree of input each parent should have in the decision.¹⁸⁰ However, allowing both parents, whether custodial or non-custodial, to contribute to end-of-life decisions will change the focus of end-of-life decision-making for children of divorced parents from the best interests of the child to the best interests of the parent.

¹⁷² *Id.* The mother argued that the court should have followed the decision in *Tully*. *Id.* Most state statutes, except the burial statute in Missouri, list "parents" as the group in the hierarchy of who is entitled to make either life-support or burial decisions for the dying or deceased. See *supra* notes 127-28, 142 and accompanying text.

¹⁷³ *Id.* The court also stated that the daughter was agreeable to having her ashes separated because she wanted them spread in three different places. *Id.* It also looked to industry standards and found that dividing cremated remains between loved ones is common. *Id.*

¹⁷⁴ *Judgment of Solomon in Burial Dispute*, PRESS ASSOC., June 16, 1994, available at LEXIS, News & Business, PANews File.

¹⁷⁵ *Id.* The father claimed that his twelve-year-old son had once stated that he wanted to be cremated. *Id.*

¹⁷⁶ *Id.* The court ordered the boy's body to be cremated and the ashes to be divided between the parents. *Id.*

¹⁷⁷ *Id.* The representative of the mother stated that the boy's ashes should not be split because "[a] kid ain't no piece of cake." *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See *supra* Part II.A.

¹⁸⁰ See *supra* Part II.B.

III. ANALYSIS

As technology increases, disputes over burial and life-sustaining treatment will become more common for divorced parents.¹⁸¹ However, the goals of the traditional custody decision-making factors should no longer be applicable when determining which parent would be best to make end-of-life decisions for his or her children.¹⁸² Instead, the focus should shift from the best interests of the child to the best interests of the parent.¹⁸³ In addition, courts and statutes have failed to set a discernable standard for determining how much input each parent will have in burial and life-support decisions.¹⁸⁴ If increasing each parent's decision-making authority should lead to a dispute, two possible methods to resolve the dispute exist: parenting plans and mediation.¹⁸⁵ Through the creation of a parenting plan, parents could stipulate how they would want life-support and burial decision-making authority allocated.¹⁸⁶ In addition, mediation, which is increasingly used to resolve other types of custody disputes, life-support disputes, and burial disputes, would also be an effective method to resolve life-support and burial disagreements between the parents of divorced children.¹⁸⁷

Part III.A analyzes how the traditional factors courts use to determine decision-making authority are no longer applicable when the child is dying or deceased.¹⁸⁸ Next, Part III.B argues that allowing both parents to participate in life-support and burial decisions is in the best interests of the parents.¹⁸⁹ Finally, Part III.C analyzes life-support and burial statutes as well as case law in order to illustrate that state legislatures and courts have failed to form a clear and convincing standard for allocating end-of-life decision-making power between divorced parents.¹⁹⁰

¹⁸¹ See *supra* notes 109, 125 and accompanying text (discussing the recent advances in life-support and burial technology).

¹⁸² See *infra* Part III.A.

¹⁸³ See *infra* Part III.B.

¹⁸⁴ See *infra* Part III.C.

¹⁸⁵ See *infra* Part III.D.

¹⁸⁶ See *infra* Part III.D.1.

¹⁸⁷ See *infra* Part III.D.2.

¹⁸⁸ See *infra* Part III.A.

¹⁸⁹ See *infra* Part III.B.

¹⁹⁰ See *infra* Part III.C.

A. *Traditional Decision-Making Allocation Factors Are Not Applicable When Making End-of-Life Decisions*

Currently, end-of-life decision-making power is essentially allocated between parents when the courts issue the original custody decree, ordering either joint custody, allowing both parents to make end-of-life decisions, or sole custody, naming only one parent as the decision-maker.¹⁹¹ When deciding which type of custody to award, the state statutes and courts focus on the best interests of the child, which include factors such as the economic capability of the parents, the amount of time the parents can spend with the child, and the distance between the parents' residences.¹⁹² Although these factors would impact the child while the child is alive and conscious and thus should be considered when deciding whether to award joint custody, these factors should not bear on the ability of both parents to make end-of-life decisions for their children.¹⁹³ Therefore, the best interests factors are generally irrelevant if the child is on life-support or deceased.¹⁹⁴

For example, one of the most important and common criteria courts require before agreeing to award joint custody, thus giving the parents equal decision-making power, is the need for continuity and stability in the child's life.¹⁹⁵ Although it may be important for a child to live in the same surroundings, with the same friends, and answer to the same parental authority figure while the child is conscious and alive, this concern would not be pertinent in determining who should make end-of-life decisions.¹⁹⁶ Because the child is unconscious, he would have no awareness of the stability of his environment and could not be hurt by the absence of continuity. There would be no need to worry about the child being a "shuttle-cock," which occurs when the child is physically and emotionally pushed and pulled between his parents.¹⁹⁷ In addition,

¹⁹¹ See *supra* Part II.A.2 (discussing the different types of custody—sole and joint—and the decision-making authority each type bestows upon each parent at dissolution).

¹⁹² See *supra* notes 46–47 and accompanying text (discussing other factors, such as communication, that the court takes into account under the best interests test).

¹⁹³ See *supra* notes 46–47 and accompanying text (discussing the best interests factors).

¹⁹⁴ See *supra* note 47 (discussing factors such as the child's preference, the child's adjustment to the child's school, and the child's interaction with her parents and siblings, which would not be relevant because the child is unconscious or deceased and therefore cannot have a parental preference, cannot attend school, and cannot interact with her parents).

¹⁹⁵ See *supra* notes 46–47 and accompanying text (discussing continuity as a best interests factor).

¹⁹⁶ See *supra* notes 46–47 and accompanying text.

¹⁹⁷ *Brauer v. Brauer*, 384 N.W.2d 595, 598 (Minn. Ct. App. 1986). While "regularity in the daily routine of providing the child with food, sleep, and general care" may be important

because parental love and dedication is not necessarily a factor considered by the courts under the best interests test, this determination may bar a loving parent from one of the most important and final decisions concerning the child.¹⁹⁸

However, there are some factors that courts take into account in order to determine whether parents are capable of managing a joint custody agreement that still need addressing if both parents are allotted equal rights in making life-support and burial decisions for their children. Both parents would still need the ability to communicate with each other in order to make a final decision for their child.¹⁹⁹ However, even if parents argued in the past and continuously litigated the right to make decisions for their children, courts still allowed them to retain joint custody and thus joint decision-making power.²⁰⁰ Because some courts allow parents to retain their inherent decision-making rights equally after divorce despite the potential of future disagreements between them, courts should also allow both parents to make burial and life-support decisions.²⁰¹

B. Allowing Both of the Parents To Be Involved in Making End-of-Life Decisions Is in the Best Interests of the Parent

While the ability to cooperate and communicate would still be the paramount concern in allowing both parents to make end-of-life decisions for the child, these decisions carry with them more finality than other decisions concerning the child.²⁰² In all other decision-making situations, the parents may later petition the court to modify a prior custody decree in order to gain more authority over their child.²⁰³ However, if the child is dead or sustained only by life support, the parent may not have as much time or would not want to prolong his

enough to deny both parents equal decision-making rights while the child is alive, those reasons would no longer be applicable if the child is unconscious or dead. *See supra* note 28 and accompanying text.

¹⁹⁸ *See supra* notes 45–49 and accompanying text (discussing the best interests test courts use when creating a custody arrangement).

¹⁹⁹ *See supra* note 37 and accompanying text (discussing communication as one of the most common and most important factors when the court decides to award joint custody and thus joint decision-making power).

²⁰⁰ *See supra* note 38 and accompanying text.

²⁰¹ *See supra* note 38 and accompanying text.

²⁰² *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 281 (1990) (stating that the state has an important interest in regulating ending life because of the “overwhelming finality” of those decisions).

²⁰³ *See supra* note 62 and accompanying text.

grief by returning to court.²⁰⁴ In addition, if the parent attempts to alter the custody decree, the court may enact a ruling that does not conform to the wishes of either parent, leaving both parents unhappy.²⁰⁵

While the best interests factors may no longer be applicable because benefits to the child are impossible, allowing both parents to participate in the end-of-life decision-making process could benefit the parents.²⁰⁶ Courts have increasingly found that parents want to be more involved in making decisions for their children, which illustrates that those decisions benefit the parents as well.²⁰⁷ This is especially important because involvement in burial and life-support decisions can help the divorced parents cope with the loss of their child.²⁰⁸

One weakness of allowing both parents to become involved in end-of-life decision-making is the risk of allowing a parent who has not been involved in the child's life to come back and usurp the power to make decisions for the child from the parent who has been involved in the child's life. The parent may try to re-enter the child's life for vindictive reasons or because he feels he should have been involved in the child's life before death.²⁰⁹ However, courts have already addressed this problem within life-sustaining treatment decision-making cases.²¹⁰ Courts could evaluate the extent to which the parents were involved in the child's life before the child was put on life-support or passed away.²¹¹

²⁰⁴ See HAFEMEISTER & HANNAFORD, *supra* note 85, at 103 (stating that parties to a dispute over life-sustaining treatment decisions should first conclude that the dispute is irresolvable before seeking judicial involvement); see also notes 118, 121, 130-31 and accompanying text (discussing loved ones' grief and emotional issues when they are required to make life-support and burial decisions).

²⁰⁵ See, e.g., Day, *supra* note 54, at 536 ("As for the problem of choosing between bickering parents, the court is likely to award legal custody to the parent who appears to be more cooperative, converting the less cooperative parent's legal custodial rights into a privilege of liberal visitation."); *Infant*, *supra* note 92 (describing a judge's ruling not to allow either parent to make the decision to remove the child from life-support).

²⁰⁶ See *supra* Part III.A (analyzing why the best interests standard is no longer relevant when the child is dying or deceased).

²⁰⁷ See *supra* notes 50-53 and accompanying text.

²⁰⁸ See *supra* notes 118, 121, 130-31 and accompanying text.

²⁰⁹ See Robert H. Mnookin & Eleanor Maccoby, *Facing the Dilemmas of Child Custody*, 10 VA. J. SOC. POL'Y & L. 54, 54 (2002) (arguing that parents usually "are strongly attached to the children, strongly committed to their welfare, and have a clear record of having been responsible, fit parents before the separation"); see also HAFEMEISTER & HANNAFORD, *supra* note 85, at 86 (stating that although family members may become involved in life-support decisions for selfish reasons, hospital ethics committees should still meet with them to try to get them to overcome their "selfish interests").

²¹⁰ See *supra* note 98 and accompanying text.

²¹¹ See *supra* text accompanying note 98.

Therefore, by considering how the divorced parents have participated in past decisions, courts could preclude the parent who had never been involved with the child from usurping power from the parent who had been the sole parent to the child.²¹²

Another alleged weakness in allowing both parents to make end-of-life decisions is that the non-custodial parent may go against the custodial parent's decision to be vindictive.²¹³ However, there is an equal risk that the custodial parent may also act only for vindictive reasons in order to deny the non-custodial parent authority to make burial and life-support decisions.²¹⁴ An otherwise loving parent could be excluded from his child's funeral or from determining whether to sustain his child's life-support because the custodial parent had a selfish agenda.²¹⁵

C. *The Courts and Statutes Have Failed To Address End-of-Life Decision-Making Disputes in a Clear and Convincing Manner*

Courts have seemingly begun to recognize that the factors it takes into consideration when it makes an end-of-life decision differ from those factors it routinely take into consideration when making the original custody decree.²¹⁶ In burial dispute cases, the courts have broken from the general tenet that the parent with sole custody has the ultimate authority to make all of the major life decisions for his child.²¹⁷ By either allowing both parents to have rights to possess the body of their deceased child or allowing the non-custodial parent to have a say in the decision-making process, courts have broken from the traditional standard that the parent with legal custody has the sole power to make all decisions for the child.²¹⁸

²¹² See *supra* text accompanying note 98.

²¹³ See *Rader v. Davis*, 134 N.W. 849 (Iowa 1912). In *Rader*, although the court found that there was not any evidence that the father-in-law acted vindictively in keeping the child's father from attending the funeral, if he had acted with vindictiveness, there still would be no cause of action. *Id.* at 851.

²¹⁴ See, *Tully v. Pate*, 372 F. Supp. 1064, 1066 (D.S.C. 1973) ("The court has suspicioned the forum is being used for vindictive pursuit rather than a place where justice is sought.").

²¹⁵ See *supra* text accompanying note 151.

²¹⁶ See, e.g., *In re Admin. of K.A.*, 807 N.E.2d 748, 750-51 (Ind. Ct. App. 2004) (relying on the state's burial statute in order to avoid giving the parent with legal custody sole authority over her deceased daughter's remains).

²¹⁷ See *supra* notes 144-78 and accompanying text (discussing the burial dispute cases and how the court allocated decision-making power in each case).

²¹⁸ See *supra* notes 28-31 and accompanying text (discussing legal custody arrangements and the authority the parent receives from such a custody arrangement); see also *Vujovic*,

However, court decisions have left parents with no discernable or settled standard.²¹⁹ Comparing the decision in *Tully* with the decision in *In re Administration of K.A.*, the courts applied two different standards.²²⁰ In one case, the court applied general custody law, but in the other case, the court applied the state statute pertaining to burial rights without regard to the underlying custody issue.²²¹ Further, most state life-support and burial statutes do not specify which parent has the right to bury a child or to end a child's life support.²²² Instead, these statutes provide only that "parents" have the right to make decisions for a patient.²²³ If parents look to these cases or to state statutes, which do not specify which parent has the right to make burial or life-support decisions for the child, they have no definitive method to determine what rights they would have in regards to each other.

A statute that has addressed end-of-life decision-making and divorced parents bases the burial decision on traditional custody decision-making allocation: The sole custodial parent makes the decision.²²⁴ But, according to the statute, if the child is the subject of a joint custody arrangement, the child's interment decisions are made by the person who lives at the child's mailing address.²²⁵ This method is not logical because there may be many reasons why a child would have a particular mailing address. The child's address does not necessarily demonstrate how much a parent is involved with the child and that the parent would be in the best position to make decisions for the child. An otherwise loving parent could be barred from his child's funeral even if the parents have joint custody.²²⁶ A different standard needs to exist in

supra note 32, at 477 ("Child custody and visitation laws have evolved over time to correspond to changing societal attitudes toward marriage, family and gender.").

²¹⁹ Compare *Tully*, 372 F. Supp. 1064 (using state custody law to determine the respective rights of the parents in making burial decisions), with *In re Admin. of K.A.*, 807 N.E.2d 748 (using the burial statute and not the custody statute to determine decision-making allocation between the parents over their deceased child).

²²⁰ See *supra* notes 150-73 and accompanying text (discussing *Tully* and *In re Admin. of K.A.*).

²²¹ See *supra* notes 152, 170 and accompanying text.

²²² See *supra* notes 85, 127 and accompanying text (discussing the life-support and burial statutes and how the statutes state only "parents" as a class of decision-makers).

²²³ See *supra* notes 85, 127 and accompanying text. This Note only considers the implications of the life-support and burial statutes on a minor and the minor's parents. However, it is important to note that so long as the statutes list "parents" as a general class of decision-makers, it can lead to confusion even for the parents of adult children.

²²⁴ See MO. ANN. STAT. §§ 194.119(2)(3)(a)-(c) (West 2004).

²²⁵ See *id.*

²²⁶ See *supra* notes 137-43 and accompanying text (discussing the rights of the non-custodial parent to participate in burial decisions).

order for parents to plan according to the rights they have in making end-of-life decisions for their children.²²⁷

D. Possible Alternative Methods To Allow Both Parents To Make End-of-Life Decisions

If a dispute should arise or the parents would like to allocate decision-making authority on the chance that a dispute will arise, there are two potential methods that parents could use to aid them in making end-of-life decisions for their children: parenting plans and mediation.²²⁸

1. Parenting Plans

First, parents could determine what method they would use to resolve an end-of-life decision-making dispute or could stipulate which parent should make the final decision in such circumstances in a parenting plan.²²⁹ Just as there is a current trend in allowing parents to utilize mediation, there is also a current trend towards allowing parents to allocate decision-making power in parenting plans.²³⁰ By creating a parenting plan, each parent would have input in the final custody decree, and the parents could address how they would want the decision-making responsibility allocated if their child needs life-sustaining treatment or dies.²³¹ While broaching the topic during the original custody determination could potentially create a problem that may never need to be addressed, it could save time and money by avoiding the issue in the future.²³²

²²⁷ See Tarantino, *supra* note 81, at 647 (stating that the federal government should step in and provide a uniform method for deciding who should make life-support decisions because there are large differences in these statutes that may encourage forum shopping).

²²⁸ See Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Arrangements*, 65 OHIO ST. L. J. 615, 657 (2004) (proposing that parents, not courts, should make custody and therefore decision-making authority decisions).

²²⁹ See Crosby, *supra* note 4, at 510 (stating that parents must discuss how decisions will be allocated when they create a parenting plan).

²³⁰ See *supra* notes 50-53 and accompanying text (discussing the increase in parental participation in creating custody decrees and thus in allocating decision-making power).

²³¹ See *supra* note 53 and accompanying text (discussing parenting plans).

²³² See *supra* notes 55, 118, 134 (stating that litigating custody, life-support, and burial disputes can be expensive and time-consuming).

2. Mediation

Second, parents could use mediation to resolve disputes over whether to remove a child from life-support or how to inter their child.²³³ Mediation has been proposed for burial and life-support termination disputes in general, despite the fact that statutes and case law have long determined which people have the superior right to make those decisions.²³⁴

However, these general proposals have failed to take into consideration any of the custody issues traditionally involved when there is a decision-making dispute between the parents of divorced children.²³⁵ Nonetheless, alternative dispute resolution has proven successful in handling other types of disputes between parents that have conventionally been handled by courts applying traditional custody law.²³⁶ Allowing parents to use mediation if a dispute arises at the end of their child's life would follow the trend of increasing the use of mediation in child custody cases.²³⁷ It is also less expensive and less time-consuming, which permits parents to resolve the life-support and burial decision-making disputes more rapidly than if they had resorted to litigation.²³⁸

IV. CONTRIBUTION

Current state statutes that describe the hierarchy of decision-makers for burial and life-support decisions list only "parents" in general as a class of persons able to make life-support and interment decisions.²³⁹ However, the statutes fail to address the situation of divorced parents.²⁴⁰

²³³ See *supra* note 56 and accompanying text (discussing the prevalence of mediation in resolving traditional custody disputes, and thus asserting that mediation could also be applied to life-support and burial disputes).

²³⁴ See generally Cohen, *supra* note 117 (proposing mediation as an alternative to litigation in order to resolve life-support disputes); Josias, *supra* note 125 (proposing alternative dispute resolution as an alternative to litigation in resolving burial disputes).

²³⁵ See generally Josias, *supra* note 125. Although Josias mentions the *Tully* case and suggests that alternative dispute resolution could be used in disputes between parents, he fails to address the underlying custody issue: complete decision-making power in the hands of the custodial parent. *Id.* Cohen also fails to address the complication of life-support decision-making for divorced parents who would also be subject to custody laws. See Cohen, *supra* note 117.

²³⁶ See *supra* note 46 and accompanying text.

²³⁷ See *supra* note 56 and accompanying text.

²³⁸ See BERGER, *supra* note 86, at 77 (stating that courts should be the last resort in end-of-life decisions).

²³⁹ See *supra* notes 85, 127 (listing examples of life-support and burial statutes).

²⁴⁰ See *supra* Part III.C.

This Note proposes model life support and burial right statutes that distinguish between parents that are still married and parents that are divorced. The statutes create a right for both parents, custodial and non-custodial, to participate in end-of-life decisions for their children. In addition, the model statutes successfully address the inadequacy of current statutes, which only allow the custodial parent to make the end-of-life decisions for the child and fail to distinguish between parents who are married and parents who are divorced:

Life-Support Statute²⁴¹

For any minor or other incompetent patient, any of the following persons, in order of priority stated, when persons in prior classes are not available or willing to serve, may serve as a surrogate for the incompetent adult or minor:

(1) A legal guardian of the patient, if one has been appointed;

(2) *In the case of an unmarried patient under the age of eighteen, the parents of the patient.*

Both parents have the ability to authorize together the withdrawal or withholding of artificially-provided nutrition and hydration of their minor child, if they so choose to be involved, regardless of the custodial arrangement, unless the custody decree or parenting plan specifically states which parent has the authority to withdraw or withhold artificially-provided nutrition and hydration.

If the parents cannot agree on whether to sustain or withdraw artificially-provided nutrition and hydration, then they shall submit to mediation. If after a reasonable effort has been made at mediation by both parents to resolve the dispute the parents cannot reach an agreement, then the court shall determine which parent shall make the decision;

(3) The patient's spouse;

(4) The patient's adult child or, if there is more than one, then a majority of the patient's adult children participating in the decision;

²⁴¹ This model statute is based on ALA. CODE § 22-8A-11 (2004) and ARK. CODE ANN. § 20-17-214 (Michie 2004). The italicized text is the author's contribution.

(5) The parents of a patient over the age of eighteen;

(6) The patient's adult sibling or, if there is more than one, then a majority of the patient's adult siblings participating in the decision;

(7) Persons standing in loco parentis to the patient;
or

(8) A majority of the patient's adult heirs at law who participate in the decision.

Interment Statute²⁴²

The following persons, in the order of priority indicated, have the authority to designate the manner, type, and selection of the final disposition and interment of human remains:

(1) The decedent's surviving spouse.

(2) The decedent's surviving adult child or children. However, if the children cannot agree on the manner of final disposition, the personal representative of the decedent's estate.

(3) The decedent's surviving parents if the decedent is not a minor.

(4) If the decedent is a minor:

Both of the decedent's parents, if they so choose to be involved, regardless of the custodial arrangement, unless the custody decree or parenting plan specifically states which parent has the authority to designate the manner, type, and selection of the final disposition and interment of human remains.

If the parents cannot agree on the manner, type, or selection of the final disposition and interment of the decedent's remains, then they shall submit to mediation. If after a reasonable effort has been made at mediation by both

²⁴² This model statute is based on an Indiana statute. IND. CODE ANN. § 25-15-9-18 (West 2001). The italicized text is the author's contribution.

parents to resolve the dispute the parents cannot reach an agreement, then the court shall determine which parent shall make the decision.

(5) The personal representative of the decedent's estate.

Commentary

The model statutes create a right for the parent who does not have formal decision-making power over the child to have some input into what may be the most difficult decisions of his life. First, the statutes only require that the parents work together to make the burial and life support decisions if they both desire to participate in the decisions. They do not require the custodial parent to alert the non-custodial parent before action can be taken. By not requiring both parents to be present to make a decision, the statutes avoid the potential problem of having to find a non-existent parent who has had no recent contact with the child. Therefore, a parent who has not seen his child for a long period of time, so long as he does not have knowledge that his child is dying or deceased, will not need to be contacted before the parent that has participated in the child's life can render a decision.

In addition, the statutes only require that parents work together if the parent actively tries to become involved in the process. The non-custodial parent does not need to be consulted on all decisions, but if that parent does have an opinion and makes it known, then the parents would need to come to some kind of consensus. By not requiring the non-custodial parent to participate, the statutes avoid the problem of trying to force a parent to participate who otherwise would not be involved in the decision-making process, thereby creating the unnecessary potential for disagreement.

Also, according to the model statutes, both parents will receive the benefits of participating in the decision-making process regardless of the original custody decree. Parents will gain from participating in burial and life-support decisions because involvement in those types of decisions helps the participant in the grieving process. Because the statutes provide a means for parents to grieve, they shift the focus onto the best interests of the parents.

Finally, the statutes foresee that there may be some disagreements between the parents over how the child should be interred or whether the child should be removed from life support. The statutes exempt parents from sharing burial and life-support decision-making power if

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the parents have already allocated the life-support or burial decision-making power in a parenting plan or in the custody decree. In recognizing parenting plans, the statutes give the parents the opportunity to formulate their own decision-making arrangement. In addition, the statutes require immediate mediation between the parents in order to come to a solution if they should disagree. Through mediation, the parents will be able to resolve disputes more quickly, less expensively, and on their own terms.

V. CONCLUSION

End-of-life decision-making for the children of divorced parents is an area of the law that has been inconsistent and unclear. While traditionally the legal custodial parent holds the right to make major decisions for their children, end-of-life decisions, such as termination of life-sustaining treatment and the method of interment, should include both parents if they desire to be involved. By clarifying the respective rights of the parents and allowing both to be involved in the end-of-life decisions, parents will be aware of their rights if their child dies. Although opening up end-of-life decisions to both parents may create some disagreement, parenting plans and mediation can help resolve any disputes. For example, as applied to the hypothetical proposed at the beginning of this Note, the model burial and life-support statutes would have granted Charlie and Amy equal decision-making authority over Clifford. Although they may still have disagreed, mediation would have allowed the two parents to make a decision together, which stands in contrast to the current all-or-nothing approach. Amy would not have been pressured to take Clifford off life-support, and Charlie would have had the right to attend Clifford's funeral.

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