TERMINALLY ILL PARENTS AND THEIR CHILDREN: DETERMINING THE PROPER PLACEMENT OF CHILDREN THROUGH THE BEST INTERESTS OF THE CHILD OR THE PARENTAL PREFERENCE STANDARD

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I. INTRODUCTION

In the media it is commonplace to hear of bitter custody battles between parents fighting over with whom their children will live.¹ Movies and news articles depict this scene over and over again.² However, not all custody disputes revolve around bitter spouses vying for revenge for deeds committed in the past.³ Courts confront custody disputes for a host of other reasons: orphaned children, child neglect, abuse, adoption, and illegitimacy proceedings are just a few to consider.⁴ In most of those situations, the courts apply the best interests of the child ("BIC") standard to determine which home environment and parent is best suited to provide for the child’s well-being.⁵

But is this the best standard to apply in all situations regarding the custody of children? Consider the following hypothetical. A single mother is diagnosed with terminal cancer. After some time passes, she begins to suffer the physical ramifications and limitations that her disease presents in its more advanced stages. Although mentally

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4 Id.
5 Id.
willing and able to provide for her child, this mother becomes physically limited in providing for the child’s basic needs, simply because of her illness. Would the home provided by this mother pass the court’s analysis for the best interests of the child? Or would the home become unsafe to raise a child because the mother could not react to her child’s needs as quickly as she once could?

Most of society would disfavor removing a child from an otherwise loving parent simply because that parent has cancer. However, depending on the analytical standard used by the court, that disfavored result could very much be a reality. As each jurisdiction varies in its approach to custody, if the court focuses too much on the effect the situation may have on the child, then that parent, who through no fault of her own contracted a deadly disease, would lose her child. The balance is delicate.

This Article will address these sensitive concerns and issues in deciding which standard is best to apply to the kind of hypothetical scenario presented. In Part II, this Article will provide a history of the legal standards used by American courts in child custody proceedings. Part II will also discuss the definition of terminal illnesses and conditions. Part III of this Article will then discuss the competing interests at play in the presented hypothetical scenario, balancing the parent’s constitutional rights with the best interests and needs of the child. And finally, Part IV will present the idea of a hybrid approach courts can apply in custody proceedings that involve a terminally ill parent.

7 Id.
9 Id. at 769 (discussing whether to remove the child from his foster mother, who suffered from AIDS, and place him with new foster parents).
II. BACKGROUND

A. A Brief History of Legal Standards Used in Custody Determinations

Like all aspects of American jurisprudence, English common law shaped and defined the development of family law in America. This area of law deals with matters that tend to be very emotionally charged, which makes it less likely for judges to favor bright-line rules. A living situation may be perfectly acceptable for one child’s development and well-being, but that very same situation may be harmful to another child. For attorneys trying to understand how and why judges make custody decisions the way they do, it is important to understand the history and development of the underlying principles applied by the judges.

1. The Parental Preference Standard

America has favored the parental preference standard through much of its legal history. Parental preference is, in simple terms, the preference for placing children with the natural parent over a third-party, nonparent, as parents have a natural right to parent. A nonparent is, quite simply, anyone who is not the child’s biological parent. The nonparent can be related, as in a grandparent or uncle, or not related, such as stepparents, foster parents, or close family friends. Even in early American history, there were times when courts were

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10 Kohm, supra note 3, at 347.
11 Id. at 337 (noting that to determine what is best for a child “is a lot to ask of anyone”).
12 See Woodward v. Woodward, 785 N.W.2d 902, 908-09 (N.D. 2010) (changing the primary residence for one of three children to the father because it was within the best interests of the child to live in the home environment the father provided).
13 See infra Sections II.A.1-3.
16 Haynie, supra note 1, at 705 n.2.
17 Id.
needed to determine the placement of a child, even though divorce was nowhere near as prevalent as it is today.\textsuperscript{18} Events that caused the splitting of families required the court’s decision in where to place the child, including the death of a parent, children being born out of wedlock, and families needing to place a child in an alternate living situation due to poverty.\textsuperscript{19} The child’s interests were rarely addressed, if ever, and instead the father’s needs and desires guided the court.\textsuperscript{20} 

Courts favored men and the male’s role in both society and the home, with the mother playing merely a secondary role.\textsuperscript{21} This patriarchal rule essentially meant, in more modern language, that it was in the best interests of the child to be raised by the father.\textsuperscript{22} Marriage rules prevalent at the time paralleled this patriarchal reasoning, and the mother, as a woman, was not considered as a viable option to raise a child.\textsuperscript{23} Also, especially in colonial America, many families were desperate for income-income that children could help provide.\textsuperscript{24} Frequently, the father placed his children in the workforce and required the children to help provide for the family, which impacted courts’ decisions in favoring the father.\textsuperscript{25} In fact, it has been stated that custody disputes in post-colonial America “might be classified as a battle between competing stakeholders for the right to the child’s earnings.”\textsuperscript{26}

\textsuperscript{19} Schuster, supranote 14, at 561-63.
\textsuperscript{20} Kohm, supranote 3, at 346-47.
\textsuperscript{21} \textit{Id}.
\textsuperscript{22} \textit{Id}. at 346-48.
\textsuperscript{23} \textit{Id}. at 345-46; Schuster, supranote 14, at 558-62.
\textsuperscript{24} See William P. Quigley, Work or Starve: Regulation of the Poor in Colonial America, 31 U.S.F. L. REV. 35, 59 (1996) (noting that needy children who did not work could be removed from the family and put to work); see also Schuster, supranote 14, at 561-62.
\textsuperscript{25} Schuster, supranote 14, at 561 (explaining that a child’s earnings and physical custody were considered property of the father).
2. The Tender Years Doctrine

Gradually the preference for the father began to give way, and the “tender years” doctrine began to take over. While courts still disfavored women in all other manners, including property rights and the handling of finances, for example, one of the first big accomplishments in women’s rights was mothers gaining the favor of the courts in child placement. The courts found that the natural bond between mother and child was so unique that it was only forthcoming that the child be placed with the mother instead of the father, especially when the child was of “tender years.”

“Tender years” referred to the age of the child and was used only for very young children. The tender years doctrine was essentially maternal parental preference. This concept carried over from England and gradually took hold in America. Eventually, as women’s roles in society began to change and increase, the woman was generally favored for child placement despite the child’s age.

Over time, however, the maternal preference began to fade like its paternal counterpart. Today, for example, at least one state has proclaimed that child placement cannot be based on the sex of the parent, which eliminates the maternal or paternal preference theory completely. Instead, courts began to place children in living situations that were best suited for the child, emphasizing the child’s needs and welfare over the wishes of a court-favored parent. Throughout the

28 Kohm, supra note 3, at 349 n.79; Sherman, supra note 27, at 694-96.
29 Kohm, supra note 3, at 346.
30 Id. at 346-47.
31 Id. at 367.
32 Id. at 361-62; Schuster, supra note 14, at 560.
33 Kohm, supra note 3, at 349 n.79.
34 Id. at 368; Schuster, supra note 14, at 566.
36 Kohm, supra note 3, at 350; Schuster, supra note 14, at 570.
1800s, this principle made its way through both the American and English legal systems. In 1924, the international community finally recognized this principle as the BIC standard. The Assembly of the League of Nations passed a resolution that endorsed the Declaration for the Rights of the Child. This brought the importance of children’s rights front and center to the world stage.

3. The Best Interests of the Child Standard

Although the BIC standard varies across jurisdictions, “the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child.” The analysis rests on which living situation would be best for the child, taking into account a number of factors that vary from state to state. For the most part, a court’s analysis is guided by statute, with some states having up to twenty best interests factors for a court to consider.

Some of the more common factors for BIC across the states include: the capacity of the parents to provide for the child’s basic needs, the mental and physical health of the child, the mental and physical health of the parent or parents, the emotional connection between the parent and child, and the preference of the child—although this preference is only considered with older children. These factors should be evaluated against the backdrop of the child’s age and the corresponding developmental needs.

However, as this standard is applied on a case-by-case basis, it

37 Kohm, supra note 3, at 350; Schuster, supra note 14, at 563-68.
38 Id.
39 Id.
40 Id.
42 Id. at 2-3; see DONALD T. KRAMER, 2 LEGAL RIGHTS OF CHILDREN § 2:4 (rev. ed., 2005)
43 See, e.g., FLA. STAT. § 61.13(3) (2015); Child Welfare Info. Gateway, supra note 35, at 3-4 (providing the statutory requirements of the BIC factors across the states).
44 § 61.13(3)(i) (discussing the child’s preference as a factor if it is deemed acceptable by the court); see also Child Welfare Info. Gateway, supra note 35, at 3.
relies on the judgment of a court, more specifically, the judge. And although the BIC standard is the statutory guidepost judges rely on most in making child custody and placement decisions, their judgment is also guided by the other underlying theories and principles that have shaped this field of law, including the parental preference standard and the tender years doctrine.

In custody disputes between two natural parents, which involve for the most part divorce proceedings, most courts use only the BIC standard. But judges frequently combine, or at least consider, all of the separate doctrines in modern custody proceedings. While courts may proclaim to solely apply the BIC standard, custody is actually very commonly decided under a totality of the circumstances, which takes into account the aforementioned standards, theories, and principles.

a. Nonparent-parent Custody Disputes and BIC

Especially in cases where custody is disputed between a nonparent and a natural parent, the appropriate standard is muddied across states. In these nonparent-parent custody disputes, some states apply only the BIC standard. Those states require each party to present evidence to the court to demonstrate which party would serve the child’s best interests. The thought behind this approach is to place both parties on equal ground and focus solely on the child’s interests instead of the parents’ interests. Essentially, there is little to no discussion of the parties’ abilities or living situation provided; the focus is on the child only.

46 Kohm, supra note 3, at 368-69.
47 Id.
48 KRAMER, supra note 42; Haynie, supra note 1, at 707.
49 See, e.g., In re Hruby, 748 P.2d 57, 58 (Or. 1987); In re Carney, 598 P.2d 36, 37 (Cal. 1979).
52 Haynie, supra note 1, at 721.
53 Id. at 721-22.
54 Id.
55 See id. at 721-23.
Some states apply the parental preference standard, thereby only denying custody to a natural parent over a nonparent if the nonparent can prove that the natural parent is unfit. However, the burden on the nonparent is "heavy and rarely overcome." There must be a "clear and unequivocal showing of unfitness, voluntary relinquishment, or abandonment." If the court finds that the natural parent is fit, then it will grant custody to that parent regardless of subsequent evidence presented by the nonparent. The principle behind this approach is that natural parents have a superior right to parent and should be given preference by the courts in custody determinations.

Yet, even further still, there is a third approach to nonparent-parent custody disputes wherein some states apply the parental presumption standard. This approach raises a rebuttable presumption. The nonparent must prove that the natural parent is unfit to have custody of the child. However, although the burden does rest on the nonparent, the burden is easy to satisfy. The presumption for the natural parent essentially evaporates once the nonparent comes forth with any evidence to suggest unfitness. With the presumption for the natural parent lifted, it is merely a preponderance of the evidence for the nonparent to prove that it is in the child's best interests for the court to grant custody to the nonparent. The principle behind this approach is to allow the courts to focus on the child rather than the parent and nonparent squabbling over who is a better parent, but at the same time still allow the court to evaluate the parties' abilities to provide for the child's care.

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56 Id. at 708.
57 Id.
58 Id. at 709.
59 See id.
60 See id. at 708-10.
61 Id. at 711.
62 Id.
63 See id. at 711-20.
64 Id. at 719-20.
65 Id. at 720.
66 Id.
67 Id. at 721.
Essentially, the BIC standard is hardly a bright-line test or a simple matter for any court in any state to apply, even though the analysis is governed by statute. The judge is guided by various other considerations outside of the statute, including, to name a few: the weight of the evidence presented, the totality of the circumstances, and viewing the witnesses and parties first-hand. These gut-wrenching custody decisions are even harder to make when a judge is faced with well-meaning parents who have difficulties raising their child simply because of a terminal illness or condition.

b. The Right to Parent

Parents have a constitutional right to be a parent and make decisions regarding their child. The U.S. Supreme Court has found a “fundamental liberty interest of natural parents in the care, custody, and management of their child.” When faced with nonparent-parent custody disputes, therefore, courts are obligated to favor the natural parent over the nonparent unless the natural parent has been found unfit by the court. This principle does not mandate custody to that parent merely because there is a blood bond, but rather presupposes the natural parent’s grant of custody.

It would seem as though this principle would only apply to custody disputes between parents and nonparents; however, the underlying concepts can apply to parent-parent custody disputes. Specifically, this concept can apply to parent-parent custody disputes where one parent had been the sole caregiver for the child, and the other

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68 See generally KRAMER, supra note 42 (discussing the complexity of the BIC standard from a state-by-state perspective).  
70 Id. at 1064-65.  
72 Id.  
74 Santosky, 455 U.S. at 753-54.  
75 See, e.g., In re Carney, 598 P.2d 36, 37 (Cal. 1979) (applying right-to-parent principles when considering a custody dispute between a quadriplegic father and the children’s mother).
parent had been, more or less, absent from the child’s life.\textsuperscript{76} When that main caregiver also happens to be the parent with a terminal illness, this preference principle could help the terminal parent maintain custody of the child and not be denied custody solely on the basis of his or her illness.\textsuperscript{77}

**B. Defining a Terminal Illness or Condition**

A terminal illness is defined as "causing death eventually."\textsuperscript{78} Most states also provide a definition for a terminal condition in the state’s health care directive statutes.\textsuperscript{79} For example, in Florida, a terminal condition is defined as “a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death.”\textsuperscript{80} Thus, to be terminal means that a person will pass on within a specified time frame as a direct result of an illness, disease, or condition from an injury that has no remedy or cure.\textsuperscript{81}

While the phrase “terminally ill” may be more commonly associated with the elderly, both terminal conditions and illnesses can and do affect the entire population, spanning age boundaries.\textsuperscript{82} Terminal illnesses such as various forms of cancer, congestive heart failure, and AIDS affect any age group, and devastating injuries that lead to terminal health conditions can affect all persons regardless of age.\textsuperscript{83} Therefore, it is not a far-flung idea that terminal conditions or

\textsuperscript{76} Id. at 38.


\textsuperscript{80} FLA. STAT. § 765.101(22) (2015).

\textsuperscript{81} See supra notes 78-80 and accompanying text.


illnesses can affect parents who have children living at home.\textsuperscript{84}

Terminal illnesses do not usually present to a person or their physician quickly, but rather, generally, take a while to produce a physical effect on a person.\textsuperscript{85} This means a person can have the disease for years or sometimes decades before his or her physical condition has deteriorated to the point where movement is severely impacted or death results.\textsuperscript{86} The same is true for terminal conditions resulting from an injury; although the physical effects may present sooner, the dying process can be long and drawn out.\textsuperscript{87}

However, in either situation, sometimes death can occur in a matter of weeks or months.\textsuperscript{88} It is difficult for physicians to nail down a specific time frame for the ultimate resulting death, with some courts calling this process "speculative, at best."\textsuperscript{89} If physicians, who have years of training and expertise under their belts, have a difficult time predicting a time frame for death, then it is almost impossible to imagine how judges are able to evaluate the information presented to them.\textsuperscript{90} Making a custody decision based on this speculative information, which will impact a child's life forever, is not an easy choice.\textsuperscript{91}

Because it is possible for a middle-aged adult to have a terminal
condition, and approximately half of all marriages in the United States end in divorce, a custody dispute arising between a healthy parent and a parent with a terminal illness or condition is a very real possibility. Situations that are more rare may arise when the custody dispute is actually between two nonparents, with one being diagnosed with a terminal illness. In these situations, would it be proper for the court to only consider the child, without considering the last wishes of a dying parent to spend time with his or her child? Is it proper to allow a child to watch the horrifying progression of their parent’s disease on a day-to-day basis? How can a court clearly draw a line between a dying parent’s rights and a child’s need for care?

III. ANALYSIS

A. Considering a Parent’s Abilities to Provide for a Child When Terminally Ill

There are some cases on the books that discuss a terminally ill parent and the fight for child custody. The courts generally apply one of the two aforementioned standards, either the BIC standard or the parental preference standard. It is important to consider the focus of the court in making its determination: the parent or the child.

In A.W. v. T.D., the Superior Court of New Jersey faced such a situation in a custody dispute between two natural parents. The mother was diagnosed with terminal breast cancer, and the father petitioned the court to reevaluate the previous custody arrangement made in the original divorce proceeding. The father emphasized the

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93 See, e.g., In re John T., 538 N.W.2d at 764-68.
94 See, e.g., A.W., 79 A.3d at 1046-50; In re John T., 538 N.W.2d at 764-68.
96 See Annette R. Appell & Bruce A. Boyer, Parental Rights vs. Best Interest of the Child: A False Dichotomy in the Context of Adoption, 2 DUKE J. GENDER L POL’Y 63, 64-65 (1995) (finding that given the same situation, different courts apply different standards).
97 A.W., 79 A.3d at 1046-47.
98 Id.
fact that the mother's illness was terminal and that the living environment provided by her would not be conducive to raise the couple's three children, aged twelve to fourteen years old.\textsuperscript{99} Despite her grim diagnosis, however, the court awarded custody to the mother.\textsuperscript{100} The court claimed to apply the BIC standard, stating that "paramount consideration of the courts is for the safety, happiness, physical, mental and moral welfare of the child,"\textsuperscript{101} and that "a child's welfare is generally superior to the rights of either parent."\textsuperscript{102} Further, the child's best interests may include, at some point, transferring custody to a healthier parent, "no matter how morally blameless the custodial parent may be."\textsuperscript{103}

However, the court also applied portions of the tender years doctrine in favoring custody of the children with the mother, focusing on the emotional harm to the children that could result from a premature separation of the children from their mother.\textsuperscript{104} Even further still, the court weighed into its consideration the custodial parent's wishes, finding "the loss of this opportunity during what may be the final stages of [the mother's] life may be irreplaceable . . . ."\textsuperscript{105} The court specifically stated, however, that when the mother's condition worsened to the point that it affected her abilities to care for the children, then custody would be renegotiated.\textsuperscript{106}

The case of \textit{A.W.} seems to be a delicate balance of parental preference and the BIC standard in a situation that is grim, heart wrenching, and emotionally trying.\textsuperscript{107} The court was careful to consider the entire situation in making its determination of custody, including the age of the children, the mother's current physical condition, and the physicians' prognoses.\textsuperscript{108} The court addressed each parent's abilities to

\textsuperscript{99} \textit{Id.} at 1047.

\textsuperscript{100} \textit{Id}.

\textsuperscript{101} \textit{Id.} at 1049 (citing Fantony v. Fantony, 122 A.2d 593 (N.J. 1956)).

\textsuperscript{102} \textit{Id.} at 1048.

\textsuperscript{103} \textit{Id}.

\textsuperscript{104} \textit{Id.} at 1049.

\textsuperscript{105} \textit{Id.} at 1049-50.

\textsuperscript{106} \textit{Id.} at 1052.

\textsuperscript{107} \textit{See supra} Section II.A.

\textsuperscript{108} \textit{A.W.}, 79 A.3d at 1047-49.
provide for the children and the children's likelihood of receiving the proper care from each parent individually.109 Because the disease had not yet affected the mother's physical condition, the mother could still provide—and the children could still receive—the proper emotional and physical support required by the court.110

1. A Comparison to Physically Disabled Parents

Because a terminal illness will eventually reveal its physical ramifications, courts must consider a parent's physical abilities to provide for the children in these types of situations, similar to a court's consideration of a physically disabled parent.111 For example, in Matta v. Matta, the Massachusetts Appeals Court determined custody between a healthy parent and a parent with multiple sclerosis.112 The mother was mentally sound, but she was bound to a wheelchair because of her disease.113 The court applied the BIC standard and found that, although the mother was completely physically disabled, the child was not negatively affected by the condition.114 There was no evidence in the record to suggest that the child could not be cared for by the mother simply because she was handicapped.115 Rather, despite the mother's "very serious" condition, the court found there was an opportunity to prepare for his mother's eventual death by spending time with her.116

Although multiple sclerosis is not a terminal disease, in the later stages of its progression the victim can be rendered anywhere from severely physically impaired to paralyzed.117 Essentially, the person becomes disabled and, for a parent involved in a custody battle, the

109 Id. at 1048-51.
110 Id. at 1051.
111 See, e.g., id. at 1049.
113 Id.
114 Id. at 1064-65.
115 Id. at 1064.
116 Id. at 1064-65.
court would treat that parent as physically disabled. The analysis would essentially be the same for a physically disabled parent as it would be for a parent with a terminal illness; does the parent’s physical capabilities allow for the parent to provide for the child? As the terminal parent’s disease progresses, the physical limitations increase and the abilities to provide for the child decrease, similar to the mother in Matta.

However, courts cannot deny custody to a parent simply because of a physical limitation. Rather, the physical condition is but a factor for the court’s consideration, and greater attention can be paid to that factor only if there is an adverse effect on the child’s emotional or physical well-being. The Supreme Court of California addressed this issue in In re Carney, where custody was granted to a quadriplegic father. At the outset, the court stated the two competing interests:

[W]e are called upon to resolve an apparent conflict between two strong public policies: the requirement that a custody award serve the best interests of the child, and the moral and legal obligation of society to respect the civil rights of its physically handicapped members, including their right not to be deprived of their children because of their disability.

The court recognized that physically limited parents could still provide the kind of positive emotional interaction that children needed. The lack of evidence to show a negative impact on the children’s emotional and physical well-being from the father’s disability allowed the court to award him custody. Further, the court

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118 See, e.g., Matta, 693 N.E.2d at 1064.
120 Matta, 693 N.E.2d at 1064.
121 In re Carney, 598 P.2d 36, 42 (Cal. 1979).
122 Id. at 41-42.
123 Id. at 36-37.
124 Id. at 37.
125 Id. at 40.
126 Id. at 42.
emphasized the ability of the father to provide "ethical, emotional, and intellectual guidance" to his children despite his handicap.\textsuperscript{127} Allowing the children to remain with a handicapped parent would teach the children life lessons in patience and tolerance, both of which could be considered priceless virtues.\textsuperscript{128} More importantly, the analysis considered the view of the children: that a "handicapped parent is a whole person to the child who needs his affection, sympathy, and wisdom to deal with the problems of growing up."\textsuperscript{129}

Accordingly, it makes sense then, if all other factors remain the same between competing parties, to award custody to a parent with a terminal diagnosis so long as there has not been a physical showing of that disease.\textsuperscript{130} This is because, at that point in time, an adverse effect on the child’s well-being would be unlikely.\textsuperscript{131} A different result would occur if the disease had manifested itself in such a manner that it had limited the parent’s physical abilities.\textsuperscript{132} In that situation, it would be more likely, and acceptable, for a court to deny custody simply because the parent’s physical ability to provide care to a child is no longer present.\textsuperscript{133} But how much of a physical limitation is enough to warrant the court’s denial of custody? As the court stated in \textit{A.W.}, those lines are drawn based on the effect of the parent’s limitations.\textsuperscript{134}

It would be fundamentally inequitable and inappropriate for this court to conclude that a person’s illness, disability, or condition, even a condition as serious as Stage IV cancer, automatically renders a person unfit per se to continue serving as a custodial parent. To the contrary, from a logical standpoint, a decision to transfer custody away from a custodial parent cannot fairly or properly rest solely upon an illness, disability, or bodily condition. Rather, there needs to be sufficient evidence,

\textsuperscript{127} Id. at 44.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} See supra notes 98-106 and accompanying text.
\textsuperscript{131} See supra notes 110-16 and accompanying text.
\textsuperscript{132} See, e.g., supra notes 107-19 and accompanying text.
\textsuperscript{133} See supra notes 107-19 and accompanying text (applying the analysis inapposite).
beyond the condition itself, which supports a conclusion that the condition or disability substantially prevents the custodial parent from continuing to satisfactorily function as a primary caretaker for his or her children, and that a transfer [or denial] of custody is presently necessary to protect the children's best interests.135

This concept seems to support the parental preference standard, giving preference first to the parent to prove that, in providing care to the child, there is not a physical limitation that negatively affects the child, and if proven, custody would be awarded.136 The BIC standard, then, would only be addressed if there were some evidence that the parent could not provide his or her child with the care that is required, technically placing the child's interests behind those of the parent.137

B. The Child's Needs and Interests Must be Provided

However, the child's interests are not completely ignored.138 For example, in In re John T., the Nebraska Court of Appeals addressed a custody dispute between a foster family and the Department of Social Services.139 The foster mother had HIV, and it was only a matter of time before her passing would occur.140 The Department of Social Services felt that it would not be in the child's best interests to remain in a situation that would ultimately result in the child watching his foster mother die.141 In finding that removal to an alternate foster family would provide more stability for the child, the Department of Social Services also emphasized that the home environment the child would face on a day-to-day basis with a terminally ill parent would be devastating.142

135 Id.
136 See supra Section II.A; see also supra notes 98-106, 111-13 and accompanying text.
138 A.W., 79 A.3d 1045 at 1048; see infra notes 139-55 and accompanying text.
140 Id. at 765.
141 Id. at 766.
142 Id.
The court clearly applied the BIC standard, "a standard which by its very nature is somewhat subjective and which eludes precise definition." Although the foster parents were not biological parents subject to the BIC standard, the court found that through the child's eyes, they were his parents, and thus the BIC standard applied. The factors considered by the court under this standard included the moral fitness of the parents, the living environment, the emotional well-being and relationship of the parents, the parents' character, and the parents' ability to provide physical care to the child. The court found that none of these factors were negatively impacted by the foster mother's terminal illness, but rather the record showed her to be a "fully capable" parent, even "operating her own business."

It was unfair, the court concluded, to deprive the child of an otherwise proper living situation on the premise that the foster mother would pass at some point in the future because of a terminal illness. In fact, much of the court's reasoning centered around the premise that the death of a parent was a normal aspect of life, and it would not be against, or harmful to, a child's best interests to be a part of the dying process.

We know that parents suffer and die from illness, and their children observe this and suffer with their parents. However, the children hopefully learn that although painful, death is a natural part of the cycle of life. When parents are ill, and even terminally so, children are not removed from their ill parent . . . .

This concept speaks to how allowing children to be a part of the dying process can be beneficial to children's emotional growth and psychological development, which are clearly factors to consider for the

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143 Id. at 769.
144 Id. at 771.
145 Id.
146 Id.
147 Id. at 771-73.
148 Id. at 772-73.
149 Id. at 773.
child’s best interests. In fact, Hospice Net—the nation’s foremost leader in dealing with death and terminal patients—has stated that although most hospitals across the nation do not allow children to visit dying patients for extended periods of time, there is a benefit to both the patient and the child in allowing children the opportunity to visit.

Another case where the BIC standard was clearly applied was in *Hatz v. Hatz*. There, the court granted custody to a mother who was a paraplegic as a result of an accident. Although physically limited in providing care, the court found the mother’s limitations did not place an “adverse and harmful effect” on the seven-year-old child’s interests or general well-being. The court specifically mentioned that “the mother’s actual and potential physical capabilities were explored” before making a custody determination. There was just not enough evidence in the record to suggest that remaining with the mother would hinder the child’s interests.

C. Which Holds Greater Weight: The Child’s Needs or the Parent’s Abilities and Rights?

While courts are not allowed to place children in homes based on the physical characteristics or conditions of the parent, it is difficult to separate a parent’s physical condition and the effect it has on a child, especially when that parent has a terminal illness that will eventually cause severe deterioration of the parent’s physical condition. Thus, the nondiscriminatory standards set forth by courts such as *In re Carney* for physically limited parents, although admirable, are hard to apply to

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151 Id.


153 Id.

154 Id.

155 Id.

156 Id.

157 See, e.g., *In re Carney*, 598 P.2d 36, 39-43 (Cal. 1979) (showing that although the father did not have a terminal illness, the lower court in this case still had a difficult time in removing the physical aspect of the father’s condition in dealing with the effect on his children).
real-life situations when a parent’s terminal illness and physical deterioration directly impact a child’s well-being and safety so dramatically. Even though the father in *In re Carney* was physically disabled, his condition was at least stable; that is starkly contrasted with a terminally ill parent who will necessarily continue to worsen over time. Although a parent has the emotional stability to care for a child, common sense suggests that it is not proper to place a child with a parent who cannot function well enough to supply basic care for the child when needed, as that is not a safe living environment.

On the other hand, courts favor a traditional, “normal” home, with “normal” meaning the preference to place children with their biological families. Thus, pulling a child away from his or her natural parent, simply because that parent is sick, goes against the long-standing principle of the courts to reunite families whenever possible. Parents should not be punished for contracting illnesses that are beyond their control.

There are numerous cases across the country in which parents with deplorable child-rearing records are granted custody by the courts. For example, in *Kimock v. Jones* a court approved custody with visitation to a father who had previously verbally and physically abused both his child and ex-wife. The hope was to allow the parent and child to reunify and foster the parent-child bond through supervision. Ultimately, however, the father lost joint custody of the child because he refused to attend parenting classes, and the child was suffering from mental distress from being around her father. The striking factor in this case is that the court allowed the father, who undeniably had

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158 *See id.* at 40-41.
159 *Id.* at 39-40.
160 *See id.* at 40 (illustrating that the BIC are the main focus and that not all physical disabilities are detrimental to the safety and success of children).
165 *Id.*
166 *Id.* at 852-53.
parenting issues, an opportunity to be with his child. The court should apply this same principle to parents with terminal illnesses.

Another case to consider is In re Shirley B., where a father and mother were given multiple opportunities by social services to regain custody of their children. Social services petitioned for court intervention based on findings that the parents had engaged in sexual acts and physical violence in front of the children and did not provide adequate food supplies for the children. After social services supplied rehabilitative services and visitation for over two years, the court ultimately decided that the children would be better served by being adopted. Reasoning that the home environment was unsafe both physically and psychologically, the BIC standard required the court to take action.

In re Shirley B. stands for the idea that the court should favor natural parents and that actions should be taken to reunite families whenever possible. Although ultimately the parents were not able to care for the children, both the court and social services at least gave them several opportunities to do so. If the parents mentioned in the above-referenced cases can be awarded multiple opportunities to receive custody of their children, the same grace and favor should be granted to parents who are terminally ill.

IV. CONCLUSION

Essentially, courts should deploy a hybrid approach in dealing with custody matters of a terminally ill parent. The parental preference and BIC standards are essentially two sides of the same coin;
one cannot be determined without analyzing and addressing the other.\textsuperscript{176} In \textit{A.W.}, the court considered both the abilities of the terminally ill mother, as well as the child’s interests in remaining with the mother through the disease’s progression.\textsuperscript{177} The court did not place a greater weight to either side, but considered both equally.\textsuperscript{178} In \textit{Matta}, the court used this same kind of analysis granting custody to the physically disabled mother.\textsuperscript{179} The court considered both the child’s well-being and development, in addition to considering the mother’s physical limitations in providing care.\textsuperscript{180}

Even in cases that purport to strictly use the BIC standard in determining custody, the courts eventually analyze the situation by viewing both sides of the coin—parental preference and the BIC standard.\textsuperscript{181} \textit{Hatz} was such a case that specifically stated the standard to be used was the BIC standard.\textsuperscript{182} However, in actuality, before addressing the child’s needs and well-being, the court first considered the parent’s abilities to provide for the child.\textsuperscript{183} After that determination was made, only then did the court look towards the BIC standard.\textsuperscript{184}

Yet judges are still placed in a position that requires them to choose what, at times, is simply the lesser of two evils.\textsuperscript{185} This position may not be as harsh when it involves choosing between two natural parents, as at least the child will have one parent remaining after the inevitable death of the other.\textsuperscript{186} When faced with nonparent-parent custody disputes, however, the situation can be exceptionally harder on

\begin{footnotes}
\footnotetext[178]{\textit{Id.} at 1048-49.}
\footnotetext[180]{\textit{Id.}}
\footnotetext[182]{\textit{Id.} at 944.}
\footnotetext[183]{\textit{Id.}}
\footnotetext[184]{\textit{Id.} at 944-45.}
\footnotetext[185]{See generally Kohm, supra note 3, at 337 (discussing the difficulty and “muddled legal haze” associated with requiring a judge to determine what is “best” for “any child at any time under any particular circumstance”).}
\footnotetext[186]{See supra notes 56-60, 73-74 and accompanying text (noting the superior right of the natural parent resulting in natural parent preference in custody considerations).}
\end{footnotes}
the judge’s conscience.\textsuperscript{187} Essentially, the court would be taking a child away from its natural parent because the parent is sick, which is a drastic step by courts, reserved only for the most deplorable of situations or unfit parents.\textsuperscript{188} Merely being sick should not make a parent unfit, but if the best situation for the child under the facts presented to the court is to be removed from an ill parent so the child may have a better opportunity to develop and thrive, then the court must take action.\textsuperscript{189}

Evidence suggests that allowing children to remain with a terminal parent can be beneficial to both the parent and the child.\textsuperscript{190} The court should consider this evidence when evaluating custody and lean in favor of allowing the parent and the child to remain together through the trying times, until the point comes where the parent can no longer provide a safe environment for the child.\textsuperscript{191} At that point, and at that point only, custody should be denied to a terminally ill parent.\textsuperscript{192} Although this approach may mean multiple court appearances, resulting in expenses for both the parties and the judicial system, the equitable benefits of granting parents access to their right to raise their children outweigh these extra costs.\textsuperscript{193}

The aforementioned cases all support the idea of a hybrid approach in analyzing custody.\textsuperscript{194} This makes the approach less one-sided for not only the parent and the child, but the judge as well.\textsuperscript{195} It provides the judge a better ability to examine all the evidence presented to the court, ensuring that the judge does not feel an obligation—based

\begin{footnotesize}
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\item[187] See generally supra Sections II.A.3.a-b (noting the constitutional right of the natural parent, which leads to a more difficult decision in nonparent versus parent custody disputes).
\item[188] See discussion supra Section II.A.3 (acknowledging the courts’ preference to keep a child with their natural parent).
\item[190] See supra notes 150-51 and accompanying text.
\item[191] See, e.g., supra notes 108-10 and accompanying text.
\item[192] See, e.g., supra notes 108-10 and accompanying text.
\item[193] See supra text accompanying note 135 (acknowledging the inequity in denying a parent his or her rights simply due to an “illness, disability, or condition”).
\item[194] See supra Sections III.A-B.
\item[195] See, e.g., supra notes 177-81 and accompanying text.
\end{enumerate}
\end{footnotesize}
on a supposed doctrinal preference within the jurisdiction—to rule one way or the other before the case is even presented.\textsuperscript{196} Essentially, the hybrid approach places the parents’ rights and the child’s interests on equal footing, with neither outweighing the other in the courtroom.\textsuperscript{197}

\textsuperscript{196} See, e.g., supra notes 177-81 and accompanying text.

\textsuperscript{197} See generally supra Sections II.A.1, 3 (discussing how parental preference and the BIC standard independently protect parental rights and a child’s interests, respectively).