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Donaldson v. Van de Kamp: Cryonics, Assisted Suicide, and the Challenges of Medical Science

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DONALDSON v. VAN DE KAMP: CRYONICS, ASSISTED SUICIDE, AND THE CHALLENGES OF MEDICAL SCIENCE

In recent years, advances in medical science have left the legal community with a wide array of social, ethical, and legal problems previously unimaginable.[1] Historically, legislative and judicial responses to these advances lagged behind the rapid pace of such developments.[2] The gap between the scientist's question, "Can we do it?," and the lawyer's question, "Should/may we do it?," is most evident in the field of cryonics, with its technique of cryonic, or cryogenic, suspension.

In cryonic suspension, a legally dead but biologically viable person is preserved at an extremely low temperature until advances in medical science make it possible to revive the person and implement an effective cure.[3] The terminally ill patient who wishes to benefit from such treatment is faced with the dilemma that present life must be ceased with hope of future recovery. As a result, the process challenges our traditional notions of death and the prospects of immortality while raising a host of concomitant legal dilemmas.[4]

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1. *See, e.g.*, Matter of Quinlan, 355 A.2d 647 (N.J.) (life-sustaining respirator and tubal feeding system), *cert. denied*, 429 U.S. 922 (1976); Davis v. Davis, No. 34, 1992 WL 115574 (Tenn. Jun. 1, 1992) (disposition of cryogenically preserved product of in vitro fertilization, or "frozen embryos"); *see also* George J. Alexander, *Death by Directive*, 28 SANTA CLARA L. REV. 67, 68 (1988) (discussing medical advances since World War II that have challenged the legal system by confronting our perceived notions about death). *See generally* George P. Smith, II, *All's Well That Ends Well: Toward a Policy of Assisted Rational Suicide or Merely Enlightened Self-Determination?*, 22 U.C. DAVIS L. REV. 275 (1989) (discussing how medical technology has forced society to rethink its traditional view of suicide).

2. *See, e.g.*, Edward J. O'Brien, Note, *Refusing Life-Sustaining Treatment: Can We Just Say No?*, 67 NOTRE DAME L. REV. 677, 695 n.146 (1992) (compiling statutes which provide durable powers of attorney for health care).

3. Mitchell v. Roe, 9 Cal. Rptr. 2d 572, 573 (Cal. Ct. App. 1992). This case involved a challenge to the state of California's refusal to grant death certificates and disposition permits to persons who designated Alcor Life Extension Foundation, Inc. (Alcor), a California corporation in the business of cryonic suspension, as a donee pursuant to the Uniform Anatomical Gift Act. *Id.* Noting the absence of any evidence that Alcor's operations posed an actual threat to the public health, the court upheld the permanent injunction against the state's interference with disposition of the bodies of persons who designated Alcor to place their bodies in cryogenic suspension. *Id.* at 575.

4. *See id.* at 575-76. In *Mitchell*, the defendant-appellants, the California Department of Health Services (DHS), posed the following questions:

Some facets of this dilemma are exemplified by *Donaldson v. Van de Kamp*.[5] In *Donaldson*, Thomas A. Donaldson sought the declaration of a constitutional right to premortem cryonic suspension of his body and the assistance of others in achieving that state.[6] Donaldson, a forty-six-year-old mathematician and computer software scientist, suffers from a malignant brain tumor that was diagnosed by his physicians in 1988.[7] This tumor is inoperable and continues to grow and invade his brain tissue.[8] Donaldson's condition will gradually deteriorate into a persistent vegetative state and will ultimately result in death.[9] Physicians predict his probable death by August 1993.[10]

Donaldson petitioned the California courts, seeking a declaration that he had a constitutional right to achieve cryonic suspension before his natural death.[11] His doctors believe that if Donaldson waits until his natural death to be suspended, future reanimation will be futile because the tumor will have destroyed his brain.[12] In addition, Donaldson's doctors sought an injunction against criminal prosecution for their participation in the suspension, because Donaldson, once suspended, would be considered "dead"

> Should cryonically suspended people be considered "dead" or should a separate category of "suspended" people be created? How should such people be registered in official records? . . . [W]hat would happen to [the] estate and assets if and when cryonic suspension is successful and the decedent is restored to life? Whose identity is the person to assume or be assigned and what of the record of the person's death? Alcor also stores body parts, such as human heads and hands. In such cases, whose identity will the suspended heads and hands assume upon their restoration; the identity of the original owner of the body part or the identity of the new body to which the body part will be attached?

Id. (quoting DHS). The California Court of Appeals responded:

> These are, of course, but a few of the presently imaginable conundrums which could arise should Alcor at some future time actually succeed in reviving the currently dead. Nonetheless, we are confident that those persons who will then head our various branches of government will be far wiser than we and entirely capable of resolving such dilemmatic issues without our assistance.

Id. at 576; *see also* GEORGE P. SMITH, II, MEDICAL-LEGAL ASPECT OF CRYONICS: PROSPECTS FOR IMMORTALITY 30-35 (1983) (discussing a hypothetical case that explores the legal conundrums that could arise under the division of an estate following the "decedent's" cryonic suspension).

5. 4 Cal. Rptr. 2d 59 (Cal. Ct. App. 1992).

6. *Id.* at 61.

7. *Id.* at 60-61; Cynthia Gorney, *Frozen Dreams: A Matter of Death and Life*, WASH. POST, May 1, 1990, at D1.

8. *Donaldson*, 4 Cal. Rptr. 2d at 60.

9. *Id.* at 60-61.

10. *Id.* at 61.

11. *Id.*

12. *Id.*

under California law.[13]

Donaldson and his doctors built their novel argument upon the recent right-to-die cases in which the courts recognized a patient's right to have life-sustaining medical treatment withdrawn.[14] Donaldson argued that his right to privacy and self-determination is paramount to any state interest in maintaining life.[15] Thus, according to Donaldson, balancing the state's abstract interest in the preservation of life against Donaldson's compelling reasons to end—or "interrupt," as cryonics enthusiasts would have it—his own life was not necessary.[16]

The trial court dismissed the complaint for failure to state a cause of action, and Donaldson appealed to the California Court of Appeals.[17] Because the cryonic process would necessarily involve physician-assisted death, or the aiding, advising, or encouraging of another to commit suicide, the appellate court affirmed the ruling of the trial court, holding that Donaldson did not have a constitutional right to assisted death.[18] Additionally, in light of Donaldson's First Amendment challenge to the statute, the court upheld the criminal statute prohibiting the aiding, advising, or encouraging of another to commit suicide.[19]

This Note briefly discusses the process of cryonic suspension and explores the holding of *Donaldson* in light of the underlying rationale of the California right-to-die cases. Considering the contradictory state and individual interests balanced in the right-to-die cases, this Note concludes that, under a similar balancing test, premortem cryonic suspension could be permitted under certain circumstances; however, the right to premortem cryonic suspension may be more effectively recognized through legislation.

I. CRYONIC SUSPENSION: AN EXPLANATION OF THE PROCESS

Cryonic suspension has its origins in the field of cryobiology, which stud-

13. *Id.*; *see* CAL. HEALTH & SAFETY CODE § 7180 (West Supp. 1992). "An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead." *Id.* § 7180(a).

14. *See Donaldson*, 4 Cal. Rptr. 2d at 61 (citing Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990); Bouvia v. Superior Court, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986); Bartling v. Superior Court, 209 Cal. Rptr. 220 (Cal. Ct. App. 1984); Barber v. Superior Court, 195 Cal. Rptr. 484 (Cal. Ct. App. 1983)).

15. *Donaldson*, 4 Cal Rptr. 2d at 61.

16. *Id.*

17. *Id.*

18. *Id.* at 64.

19. *Id.* at 64-65; *see* CAL. PENAL CODE § 401 (West 1988) ("Every person who deliberately aids, or advises, or encourages another to commit suicide is guilty of a felony.").

ies the effects of low temperatures on living organisms.[20] Although medical research into the clinical uses of hypothermia dates back to Hippocrates,[21] the term "cryobiology" was not developed until the 1950s when biologists needed a term to describe their experiments with low temperatures.[22] Since the 1950s, cryobiologists have experimented with the preservation of living cells through freezing and have made great strides towards realizing their ultimate goal, a "cryobank" filled with body parts ready for transplant.[23] Considering that an estimated sixty percent of human hearts and ninety percent of livers available for transplant are discarded and never used because the technology of cryopreservation has yet to be perfected,[24] the potential benefit of such a technology is immense. Although the technology of cryopreservation is still in its infancy, cryonicists aspire to expand and to apply the developments in cryobiology to human body suspension.[25]

Cryonicists believe that human body suspension is possible because death is not an instantaneous event.[26] "Total death" is a gradual process whereby the body drifts through a series of stages.[27] "These stages include clinical death, when spontaneous heartbeat and respiration cease, brain death, when all sections of the brain are deprived of oxygen, biological death, when the brain is no longer active and, finally, cellular death when all organs and cells cease functioning."[28] Because the majority of states define "legal death" as either clinical death or brain death,[29] the ideal time to achieve cryonic sus-

20. STEADMAN'S MED. DICTIONARY 375 (25th ed. 1990).

21. SMITH, *supra* note 4, at 7 ("[t]he writings of Hippocrates discuss the control of hemmorage [sic] by use of local cold and, during the Napoleonic Wars, medical literature records successful instances of local hypothermia to ease and deaden pain when amputations were performed.").

22. *Id.* at 8. Post World War II breakthroughs include the successful preservation of frog sperm in a partially frozen solution by a French biologist in 1946, and the successful preservation of fowl sperm at a low temperature by an English scientist in 1948. *Id.* at 7. Thereafter, the fowl sperm was successfully used for fertilization. *Id.*

23. *See* Paul Bagne & Nancy Lucas, *Souls on Ice, Cryo Science*, OMNI, Oct. 1986, at 116, 162. Cryobiologists hope someday to have a long-term organ bank of hearts, livers, and kidneys. *Id.* at 118, 162-63; *see also* SMITH, *supra* note 4, at 8 (discussing the United States Navy Tissue Bank, founded in 1950 as a massive effort to freeze-dry human tissue for clinical use).

24. *See* Carol Kahn, *On Ice*, HEALTH, Mar. 1987, at 70, 74-75 (quoting Dr. Gregory Fahy, a cryobiologist at the American Red Cross transplantation laboratory in Bethesda, Md.); *see also* Bagne & Lucas, *supra* note 23, at 118. Cryobiologists have had some success in preserving kidneys using the perfusion method. *Id.* at 161.

25. *See* ARLENE SHESKIN, CRYONICS: A SOCIOLOGY OF DEATH AND BEREAVEMENT 14-15 (1979).

26. *Id.* at 15.

27. *Id.*

28. *Id.*

29. *See* UNIF. DETERMINATION OF DEATH ACT § 1, 12 U.L.A. 360 (Supp. 1992) (noting that twenty-seven states and the District of Columbia have adopted the Uniform Determina-

pension is immediately after a person is pronounced legally dead yet prior to biological or cellular death.[30]

Once a patient is pronounced legally dead, cryonic suspension begins by reducing the person's body temperature with ice.[31] Because seventy-five percent of the weight of the human body is water, which expands when it is frozen, precautionary measures are required to insure that the body cells do not burst upon freezing.[32] This is achieved by the perfusion method of internment, "the linchpin for successful cryonic suspension."[33] In this procedure, a protective chemical solution is pumped through the patient's bloodstream to ensure ice crystals do not form on the inside of the cells.[34] Once the perfusion is completed, the patient is wrapped in a heavy-duty foil and encapsulated in a giant steel tank.[35] Long-term storage is maintained by placing the body in liquid nitrogen, reducing the body temperature to -196 degrees Celsius (-320 degrees Fahrenheit), allowing the body to remain in a near perfect state of preservation, or suspended animation.[36]

Cryonic suspension has been dramatized as science fiction on television and in motion pictures,[37] and popularized by contemporary personalities

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tion of Death Act); *see, e.g.*, CAL. HEALTH & SAFETY CODE § 7180(c) (West Supp. 1992) (noting California's adoption of the Uniform Determination of Death Act).

30. *See* SHESKIN, *supra* note 25, at 15-16. *See generally* George P. Smith, II, *Cryonic Suspension and the Law*, 17 OMEGA J. DEATH & DYING 1, 4-5 (1986-87) (discussing the phenomenon of death and the problems that could arise under the current statutory definition of death if a person were to undergo cryonic suspension premortem).

31. SHESKIN, *supra* note 25, at 16.

32. SMITH, *supra* note 4, at 9.

33. *Id.*

34. *Id.* This protective chemical, a combination of glycerol and dimethyl sulfoxide, absorbs ninety percent of the cells' water, assuring that the formation of ice crystals will occur on the outside of the cell, not the inside. *Id.*; *see* SHESKIN, *supra* note 25, at 17.

35. SHESKIN, *supra* note 25, at 17. The capsule, referred to by some cryonicists as the "Forever Flask," is a giant thermos bottle, eight feet tall and thirty-one inches in diameter, and comes equipped with a removable top. *Id. See also* Gorney, *supra* note 7, at D6 (describing a cryogenic suspension tank as a "giant steel thermos").

36. SMITH, *supra* note 4, at 9. This is the temperature of liquid nitrogen. *Id.* at 12 n.25.

37. *See* FOREVER YOUNG (Warner Bros. 1992) (depicting a story in which a test-pilot, in despair after an accident that leaves his fiancee in a coma, volunteers in 1939 to be cryogenically suspended as part of a science experiment; he is brought back to life in 1992 discovering romance once again); SLEEPER (United Artists 1973) (depicting a story in which a character played by Woody Allen is sealed in aluminum foil and placed in suspended animation after complications arise in an appendectomy; two hundred years later he is unwrapped to discover that the world has changed.); *L.A. Law: The Good Human Bar* (NBC television broadcast, Jan. 4, 1990) (discussed in Gorney, *supra* note 7, at D6). The L.A. Law episode, remarkably similar to the *Donaldson* case, involved a young woman suffering from cancer who petitioned the court seeking cryogenic suspension before her rapidly growing tumor began to severely affect her brain.

> JUDGE: But you realize, if I grant your request, and even if this technology comes true in a hundred years, you'll never see [your friends and family] again.

and the media.[38] Despite the fact that the technology to reanimate a frozen human body has yet to be developed, several hundred American men and women have requested, and in some cases undergone, cryonic suspension.[39] These individuals place their faith in the technology of the future, i.e., that someday physicians and scientists will be able to thaw suspended people and repair their ailments before bringing them back to life.[40]

Most members of the scientific community view this small but active group of cryonicists as "more of a religious group than one with scientific leanings."[41] Although living creatures, such as insects and certain variety of frogs, have been frozen and brought back to life, current scientific technology is far from that necessary to reanimate human life.[42] It is against this background that Thomas Donaldson petitioned the California courts, seeking the declaration that he had a constitutional right to seek cryonic suspension before his imminent death from natural causes.

II. PRIOR LAW

Donaldson based his complaint on the underlying rationale of the Califor-

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> PAULA: I know that. But they will forever remind me of what this world has to offer. And that's why I'm here: I'm not asking you for death. I'm begging you for my last chance at life.

Gorney, *supra* note 7, at D6 (quoting *L.A. Law: The Good Human Bar*).

38. *See* Carol Cioe, *Disney on Ice*, ESQUIRE, Jan. 1985, at 48 (noting that, despite rumors, Walt Disney's body is not frozen); Kahn, *supra* note 24, at 75 (" 'Walt was cremated and his ashes are in Forest Lawn Cemetery.' So it looks like Disney, at least, will never get reanimated."); *see also* Bernie Lincicome, *A Few Bear Flaws Need Correcting*, CHI. TRIB., Sept. 30, 1991, § 3 at 1:

> For the Bears to get from here to there, from where they are to where the Bills are, which is in the fast lane to the Super Bowl, a few small adjustments may be necessary. Most obvious, of course, is to put Stan Thomas, the rookie tackle, into cryogenic suspension, thawing him out in, oh, 1996 or '97 when the Bears are either good enough to overcome his blunders or bad enough so that they don't make any difference.

39. Gorney, *supra* note 7, at D6. Inspired by Robert Ettinger's 1964 book, *The Prospect of Immortality*, cryonic societies were established across the country to promote education, research, organization, and action in the field of cryonics. *See* SMITH, *supra* note 4, at 15-19; SHESKIN, *supra* note 25, at 12-14 (discussing the advent of the cryonics movement).

40. Gorney, *supra* note 7, at D1. Because the most critical organ to be frozen is the brain, cryonicists believe that it may be necessary to suspend only the brain since future technology may develop a way to force cells to replicate themselves for the production of body parts. *Id.* Thus, some cryogenic suspension patients opt for "neurosuspension" instead of "whole body suspension." *Id.* Indeed, neurosuspension has its economic advantages as it costs considerably less—$35,000 compared with $100,000 for "whole body suspension." *Id.* at D6.

41. *Id.* at D6 (quoting John Baust, past president of the Society for Cryobiology and director of the Center for Cryobiological Research at State University of New York in Binghamton).

42. *See id.* ("The extrapolation from insect to human is very difficult to make.").

nia right-to-die cases, which recognize that a patient's right to refuse unwanted medical treatment included the right to refuse life-sustaining medical treatment.[43] Donaldson argued that, similar to the patient's interests in the right-to-die cases, his interest in seeking to achieve cryonic suspension outweighs the countervailing state interests at issue.[44]

A. Cruzan v. Director, Missouri Department of Health:[45] *Clarifying the Legal Basis for a Patient's Right To Refuse Life-Sustaining Treatment*

The right-to-die cases are grounded in the common law doctrine of informed consent.[46] This doctrine embodies the principle of bodily integrity that holds that the touching of an individual without consent or legal justification constitutes a battery.[47] The "logical corollary" of the doctrine of informed consent is that a patient possesses the right not to consent to treatment.[48]

In the seminal case *Cruzan v. Director, Missouri Department of Health*, the Supreme Court discussed the common law and constitutional foundations of the right to refuse unwanted medical treatment.[49] While various state courts

43. Donaldson v. Van de Kamp, 4 Cal. Rptr. 2d 59, 61 (Cal. Ct. App. 1992); *see* Bouvia v. Superior Court, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986); Bartling v. Superior Court, 209 Cal. Rptr. 220 (Cal. Ct. App. 1984); Barber v. Superior Court, 195 Cal. Rptr. 484 (Ct. App. 1983).

44. *Donaldson*, 4 Cal. Rptr. 2d at 61.

45. 497 U.S. 261 (1990).

46. *Id.* at 269.

47. *Id.* Justice Cardozo, while serving for the New York Court of Appeals, noted that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Id.* (quoting Schloendorff v. Society of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914)).

48. *Cruzan*, 497 U.S. at 270. In some exceptional cases a patient may be forced to accept treatment, when the state's interest in protecting innocent third parties (usually minor children) outweighs the patient's right to refuse treatment. *See, e.g.*, Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (D.C. Cir.) (ordering lifesaving blood transfusion for mother of infant child), *cert. denied*, 377 U.S. 978 (1964). "The patient, 25 years old, was the mother of a seven month old child. The state, as *parens patriae*, will not allow a parent to abandon a child, and so it should not allow this ultimate of voluntary abandonments." *Id. See also Cruzan*, 497 U.S. at 306 n.6 (Brennan, J., dissenting).

49. *See Cruzan*, 497 U.S. at 269-79. Nancy Cruzan's parents sought a court order directing the withdrawal of their daughter's artificial feeding and hydration equipment. *Id.* at 265. The limited issue before the Court was whether the U.S. Constitution prohibited Missouri from requiring clear and convincing evidence that Nancy, rendered incompetent as a result of a severe automobile accident, would have chosen to withdraw the hydration and nutrition equipment. *Id.* at 280. Although the Court only assumed, for purposes of the case, that the U.S. Constitution granted a competent person a constitutionally protected right to refuse lifesaving hydration, *id.* at 279, the dicta is instructive in analyzing the legal basis for the right-to-die cases.

had previously held that the right to refuse unwanted treatment is protected by a generalized constitutional right to privacy,[50] the *Cruzan* majority rejected that theory as the basis for the right-to-die cases.[51] The Court found that the issue is more properly analyzed under the terms of a protected liberty interest found in the Fourteenth Amendment.[52] Regardless of whether a patient's right to refuse treatment is derived from a constitutional right to privacy, a protected liberty interest, or the common law doctrine of informed consent, the courts balance the individual's interests against the relevant state interests.[53]

B. California Right-To-Die Case Law

Three leading California right-to-die cases attempted to clarify the boundaries of a recognized right to die without opening the Pandora's box of recognizing a limited right to assisted suicide.

1. Affirmative Act Versus Omission

The first California case to recognize that the patient's right to refuse unwanted medical treatment encompassed the right to refuse life-sustaining treatment was *Barber v. Superior Court*.[54] In *Barber*, two doctors who had disconnected a patient's life sustaining respirator at the request of the patient's family sought a writ of prohibition against prosecution for murder.[55] Although the court recognized a patient's fundamental right to refuse medical treatment,[56] the court ultimately decided the case by characterizing the doctors' conduct as that of an omission rather than an affirmative act.[57] The cessation of "heroic" life support measures was viewed not as an affirmative act amounting to unlawful conduct, but analogous to withholding a manu-

50. *See, e.g.*, Bouvia v. Superior Court, 225 Cal. Rptr. 297, 301 (Cal. Ct. App. 1986); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 427 (Mass. 1977); Matter of Quinlan, 355 A.2d 647, 663 (N.J.), *cert. denied*, 429 U.S. 922 (1976).

51. *See Cruzan*, 497 U.S. at 279 n.7; *but see In re* Browning, 568 So. 2d 4, 9-10 (Fla. 1990) (post-*Cruzan* case relying on state constitutional right of privacy as basis for finding a right to refuse life-sustaining medical treatment).

52. *Cruzan*, 497 U.S. at 279 n.7.

53. *See id.*; *see also infra* notes 66-67 and accompanying text discussing the relevant state interests at issue in the right-to-die cases.

54. 195 Cal. Rptr. 484 (Cal. Ct. App. 1983).

55. *Id.* at 486. Three days following a cardio-respiratory arrest, the patient fell into a deep comatose state leaving him in a permanent vegetative state. At the request of the family, the respirator and other life sustaining equipment were removed. The patient died thereafter. *Id.*

56. *Id.* at 489-90.

57. *See id.* at 490.

ally-administered injection or medication.[58] Because the doctors' conduct involved the failure to act, the issue was whether they had a legal duty to continue to provide life-sustaining treatment.[59]

The court held that the "omission" of continued treatment was not an unlawful failure to perform a legal duty, and that the doctors could not be prosecuted for murder.[60] By characterizing the doctors' actions as an omission, the court found it unnecessary to address the vexing question of whether the doctors' conduct was in fact the proximate cause of the patient's ultimate death.[61]

2. *Balancing the Competing State and Individual Interests*

Subsequent to the *Barber* decision, the California courts have expanded and clarified the right of a patient to have unwanted life-sustaining treatment withdrawn. *Bartling v. Superior Court*[62] involved a competent, seventy-year-old man who suffered from emphysema, chronic respiratory failure, arteriosclerosis, an abdominal aneurysm, and a malignant tumor of the lung.[63] Mr. Bartling petitioned the court to have his life-sustaining ventilator removed.[64] The court held that the right to have life-sustaining medical equipment withdrawn was not limited to comatose, terminally-ill patients or representatives acting on their behalf.[65]

In balancing the competing state and personal interests at issue, the court set forth three compelling state interests:[66] the preservation of life, the prevention of suicide, and the maintenance of the ethics of the medical profession.[67] Balanced against these interests were the patient's constitutional right to privacy and autonomy in medical decisions.[68] The court found that even the most significant state interest, the preservation of life, was outweighed by the patient's self-determination of his medical treatment: "[I]f the right of the patient . . . is to have any meaning at all, it must be paramount to the interests of the patient's hospital and doctors. The right of a

58. *Id.*
59. *Id.*
60. *Id.* at 493.
61. *Id.*
62. 209 Cal. Rptr. 220 (Cal. Ct. App. 1984).
63. *Id.* at 220-21.
64. *Id.*
65. *Id.* at 223.
66. The court also noted that a fourth interest—the protection of innocent third parties—was not at issue in this particular case. *Id.* at 225.
67. *Id.*; *see also* Satz v. Perlmutter, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 424-27 (Mass. 1977); *In re* Conroy, 486 A.2d 1209, 1222-25 (N.J. 1985).
68. *Bartling*, 209 Cal. Rptr. at 224-25; *but see supra* notes 50-52 and accompanying text.

competent adult patient to refuse medical treatment . . . must not be abridged."[69]

The court in *Bartling* also addressed the assisted suicide issue. The court concluded that by disconnecting the ventilator, Mr. Bartling's doctors merely hastened his inevitable death by natural causes, and that the decision to allow nature to take its course is not the same as enlisting the assistance of others in committing suicide.[70] Thus, the underlying reason for the state's interest in preventing assisted suicide—the prevention of irrational self-destruction—is not implicated where the competent rational decision is made in the face of impending death when treatment offers no hope.[71]

3. *Motivation of Patient Not at Issue*

The final development in the California right-to-die case law was *Bouvia v. Superior Court.*[72] This case involved a competent, twenty-eight-year-old quadriplegic woman suffering from cerebral palsy who sought the removal of her feeding tube.[73] The trial court refused to grant the requested relief, finding the patient's motives indicative of an attempt to commit suicide with the state's help.[74] Previous right-to-die decisions placed great emphasis on the fact that the patient did not want to die;[75] in such cases, death was the result of nature's taking its course, not the result of affirmative actions or an intent to bring about death.[76]

Despite Ms. Bouvia's previously expressed desire to end her life and her attempt to starve herself to death, the California Court of Appeals found that her reason for refusing treatment was irrelevant in the assertion of a constitutional and common law right.[77] In reversing, the court noted that "[i]f a right exists, it matters not what motivates its exercise."[78] Applying the *Bartling* balancing test, the court found Ms. Bouvia's interests predominant and held that the ultimate decision to forego medical treatment was the patient's alone.[79] The fact that Ms. Bouvia was not terminally ill and could

69. *Bartling*, 209 Cal. Rptr. at 225.
70. *Id.* at 225-26.
71. *Id.* at 226.
72. 225 Cal. Rptr. 297 (Cal. Ct. App. 1986).
73. *Id.* at 298-300.
74. *Id.* at 299, 305.
75. *See* Bartling v. Superior Court, 209 Cal. Rptr. 220, 222-23 (Cal. Ct. App. 1984); *see also* Satz v. Perlmutter, 362 So. 2d 160, 162-63 (Fla. Dist. Ct. App. 1978).
76. *Bartling*, 209 Cal. Rptr. at 225-26; *see also Satz*, 362 So. 2d at 162-63.
77. *Bouvia*, 225 Cal. Rptr. at 300, 305-06. "Overlooking the fact that a desire to terminate one's life is probably the ultimate exercise of one's right to privacy, we find no substantial evidence to support the court's conclusion." *Id.* at 306.
78. *Id.* at 306 (internal quotations omitted).
79. *Id.* at 304, 306.

live an additional fifteen to twenty years with the feeding tube was of no consequence.[80] Thus, *Bouvia* moved the court closer to the realization of the similarity between disconnecting life-sustaining treatment and assisted suicide.[81]

4. Implicit Balancing of the Patient's Quality of Life

Although the *Bouvia* court recognized that Ms. Bouvia could live an additional fifteen to twenty years on her feeding tube, the court balanced the quality of the patient's life with the benefits of continuing treatment: "[T]he trial court mistakenly attached undue importance to the *amount of time* possibly available to petitioner, and failed to give equal weight and consideration for the *quality* of that life; an equal, if not more significant, consideration."[82]

This balancing lurks beneath the rationale of all right-to-die cases.[83] The relevant state interests in protecting life and preventing suicide are dimin-

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80. *Id.* at 304.

81. *See id.* at 307 (Compton, J., concurring) ("I have no doubt that Elizabeth Bouvia wants to die; and if she had the full use of even one hand, could probably find a way to end her life—in a word—commit suicide. . . . [T]he majority opinion here must necessarily 'dance' around the issue."). The tenuous distinction between the affirmative, death-producing acts constituting assisted suicide and the passive refusal of medical treatment allowing a patient to die naturally is illustrated by the case McKay v. Bergstedt, 801 P.2d 617 (Nev. 1990). In *McKay*, Mr. Bergstedt, a thirty-one-year-old quadriplegic who had been dependent on a respirator since the "tender age of ten," sought an order to have his respirator disconnected. *Id.* at 620. The court found that the decision to refuse medical treatment was not tantamount to state-assisted suicide despite the fact that the patient knew that death would imminently follow and that the refused "treatment" had allowed Mr. Bergstedt to breathe for twenty-three years. *Id.* at 625-27. Disconnecting the respirator would merely permit the "natural death" of Mr. Bergstedt. *Id.* at 627. The dissent persuasively points out that "after twenty-three years of living and breathing in this machine-aided manner, the whole process becomes something quite more than mere medical *treatment*." *Id.* at 634 (Springer, J., dissenting). The dissent goes on to conclude, "[w]hen Kenneth Bergstedt asked the court to give legal sanction to the death-inducing act of disconnecting his breathing apparatus, he was not to my mind merely exercising his right to be let alone, and his right to refuse unwanted medical treatment." *Id.* (footnote omitted).

82. *See* Bouvia v. Superior Court, 225 Cal. Rptr. 297, 304 (Cal. Ct. App. 1986).

83. *See id.*; Bartling v. Superior Court, 209 Cal. Rptr. 220 (Cal. Ct. App. 1984). "[Mr. Bartling] wanted to live but preferred death to his intolerable life on the ventilator." *Id.* at 223. " 'What we consider here is a competent, rational decision to refuse treatment when death is inevitable and the treatment offers no hope of cure or preservation of life.' " (quoting Superintendent of Belchertown v. Saikewicz, 370 N.E.2d 417, 426 n.11 (Mass. 1977)); *see also* Barber v. Superior Court, 195 Cal. Rptr. 484, 491 (Cal. Ct. App. 1983) ("A more rational approach involves the determination of whether the proposed treatment is proportionate or disproportionate in terms of the benefits to be gained versus the burdens caused."). *See generally* Smith, *supra* note 1, at 380-408 (discussing the balancing of the quality of the patient's life underlying the leading right-to-die cases).

ished where the benefits of continued treatment are slight.[84] The *Bouvia* court recognized that a patient's desire to die in dignity outweighs the state's interest in preserving life against the will of the sufferer.[85] In other words, this moral and philosophical decision belongs to the patient and not to physicians, lawyers, judges, or ethics committees.[86]

III. *DONALDSON V. VAN DE KAMP*:[87] REFUSING TO RECOGNIZE A RIGHT TO ASSISTED SUICIDE

The *Donaldson* court rejected the notion that the current right-to-die cases could be interpreted as recognizing a limited right to assisted suicide.[88] The petitioners argued that in the past courts relied on a "legal fiction" in the right-to-die cases to avoid the assisted-suicide issue:

> As is often true in times of social transition, case law has created fictions to avoid affronting previously accepted norms. In life support termination, there is a fiction of medical determinism. Patients are seen as passive victims of their illness. They do not choose to die; death overtakes them.[89]

The court, however, embraced the idea that a physician's act of disconnecting life-sustaining equipment is not an affirmative, death producing act.[90] The court noted that "[t]he patient . . . who is being kept alive by a life-support system has taken a detour that usually postpones an immediate encounter with death. . . . [T]he medical treatment has prolonged life and prevented death from overtaking the patient. Stopping the treatment allows the delayed meeting with death to take place."[91] Nevertheless, the court found that recognizing a right to pre-mortem cryonic suspension was tantamount to sanctioning assisted suicide.[92] Thus, the court held that Donaldson did not have a constitutional right to state-assisted death.[93]

The court did note that Donaldson could take his own life with impu-

84. *See Bouvia*, 225 Cal. Rptr. at 304-05.

85. *Id.* at 305.

86. *Id.*

87. 4 Cal. Rptr. 2d 59 (Cal. Ct. App. 1992)

88. *Id.* at 62-64. "Donaldson is asking that we sanction something quite different. . . . [A] third person will simply kill Donaldson and hasten the encounter with death. No statute or judicial opinion countenances Donaldson's decision to consent to be murdered or to commit suicide with the assistance of others." *Id.* at 63.

89. *Id.* (quoting from George J. Alexander, *Death by Directive*, 28 SANTA CLARA L. REV. 67, 82 (1988)).

90. 4 Cal. Rptr. 2d at 63.

91. *Id.*

92. *See id.*

93. 4 Cal. Rptr. 2d at 64.

nity.[94] "He makes a persuasive argument that his specific interest in ending his life is more compelling than the state's abstract interest in preserving life in general. No state interest is compromised by allowing Donaldson to experience a dignified death rather than an excruciatingly painful life."[95] Yet, the court found that the state maintained a controlling interest in protecting society from abuses and maintaining social order through the enforcement of criminal laws.[96]

Although it delineated the reasons why the state has a compelling interest in preventing assisted suicide, the court failed to analyze the applicability of those reasons to the facts of the particular case. Clearly the state had a compelling interest "to protect the lives of those who wish to live no matter what their circumstances."[97] The court, however, overlooked the fact that Donaldson's decision to seek suspension before his natural death was rational and voluntary.[98] In addition, Donaldson's hopes of being reanimated in the future are diminished if he waits until his natural death from cancer.[99] Because Donaldson's motives were calculated, reasonable, and openly presented before the court, the "important [state] interest to ensure that people are not influenced to kill themselves" was not at issue.[100]

IV. Recognizing a Right to Pre-mortem Cryonic Suspension: Balancing the Competing State and Individual Interests

Because the *Donaldson* court refused to interpret the right-to-die cases as recognizing a limited right to assisted suicide, it did not balance the relevant state interests with those of Donaldson to end his life and achieve cryonic suspension.[101] However, by realizing that the same competing interests discussed in the right-to-die cases were at issue in *Donaldson*, the court could have employed a similar balancing test and could have held that Donaldson had a fundamental right to be cryonically suspended before his natural

94. *Id.* at 63; *see also* Smith, *supra* note 1, at 289-91. While suicide is not a crime, twenty-two states classify assisted suicide as a statutory crime. *Id.* at 290-91 n.106 (compiling statutes).

95. *Donaldson*, 4 Cal. Rptr. 2d at 63.

96. *Id.*

97. *Id.*

98. *See* Gorney, *supra* note 7, at D6. "I would not see myself as committing suicide, nor would the people who froze me see me as committing suicide. They'd see me as going through a draconian treatment that was my only chance to stay alive, however slim that chance might be." *Id.* (quoting Mr. Donaldson).

99. *Id.*; *Donaldson*, 4 Cal. Rptr. 2d at 61.

100. *Donaldson*, 4 Cal. Rptr. 2d at 64.

101. *See id.* at 63.

death. In so doing, the court would balance Donaldson's individual interests in seeking pre-mortem cryonic suspension with the state's general interests in preserving life, preventing suicide, and maintaining the ethics of the medical profession.[102]

The most significant of the relevant state interests at issue in a right-to-die case is the preservation of life.[103] The state's interest in the protection and preservation of human life encompasses two aspects—preserving the sanctity of all life to society as a whole and the value of the individual's life.[104] Despite the state's compelling interest in preserving human life, a patient's right of self-determination consistently has been held to predominate in right-to-die cases.[105] Similarly, Donaldson had a particular and compelling interest in ending his life.[106] It is ironic that eventually Donaldson's condition will deteriorate to a persistent vegetative state;[107] once this happens Donaldson will have a right to have his life-sustaining medical equipment withdrawn and undergo cryonic suspension immediately thereafter.

A final state interest to be considered is the maintenance of the ethical standards of the medical profession. With the growing emphasis on a patient's right to privacy and autonomy, the courts have placed less emphasis on medical ethics as an important state interest.[108] However, considering that the technology of cryonic suspension is still in its infancy, a court should consider whether allowing a patient to achieve cryonic suspension before natural death would significantly damage the reputation or ethical structure of the medical profession.[109] The fact that members of the scientific and medical community do not agree that it is possible to reanimate a frozen human body weighs significantly against the patient.

The analysis in *Donaldson* never reached this type of balancing of compet-

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102. *See, e.g.*, Bouvia v. Superior Court, 225 Cal. Rptr. 297, 304 (Cal. Ct. App. 1986).

103. Bartling v. Superior Court, 209 Cal. Rptr. 220, 225 (Cal. Ct. App. 1984).

104. *See* Note, *Physician-Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021, 2033 (1992); *see also In re* Conroy, 486 A.2d 1209, 1223 (N.J. 1985).

105. *See* Smith, *supra* note 1, at 408.

> Behind the extended judicial rhetoric of balancing individual privacy interests and rights of self-determination against countervailing state interests is a highly predictable endpoint of judicial reasoning; once it is reasonably understood that one has chosen to end her life by refusing life-sustaining medical treatment, the appellate courts will respect and uphold this decision as within her common-law right of self-determination as guaranteed by the right of privacy found within the Fourteenth Amendment to the Constitution.

Id.

106. *See* Donaldson v. Van de Kamp, 4 Cal. Rptr. 2d 59, 60-61 (Cal. Ct. App. 1992).

107. *See id.*

108. Martha A. Matthews, Note, *Suicidal Competence and the Patient's Right to Refuse Lifesaving Treatment*, 75 CAL. L. REV. 707, 733-35 (1987).

109. *See* Note, *supra* note 104, at 2035.

ing state and individual interests. The characterization of Donaldson's petition as a request to condone assisted suicide precluded the court from addressing Donaldson's compelling reasons to seek cryonic suspension before his natural death.[110] Although the court gave lip service to balancing the countervailing interests,[111] its opinion does not inquire into why the state's general interest in preserving life and preventing irrational self-destruction predominate over Donaldson's interest in being cryogenically suspended before his natural death.

V. CONCLUSION

The California right-to-die cases necessarily walk a judicial tightrope in finding that a patient has a right to refuse life-sustaining medical treatment without recognizing a right to assisted suicide in limited circumstances. The *Donaldson* court rejected the notion that the current right-to-die cases could be interpreted to allow a patient to achieve cryonic suspension before his natural death.[112] The court characterized the request as tantamount to physician-assisted suicide.[113]

Perhaps the most compelling question that the *Donaldson* court did not address was whether cryonic suspension is something that should be done.[114] "[T]he fact that something *can* be done does not automatically mean that it *should* be done . . . ."[115] It is evident that advances in medical science such as cryonic suspension will continue to challenge the legal community with a wide array of social, ethical, and legal problems previously unimaginable.

The recurring question will be whether a courtroom is an appropriate forum in which to address these ethical questions. As the *Donaldson* court ultimately concluded: "It is unfortunate for Donaldson that the courts cannot always accommodate the special needs of an individual. We realize that time is critical to Donaldson, but the legal and philosophical problems posed by his predicament are a legislative matter rather than a judicial one."[116]

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110. *See* Donaldson v. Van de Kamp, 4 Cal. Rptr. 2d 59, 63 (Cal. Ct. App. 1992).

111. *See id.* at 62 ("To determine whether Donaldson has suffered a violation of his constitutional rights, we must balance his interests against any relevant state interests.").

112. *Donaldson*, 4 Cal. Rptr. 2d at 63.

113. *Id.*

114. *See* Dennis J. Doherty, *An Ethical Appraisal of Cryonics*, U.S.A. TODAY MAG., Jan. 1989, at 73.

115. *Id.* at 74.

116. *Donaldson*, 4 Cal. Rptr. 2d at 64.