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Brian L. Josias

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BURYING THE HATCHET IN BURIAL DISPUTES:
APPLYING ALTERNATIVE DISPUTE RESOLUTION
TO DISPUTES CONCERNING THE
INTERMENT OF BODIES

*Brian L. Josias**

[B]ut in this world nothing can be said to be certain, except death
and taxes.

Benjamin Franklin¹

INTRODUCTION

The calm serenity that surely accompanies the eternal sleep of death deposits in its earthly wake the potential for a calamitous dispute between those left behind: what to do with the deceased's body? Many are familiar with the recent dispute baseball great Ted Williams's children engaged in over how to inter his earthly remains.² Inspired by the Williams controversy, this Note examines the processes of resolving conflicts that emerge in the wake of the death of a human being, focusing on clashes that arise regarding burial arrangements. In addition, controversies concerning organ donation will be considered at length. Technological developments suggest that in the future these decisions will continue to be cause for dispute as burial methods change, costs increase, and the demand for donated organs increases.

This Note attempts to compare and contrast current methods of dispute resolution with available alternative mechanisms. I examine

* Candidate for Juris Doctor, Notre Dame Law School, 2004; B.A., The Johns Hopkins University, 2001. I would like to thank Professor Tom Patrick for his valuable comments and insight. I also would like to thank my parents for all their support and whose dedication and commitment to the value of education serve as a constant inspiration while I pursue my studies.

1 Letter from Benjamin Franklin to Jean Baptiste LeRoy (Nov. 13, 1789), *quoted in* BEN FRANKLIN LAUGHING 57 (P.M. Zall ed., 1980).

2 *See, e.g.,* Raja Mishra, *Williams Children Settle Dispute*, BOSTON GLOBE, Dec. 21, 2002, at B1; *see also infra* notes 67–86 and accompanying text.

the current dispute resolution model considering the processes by which disputes between interested parties are resolved. Are alternative methods such as mediation and arbitration currently being used to resolve these arguments? This Note considers whether those "alternative" methods have proven themselves appropriate and effective in this area. I argue that this area is one which highly recommends itself to the use of alternative dispute resolution (ADR). However, structural barriers have prevented widespread implementation and use of ADR to provide effective solutions to these problems. Conventional methods have proven themselves ill suited to respond to the complex interests presented and are incapable of dealing with the multiplicity of parties who have some stake in the outcome of these conflicts. Demand for crafting and applying appropriate dispute resolution mechanisms is particularly acute for this context. I conclude by suggesting that the weaknesses of conventional methods to resolve burial disputes illustrate that several other types of conflicts would benefit from a reexamination of the dispute resolution techniques employed there. In particular, disputes that involve multiple parties with highly emotional interests and no clear "right" answer recommend themselves most to the use of narrowly tailored dispute resolution techniques.

Part I identifies the issues that are likely to arise following one's death. I describe what burial options are available and explore why these options are cause for dispute. Detailed attention is also devoted to an examination of the growing field of organ donation and disputes that emerge concerning organ donation decisions. In addition, Part I explores the identities of the interested parties, and later segments discuss how various models of dispute resolution represent or fail to represent the interests of those potential disputants. A particular feature of the burial dispute context is also dealt with: the problem of the absent interested party—namely, the deceased.

Having established the issues that pervade burial controversies, Part II begins to examine conventional methods for resolving these disputes. This Part features an introduction of several case studies to demonstrate traditional methods of dealing with these fusses. I identify five primary shortcomings of the traditional model in resolving burial disputes.

Part III suggests alternatives to the traditional model. Various models of alternative dispute resolution will be introduced, focusing primarily on arbitration and mediation. This section describes both the ADR movement in general and specific ADR processes, including their origins, goals, and some criticisms. Part IV attempts to demonstrate what types of nontraditional dispute resolution would be most applicable to these highly peculiar disputes. The argument focuses on

resolution techniques that combine speed with an ability to entertain viewpoints from many diverse parties while recognizing the limited solutions to the problem.

This Note concludes by showing how the use of alternatives in this field of dispute resolution recommends itself not only to analogous types of disputes, but also to disputes that do not share the same characteristics as the burial controversy. However, my argument does not stretch so far as to recommend use of alternative techniques in all contexts, but instead suggests that barriers that prevent its utilization in this type of dispute may exist elsewhere. Particularly, I believe that the failure of traditional adjudication to deal with burial disputes suggests that the “one-size-fits-all” approach to traditional adjudication is seriously flawed. In similar contexts, I recommend that this approach needs to be reevaluated and reformed to lower barriers to the usage of more appropriate dispute resolution mechanisms, and I offer several methods to lower barriers to ADR usage.

I. DESCRIPTION OF ISSUES THAT COULD GIVE RISE TO DISPUTES

First, a comment about what this Note does not discuss. The controversies that arise from the actual termination of one’s life, such as euthanasia and physician-assisted suicide, are beyond the scope of this Note. There is an enormous body of scholarship and case law associated with that topic, and it has been the subject of enormous discussion.³ In addition, reams of scholarship suggest the potential for

3 See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that an asserted right to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause); *Cruzan v. Dir. Mo. Dep’t. of Health*, 497 U.S. 261 (1990) (holding that the U.S. Constitution does not forbid a state from requiring that evidence of an incompetent’s wish as to the withdrawal of life-sustaining treatment be proved by clear and convincing evidence); Ronald Dworkin, *Euthanasia, Morality, and Law*, Fritz B. Burns Lecture (Nov. 22, 1996), in 31 *LOV. L.A. L. REV.* 1147, 1154 (1998) (noting that “it’s very important that we understand the strengths and limits of the supposed distinction that is often described as the distinction between killing and letting die”); Ezekiel J. Emanuel, *The Future of Euthanasia and Physician-Assisted Suicide*, 82 *MINN. L. REV.* 983, 984 (1998) (arguing that “[t]he debate needs to move away from this or that heart-wrenching case calling out for euthanasia, shake off the distortions concerning end-of-life practices that have so far informed it, and carefully examine what likely benefits and harms might result from legalization”); Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 *HARV. J.L. & PUB. POL’Y* 599, 606 (2000) (suggesting that “whether the venue is judicial or legislative, the appropriate line society should draw—and today largely does draw—is between acts intended to kill and acts where no such intention exists”); Cynthia M. Bumgardner, *Comment, Euthanasia and Physician-Assisted Suicide in the United States and the Netherlands*, 10 *IND. INT’L & COMP. L. REV.* 387, 388–89 (2000) (arguing that “[l]egalizing either euthana-

utilizing alternative dispute resolution to help resolve end of life issues.⁴ However, I do not focus on that scholarship or enter that debate. Instead, I concentrate my discussion on the disputes that arise out of interring the body in its final resting place.

A. *Options*

Death is a certainty for all of us at some point.⁵ Every human being on the planet will die. It is true that recent advances in science, medicine, and technology have enabled humans to extend their life spans dramatically. According to the U.S. Census Bureau, the average American male born in 1999 will live seventy-four years and the average female seventy-nine.⁶ Yet, in spite of these advances, we will all meet our end at some point and our corporal remains must be disposed of somehow. In addition to the certainty of our own death and burial, at some point it is highly likely that we will be required to participate in the planning or execution of a loved one's funeral.⁷

Death is unlike any other phenomenon that we encounter on this planet—and courts and the law recognize this. There are issues associated with death that do not appear in other contexts, as Justice Lumpkin artfully stated:

Death is unique. It is unlike aught else in its certainty and its incidents. A corpse in some respects is the strangest thing on earth. A man who but yesterday breathed and thought and walked among us has passed away. Something has gone. The body is left still and cold, and is all that is visible to mortal eye of the man we knew. Around it cling love and memory. Beyond it may reach hope.⁸

Yet, in spite of its unique nature, the law and human beings must deal with death:

sia or PAS [physician-assisted suicide] or both violates the Americans With Disabilities Act as well as the Fourteenth Amendment to the U.S. Constitution”).

4 See, e.g., Diane E. Hoffmann, *Mediating Life and Death Decisions*, 36 ARIZ. L. REV. 821, 826 (1994) (concluding that “there is reason to be cautious about the application of mediation to termination of life support cases,” yet “conced[ing] that there may be a small number of cases where mediation is appropriate, in particular, disputes between relatives of an incapacitated patient”).

5 The other, as noted earlier, is the payment of taxes. Interestingly, this other certainty also leads to many conflicts. However, in that case there is a well settled and noncontroversial method for resolving conflicts.

6 See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 72 (2002).

7 See HUGH Y. BERNARD, *THE LAW OF DEATH AND DISPOSAL OF THE DEAD* 23 (2d ed. 1979) (noting that “[f]ew adults who live to mature years . . . do not, at least once, experience the necessity of making funeral arrangements for someone”).

8 *Louisville & N.R. Co. v. Wilson*, 51 S.E. 24, 25 (Ga. 1905).

It must be laid away. And the law—that rule of action which touches all human things—must touch also this thing of death. It is not surprising that the law relating to this mystery of what death leaves behind cannot be precisely brought within the letter of all the rules regarding corn, lumber and pig iron. And yet the body must be buried or disposed of. . . . And the law, in its all-sufficiency, must furnish some rule, by legislative enactment or analogy, or based on some sound legal principle, by which to determine between the living questions of the disposition of the dead and rights surrounding their bodies. In doing this the courts will not close their eyes to the customs and necessities of civilization in dealing with the dead and those sentiments connected with decently disposing of the remains of the departed which furnish one ground of difference between men and brutes.⁹

Because of the unique nature of death, there are hosts of issues, legal and otherwise, which arise upon the death of a person. For example, as to burial, disputes may arise as to timing, manner, location, and type. The law in most states requires that all bodies be buried shortly after death.¹⁰ This requirement adds focus to the remainder of this Note. Time acts as a secret third party in all of the issues that develop over disposal of bodies. However, there is a great irony in the rush to “get the body in the ground.” The deceased, once interred or disposed of, must remain in that state for, conceivably, the rest of eternity.

The finality of most interment decisions is another factor at play that adds pressure to the decisions made at the time of death and creates another ingredient in the recipe for conflict. Decisions made regarding disposal of a body are difficult to undo. Public policy and human nature frowns on disturbing the remains of the deceased and “courts throughout the land look with disfavor upon the disinterment and removal of the body.”¹¹

Just a small listing of the options underlies the realm of possibilities for conflict to develop. Among the available options are cremations, conventional interment in the ground, and interment in a

9 *Id.*

10 *See, e.g.,* CONN. GEN. STAT. § 7-64 (2003) (stating that “the body shall be buried, removed or cremated “within a reasonable time after death”); *see also* BERNARD, *supra* note 7, at 25 (stating that “[a]n example is Arizona, where a body may not be kept more than 48 hours after death unless it is embalmed or stored at below 32 degrees”); PERCIVAL E. JACKSON, *THE LAW OF CADAVERS* 60 (1950) (noting that “[o]rdinary requirements of health import the necessity of burial within a reasonable time”).

11 RAYMOND LOUIS BRENNAN, *THE LAW GOVERNING CEMETERY RULES AND REGULATIONS* 66 (2d ed. 1951).

sarcophagus above ground or the newest method: cryogenic freezing.¹²

A brief exploration of the issues that may arise from the selection of the different methods is appropriate here. To begin with, a definition of some of the terms is necessary as well as the possible consequences that flow from their selection. Cremation is defined by the *Oxford English Dictionary* as "the action of burning or cremating; the reduction of a corpse to ashes as a way of disposing of it in lieu of interment."¹³ When the body is cremated, nothing but ashes remain. Therefore, if cremation is elected, the body cannot be reconstituted later. In addition to controversies that may arise from selecting cremation itself is the question of a final resting place for the ashes themselves. Conflict may develop over who will maintain custody of the ceremonial urn or as to the disposition of the ashes. Next of kin will sometimes go to great lengths in an attempt to dispose of their loved ones in a manner they see as fitting, even when there is no opposition to the method they have selected. One particularly compelling and emblematic story describes the May 2002 attempts of a woman to scatter her husband's ashes over a baseball field in Seattle. This effort grabbed headlines across the country by causing the evacuation of the stadium due to terrorism related fears lingering in the wake of the September 11 terrorist attacks.¹⁴

Burial choices, once made, are often difficult if not impossible to reverse. If interment is the preferred method, laws in many states have stringent prohibitions on the exhumation of bodies.¹⁵ These laws make interment almost as irreversible as cremation in terms of long-term ramifications of the choice that can stir controversy. Furthermore, and perhaps more importantly for creation of disputes, the

12 See *infra* notes 67–86 and accompanying text for a discussion of the Ted Williams case and more details on the emerging field of cryogenics. This list is by no means exhaustive. For example, one may think of Vladimir Lenin's crypt in Red Square in Moscow. Other examples include the inventor of the Frisbee's remains being melted into a Frisbee or recent technology that offers the ability to turn the carbon in a loved one's bones into a gem. See *Alternative Death Styles*, USA TODAY, Aug. 30, 2002, at 12A.

13 4 OXFORD ENGLISH DICTIONARY 5 (2d ed. 1989).

14 *Cremated Man's Ashes Shut Stadium*, HOUS. CHRON., May 25, 2002, at A25; see also John Canzano, *She Won't Let Him Miss a Ducks Game*, OREGONIAN, Dec. 22, 2002, at C1 (reporting a wife's ongoing, annual efforts to place a small amount of her cremated husband's ashes on a college football field). For a more amusing perspective, see MEET THE PARENTS (Universal Studios 2000); THE BIG LEBOWSKI (Gramercy Pictures 1998).

15 See BRENNAN, *supra* note 11, at 66–74 (providing case annotations and commentary on disinterment and removal).

method selected impacts the type of funeral service which may be had. For example, cremations are typically "strictly private," and "no one except the immediate family" may attend.¹⁶

Cost frequently influences choices made concerning the type of burial service and can fuel controversy. For example, the "pomp and circumstance" associated with a conventional in-ground burial is quite expensive and becoming more so. The funeral industry has seen "the growth of corporate funeral chains."¹⁷ Consequently there are "far more mortuaries than can be supported full-time by the death rate."¹⁸ This excess of supply has caused funeral service providers to engage in unsavory practices resulting in inflated prices.¹⁹ As the prices of funerals rise, controversies over payment of the excessive rates are the likely result. Insufficiency of funds to pay for elaborate, or even simple, ceremonies may cloud family members' decisions about obeying the deceased's wishes and fuel confrontations between relatives of the deceased.

In addition to disputes that may arise as to location and method of burial, religious issues may create friction amongst decisionmakers who are planning a funeral. While some religions endorse or encourage certain practices, i.e., embalming, other religions discourage or patently forbid such practices.²⁰ Not only does religion create issues as to the preparation of the body and the precise method of burial, it also can cause friction over the performance of types of funeral ceremonies. One can easily create a number of hypothetical scenarios that could give rise to this controversy, especially in light of the modern American trend toward intermarriage, divorce, and remarriage.²¹ It is quite simple to imagine a scenario where the deceased may be Jewish, the current spouse Catholic, the natural children Buddhist, and the parents of the deceased Southern Baptist. In such a situation,

16 *Id.* at 46.

17 See LISA CARLSON, *CARING FOR THE DEAD* 126–29 (1998). For a historical perspective, see BERNARD, *supra* note 7, at 24 (noting that in 1960 the cost for an average adult funeral was "about \$1,160").

18 CARLSON, *supra* note 17, at 118.

19 See *id.* at 167–72.

20 See, e.g., *Lott v. State*, 225 N.Y.S.2d 434, 435–36 (N.Y. Ct. Cl. 1962) (noting that embalming is prohibited by Orthodox Judaism and describing traditional Roman Catholic burial practices, including adorning the corpse with a crucifix, placing rosary beads in the hands, and using cosmetics to improve the corpse's appearance).

21 See, e.g., Alberto Bisin et al., *Religious Intermarriage and Socialization in the U.S.*, 112 J. POL. ECON. (forthcoming 2004) (finding that "[t]he observed intermarriage and socialization rates are consistent with a strong preference of Protestants, Catholics, and Jews for having children who identify with their own religious beliefs").

one or all of the family members may be uncomfortable with the funeral service. The potential for conflict is ripe.

Finally, other micro-level issues may occur during the planning of a funeral. Scheduling of the funeral, to permit all out of town relatives and friends to attend, may be problematic.²² In addition, minor issues such as the identity of the eulogizer—or eulogizers—the color/type of the coffin, selection of pall bearers, and contents of the coffin, may all emerge as potential sources of conflict for a group of interested parties.

B. *The Organ Donation Problem*²³

In addition to conflicts that may arise as to manner, location, and time of burial, issues regarding organ donation continue to be problematic in the current disposal-of-bodies paradigm. It is frequently difficult to discern the intent of the deceased, and the wishes of the family. The “feelings” of the medical profession and the government often complicate things further. Once again, religious issues may come into play in this context, as some religions specifically prohibit organ donation.²⁴

1. A Brief History of Organ Donation

Prior to 1968, American law lacked a consistent framework for dealing with the issues of donation of all or part of dead bodies.²⁵ In spite of this lack of a consistent framework, the practice of donating cadavers for the purpose of medical research enjoys a long and healthy pedigree.²⁶ Legal scholars, inspired by the problems created by the demand for cadavers for medical research, began spilling ink over the problems of the commoditization of human bodies and their

22 This problem is obviously closely tied in with that mentioned *supra* note 10: the statutory pressure to bury the dead in a specific period. In addition, scheduling of the funeral may further implicate religious issues, such as the Jewish requirement that the dead be buried “before sunset following the death.” MAURICE LAMM, *THE JEWISH WAY IN DEATH AND MOURNING* 22–33 (2000)

23 Again, an aside about what this Note will not discuss. In considering organ donation and the donation of cadavers, I have intentionally avoided any discussion of the controversy surrounding medical research conducted using fetal tissue, i.e., stem cell research.

24 For example, the Jewish religion has a general prohibition against organ donation. See LAMM, *supra* note 22, at 6–9.

25 BERNARD, *supra* note 7, at 55.

26 See generally RUTH RICHARDSON, *DEATH, DISSECTION AND THE DESTITUTE* 30–51 (2d ed. 2000) (describing the historical evolution of “clinical detachment . . . both in the lives of individual clinicians and . . . the history of medicine”). *Id.* at 31.

donation as early as 1885.²⁷ Since that time, the controversy over increased demand for organs and tissue material has only grown. Conflicts have emerged—both legally and medically—particularly with the development of advanced medical technologies permitting the transplantation of many different organs ranging from eyes to hearts.²⁸ However, in spite of the growing demand for post-death human tissue, the law prior to 1968 had been slow to develop a coherent system for organ donation dispute resolution. Currently, the American legal system may have a method of dispute resolution for these disputes. Yet, this method is not adequately prepared to meet the changing landscape of medical technologies. The current system is also ill equipped to resolve the conflicts between next of kin that emerge, or may emerge, as technology advances.

In America, there have been some attempts at creating a coherent legal framework for the organ donation problem. However, the underdevelopment of the law of donation of bodies is a continuing problem without an easy solution, and the overarching theme of this Note, the disposition of dead bodies generally, reflects this systematic failure to deal with these problems. Commoditization—or lack thereof—and finding a consistent legal identity for dead bodies has been problematic since the time of the great English jurist Sir Edward Coke.²⁹ This is primarily because the legal system, and more importantly those who design and maintain it, disdains conceptualizing bodies as “property.”³⁰ In spite of the law’s distaste for treating corpses as property, an increasing need for a cogent body of law to respond to this problem demanded a response. That response, in America, came in the form of the Uniform Anatomical Gift Act (UAGA). The American Bar Association approved the UAGA in 1968, and by 1971, it had been adopted in some form by all fifty states and the District of Co-

27 Francis King Carey, *The Disposition of the Body After Death*, 19 AM. L. REV. 251, 252 (1885) (noting that “the subject [of corpses] (both popularly and technically) has become one of the great problems of the age”).

28 See, e.g., R. Alta Charo, *Skin and Bones: Post-Mortem Markets in Human Tissue*, 26 NOVA L. REV. 421, 422–23 (2002) (describing the “history of using various human non-organ tissues, whether obtained from living or deceased donors, so that the issues surrounding postmortem markets in bone, skin, and other tissues can be better situated within the context of the American market and regulation for tissue generally”); William Boulier, Note, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 693–94 (1995) (noting that as a result of technological advancements, “human body parts have taken on a new value above and beyond any sentimental, dignitary, or elemental value”).

29 BERNARD, *supra* note 7, at 16.

30 *Id.*

lumbia.³¹ The adoption of the UAGA by the several states has greatly clarified the law of organ donation and has added a much needed degree of uniformity to the process. However, questions and legal disputes over organ donation persist and will continue to persist as the demand for organs grows along with America's aging population.³²

2. Modern Disputes and the Problem of Organ Donation

While a great deal of case law on the subject highlights how frequently organ donation causes disputes, many of these cases are state interpretations of state law. These cases also illustrate how disputes frequently use litigation as a resolution mechanism. While many states adopted the UAGA, modification was typical prior to acceptance.³³ This amendment process means that the laws governing donation of organic tissue are heavily state-dependent and thus vary significantly in their application from state to state. Indeed, the federal government has made a foray into the issue of organ donation, but this legislation consists primarily of statutes authorizing federal funding of organ or tissue banks and facilitation of their operation.³⁴

It is useful at this point to discuss some modern organ donation cases and hypothetical situations that could emerge. The majority of existing cases deal with issues of improper action by medical personnel in either removing organs without permission or confusing the identities of patients.³⁵ These disputes, while not dealing directly with controversies among family members, suggest how problems may arise. In contrast, one could suppose a hypothetical situation where a minor child signs an organ donation form while obtaining her driver's

31 *Id.*

32 *See generally* U.S. CENSUS BUREAU, *supra* note 6, at 15 (projecting resident population by sex and age from 2005 to 2050).

33 *See* Charo, *supra* note 28, at 429–31.

34 *See* 42 U.S.C. §§ 273, 274–274e (2000).

35 *See, e.g.*, Brotherton v. Cleveland, 923 F.2d 477, 482 (6th Cir. 1991) (holding that a county coroner's office is bound by due process to consult the medical records of the deceased prior to removing corneas); Jacobsen v. Marin Gen. Hosp., 963 F. Supp. 866, 873–74 (N.D. Cal. 1997) (holding that the California UAGA provides that when a search for next of kin is unsuccessful, the corpse may be released to facilitate the underlying purposes of the Act); Perry v. St. Francis Hosp. & Med. Ctr., 886 F. Supp. 1551, 1558 (D. Kan. 1995) (holding that a consent form signed by the deceased's family members is not an enforceable contract); Lyon v. United States, 843 F. Supp. 531, 536 (D. Minn. 1994) (holding that a hospital acted in good faith in harvesting corneas from a patient whose family had mistakenly signed an "eye donor" card, and therefore the hospital was immune from liability).

license.³⁶ The parents, whom the UAGA considers the next of kin, are not aware of this action. The child is tragically killed in a car accident and the hospital wants to act based on the driver's license consent to harvest the organs. This would seem to be a dispute ripe for resolution. Traditional models suggest that a courtroom is the proper forum to resolve this problem.³⁷ The difficult question to ascertain here is: Whose wishes should be followed? Should a decisionmaker follow the desires of the deceased minor, or the parents? Alternatively, and perhaps more novel—and unique to this Note as a hypothetical—would be a situation where there was no clear intent to donate evidenced by the deceased. However, one parent wants to donate the organs and the other does not. An immeasurable number of hypothetical conflict situations could arise.

C. *The Interested Parties Problem*

In resolving any dispute, it is important to consider the identities of the parties to the dispute. For example, two corporations “feel” very differently about the outcome of disputes than do two individuals. They may be willing, or able, to invest more resources in the outcome. Individuals may have a greater need for closure than do corporations. In considering current systems and proposing alternatives to any dispute resolution device, it is essential to consider the nature of those involved in the situation.

The identity of the parties who are interested in burial controversies has serious weight. When evaluating the current dispute resolution mechanisms or considering potential alternatives, it is essential to remember the disputants. Burial disputes create a unique confluence of factors suggesting that ADR is the best-suited mechanism to resolve the dispute. Family members and next of kin are the key parties con-

36 Many states include on their driver's license forms the ability to enroll in the state's organ donation program. However, these indications are oftentimes not binding on the donee absent consent from the next of kin. There has been a movement afoot to reverse this presumption. See Patricia Lopez, *Rep. Luther to Propose National Organ Donation Bill*, STAR TRIB. (Minneapolis/St. Paul), July 9, 2002, at 5A (commenting on a Minnesota law that made a driver's license organ donation preference binding, and a nationwide effort to create a similar program); see also MINN. STAT. § 171.06 (2003) (creating the Minnesota Driver License Organ Donor Program); Josephine Marcotty, *Making the Wish of an Organ Donor into a Promise*, STAR TRIB. (Minneapolis/St. Paul), Mar. 9, 2002, at 1A (reporting that the “trend shows how organ-procurement organizations across the country are becoming more assertive as the demands for life-saving organs continue to rise while the number of donors stays fairly constant”).

37 In fact, this is the resolution mechanism prescribed by the UAGA in most states.

cerned. Of course, they will be interested in the arrangements, but some parties may have more interest than others. Parents may be more interested in the interment arrangements for their children than will be siblings. In addition, spouses may want to have more input than children or other family members. Typically, many jurisdictions arrange their laws to respect this ordering of interest.³⁸ In spite of there being some degree of legal certainty over who has control over the actual disposition of the body, that does not mean this ordering is the best way to resolve these disputes. Furthermore, the rules vary from jurisdiction to jurisdiction.³⁹

The law may have its own hierarchy and method of identifying interested parties. However, this system does not necessarily account for all of the parties who may be involved in a dispute over disposition of the body. One of the key parties, especially in the organ donation context, is the state. This interested party expresses its role through the many state statutes that set up a comprehensive organ donation network and support citizen awareness programs to encourage enrollment in organ donation programs.⁴⁰

Additionally, religious organizations may have an interest in how these disputes are resolved. Certain religious organizations have views regarding the desecration of bodies and their proper interment. Another potential party to consider is the interest of burial or funeral arranging organizations. They may exert lobbying influence on a state to insure certain default mechanisms in burial proceedings. Funeral organizations may also pressure the other interested parties to have them choose a particular method of burial because of an inherent self-interest. From the moment a family arrives at a funeral home, the funeral director is doing a “mental calculation of your income” in order to maximize his profit.⁴¹ Certainly, the funeral directors have an interest in how disputes over disposal of dead bodies are resolved.

These hypothetical interested parties are suggested to illustrate that, in order to resolve burial disputes, resolution mechanisms ideally would be able to take into account the interests of all of the interested parties—from the state to the deceased’s pets, like Ted Williams’s dog

38 See JACKSON, *supra* note 10, at 41–55; see also CARLSON, *supra* note 17, at 55–56 (cataloging various states’ next of kin rules for control over estates and other post-death interests).

39 CARLSON, *supra* note 17, at 55–56.

40 See, e.g., Joanna E. Scannell, *Funeral Arrangements and Organ Donations*, in DRAFTING WILLS AND TRUSTS IN MASSACHUSETTS § 3.5 (2002) (describing a number of organizations that are involved in facilitating organ donation).

41 CARLSON, *supra* note 17, at 119.

“Sluggier.”⁴² I suggest that the current system is ill equipped to meet the many demands of all of the interested parties.

II. TRADITIONAL METHODS FOR RESOLVING DISPUTES

A. *The Adversarial System: A Perspective and History*

One of the main arguments of this Note is that the failure on Americans' parts to consider nonadversarial or alternative dispute resolution mechanisms is partially responsible for the “litigation explosion” that has plagued and clogged our justice system. Since America's founding, adversarial processes have formed the basis for our resolution of conflicts. Even in its genesis, America was a nation forged from the fire of direct confrontation, the Revolutionary War, and America remains “a nation of fighters, with a tradition of every man—and sometimes woman—for himself.”⁴³ The explanations for America's confrontational, individualistic culture are as diverse and numerous as the nation's population itself.⁴⁴ Yet discussion of these explanations lies beyond the scope of this Note. Instead, I wish to focus on how this confrontational culture has manifested itself in the American model of dispute resolution through what is frequently described as the “litigation explosion” of the past quarter century. How does our confrontational culture express itself when it comes to disputes over the burial of members of our society? What devices does the legal system currently use to resolve those disputes?

Americans historically and presently have expressed a dislike for lawyers.⁴⁵ However, since the time of our founding we have been, ironically, a litigious society. De Tocqueville chronicled our nation's obsession with the law from its early history when he wrote that “[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”⁴⁶ The simplest explanation for this phenomenon is the American belief in a government of laws and not of men. Our constitution entrusts the role of

42 “Ted told me several times that he wanted to be cremated and have his ashes, and the ashes of his dog Sluggier, spread off the Florida Keys.” Mishra, *supra* note 2 (quoting Williams's longtime friend and business partner, Arthur “Buzz” Hamon).

43 LINDA R. SINGER, *SETTLING DISPUTES* 1 (2d ed. 1994).

44 See, e.g., JOHN W. KINGDON, *AMERICA THE UNUSUAL* 26–32 (1999). “This individualism is closely connected to the much-noticed tendency of Americans to prize liberty or freedom, that is, liberty or freedom for autonomous individuals.” *Id.* at 26.

45 See SINGER, *supra* note 43, at 1–2 (noting that “[e]arly Americans distrusted lawyers” and commenting on the early constitution of South Carolina that criticized lawyers).

46 ALEXIS DE TOCQUEVILLE, *1 DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., Henry Reeve trans., 1953) (1835).

applying and interpreting the law in a uniform manner to the judiciary.⁴⁷ Therefore, all questions of law wind up in court, and through inheritance of the English legal system, the judicial system in America is an adversarial one. Ordered conflict discovers the truth; the operation of "saying what the law is" involves conflict between parties to arrive at a just result.⁴⁸

B. *Litigation and Adjudication—The Default Route*

As with most disputes in the United States, serious controversies arising out of the burial of bodies are primarily resolved through litigation. As one treatise author has noted, "[t]he traditional legal response to a dispute between parties has been for a lawyer for one of the parties to initiate the litigation process"⁴⁹ *Black's Law Dictionary* defines "litigation" as a "[c]ontest in a court of law for the purpose of enforcing a right or seeking a remedy."⁵⁰ Litigation, for purposes of this Note, means a standard lawsuit between two parties, with a plaintiff and a defendant, filed in a court of law. I say *filed* in a court of law as opposed to resolved in a court because most disputes that become lawsuits do not actually go to trial.⁵¹ On the contrary, treasures trove of scholarly inquiry and statistical studies and analyses have demonstrated that the "vast majority of cases are settled" before reaching the trial stage.⁵² Furthermore, many disputes between parties will not be "serious" enough for the parties to actually retain a lawyer and commence a lawsuit.⁵³ For example, if one is "stood up" by a blind date there will undoubtedly be some "dispute" between the jilted suitor and the woman who has elected to forgo their date. How-

47 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

48 See Robert Gilbert Johnston & Sara Lufrano, *The Adversary System as a Means of Seeking Truth and Justice*, 35 J. MARSHALL L. REV. 147, 147 (2002). "The purpose of a lawsuit is to arrive at the truth of the controversy, in order that justice may be done." *Id.* (quoting Edward F. Barrett, *The Adversary System and the Ethics of Advocacy*, 37 NOTRE DAME LAW. 479, 479 (1962)).

49 JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION* 1 (1992).

50 BLACK'S LAW DICTIONARY 934 (6th ed. 1990).

51 See, e.g., D.A. WATERMAN & MARK A. PETERSON, *MODELS OF LEGAL DECISIONMAKING* 1 (1981).

52 *Id.*

53 See, e.g., William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 632 (1981) (providing "a framework within which the emergence and transformation of disputes can be described"); Richard E. Miller, *Grievances, Claims, and Disputes*, 15 LAW & SOC'Y REV. 525, 525 (1981) (noting that the origin, development, and rate of transformation of problems into disputes are "questions . . . rarely addressed").

ever, societal conventions and a reasonable cost-benefit analysis, informed by the likelihood that the erstwhile Romeo will not obtain relief in a court, all counsel strongly against this dispute becoming a lawsuit. The blind date hypothetical is but one of millions of disputes that arise every day that could not and do not become lawsuits. Yet, there are still thousands of lawsuits filed every day in courts across this country, concerning disputes ranging from the enormous—multi-billion dollar tobacco litigation—to the miniscule—a minor car crash between two college students.⁵⁴

Academics and jurists alike, researching for over thirty years, have extensively documented and debated the phenomenon in America of increasing numbers of lawsuits known as the “litigation explosion.”⁵⁵ The perception of a litigation explosion is a surprisingly modern development. As recently as 1960, commentators, including prominent judges, remarked about a decline in litigation in America, rather than a rise.⁵⁶ Yet, the American public, academics, and government have all been concerned in recent years with the problem of the litigation explosion. It is widely perceived that the use of lawsuits to resolve disputes in America has become far too pervasive. Consequently, litigants pack courts and the dockets of our public servant judges figuratively overflow. In spite of the forceful assertions of many regarding the extent of the growth of lawsuits, some writers have argued that the problem is not as serious as the masses contend.⁵⁷ The inescapable fact remains that the litigation explosion, perceived or otherwise, has ground the traditional model of dispute resolution in American society to a near halt.

It is useful at this stage to describe, in slightly greater detail, how the adjudication process works. Most of this process is common knowledge to any lawyer who has taken a first year Civil Procedure

54 For a further discussion on the so-called litigation explosion and the difficulties in determining precisely how many lawsuits are filed in the United States every year, see generally Samuel Jan Brakel, *Using What We Know About Our Civil Litigation System: A Critique of “Base-Rate” Analysis and Other Apologist Diversions*, 31 GA. L. REV. 77 (1996).

55 See, e.g., Stephen B. Burbank, *The Roles of Litigation*, 80 WASH. U. L.Q. 705, 706 (2002) (noting that “[e]mpirical studies that debunk claims about various aspects of the U.S. litigation landscape have been available for decades”); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5 (1986) (examining “several aspects of the current discourse about litigation: the assumption that Americans are excessively litigious; the belief that this is displayed in skyrocketing court caseloads; and the tendency to see the costs but not the benefits of litigation”).

56 See, e.g., Charles D. Breitel, *The Quandary in Litigation*, 25 MO. L. REV. 225, 225 (1960) (commenting that “it is also true that there is a decline in litigation”).

57 See Galanter, *supra* note 55 *passim*.

class; however, a quick review will be useful to compare the features of adjudication with those used in alternative models. In the U.S. federal district courts and most state courts, a lawsuit is initiated through a process known as “notice pleading.”⁵⁸ This system was designed to replace what was seen as the overwhelmingly complicated and cumbersome process that had preceded it: code pleading.⁵⁹ One of the main objectives of the notice pleading system is that technical deficiencies should not deny a meritorious claim its day in court. Rule 8 of the Federal Rules of Civil Procedure, which establishes a very low bar for a complaint to clear in order to become a lawsuit, is the primary facilitator of this objective.⁶⁰ Rule 8 only requires a “short and plain statement of the facts and the law on which relief is to be granted.”⁶¹ The Supreme Court has repeatedly rebuffed attempts by lower courts to utilize “heightened pleading” as a way of raising the barrier of entry.⁶² Instead, the current rules provide that nonmeritorious but technically sound claims should be dismissed through extensive, and quite frequently expensive, pretrial processes such as discovery and subsequent summary judgment. While this system has proven relatively effective at “resolving disputes,” as fewer than five percent of claims filed reach trial,⁶³ it is not without many problems.

If a disputant has the resources and patience to see her claim through to trial, the dispute resolution mechanism utilized therein is very formal. Extensive sets of rules govern trials, and they are presided over by a neutral third party provided by the government. With the exception of the small cost of filing fees, the actual trial itself does not cost the disputants at all. The decisionmaker is most frequently a judge, although many civil cases in America also use a jury. When a jury is involved, their role is limited to deciding questions of fact. With the exception of the ability to appeal, which is very time and dollar consuming, decisions made by the court are final and binding on the parties involved.

When all the process concludes, resolving disputes through resort to traditional government provided dispute resolution mechanisms can take many years. If appealed to the highest level, it could take as

58 See RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE 301–36 (3d ed. 2001).

59 *Id.*

60 FED. R. CIV. P. 8.

61 *Id.*

62 See, e.g., *Leatherman v. Tarrant County*, 507 U.S. 163 (1993); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (holding that an employment discrimination plaintiff “need not plead a prima facie case of discrimination”).

63 Galanter, *supra* note 55, at 8.

long as five to ten years to resolve the conflict. In addition, the process requires extensive use of lawyers, experts, consultants and other technicians, although taxpayers provide the services of the judge and jury free of cost to the disputants. The costs that can accumulate to a defendant, even if ultimately victorious, are enormous. As many plaintiffs' attorneys operate on a contingent fee basis, the initial direct costs to plaintiffs are not quite as large. However, the time consumption remains the same and the standard thirty percent contingent fee⁶⁴ is not exactly "small potatoes."

C. *Examples of the Traditional Method: The Cases*

It is, perhaps, insurmountably difficult to accurately describe how burial disputes are dealt with in specific particularity. This is primarily because the rules that govern decisions in these disputes are normally generated either through state court-made common law or state statutes, but the content of the law itself varies tremendously from state to state. Therefore, when describing the contemporary methods of burial dispute resolution, it is of course necessary to issue the caveat that these mechanisms differ markedly from state to state in the specifics of their application. However, I attempt to draw a rough outline of what happens when "brother" and "sister" get into an argument over how to bury "dad" properly. As a primary guide, we have several cases, beginning with the high profile Ted Williams case described below,⁶⁵ to outline the contours of how these disputes are resolved. To commence, I introduce a more general guideline as to how litigation works.

In the typical burial dispute situation, one needs several "ingredients." First, there is an obvious need for a deceased person. However, that alone is not enough, for the dispute also needs an additional interested party to contest some aspect of the burial method. In this situation, the aggrieved person will institute a lawsuit in a state or federal court to contest the will in a probate proceeding, or they will institute a common law action for some other transgression, such as mishandling of a dead body or conversion. The two parties then either negotiate a settlement or they proceed through the normal

64 "(A) contingent fee of one-third of the amount recovered has become a general standard, at least in personal injury actions." 1 ROBERT L. ROSSI, *ATTORNEY'S FEES* § 2:9, at 112-13 (2d ed. 1995).

65 See *infra* notes 67-86 and accompanying text.

hoops⁶⁶ until either they provide themselves with a resolution or the judicial system provides one for them in the form of a court order. There are many, many possible permutations to this basic scenario, however, and in the following subsections, I explore several cases to demonstrate how these scenarios play out in the traditional dispute resolution process.

In general, I categorize burial disputes into three groups, each with its own special characteristics entering into the calculus of their appropriateness for alternative dispute resolution mechanisms. First are disputes that erupt prior to the interment of the body of the deceased. A time crunch, due to natural human desire and the common law requirement of a "Christian burial," acts to accelerate the dispute. Therefore, in evaluating contemporary methods I will place special emphasis on the speed of the process.

Second is a category of disputes that focus on bodies that have already been interred. Here there is little absolute need to resolve the dispute quickly. However, additional concerns, such as the sanctity of a "final resting" place enter into the picture. In addition, problems of state concern, such as sanitation and health issues, emerge, as do the interests of multiple parties.

Finally, I will consider disputes that arise when families disagree about the donation of the deceased's organs. This area is a special subset of the pre-burial disputes mentioned above, so many of the same issues pertain. Here the time crunch issue is perhaps even more relevant and the irreversibility problem is exacerbated. Additionally, the state's interest, which manifests the public's interest generally, is increased because of the demand for a supply of viable organs for donation.

Throughout all of these disputes, the issues of money and costs are also present. It is expensive to bury someone in the first place. As described above, every minute the dispute drags on increases the costs to the disputants. Furthermore, in this context, it is unlikely that either side is being represented on a contingent fee basis because the recovery will normally be in the form of control, not money.

1. Before Burial Disputes

While it is certain that there are many disputes that erupt after death but prior to burial, there is a paucity of reported cases dealing with this issue. One of the high profile cases was that of baseball great

66 The normal hoops would consist of summary judgment, discovery, and the other "filtering devices" provided by the Federal Rules of Civil Procedure. See *supra* Part II.B.

Ted Williams, the “Splendid Splinter.” The sordid affair that erupted after his death, as his daughter publicly fought her brother for control of her father’s burial, largely provided the genesis for this Note.

By way of introduction, for the woeful among us who do not enjoy baseball or its history, here is a small sketch of who Ted Williams was. Mr. Williams is often quoted as having said that when he walked down the street, he wanted people to say, “[t]here goes Ted Williams, the greatest hitter who ever lived.”⁶⁷ By the time of his death, Ted Williams had certainly accomplished that goal. The last player in Major League Baseball to have hit for a .400 average in a season,⁶⁸ Williams was acknowledged by Major League Baseball, prior to his death, as the “greatest living ballplayer.”⁶⁹ In addition to his outstanding baseball achievements, Williams also abandoned his career twice to serve his country in both World War II and the Korean conflict as a fighter pilot with the U.S. Marine Corps. Finally, Ted Williams was a world-record-holding fly angler, remaining active in the sport until shortly before he passed away.

Ted Williams was a living legend to millions of American baseball fans and his passing on July 5, 2002 was greeted with shock and mourning across the country and the world.⁷⁰ Former presidents eulogized the man as “demonstrat[ing] unique talent and love of country.”⁷¹ Yet, for all of his accomplishments in life, the last chapter of his legacy, written after his death, would play itself out in full view of the American public as his children engaged in a furious debate over his final resting place.

The dispute over Williams’s body first became public a few days after his death⁷² and was not fully “resolved” until late December.⁷³ The core of the dispute was simple enough: Ted Williams’s son, John Henry Williams claimed that his father’s preferred method of inter-

67 TED WILLIAMS, *MY TURN AT BAT* 7 (1969).

68 BILL JAMES, *BASEBALL STATISTICAL ABSTRACT* 382–83, 582 (2002). Williams accomplished this legendary feat in 1941, going six for eight on the last day of the regular season to raise his average from .3995 to .406. *Id.*

69 MLB.com, *A Tribute to Ted Williams*, at http://mlb.mlb.com/NASApp/mlb/mlb/news/tributes/mlb_obit_ted_williams.jsp (last visited Feb. 11, 2004).

70 See, e.g., William Gildea, *The Greatest Hitter Ever*, *WASH. POST*, July 6, 2002, at D1; Peter Schmuck, *Baseball Hall of Fame Hitter Dead at 83*, *BALT. SUN*, July 6, 2002, at 1A; *Sporting Digest—Baseball*, *INDEPENDENT* (London), July 6, 2002, at 9; George F. Will, *An Alloy of Innocence, Arrogance*, *PLAIN DEALER* (Cleveland), July 6, 2002, at B8.

71 Gildea, *supra* note 70 (quoting former President George H.W. Bush).

72 See, e.g., Peter Finney, *Sluggers’ Son Has Cold Heart*, *TIMES-PIAYUNE* (New Orleans), July 14, 2002, at A1.

73 See Mishra, *supra* note 2.

ment was to be cryogenically frozen.⁷⁴ The Splinter's daughter, Barbara Joyce (Bobby-Jo) Williams Ferrell believed Williams desired to be cremated and "sued for Williams's cremation."⁷⁵ John Henry claimed to have proof of his father's wishes, as evidenced by a pact from the year 2000 scrawled on an "oil-stained paper scrap."⁷⁶ Bobby-Jo's claim was based on the text of Williams's 1996 will, which specified that he should be cremated and have his ashes scattered in the Atlantic Ocean off the Florida coast.⁷⁷

What was initially an intra-family dispute quickly found itself in a Florida courtroom. Bobby-Jo filed suit contesting the interment of Ted Williams—" [i]mmersed in liquid nitrogen . . . being frozen"—as contrary to his will.⁷⁸ Shortly thereafter, on July 16, 2002, Williams's will was filed in court, with its executor, Albert Cassidy, agreeing with the validity of John Henry's handwritten cryogenic agreement.⁷⁹ The saga continued over the next several months with attempts at reaching a negotiated agreement proceeding and then stalling and then proceeding again. It is important, for this Note's purposes, to briefly observe that the disputants had to request permission from the court to reach a private settlement.⁸⁰ As the months dragged on, Bobby-Jo's legal expenses mounted and she made an appeal to the public to help her finance the growing cost of challenging the method of disposal of her father's body.⁸¹ By early August, the dispute had already cost Mrs. Ferrell "\$30,000 to \$40,000 . . . and [that was] just starting."⁸² Tellingly, Bobby-Jo's own attorney commented on these types of disputes: "It's unfortunate, but it's the nature of the beast."⁸³

With the estate's executor supporting John Henry, Mrs. Ferrell's legal claims were close to exhaustion as August ended.⁸⁴ In spite of this, she filed a new suit, challenging the Florida court's jurisdiction

74 Franci Richardson, *Talks Heat Up Over Frozen Ted*, BOSTON HERALD, Nov. 6, 2002, at O31.

75 *Id.*

76 Mishra, *supra* note 2.

77 *Williams' Daughter Drops Objections to Cryonic Storage*, L.A. TIMES, Dec. 21, 2002, at D10.

78 Finney, *supra* note 72.

79 Jeffrey Bair, *Sports Notebook*, HOUS. CHRON., July 17, 2002, at 10.

80 *See No Settlement Reached in Ted Williams Dispute*, CHI. SUN-TIMES, July 24, 2002, at 46.

81 Franci Richardson, *Slugger's Daughter Makes Public Cash Appeal*, BOSTON HERALD, Aug. 6, 2002, at 12.

82 *Id.*

83 *Id.*

84 Raja Mishra, *Ted Williams Estate Backs Plan to Freeze Remains*, PITT. POST-GAZETTE, Aug. 14, 2002, at S2.

because the body was in Arizona. This new suit merely spurred more negotiations, which eventually culminated in the court supervised agreement entered into in December.⁸⁵ In the end, Ferrell relented in her pursuit of her father's last wishes primarily because of the expense of the matter. "The financial cost of my struggle would be extraordinary and would result in significant difficulties for my family," Ferrell said in a statement after the settlement of her case.⁸⁶

The Williams case is a perfect example of the potential disputes that may emerge following the death of a loved one in our society. The cost to one side was described in the tens of thousands of dollars. The dispute was not finally resolved until almost half a year after it had begun. It is also important to note that the court was not equipped, as a dispute resolution mechanism, to have prevented John Henry Williams from "interring" Ted Williams in the manner of his choosing, in spite of Bobby-Jo's initial objections. Had the scenario been reversed, a negotiated settlement would have been very difficult to accomplish. How is one to un-cremate the deceased's body?

Another dispute that was resolved using adjudication was that of *Enos v. Snyder*,⁸⁷ a case from the early twentieth century in California. An analysis of that case illustrates that many of the weaknesses that plagued the traditional model of dispute resolution in the Ted Williams case have a long pedigree.

In 1898, John Enos died in Sonoma County.⁸⁸ Mr. Enos had lived a racy life by nineteenth century standards. He had been living "[f]or several years . . . before his death" not with his wife, but with the defendant in the case, Rachel Jane Snyder.⁸⁹ Before he expired, Mr. Enos drafted a will directing that his burial should be conducted "according to the wishes and directions of Mrs. R.J. Snyder."⁹⁰ Mrs. Snyder was only too happy to comply with Mr. Enos's will, but, his wife and daughter objected to this provision of his will and "made demand of defendant Snyder for possession of his body for the purpose of burying the same."⁹¹ When Mrs. Snyder refused the Enos' demands, Mrs.

85 See, e.g., Mishra, *supra* note 2; Raja Mishra, *Williams Family in Talks to End Feud*, BOSTON GLOBE, Dec. 12, 2002, at B2; Richardson, *supra* note 81; Mike Schneider, *Williams' Heirs Each to Receive \$215,000*, ORLANDO SENTINEL, Dec. 20, 2002, at B5.

86 *Williams' Daughter Drops Objections to Cryonic Storage*, *supra* note 77.

87 63 P. 170 (Cal. 1900).

88 *Id.* at 171.

89 *Id.*

90 *Id.*

91 *Id.*

Enos sought to resolve the dispute using the mechanism most Americans would look to first:⁹² she sued.

The lower court entered a judgment for the plaintiffs and the defendant appealed to the California Supreme Court.⁹³ The court then looked at legal precedent and statutory law and decided that, regardless of the stated will of the deceased, the right of burial belonged to the wife or next of kin.⁹⁴

The essential facts of this case, for present purposes, are that John Enos died on March 30, 1898.⁹⁵ Yet, the Supreme Court of California did not enter final judgment until December 21, 1900.⁹⁶ Further prolonging the resolution of this dispute, a petition for rehearing was not denied until January 19, 1901.⁹⁷ It took the traditional model of dispute resolution almost three full years to settle a dispute between two parties who both sought the same goal—to see John Enos laid to rest. In addition, we can have no idea of the costs involved in this case, although one can assume that it was no less expensive in 1900 to appeal a case to a state supreme court than it is now.

2. After Burial Disputes

I will analyze several cases which deal with disputes that arise after the deceased has been interred for some time. In this context, there are different special interests represented—namely society's expressed desire to permit one a final resting place and its general distaste for exhumation of bodies. The cases will illustrate how courts grapple with these issues and subsequently resolve them.

First is a 1921 case from the Supreme Court of New Hampshire, *Lavigne v. Wilkinson*.⁹⁸ This case offers only a brief introduction into how courts deal with burial disputes post-interment. In the reported versions of the case, which come from the appellate court and not the trial court, the final outcome of the dispute is not indicated. However, rules of decision for disputes over interred bodies are, in some respects, announced.⁹⁹

92 This, I am sure, was particularly true at the turn of the century. I find it difficult to believe that the concept of the multi-door courthouse had gathered much speed in 1898. See *infra* Part III.A.

93 *Enos*, 63 P. at 171.

94 *Id.* at 171-72.

95 *Id.*

96 *Id.*

97 *Id.* at 170.

98 116 A. 32 (N.H. 1921).

99 *Id.* at 33 (discussing other cases involving burial disputes and the rules of decision announced therein).

George Lavigne sued his daughter, Eva Wilkinson, in equity to obtain permission for the removal of the remains of his wife from their place of original interment.¹⁰⁰ His daughter fought this request, primarily because Mr. Lavigne remarried after his wife's passing. The trial court dismissed Mr. Lavigne's suit, "based upon the finding that the plaintiff freely consented to the burial of his wife . . . with the intention and understanding that it should be her final resting place."¹⁰¹

The Supreme Court of New Hampshire reversed the trial court's dismissal and remanded the case for reconsideration with instructions for the court to "seek to find what ought to be done under all the circumstances."¹⁰² The court analyzed many prior precedents and found that, although the bodies of the deceased are not property in the conventional sense, the next of kin retain rights in their loved one's proper interment. The court stated that these rights could be "best determined and administered by the rule of reasonableness"¹⁰³ and went on to note that this rule was justified because

there is nothing that touches more intimately the feelings and sensibilities of people than controversies relating to the disposal and control of the remains of their dead. And such methods should be adopted in dealing with these unfortunate disputes as are best calculated to reach just and equitable results, and to inflict the least trouble and distress upon the parties.¹⁰⁴

Justice Plummer then went on to state that, to obtain disinterment and removal, a party must demonstrate "strong and convincing evidence showing that it would be unreasonable to refuse" to allow the disinterment.¹⁰⁵ This language seems to open the door for a long and searching trial to determine whether it is reasonable to move the deceased. While the desirability of a legal rule that permits flexibility goes without stating, the method suggested by this opinion highlights some of the difficulties associated with the traditional model. The main difficulty that comes to mind is cost. If a deceased's next of kin objects to an attempt by another relative to disinter the remains of the deceased, this ruling would seem to imply that they must go to court and fight off the efforts of their other family member. The realm of evidence that a New Hampshire court, following this ruling, would

100 *Id.* at 32.

101 *Id.*

102 *Id.* at 33.

103 *Id.*

104 *Id.*

105 *Id.*

have to consider would in all likelihood be voluminous. However, it seems obvious that a case like this may well not at all be about the deceased's wishes. In fact, if the case developed like *Lavigne*, collateral issues may predominate, such as a child's disapproval of their new step-parent. Courts appear ill equipped to deal with such a complicated case and resolve the true core of the dispute.

A second, more modern case that demonstrates how courts attempt to resolve post-burial disputes is *Tully v. Pate*.¹⁰⁶ This is an excellent case for purposes of this Note because it demonstrates the inability of courts to resolve the "real" issues that often underlie disputes regarding burial arrangements. *Tully* also illustrates well the snail's pace at which adjudications of these claims proceed.

In *Tully v. Pate*, Mr. Tully sued the sister of his estranged wife and alleged that she interfered with his burial rights in his children and his attendance at their funeral.¹⁰⁷ The facts of the case are complicated and distorted, and paint the picture of a bitter divorce and custody struggle between Mr. Tully, his wife, and his wife's family—a struggle that unfortunately included a burial dispute due to the tragic death of his two children in a fire.¹⁰⁸ Following the death of his children, who were the subject of a then unresolved custody battle, Mr. Tully unsuccessfully sought a restraining order to prevent Mrs. Pate and his estranged and severely injured wife from interring his children.¹⁰⁹ Meanwhile, the Tully divorce case, involving the issues of burial and custody of the children, wound its way to the Georgia Supreme Court, where it was decided in favor of Mrs. Tully.¹¹⁰

Tully v. Pate, as the district court judge who decided it aptly concluded, was "essentially a fight between an estranged husband and his sister-in-law," and it "shock[ed] the sensibilities of [the] court."¹¹¹ Judge Hemphill thought that "the forum is being used for vindictive pursuit rather than a place where justice is sought."¹¹² In spite of these suspicions, the court's first opportunity to dispose of the entire case, which it could not do, did not present itself until almost a full

106 372 F. Supp. 1064 (D.S.C. 1973).

107 *Id.* at 1066.

108 *Id.* at 1065-71.

109 *Id.* at 1068-69.

110 *Id.* at 1070; *see also* *Tully v. Tully*, 177 S.E.2d 49 (Ga. 1970) (affirming the lower court's decision in the earlier divorce and custody battle between the two Tully parents).

111 *Tully*, 372 F. Supp. at 1065-66.

112 *Id.* at 1066.

year after it had been filed.¹¹³ In addition, the core issues of this case—specifically the inability of Mr. and Mrs. Tully to get along—could not be effectively dealt with by the court. Adjudication was also unsuccessful in stopping the burial or in enabling Mr. Tully to attend the funeral of his own children. Once again, one can only speculate at the cost involved in bringing this case to the Supreme Court of Georgia and then raising it again in federal district court.

3. Organ Donation Disputes

The final types of disputes concerning the death of a loved one that this Note evaluates are controversies developing out of organ donation decisions. The issues surrounding these disputes have been raised above.¹¹⁴ I now examine two cases that illustrate how courts have confronted these issues utilizing traditional dispute resolution techniques. In these cases, one again observes how ill suited courts are for resolving the primary issues at stake in burial disputes.

Two cases with relatively similar fact patterns demonstrate well the failure of courts to adequately deal with organ donation disputes. *Whaley v. County of Saginaw*¹¹⁵ and *Newman v. Sathyavaglswaran*¹¹⁶ both concerned suits by discontented next of kin against government officials for damages after their loved ones' organs were removed without their permission. In both cases, the courts found for the plaintiffs and awarded damages of some type. While these cases deal more with discrete issues of law, they illustrate that disputes between interested parties can easily develop when organ donation is at issue. The statutes make it relatively clear how states should act in seeking donors, however at times either those statutes are not entirely clear or their dictates are ignored. When mistakes are made, the only possible recourse for the injured parties is expensive and time-consuming litigation, with the possible award of damages as the fleeting pot of gold at the end of the rainbow.

An additional scenario for which my research was unable to discover any case law is the hypothetical and easily imaginable case where two parents disagree over whether or not to donate their child's or-

113 Summary judgment in the case was denied on December 21, 1973. *Id.* at 1076. The case had originally been filed in February 1972. *Id.* at 1066. The divorce itself began in August 1969, *id.* at 1067, and the fire that killed the children occurred in February of 1970. *Id.* at 1068. That means the dispute that formed the core of the conflict between these two people began in 1969 and was still unresolved as 1974 dawned.

114 See *supra* notes 35–37 and accompanying text.

115 941 F. Supp. 1483 (E.D. Mich. 1996).

116 287 F.3d 786 (9th Cir. 2002).

gans. This dispute could also manifest itself as two adult children who have a dispute over the donation of their parent's organs. In that situation, the need for a speedy resolution would arise because of the short window of opportunity in which to harvest viable organs. If the surviving next of kin are unable to reach an agreement about how to proceed, litigation would appear to be the only option—most likely in the form of a temporary injunction.

D. *Problems with Traditional Adjudication*¹¹⁷

The above cases demonstrate several problems with adjudication and settlement, the traditional model, as a method of dispute resolution in the context of burial disputes. Five primary failures of the traditional model emerge. These failures are: inability to deal with matters in a timely fashion, extraordinary expense, the winner-take-all outcome and consequential damage to close relationships, failure to deal with the interests of all of the parties involved, and a lack of expertise in dealing with these issues or lack of flexibility to create innovative solutions.

As demonstrated clearly by commentators, common sense, and the cases introduced above, the traditional model is slow.¹¹⁸ It simply takes a lot of time for courts to act, especially if the dispute proceeds all the way to trial. For the twelve-month period ending on March 31, 2002, it took a median time of 8.1 months for a federal civil case to proceed from filing to disposition.¹¹⁹ Burial disputes, for the most part, demand quick action. Bodies must be buried, organs must be harvested, and healing for the next of kin must begin. Oftentimes decisions need to be made quickly and, once made, they are irreversible. The traditional model, adjudication combined with settlement, has not proven itself an adequate vehicle for timely resolution of these pressing disputes. There must be a quicker alternative to resolve burial disputes.

117 Earlier in this Note, I alternatively used the terms “adjudication” and “traditional model” to describe litigation. Many commentators and scholars classify arbitration as a form of adjudication because a third party is the one deciding the dispute. In spite of this, for the purpose of simplicity, I will consider arbitration under the rubric of nonadjudicative.

118 See *supra* Part II.A; see also ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASE LOAD STATISTICS 56–58 (2002). The limitation of this resource is that it only documents cases in the federal judiciary. As reported by Marc Galanter, more than 98% of civil cases are filed in state courts. However, one might accurately presume that these two systems would display parallel trends. See Galanter, *supra* note 55, at 6.

119 ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra* note 118, at 56.

Secondly, the lengthy nature of the adjudicative process, combined with the high cost of lawyers, makes resolving these disputes extremely expensive.¹²⁰ Often, when someone's motivation for creating a controversy is no more than an innocent desire to see the deceased's wishes fulfilled, high cost will prevent those wishes from being realized. Yet that high cost does not make the wishes any less important. Justice and correct outcomes, it can be argued, should not be contingent on the size of the wallet of the person seeking the correct outcome. This is especially true in the sensitive and painful time that follows the death of a loved one.

One of the major criticisms of the adversary system is that it compels participants to view each other as combatants or opponents.¹²¹ The conception of a lawsuit is that it is a zero-sum game. This can be seen as especially true in the burial dispute context, where often victory will mean "getting your way" as to how "dad" is going to be buried. Whether one wins or loses a trial of any variety, the parties are likely to have developed a strong dislike for their opponent at the conclusion of it, especially when staring at large legal bills and months of effort wasted. This animosity and adversarial current that drenches the traditional adjudicative model is especially poisonous in the burial dispute paradigm. The death of a loved one is painful enough for most people, but the effect of a long and expensive trial on the continuing relationships of the disputants would be devastating. In most cases, the disputants are family members, like Bobby-Jo and John Henry Williams, who will remain family members for a long time. The collateral issues and effects of the dispute, which both contributed to

120 See, e.g., Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 7-8 (1996) (noting that "[t]rials are the most visible aspect of our system of adjudication, and they show it at its worst," and that "[t]hey are the slowest, most expensive and most contentious cases, in which compromise has failed and in which the verdict is most likely to seem arbitrary or extreme"); see also *supra* notes 81-83 and accompanying text (noting how, in the Ted Williams case, one of the key factors that forced Mrs. Ferrell out of the litigation was rapidly expanding cost).

121 See, e.g., LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 210 (1987); Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971) (noting that, in complex situations, "the mediator will have to enlarge considerably the range of his concerns and in the process have to content himself with something short of perfection in the achievement of his more familiar objectives"); Dwight Golann, *Is Legal Mediation a Process of Repair—or Separation?*, 7 HARV. NEGOT. L. REV. 301, 302 (2002) (finding "a dichotomy . . . between what law schools teach about the [mediation] process and the way many litigators describe it in practice").

its creation, and often hamper its resolution, will only be exacerbated by the competition of trial.

Courts are very good at resolving disputes when the issues and the law are clear. The converse is true as well. When the law is unclear or an issue is novel, courts frequently struggle to fashion the appropriate type of relief.¹²² The adjudicative model's lack of flexibility and expertise is a serious handicap to the effective resolution of burial disputes. Frequently, creative solutions to the problem could end the dispute. For example, suppose that son *A* wants dad buried, and son *B* thinks that dad should be cremated. Under the adjudicative model, if they go to court, there are only two options available to the court in fashioning relief—cremation or burial. This myopic view constrains courts, hiding the potential that there is a third or even fourth option that may be available. A method of resolving this controversy that utilized a decisionmaker or advisor who is familiar with burial and interment and is more flexible might be better able to propose those solutions and vindicate the wishes of all the parties. Courts simply are not flexible or knowledgeable enough to deviate from the relief requested by the parties themselves.

A final problem with the adjudicative model is its lack of ability to deal with the multiplicity of parties that frequently present themselves in a burial dispute. The American adjudication system categorizes the parties as plaintiffs and defendants.¹²³ There is no room for an intermediate position; the choice is narrowed to two sides. While a third party, the state, may appear via statutes and rules of decision, that role is limited because of a lack of either common or statutory law dealing with the burial of bodies.

Thus, it is clear that the current model for resolving burial disputes is seriously lacking in its capacity to effectively terminate these controversies. In the next Part of the Note, I present alternatives to the current model and attempt to determine if these alternatives

122 For a high profile example of this problem, one need look no further than the integration of American schools—a process that began in the early 1950s and continues today. See generally Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1043 (1984) (attempting to “fill [the] vacuum in the Supreme Court’s remedial jurisprudence by fashioning a remedial theory against which the utility and legitimacy of busing, and of school desegregation remedies generally, can be assessed”).

123 While there is a potential in the Federal Rules for third parties to join through mandatory and permissive joinder, the courts are still constrained by the “v” in the middle of every case caption. Adjudication in America is a contest with two sides and no more. See Ellen E. Sward, *A History of the Civil Jury Trial in the United States*, 51 U. KAN. L. REV. 347 *passim* (2003).

would achieve better results in this area. I also seek to demonstrate why it is that these methods have not been used more frequently.

III. ALTERNATIVE METHODS

Thus far, this Note has primarily explored traditional methods of resolving disputes. That description necessarily implies that there exist nontraditional methods, and this is certainly true. The litigation explosion and increased court dockets of the 1960s spawned increased interest in nontraditional methods of resolving conflicts that formally developed "early in the century."¹²⁴ These procedures are commonly referred to under the general term alternative dispute resolution (ADR) mechanisms. The academic and jurisprudential thinking about ADR often is described under the rubric of the ADR movement. *Black's Law Dictionary* defines ADR as "procedures for settling disputes by means other than litigation; e.g., by arbitration, mediation, mini-trials."¹²⁵ The next section of this Note briefly describes the development of ADR as a movement in general and its growth and acceptance. I then turn to particular types of ADR, specifically mediation, arbitration, and hybrid techniques, describing their strengths and weaknesses. Concluding this Part of the Note is a section in which I apply the various ADR mechanisms to burial disputes to determine their usefulness in this area.

A. *ADR: The Growth and Development of a Movement*

Nonlitigious models of dispute resolution have been employed throughout the world and across this country for almost as long as law has been administered. For example, for over "60 years" arbitration has been used in many contexts to resolve disputes.¹²⁶ However, it was not until awareness and discussion of the "litigation explosion" began to peak in the early 1970s that ADR began to gather strength as a full fledged legal reform movement. A key event in this development was the Roscoe E. Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Pound Conference) convened by former Chief Justice Warren Burger.¹²⁷ At that conference, "leading jurists and lawyers expressed concern about increased expense

124 STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 7 (3d ed. 1999).

125 BLACK'S LAW DICTIONARY, *supra* note 50, at 29.

126 GOLDBERG ET AL., *supra* note 124, at 6.

127 *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (1976) [hereinafter Pound Conference Report]; see also NOLAN-HALEY, *supra* note 49, at 5 (noting that "[s]ome of the papers

and delay for parties in a crowded justice system.”¹²⁸ The conference created a task force that adopted Professor Frank Sander’s idea of the “multi-door courthouse,” a concept that conceived of the courthouse as an all purpose dispute resolution center.¹²⁹ Over the last twenty-five years “[n]o field of law has experienced more growth or had a greater impact on the law . . . than alternative dispute resolution,”¹³⁰ and the ADR movement has expanded beyond the legal community and has pulled in endorsements and criticism from fields such as psychology, sociology, and anthropology.¹³¹ At the same time, ADR reformers have struggled to find a place for ADR against staunch defenders of traditional methods. At times ADR’s critics have been both many and highly vocal. This criticism has not gone unnoticed, but the movement has continued to grow.

Many of the early criticisms focused on the ambitious nature of the movement itself, which tended to see alternative, or sometimes called appropriate, dispute resolution as a tonic for all of the legal system’s ills.¹³² In response to criticisms, by the early 1980s, the movement had narrowed its ambitions and agenda. Yet, this narrowing did not stop the criticism. Commentators “began to report research that challenged every premise of the movement’s call for public support.”¹³³ As this past century drew to a close, the fact of life was that many facets and usages of ADR were here to stay. Thus, the focus “shifted from experimentation to institutionalization.”¹³⁴ While in some contexts, use of alternative methods is firmly entrenched—for example, management-labor relations where arbitration is a fixture of disputes¹³⁵—the ultimate extent of alternative dispute resolution’s usefulness remains to be seen. Additionally, the extent to which ADR has met its objectives by reducing court backlog, speeding resolutions, and reducing costs, among others, has not yet been determined. Finally, there remain many barriers to a more complete implementation

which emerged from this conference . . . formed the basic understanding of dispute resolution today”).

128 GOLDBERG ET AL., *supra* note 124, at 7 (citation omitted).

129 *Id.*; Pound Conference Report, *supra* note 127, at 111.

130 Richard Chernick, *Alternative Dispute Resolution: The Growth and Maturation of Mediation*, L.A. LAW., Mar. 2002, at 8.

131 NOLAN-HALEY, *supra* note 49, at 5–6.

132 See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that settlement “should be treated . . . as a highly problematic technique for streamlining dockets”).

133 GOLDBERG ET AL., *supra* note 124, at 8–9.

134 *Id.* at 9.

135 *Id.* at 233.

of ADR procedures—some of them justified and some of them simply the result of inertia or entrenched interests.

B. A Sampling of Mechanisms and an Application to Burial Disputes

Not all alternative dispute resolution techniques are created equal. In addition, as ADR methods grow in usage they may begin no longer to be seen as alternatives to the traditional methods. For example, negotiated settlements are not adjudication, yet they are such a fundamental part of the notice pleading structure that many jurists and commentators see them as adjudicative in nature.¹³⁶ There is a wide ranging normative consensus in describing several ADR methods. In the interest of brevity, I will attempt to focus on two primary methods of dispute resolution with cursory treatment of some hybrid options. I believe that the use of either mediation or arbitration is the best way to resolve burial disputes.

Subsequent portions of this Note will describe these two processes. However, as a starting point it is useful to discuss the features these two methods share with almost all ADR methods. First, and perhaps foremost, is informality. Mediation and, to a slightly lesser extent, arbitration take great pains to maintain a level of informality that contrasts sharply with the rigidly defined procedures and practices of the courthouse.¹³⁷ In addition, mediation and arbitration are both designed to be low cost. However, unlike a judge in a courtroom, parties must pay for the services of the mediator or arbitrator, which occasionally frustrates that intention. Furthermore, neither the mediator nor the arbitrator has independent power to enforce the result of their processes. This is a bit of an overstatement because if a contract clearly stipulates final and binding arbitration, then a court will usually enforce the result. However, there is the slim likelihood that a court will not enforce the contract due to some procedural error or other concern about unconscionability.

Of course, major differences also characterize mediation and arbitration.¹³⁸ For example, while I noted above that both are informal processes, arbitration has grown more formal and institutionalized with its increasing use over the past several decades. A further crucial difference is that, in mediation, the parties are the ones who ultimately decide the issue. In contrast, in arbitration, the arbitrator

136 See, e.g., Gross & Syverud, *supra* note 120, at 4.

137 GOLDBERG ET AL., *supra* note 124, at 4–5 tbl. 1-1.

138 See Robin Hoberman, *Mediation: A Nonadversarial Alternative to a Win-Lose System*, 90 ILL. B.J. 588, 588 (2002) (describing mediation as “nonadversarial and negotiation-based, while arbitration and litigation are both adversarial and proof-based”).

often will decide the issues for the parties. Thus, mediation can be seen as more cooperative, where the "focus . . . is on the communication between the parties, not on the presentation of proof to a neutral."¹³⁹ Of course, this also means that mediation is not outcome certain; there is no guarantee that mediation will result in a settlement of the case at hand.

In the next subsections of this Note, I introduce both mediation and arbitration in detail and demonstrate their potential for application in the context of burial disputes. Following this is an investigation of the reasons for the failure to use these resolution devices and why they may not be used in the future in spite of, or because of, their relative "fit" for this type of dispute.

1. Arbitration

Arbitration is the senior fellow in the department of alternative dispute resolution mechanisms. It has existed since the time of mythology and the ancient Greeks and has continued in active usage throughout human history.¹⁴⁰ In addition to being the oldest alternative dispute resolution mechanism, it is also the process that most resembles traditional methods of adjudication and the "most formalized alternative to the court adjudication of disputes."¹⁴¹ Its history in America "antedate[s] the American Revolution in New York and several other colonies."¹⁴² In contemporary American society, arbitration first came into widespread usage in the 1940s, and today disputes ranging from credit card billing controversies to setting the salary of Major League Baseball Players use arbitration. It truly is the granddaddy of alternatives to traditional adjudication, although its widespread usage and increasing institutionalization has led some to criticize its effectiveness as a true alternative.

a. How Arbitration Works

Arbitration, like all alternative dispute resolution processes, is a difficult creature to describe. This is primarily because it is chameleon-like. Unlike the traditional adjudicative processes, arbitration is "designed by the parties to serve their particular needs," and therefore "it cannot be defined or described in a manner that will encompass all

139 *Id.*

140 See FRANCES KELLOR, *AMERICAN ARBITRATION* 3 (1972) (noting that "[c]ommercial arbitration was known to the desert caravans in Marco Polo's time and was a common practice among Phoenician and Greek traders").

141 NOLAN-HALEY, *supra* note 49, at 119.

142 GOLDBERG ET AL., *supra* note 124, at 233.

arbitration elements.”¹⁴³ However, there are certain features that are generally common to all types of arbitration.

Traditional models of arbitration “contemplate[] a *voluntary* process where parties submit a dispute to a neutral person for a decision.”¹⁴⁴ There are also nontraditional models of arbitration where the decision to arbitrate is not entirely voluntary, i.e., court annexed or compulsory arbitration. In these situations, however, the resolution of the dispute is generally not binding on the parties.

One of the main features of traditional arbitration is limited discovery. Limited discovery increases the speed of the process and lowers the costs.¹⁴⁵ The process of arbitration itself is very much like traditional adjudication, with either side to the dispute presenting their proof to the neutral third party. The resolution of the dispute, however, is much different than traditional disputes. In arbitration, juries are never used. The arbitrator decides questions of both fact and law. In addition, outside of the labor context, “arbitrators (unlike judges) commonly do not write reasoned opinions attempting to explain and justify their decisions.”¹⁴⁶ This gives arbitrators greater flexibility in announcing their decisions. It also means that the principle of *stare decisis* generally does not bind arbitrators, leaving them to decide issues in a manner they see as fair.¹⁴⁷ Furthermore, the ability of the arbitrator to avoid a written opinion increases the speed and decreases the cost of using arbitration.

b. Goals of Arbitration and Criticisms

Arbitration has many goals as an alternative to adjudication. Fundamentally, the goal is to arrive at a more just result than adjudication would permit. This concept of justice encompasses more than simply the outcome of the decision, but also the process required to arrive at that decision. Several of the theoretical advantages of arbitration over traditional court adjudications include the expertise of the decisionmakers, finality of the decision due to lack of appeals mechanisms, privacy of the proceedings, procedural informality, low cost, and speed.¹⁴⁸ It is quite easy to see how many of those advantages could be desirable in the burial dispute context.

143 *Id.*

144 NOLAN-HALEY, *supra* note 49, at 124.

145 GOLDBERG ET AL., *supra* note 124, at 233–34.

146 JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION* 514 (2d ed. 1996).

147 *Id.*

148 GOLDBERG ET AL., *supra* note 124, at 234.

However, critics of arbitration have pointed out that in practice arbitration may not be faster or more efficient than traditional models, and that the rush to judgment inherent in arbitration results in incorrect or unjust results.¹⁴⁹ In addition, many have pointed out that arbitration benefits repeat players because they become familiar with the process. Furthermore, one of the major criticisms of arbitration, particularly final and binding arbitration imposed by boilerplate in many commercial contracts, is that it operates as a barrier to the achievement of justice because it increases costs to litigants. That criticism focuses primarily on the fact that, unlike state provided court adjudication, the parties pay for the arbitrator. This puts the indigent plaintiff at a disadvantage, because if she lacks the funds to pay for the arbitrator, she may be unable to seek relief.¹⁵⁰

A conclusive answer to whether arbitration as a process is meeting its lofty goals is beyond the scope of this Note. There is already a wealth of scholarly commentary on the subject. It is essential to note that it is not a panacea to the problems of the traditional civil justice system; however, it may present an attractive model for use in resolving burial disputes.

2. Mediation

Mediation is a relative newcomer to the field of alternative dispute resolution, yet it has been enormously well received in its brief stay on the block. In the words of one commentator, "mediation is the most important [ADR] innovation and will provide the most lasting benefit to law and society."¹⁵¹ Yet, as with arbitration, mediation in some form has existed for centuries, and in some ways "probably predates the formal creation and enforcement of law."¹⁵² Today, a wide variety of conflicts in American society are resolved through mediation, and it has its share of both proponents and critics.

149 See NOLAN-HALEY, *supra* note 49, at 125.

150 See, e.g., EEOC v. Waffle House, 534 U.S. 279 (2002) (holding that an employer-employee arbitration agreement mandating the arbitration of employment related disputes does not bar the EEOC from pursuing victim specific judicial relief in an ADA enforcement action); Ann C. Hodges, *Can Compulsory Arbitration be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 174-76 (2003) (examining "whether the NLRA's right to engage in concerted activity protects employees from being forced to agree to arbitration of employment claims as a condition of employment").

151 Chernick, *supra* note 130, at 8.

152 MURRAY ET AL., *supra* note 146, at 294.

a. What is the Mediation Process?

Mediation is a process where disputants invite a third party into a dispute to facilitate its resolution. Mediation is “generally understood to be a short-term, structured, task-oriented, participatory intervention process.”¹⁵³ Theorists and scholars typically divide mediation into two subfields, evaluative and facilitative, and there is a great deal of academic debate about whether this division should even occur.¹⁵⁴ In facilitative mediation, the third party attempts to encourage the parties to find common ground through “information exchange and creativity.”¹⁵⁵ In facilitative mediation, the third party does not give the parties an opinion as to the outcome of the case, but acts only to help the parties to “reach their own joint decision on a reasonable settlement or solution.”¹⁵⁶ In contrast, an evaluative mediator may “give an opinion or recommendation on settlement value or some other solution.”¹⁵⁷ However, even in evaluative mediation, the solution always comes from the parties themselves.

The process varies greatly from mediation to mediation, typically depending upon, independent of the evaluative or facilitative role of the mediator, the style and skills of the mediator. Usually, however, mediation begins with the two parties presenting their “case” to the other side and to the mediator. The mediator asks the parties several questions while still together to get a better feel for the issues and interests of the parties. At that point, the mediator often breaks the parties up into private caucuses and will attempt to work out a deal. This helps the two parties to see the issues alone without constantly tying them up in the “conflict” of adversarial proceedings. One of the prime reasons why mediation succeeds where traditional methods often fail is because of the confidential relationship the mediator is obligated to maintain with both parties. The mediator must not disclose any confidential information that either party chooses to share with her in private. However, that information may help the mediator to facilitate the eventual resolution of the dispute because she has access to more perfect information and may be able to construct a unique and special remedy better suited to the interests and not the positions of the parties.

A court may order mediation, or parties may elect to mediate voluntarily or through contractual arrangement. Increasingly, “disputes

153 NOLAN-HALEY, *supra* note 49, at 56.

154 See GOLDBERG ET AL., *supra* note 124, at 139–40.

155 JOHN W. COOLEY, *MEDIATION ADVOCACY* 18 (2002).

156 *Id.*

157 *Id.*

of any size are now mediated early in the litigation process [Parties] now routinely schedule a mediation without urging from the court and often prior to filing a suit.”¹⁵⁸

b. Objectives of Mediation and Critical Acclaim and Disclaim

Increasingly, mediation has moved from its origins as a technique designed to “get to yes” to become a device for “repairing relationships.”¹⁵⁹ On one hand, mediation has been hailed as a device not only to ensure just results, but also to repair relationships where they otherwise would have been critically damaged. On the other hand, “[c]ivil litigators . . . tend to speak of the mediation process in a different way.”¹⁶⁰ Attorneys see mediation as a method to “facilitate distributive, often adversarial, bargaining over money.”¹⁶¹ In addition to these conflicting goals, mediation is designed to operate quickly to resolve disputes in an informal and inexpensive way. Furthermore, the proponents of mediation claim that one of its hallmarks, and the reason why it is seen as being able to restore relationships, is its flexible nature, enabling the parties themselves to come up with creative, appropriate solutions.¹⁶² This creative flexibility also allows mediated solutions to consider and include a greater diversity of interests. In fact, mediation may procedurally include more than just two parties, and the mediator may consider the desires of many groups in arriving at a conclusion.

Does mediation accomplish its goals? In Golann’s empirical study, he concluded that disputants were satisfied with mediation because “it provides a fundamentally different kind of settlement process.”¹⁶³ His data suggested that “disputants can realize important psychological and emotional benefits from mediation even when their relationship is not repaired.”¹⁶⁴ This benefit is in addition to settling the dispute. The proof of mediation’s success is in the pudding—private parties increasingly use it and states have continued to enact statutes encouraging or requiring its usage in a number of contexts.

This is not to suggest that mediation is a cure all and that all disputes should go to mediation. Mediation is not without its disadvantages. Many complain that mediation changes the process of dis-

158 Chernick, *supra* note 130, at 12.

159 Golann, *supra* note 121, at 301.

160 *Id.* at 302.

161 *Id.*

162 Danny Ciraco, *Forget the Mechanics and Bring in the Gardeners*, 9 U. BALT. INTELL. PROP. L.J. 47, 65–66 (2000).

163 Golann, *supra* note 121, at 335.

164 *Id.*

pute resolution and, as a result, changes the balance of power between the two parties, and that it may lead to wrong outcomes.¹⁶⁵ Furthermore, the informality of mediation means that it lacks the procedural protections of the traditional adversarial system.¹⁶⁶ In addition, mediation is generally focused on a fair outcome, which means that there often is no conclusion of who was "right" or "wrong."¹⁶⁷ This suggests that parties who need conclusions as to "fault" may be dissatisfied with mediation. In addition, while some experimental cost-free public mediation programs exist,¹⁶⁸ in the majority of cases the parties will need to pay for the mediator and other costs themselves. As mediation is not a guarantee of a solution, but merely a process, there is the possibility that the parties will pay for the mediation but not reach a settlement and have to go to court for relief anyway.

IV. APPLYING THE ALTERNATIVE METHODS TO BURIAL DISPUTES

Now that I have briefly sketched a few of the alternatives available, I consider whether they would be better suited to resolving burial disputes than conventional litigation. Professors Frank Sander and Stephen Goldberg wrote an article that serves as a useful guide to selecting mechanisms to fit various disputes.¹⁶⁹ In *Fitting the Forum to the Fuss*, Professors Sander and Goldberg designed a matrix-like system that allows a disputant to select the goals of their dispute and compare those objectives to the capabilities of dispute resolution systems.¹⁷⁰ For example, their matrix categorizes courts as weak at cost reduction, speed, and privacy. However, courts do rate highly in vindication, issuing a neutral opinion, and maximizing or, minimizing recovery. Given my criticisms of the traditional processes' failures to resolve burial disputes above, this categorization system is extremely helpful in

165 See Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391-99 (1985).

166 See NOLAN-HALEY, *supra* note 49, at 59 (noting mediation's independence from the judicial system).

167 See Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 181-84 (2003).

168 See Tina Drake Zimmerman, *Representation in ADR and Access to Justice for Legal Services Clients*, 10 GEO. J. ON POVERTY L. & POL'Y 181, 193 (2003) (describing the free mediation services provided by the Kankakee Center for Conflict Resolution in Kankakee, Illinois).

169 Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

170 *Id. passim*.

comparing and contrasting the "fit" of dispute resolution mechanisms to these conflicts.

A. *Will They Work?*

To determine if the alternatives to the traditional system will work, it is first necessary to identify the goals of disputants in burial disputes. This Note previously discussed most of the goals of the disputants.¹⁷¹ In these conflicts, especially pre-burial and organ donation disputes, quickness, finality, low cost, informality, and flexibility are all essential for the resolution mechanism to be effective. In addition, all of these disputes do need, in some respect, to have legal authority, because the deceased may have a will that must be followed. Furthermore, the processes selected here must, ideally, be capable of dealing with the highly emotional demands of the parties about a sensitive subject.

This section will analyze the alternatives under the Sander-Goldberg system. If the client's goals are speed, maintaining or improving the relationship, minimizing costs, and receiving a neutral opinion, then mediation receives a Sander-Goldberg score of nine, arbitration gets a score of six, and trial would receive a score of three.¹⁷² Thus, mediation would seem to be the best mechanism to choose for this dispute. Arbitration would also satisfy more of the parties' goals than going to court. This result makes good sense. As illustrated above, mediation's goals are to provide inexpensive, flexible, and quick dispute resolution. Furthermore, one of the objectives of the process is to empower the disputants to come together to find their own solution to the problem, which is essential to restoring fractured relationships.¹⁷³ In a burial dispute, which will usually involve family members, the restoration of damaged relationships is something that should be highly valued. Empowering the disputants to reach a peaceful, self-crafted resolution may avoid or resolve collateral disputes such as divorce/child custody disputes or will controversies that may emerge following a death.¹⁷⁴

An additional factor that the Sander-Goldberg matrix does not consider is the multiplicity of parties to a burial dispute. Mediation has the advantage of being able to consider the interests of several

171 See *supra* Parts I—II.

172 See Sander & Goldberg, *supra* note 169, at 53 tbl.1.

173 Golann, *supra* note 121, at 301–02.

174 See, e.g., *Tully v. Pate*, 372 F. Supp. 1064 (D.S.C. 1973); see also *supra* notes 70–86 and accompanying text (discussing the Ted Williams case, which featured issues about the disbursement of Williams's estate).

different parties. For example, if there are three children fighting over how or where to bury their father, a mediator could easily meet with all three of them. If they wanted to go to court, there would be no space for accommodating three adversaries' solutions.

However, not all the characteristics of a burial dispute argue in favor of mediation. For example, mediation is nonbinding, which may be a disadvantage in this context. If one of the goals of a mechanism in resolving burial disputes, particularly pre-burial disputes, is to allow for some sense of finality, then mediation may not be authoritative enough for this purpose. The very ability of mediation to entertain multiple parties also means that some interested parties may not be included in a voluntary mediation. The disallowed party may then attempt to interfere with the mediated settlement by going to court, thus eliminating all that was gained by using mediation in the first place.

Arbitration may offer some benefits in resolving burial disputes, particularly where there is a will that must be interpreted and enforced to honor the wishes of the deceased. Comparing the Ted Williams case,¹⁷⁵ where there was a will, with a will-less scenario, i.e., the death of a divorced parent's children, highlights this concern. In Ted Williams's case, the dispute focused on identifying Ted's wishes. If there had been no will, the goal of resolving the conflict would be in seeking an agreement between the surviving relatives. Thus, in a situation where there is no will, mediation may be best. However, where there is a will, arbitration may be more appropriate because a will acts as a guiding hand for the dispute, and commentators have argued that mediation may be most desirable where there is a "lack of decisive case law."¹⁷⁶

B. *Obstacles to Use*

If mediation and arbitration seem so suitable to resolving burial disputes, why are they not used more often? The easiest answers are inertia and ignorance. Even though these explanations are simple, they remain the best. Many criticisms of mediation and arbitration claim that they are not really cheaper for plaintiffs because they have to pay for the forum.¹⁷⁷ Commentators contrast this payment system with the state courts.¹⁷⁸ There, the forum is provided cost-free and

175 See *supra* Part II.C.1.

176 See, e.g., NOLAN-HALEY, *supra* note 49, at 116.

177 See, e.g., Reginald Alleyne, *Arbitrators' Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 U. PA. J. LAB. & EMP. L. 1, 30 (2003).

178 *Id.*

plaintiffs are normally represented on a contingent fee basis. Therefore, in your average dispute—for example, a car accident—the plaintiff does not have any costs if she does not win. However, the contingent fee system and its benefits do not arise as much in the burial dispute context, where damage rewards are not really at stake (except in organ donation controversies). Therefore, both parties to a burial dispute are already paying for their attorneys up front, so any method that will reduce the amount of billable hours is probably desirable; both mediation and arbitration accomplish the goal of reducing billable hours.

In connection with inertia and ignorance, speed and habit provide another reason why ADR mechanisms have gone unused in this scenario. Many lawyers are unfamiliar with ADR and thus, when they are drafting wills or first advising clients how to stop the potential cremation of their relative, they do not consider using ADR. When an attorney needs to act quickly to aid her client, she turns to the familiar and traditional mechanisms because she knows they will work.

ADR usage could be encouraged in this field in several ways. The first and least contentious way to encourage its use is through greater education of attorneys, particularly probate and trusts and estates attorneys. If trusts attorneys draft their clients' wills with mediation or arbitration provisions, they can help their clients and their clients' relatives resolve disputes. A second step could be to educate judges about the availability of ADR to help them resolve more cases, clear their docket, and deliver justice cheaply and quickly. One way to assist judges would be for states to pass laws encouraging the use of mediation in general, or at least in burial disputes in particular.

In the organ donation context, hospitals could provide parties with mediators on site to help them resolve their conflicts in a timely manner that would permit the harvesting of the organs before it becomes too late. In addition, state statutes authorizing organ donation could specify the use of ADR procedures for the resolution of controversies between family members or between organ bank personnel and families.

CONCLUSION

As America's population continues to grow, our courts are bound to become increasingly crowded and unable to resolve disputes in an adequate fashion. The litigation explosion of the past thirty years has seen a corresponding growth in alternative dispute resolution mechanisms. This correlation is more than just causally related. Crowded courts initially forced the usage of ADR methods to relieve a backlog

of disputes, but over time increased usage of ADR has highlighted some of the failures of our traditional adjudicative model. I believe that the example of burial disputes provides further evidence of the weaknesses of litigation as a dispute resolution model and of the American civil justice system in general.

A “one-size-fits-all” mentality characterizes the traditional model of dispute resolution in America. While this approach may enjoy the benefits of simplicity, it has proven to be expensive and prone to crowding. As this Note has shown, not all disputes are the same. A car accident does not involve the same issues that a fuss over burying a relative involves. Yet, our court system would use the same mechanisms to resolve both arguments. As illustrated, this does not make sense and prevents people from pressing their claims, or it drags others into expensive and prolonged “disputes” which resemble a form of government sanctioned blackmail. So long as America maintains a “notice pleading” system with its low barrier to entry, extensive and expensive discovery, and summary judgment as the only early exit strategy, burial disputes will not be resolved effectively and the system will thwart just results.

Ensuring fulfillment of the burial wishes of a deceased loved one should not require their surviving kin to enter into time-consuming and costly litigation. The goals of clients in these kinds of disputes include a desire to see a final decision quickly—at a low cost. Additional disputants prefer to arrive at their result in a fashion that can repair relationships harmed by the disagreement. These goals are not limited to burial disputes; they apply in many others as well. It is a reasonable demand to have a flexible justice system that can better meet the goals of disputants; one size does not fit all. This Note joins the many that have preceded it in the ADR movement and suggests that greater usage of alternative dispute resolution mechanisms would be a much needed reform of our civil justice system—one designed to provide justice to disputants in burial cases.

