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## Dying for Leave: How Societal Views on End-of-Life Care Pushed Ballard to Expand the Meaning of Care Under the Family and Medical Leave Act

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# DYING FOR LEAVE: HOW SOCIETAL VIEWS ON END-OF-LIFE CARE PUSHED *BALLARD* TO EXPAND THE MEANING OF CARE UNDER THE FAMILY AND MEDICAL LEAVE ACT

## I. INTRODUCTION

The Seventh Circuit's recent decision in *Ballard v. Chicago Park District*<sup>1</sup> shook employers and employment law attorneys to their core,<sup>2</sup> forcing reevaluation of what it means to *care* for a family member with a serious medical condition under the Family and Medical Leave Act (FMLA).<sup>3</sup> *Ballard*, a former employee of the Chicago Park District, requested FMLA leave to take her terminally-ill mother on vacation to Las Vegas as part of her mother's end-of-life plan, constructed by her mother and her mother's hospice team.<sup>4</sup> The Seventh Circuit agreed with *Ballard* that her employer should have granted FMLA leave for the trip.<sup>5</sup> In fact, *Ballard* created a circuit split on the issue,<sup>6</sup> placing the Seventh Circuit at odds with the First and Ninth on the meaning of care in the context of traveling.<sup>7</sup> By holding that an employer improperly denied FMLA leave to an employee accompanying her dying mother on a Las Vegas vacation,<sup>8</sup> the Seventh Circuit stretched the FMLA's meaning of care when applied to a seriously ill family member.<sup>9</sup> *Ballard* expanded the meaning of care

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1. *Ballard v. Chi. Park Dist.*, 741 F.3d 838 (7th Cir. 2014).

2. See, e.g., Jeff Nowak, *What!?! Time Caring for Mom in Las Vegas is FMLA Leave*, FMLA INSIGHTS (Nov. 26, 2012), <http://www.fmlainsights.com/what-time-caring-for-mom-in-las-vegas-is-fmla-leave/>; Russell Samson, *Momma, Let's Go to Las Vegas on FMLA Leave!*, DICKINSON LAW (Feb. 6, 2014, 11:26 AM), <http://www.dickinsonlaw.com/2014/02/momma-lets-go-to-las-vegas-on-fmla-leave/>.

3. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2012).

4. *Ballard*, 741 F.3d at 839–40.

5. *Id.* at 839.

6. The issue is “what qualifies as ‘caring for’ a family member under the [FMLA],” and whether the definition changes when the parties are traveling. *Id.* at 839.

7. Compare *id.* at 842 (finding participation in ongoing medical treatment is not requisite element of providing care under FMLA, either at home or while traveling), with *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045, 1047 (9th Cir. 2005) (finding “caring for a family member with a serious health condition ‘involves some level of participation in ongoing treatment of that condition’” (quoting *Marchisheck v. San Mateo Cty.*, 199 F.3d 1068, 1076 (9th Cir. 1999))), and *Tayag v. Lahey Clinic Hosp. Inc.*, 632 F.3d 788, 791 & n.2 (1st Cir. 2011) (finding employee “properly” withheld argument that caring for husband during travel unrelated to husband’s medical treatment “would itself be protected leave”). For an in-depth discussion on traveling while taking FMLA leave, see Heather N. Collinet, *Gambling on Court Interpretations of Care: Approving Leave for Travel under the FMLA*, 10 SEVENTH CIRCUIT REV. 345 (2015).

8. *Ballard*, 741 F.3d at 843.

9. 29 U.S.C. § 2612(a)(1)(C) (2012).

by finding aspects of end-of-life care acceptable as caregiving activities.<sup>10</sup> The unique facts of this case and the court's emphasis on the nature of the mother's terminal illness introduce the subtle notion that the meaning of care loosens when applied to a dying family member. This case creates a lower threshold that was likely not intended by Congress and will frustrate employers, but is very much in line with American values and societal norms regarding end-of-life care.<sup>11</sup>

This Note analyzes the Seventh Circuit's interpretation of FMLA care in *Ballard*. Part II provides an overview of the FMLA, focusing on the family-member-care provision, and various judicial interpretations of this provision. Part III explains the facts and judicial rationale in *Ballard*. Then, Part IV analyzes societal and congressional views of end-of-life care. Finally, Part V of this Note explores the significance of the *Ballard* decision and the risk of employee abuse. While the FMLA does not distinguish or discriminate on its face between a seriously ill family member and a dying one,<sup>12</sup> this Note explores how the definition of care likely becomes more flexible if the employee requests FMLA leave to tend to a terminally ill family member. This flexibility will have a huge impact as the largest generation begins to depart while under the care of employed, younger family members.<sup>13</sup> While Congress likely did not intend the FMLA's meaning of care to be taken so far,<sup>14</sup> *Ballard's* expansion of the meaning of care is well in line with other legislative actions addressing elderly care and societal views that the dying deserve the best care, even beyond what medicine can provide.<sup>15</sup>

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10. *Ballard*, 741 F.3d at 838.

11. Our society accepts a belief that terminally ill suffering should be met with "presence . . . rather than abandonment." Courtney S. Campbell, *Suffering, Compassion, and Dignity in Dying*, 35 DUQ. L. REV. 109, 123 (1996).

12. *See* 29 U.S.C. § 2611(11).

13. By 2030, the baby boomer generation will move into the elderly age bracket, 65 and older. JENNIFER M. ORTMAN ET. AL., U.S. CENSUS BUREAU, AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES 4 (2014), <https://www.census.gov/prod/2014pubs/p25-1140.pdf>.

14. In 29 U.S.C. § 2601, Congress lays out the findings and purposes of the FMLA. Children and births are explicitly mentioned, but death or dying is never mentioned. *See id.*

15. *See infra* Part V.a. Support for hospice care stems from moral reasoning and less from economic rationalization. Roi Livne, *Economies of Dying: The Moralization of Economic Scarcity in U.S. Hospice Care*, 79 AM. SOC. REV. 888, 889 (2014).

## II. THE FAMILY AND MEDICAL LEAVE ACT

### A. *History and Purpose*

Congress enacted the FMLA in 1993 to help working Americans “balance the demands of the workplace with the needs of families.”<sup>16</sup> Recognizing the need for federal intervention into employer practices,<sup>17</sup> the FMLA created the first set of federal statutes that required many employers to provide leave for employees to address family and medical needs outside the workplace.<sup>18</sup> In his appeal to the President to sign the FMLA, Senator Pell stated:

We may not be able to prevent the tragedy of a child dying or becoming very sick, but certainly we can provide to that child the comfort of his or her family, and provide the family with the chance to help, to show love . . . For the sake of the next generation, and for the sake of the sick children and elderly today who have no one at home to care for them, we must as a Nation decide that we will not make our workers choose between their loved ones and their jobs.<sup>19</sup>

Since the United States remains one of the only post-industrial countries without a national family leave policy in place, Congress sought to devise a program that would meet the needs of working family members without disrupting the economy or overburdening employers.<sup>20</sup>

The Legislature recognized that a growing number of women were entering the workforce.<sup>21</sup> By the time the FMLA was enacted, seventy-four percent of women ages twenty-five to forty-five had employment outside the home.<sup>22</sup> Furthermore, longer life spans and the aging baby-boomer generation increased many workers’ caregiving duties.<sup>23</sup> Finding that women were more likely to face conflicts between caring for families and maintaining jobs outside the home,<sup>24</sup> Congress believed that the FMLA would create better job security, family stability, and even advance

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16. 29 U.S.C. § 2601(b)(1).

17. See 139 CONG. REC. 1691 (1993). In the three years preceding the FMLA, one study showed that 300,000 people lost their jobs due to lack of job-guaranteed medical leave. *Id.*

18. Maegan Lindsey, Comment, *The Family and Medical Leave Act: Who Really Cares?*, 50 S. TEX. L. REV. 559, 562 (2009).

19. 137 CONG. REC. 24992 (1991).

20. 139 CONG. REC. 1691.

21. *Id.*

22. Lindsey, *supra* note 18, at 562.

23. 139 CONG. REC. 1691.

24. See U.S.C. § 2601(a)(5) (2012).

gender equality.<sup>25</sup> The FMLA would also ensure that working Americans would have healthcare when they needed it the most.<sup>26</sup> Even though leave under the FMLA would be unpaid, the employee would maintain health benefits.<sup>27</sup>

The FMLA was also designed to promote employers' economic interests.<sup>28</sup> A study cited by Congress prior to passing the Act found that hiring and training cost an employer far more than extending family or medical leave to an existing employee.<sup>29</sup> In addition, the findings also demonstrated that quitting or losing jobs increases the unemployment rate and dependence on social welfare programs.<sup>30</sup>

To strike the balance between work duties and family and medical obligations, the FMLA offers eligible employees<sup>31</sup> up to twelve weeks of leave for any of five reasons: (1) birth of the employee's child; (2) placement of an employee's child via adoption or foster care; (3) care for the employee's spouse, child, or parent if that individual suffers from a serious health condition; (4) impairment of employee's ability to perform job due to his or her own serious health condition; and (5) a spouse, child, or parent called to active duty.<sup>32</sup> If the employee is granted FMLA leave to care for a family member with a serious health condition, the employee also has the option to take leave on a reduced leave schedule or intermittently.<sup>33</sup> After the leave has concluded, the employee must be reinstated to the previous position or to an equivalent position with the same benefits.<sup>34</sup>

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25. See Kelli K. Garcia, *The Gender Bind: Men as Inauthentic Caregivers*, 20 DUKE J. GENDER L. & POL'Y 1, 5–6 (2012).

26. 139 CONG. REC. 1691.

27. *Id.*; 29 U.S.C. § 2614(c)(1).

28. 139 CONG. REC. 1691.

29. *Id.*

30. *Id.* Findings indicated that large business that implemented private family and medical leave policies were saving millions on training and replacement costs. AT&T, for example, reported a savings of \$15 million each year. *Id.*

31. In order to be eligible for FMLA leave, an employee must meet two requirements: (1) the employee must be requesting leave from an employer for which he or she has been employed under for at least twelve months; and (2) the employee must have worked at least 1,250 hours during the twelve-month period leading up to the leave. 29 U.S.C. § 2611(2)(A)(i)–(ii). For more information about calculating the twelve months of employment, see 29 C.F.R. § 825.110(b) (2016). Even if the employee meets these requirements, certain exclusions apply. For example, the employee must be employed at a location in which the employer has at least fifty employees within seventy-five miles. 29 U.S.C. § 2611(2)(B)(ii); *see also* 29 C.F.R. § 825.110(e).

32. 29 U.S.C. § 2612(a)(1)(A)–(E). This Note focuses on the third option for FMLA entitlement: care for the employee's spouse, child, or parent if that individual suffers from a serious health condition. *Id.* § 2612(a)(1)(C).

33. *Id.* § 2612(b)(1).

34. *See id.* § 2612(b)(2).

## B. Caring for a Family Member with a Serious Health Condition

An eligible employee may take FMLA leave to care for a family member with a serious health condition.<sup>35</sup> However, certain restrictions limit how this leave can be used.

### 1. Who Is a Family Member?

The caregiving provision of the FMLA only applies to the employee's spouse,<sup>36</sup> son, daughter,<sup>37</sup> or parent.<sup>38</sup> A parent could include "a biological, adoptive, step or foster" parent or even one "who stood in loco parentis to the employee."<sup>39</sup>

### 2. What Is a Serious Health Condition?

The eligible employee may only take FMLA leave to care for his or her eligible family member if that family member suffers from a "serious health condition."<sup>40</sup> The FMLA gives a brief yet broad definition of a serious health condition by including any "illness, injury, impairment or physical or mental condition" involving either inpatient care or "continuing treatment by a health care provider."<sup>41</sup> Regulations by the Department of Labor (DOL) further define inpatient care and continuing treatment by health care providers.<sup>42</sup> This definition is applicable to

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35. *Id.* § 2612(a)(1)(C).

36. An eligible employee in a married same-sex relationship is fully entitled to FMLA leave to care for his or her spouse. The Department of Labor (DOL) altered the definition of "spouse" in February 2015 to recognize spouses of legally recognized same-sex marriages. For more information, see Jeff Nowak, *Now That Same-Sex Marriage is a Constitutional Right, How Do Employers Administer FMLA Leave?*, FMLA INSIGHTS (June 29, 2015), <http://www.fmlainsights.com/now-that-same-sex-marriage-is-a-constitutional-right-how-do-employers-administer-fmla-leave/>.

37. A "son" or "daughter" can be a biological child, adopted child, foster child, stepchild, legal ward, or "a child of a person standing in loco parentis." 29 C.F.R. § 825.122(d) (2016). If the son or daughter is over eighteen, the eligible employee may only seek FMLA leave if that son or daughter is "incapable of self-care because of a mental or physical disability." *Id.* "Incapable of self-care" describes a situation when one "requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living." *Id.* § 825.122(d)(1) (2015).

38. 29 U.S.C. § 2612(a)(1)(C).

39. 29 C.F.R. § 825.122(c). In-laws, for example, are not included in the definitions of "parent" or "son or daughter." 29 C.F.R. § 825.122(c)-(d); see *Tsun v. WDI Int'l, Inc.*, No. 12-00051 LEK-KSC, 2013 U.S. Dist. LEXIS 44995 (D. Haw. Mar. 28, 2013), *aff'd*, 585 F. App'x 489 (9th Cir. 2014) (finding employee ineligible for FMLA leave because his ill father-in-law did not meet the definition of parent under the FMLA).

40. 29 USC § 2612(a)(1)(C).

41. *Id.* § 2611(11)(A)-(B).

42. 29 C.F.R. §§ 825.114-115.

situations in which the employee seeks FMLA leave for self-care and when the employee seeks leave to provide care to family members.<sup>43</sup>

This one-sentence statutory definition creates a threshold test but does not distinguish in severity or lethality. It is worth noting, however, that death is not considered a serious health condition.<sup>44</sup> Despite clarity and commentary from the DOL,<sup>45</sup> the actual meaning of a “serious health condition” in practice has often thwarted employers<sup>46</sup> and created a plethora of litigation.<sup>47</sup> However, in cases where it is clear to all parties involved that the family member is dying or terminally ill, it is a criterion rarely contested.

### 3. *What Is Care?*

Even if all the previously stated criteria have been met with respect to eligibility,<sup>48</sup> relationship, and serious health condition, the employee is only able to take FMLA leave if he or she will be providing *care*.<sup>49</sup> Since the FMLA is not intended to “cover every family emergency,” the meaning of care is critical to understanding the parameters of the FMLA.<sup>50</sup> Unfortunately for both the courts and employers, “care” is not defined anywhere in the statute.

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43. 29 U.S.C. § 2612(a)(1)(D) (entitling employee to take FMLA leave for his or her own serious health condition); *id.* § 2612(a)(1)(C) (entitling employee to take FMLA leave to care for a family member with a serious health condition).

44. *See* *Brown v. J.C. Penney Corp.*, 924 F. Supp. 1158 (S.D. Fla. 1996) (rejecting argument that managing father’s affairs the month following father’s death was protected leave under FMLA because “serious health condition” does not apply after the family member has died).

45. 29 C.F.R. § 825.113.

46. Employers struggle to understand what qualifies as a serious health condition, regardless of its legal interpretation, leaving many employers to adopt a broader definition when approving employees for FMLA leave. Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, a New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 348 (2014). For an in-depth discussion on what constitutes a “serious health condition,” see William McDevitt, *Evaluating the Current Judicial Interpretation of “Serious Health Condition” Under the FMLA*, 6 B.U. PUB. INT. L.J. 697 (1997).

47. *See, e.g.,* *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238 (E.D. Pa. 1994).

48. *See supra* note 31 and accompanying text.

49. *See* 29 USC § 2612(a)(1)(C). *See, e.g.,* *Mora v. Chem-Tronics, Inc.*, 16 F. Supp. 2d 1192 (S.D. Cal. 1998).

50. *Fioto v. Manhattan Woods Golf Enters., LLC*, 270 F. Supp. 2d 401, 404 (S.D.N.Y. 2003), *aff’d*, 123 F. App’x 26 (2d Cir. 2005).

### C. What Does It Mean to Give Care?

In the absence of a definition from Congress, the DOL has provided guidance on the meaning of care.<sup>51</sup> The DOL provides some direction on when an employee is “needed to care for a family member” under the FMLA.<sup>52</sup> DOL regulations specify that care incorporates both physical and psychological care.<sup>53</sup> The regulations provide an array of examples of care. Physical care, for example, is needed when “the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor.”<sup>54</sup> Psychological care could include “providing psychological comfort and reassurance which would be beneficial to a [family member] who is receiving inpatient or home care.”<sup>55</sup> Courts have freely admitted that the threshold for psychological care is set quite low.<sup>56</sup> While the DOL offers many examples of what encompasses care, real-life situations leave courts guessing whether a case’s facts closely relate to the regulation’s examples.<sup>57</sup>

In an attempt to provide clarity to employers, courts have identified different guidelines on what types of activities constitute care under the FMLA. Unfortunately, these guidelines are not congruent throughout every circuit, and some inconsistencies arise.<sup>58</sup> Three of these guiding rules provide insight into how various courts interpret care. First, many circuits, including the Seventh, find that visiting a family member who is suffering from a serious health condition does not constitute care.<sup>59</sup>

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51. If the Court has determined that Congress has not given guidance on a specific issue, the Court may then turn to regulations promulgated by the appropriate agency. *See generally* *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In the FMLA context, courts examine the DOL’s regulations. *See Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1082 (9th Cir. 2002).

52. 29 C.F.R. § 825.124 (2016).

53. *Id.* § 825.124(a).

54. *Id.*

55. *Id.*

56. “Our sister court in Maine, however, has twice ruled that the concept of ‘psychological care’ includes providing even a minimal level of comfort to a sick relative.” *Fioto v. Manhattan Woods Golf Enters., LLC*, 270 F. Supp. 2d 401, 405 (S.D.N.Y. 2003) (referring to two Maine district court decisions: *Plumley v. S. Container Inc.*, No. 00-140-P-C, 2001 WL 1188469, at \*1 (D. Me. Oct. 9, 2001) and *Brunelle v. Cytec Plastics, Inc.*, 225 F. Supp. 2d 67 (D. Me. 2002)) *aff’d*, 123 F. App’x 26 (2d Cir. 2005).

57. *See Lindsey*, *supra* note 18, at 569 (“While the regulations offer guidance, the litigation arising in each of these areas make clear that many situations do not fit neatly within each of the situations . . .”).

58. The issue of this Note, the impact of traveling while caring for a family member, is one example of an inconsistent directive.

59. *See, e.g., Overley v. Covenant Transp., Inc.*, 178 F. App’x 488 (6th Cir. 2006); *Cianci v. Pettibone Corp.*, No. 95 C 4906, 1997 U.S. Dist. LEXIS 4482 (N.D. Ill. Apr. 7, 1997), *aff’d*, 152 F.3d



Second, when the family member receives some sort of care as an incidental benefit of a non-care activity, the employee will not be entitled to FMLA leave under 29 U.S.C. § 2612(a)(1)(C).<sup>60</sup> Third, when the timing of the care appears to burden the employer more than it benefits the family members, courts may find the employee is not entitled to FMLA leave.<sup>61</sup>

### *I. Visitation Is Not Care*

Courts often inquire into the employee's level of participation in the family member's care.<sup>62</sup> For example, *Overley*, a truck driver, missed work in order to tend to her disabled daughter, who was residing in an assisted-living facility.<sup>63</sup> During this visit, *Overley* did her daughter's laundry, met with an employee of the facility to discuss matters related to her daughter's finances, and made a trip to her daughter's new potential residence.<sup>64</sup> The Sixth Circuit found that *Overley* did not provide an adequate level of care to invoke FMLA leave because she was not actively participating in any ongoing care.<sup>65</sup> Instead, *Overley* was simply visiting her daughter to "check on her care" and engage in meetings that were neither time-sensitive nor conducted for any care-related reason.<sup>66</sup> The Sixth Circuit rejected the notion that FMLA covered visitation that did not involve some direct participation in the family member's care.<sup>67</sup>

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723 (7th Cir. 1998); *Fioto v. Manhattan Woods Golf Enters., LLC*, 270 F. Supp. 2d 401 (S.D.N.Y. 2003), *aff'd*, 123 F. App'x 26 (2005).

60. See *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045, 1048 (9th Cir. 2005); *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078 (9th Cir. 2002); *Lane v. Pontiac Osteopathic Hosp.* No. 09-12634, 2010 U.S. Dist. LEXIS 61003 (E.D. Mich. June 21, 2010); *Leakan v. Highland Cos.*, No. 96-CV-75445-DT, 1997 U.S. Dist. LEXIS 20381 (E.D. Mich. Nov. 19, 1997).

61. See, e.g., *Overley*, 178 F. App'x 488; see also *Lindsey*, *supra* note 18, at 578–79.

62. See, e.g., *Overley*, 178 F. App'x 488; *Cianci*, 1997 U.S. Dist. LEXIS 4482, at \*1; *Fioto*, 270 F. Supp. 2d 401. *But see Scamihorn*, 282 F.3d 1078 (9th Cir. 2002) (finding employee's trip to visit his depressed father was more than mere visitation due to the employee's involvement in his father's counseling and daily care).

63. *Overley*, 178 F. App'x at 490.

64. *Id.*

65. *Id.* at 495.

66. *Id.* *Overley's* meetings addressed the state of her daughter's trust and offered *Overley* a chance to visit a plot of undeveloped land. *Id.*; see also *Gray v. Clarksville Health Sys., G.P.*, No. 3:13-00863, 2015 U.S. Dist. LEXIS 2455, at \*18 (M.D. Tenn. Jan. 9, 2015) (finding employee was not entitled to FMLA leave because "strategizing a plan of physical and mental health for her daughter" did not qualify as care).

67. *Overley*, 178 F. App'x at 495; *cf. Bell v. Prefix, Inc.*, 321 F. App'x at 425, 427 (6th Cir. 2009) (finding employee entitled to FMLA leave while he cared for his hospitalized father because employee was actively involved in medical decisions related to father's care and provided comfort and reassurance to his scared father).

The rule that “mere visitation” is not a permissible form of care under the FMLA is reiterated in *Fioto v. Manhattan Woods Gold Enterprises*.<sup>68</sup> In *Fioto*, an employee was terminated after missing work to visit his mother, who was in the hospital for brain surgery.<sup>69</sup> While the employee was present inside the hospital during his mother’s brain surgery, the employee never directly interacted with his mother.<sup>70</sup> The only connection between the employee and his mother was his physical presence within the hospital during the surgery, and the record indicated that his mother might not have even known he was there.<sup>71</sup> The U.S. District Court for the Southern District of New York found that mere visitation did not constitute care under the FMLA.<sup>72</sup> The court noted this was a low threshold, as even helping with the family member’s medical decisions would satisfy the requirement for participation.<sup>73</sup>

The Seventh Circuit also follows the rule that caring for a family member suffering from a serious health condition requires a step beyond visitation.<sup>74</sup> In *Cianci v. Pettibone Corporation*, the employee learned her mother, who lived in Italy, was near death, so the employee sought FMLA leave from her employer.<sup>75</sup> However, the employee’s sister was already caring for their mother and meeting her needs, so the Seventh Circuit found the employee’s trip was merely a visit unrelated to her mother’s care.<sup>76</sup>

## 2. Care Does Not Consist of an Incidental Benefit

Courts have found that even if an employee was actively involved with his or her family member’s care, the FMLA does not protect activities in

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68. 270 F. Supp. 2d 401, 406 (S.D.N.Y. 2003).

69. *Id.* at 402.

70. *Id.* at 404 (“There is no evidence in the record testimony about Fioto’s interaction with his mother or her doctors.”).

71. *Id.* at 405.

72. *Id.* (“Because the language of the statute does not guarantee employees FMLA leave to visit an ailing parent, it was incumbent on plaintiff to demonstrate that he was doing something—anything—to participate in his mother’s care.”).

73. *Id.* (citing *Brunelle v. Cytec Plastics, Inc.*, 225 F. Supp. 2d 67 (D. Me. 2002) (finding employee entitled to FMLA leave because he helped his ailing father’s doctors make medical decisions regarding his father’s care)).

74. *Cianci v. Pettibone Corp.*, 152 F.3d 723 (7th Cir. 1998), *aff’g* No. 95 C 4906, 1997 U.S. Dist. LEXIS 4482 (N.D. Ill. Apr. 7, 1997).

75. *Id.* at \*5–6.

76. *Id.* at \*19–20.

which that care is an incidental benefit.<sup>77</sup> In *Tellis v. Alaska Airlines*, the employee requested FMLA leave so that he could fly across the country to retrieve a family vehicle and drive the vehicle back to his home.<sup>78</sup> The employee argued that his wife needed a vehicle for transportation, and delivering the family car would bring her psychological comfort at a time when she was experiencing late-stage pregnancy complications. In addition, the employee argued that he called his wife throughout his time on the road, and their conversations gave her psychological support and assurance.<sup>79</sup> The court found that the FMLA demands that providing care to a family member must involve actual care, and such care did not occur in this case.<sup>80</sup> Even though securing the car may have been a comfort to his wife, the court found the emotional benefit to the wife was merely an indirect benefit of an unprotected activity.<sup>81</sup> In addition, the phone calls between the employee and his wife could not be enough to qualify for FMLA-protected leave, regardless of the moral support that the calls provided.<sup>82</sup>

Even though the Ninth Circuit held that comforting phone calls alone are not enough to qualify as care, “daily conversations” and “constant presence” can qualify as care.<sup>83</sup> In *Scamihorn v. General Truck Drivers*, the employee sought leave to care for his father, who was suffering from depression.<sup>84</sup> Since his father lived out of state, the employee traveled to his father’s home to provide care during his father’s depression.<sup>85</sup> The employee spent his time conversing with his father, helping with daily chores, and occasionally driving his father to the doctor and psychologist.<sup>86</sup> In fact, the employee came to the aid of his father based on the recommendation of his father’s doctor, who believed that the son’s

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77. See Lindsey, *supra* note 18, at 571 (“[C]ourts have regularly held that where physical and psychological care is merely an incidental consequence of an unprotected activity, FMLA leave will not be granted.”).

78. 414 F.3d 1045 (9th Cir. 2005). The employee flew from Seattle to Atlanta to retrieve the car, and his trip took nearly four days. *Id.* at 1046, 1048.

79. *Id.* at 1047.

80. *Id.*

81. The court found the “unprotected activity” was securing and driving the car. This activity is unrelated to the wife’s serious health condition: pregnancy complications. In addition, the court took note that the activity took the husband away from his wife during her actual care. *Id.* at 1048.

82. *Id.* (“Common sense suggests that the phone calls . . . do not fall within the scope of the FMLA’s ‘care for’ requirement”).

83. *Id.* at 1047 (citing *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1088 (9th Cir. 2002)).

84. *Scamihorn*, 282 F.3d at 1080. The father’s depression was brought on by his daughter’s murder by her ex-husband. *Id.*

85. *Id.* at 1081.

86. *Id.*

presence would help the father manage his depression.<sup>87</sup> The Ninth Circuit found that the employee actively participated in his father's care by ensuring his father continued his prescribed psychological treatment, by conversing with his father about the issues surrounding his depression, and assisting his father with daily tasks.<sup>88</sup>

While the court relied mostly on the regulation's definition of care to hold that the employee's actions fell within the scope of the FMLA, the court also noted the father's doctor's testimony that the employee's "help" was beneficial to the father, citing the doctor's testimony to show the meaning of care under the law aligns with the meaning of care in a medical sense.<sup>89</sup> Therefore, the court concluded that the care provided by the employee was in line with the meaning of care under the FMLA.<sup>90</sup>

Another federal district court found certain caring activities to be too indirect to qualify for FMLA leave.<sup>91</sup> In *Lane v. Pontiac Osteopathic Hospital*, the employee missed work after his mother's basement had flooded.<sup>92</sup> His mother had diabetes, high blood pressure, and arthritis, and the employee frequently helped her prepare meals and transport her to her doctor appointments.<sup>93</sup> The employee claimed that cleaning up the basement flooding constituted care because standing water in the basement was a breeding ground for hepatitis, another disease his mother had.<sup>94</sup> The district court found that the employee's actions did not meet the level of care required by the FMLA because the employee was unable to show that his mother was unable to clean up the basement herself, or in the alternative, that the basement needed to be immediately cleaned in order to meet his mother's "basic medical, hygienic, or safety needs."<sup>95</sup>

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87. *Id.* at 1084.

88. *Id.* at 1088.

89. *Id.* Courts often cite to testimony from a health professional that the care was necessary. In fact, 29 U.S.C. §2613 enables an employer to require certification from a physician that care is necessary prior to approving an employee's FMLA leave request. Certification or testimony from a health professional is not required under the FMLA, but it adds a layer of legitimacy to an employee's FMLA request. 29 U.S.C. §2613 (2015). For more about the role of doctors in FMLA leave, see Mary Kalich, Note, *Do You Need a Doctor's Note? Lay Testimony Should Be Sufficient Evidence for FMLA Leave Unless Compelling Counter Conditions Exist*, 86 ST. JOHN'S L. REV. 603 (2012).

90. *Scamihorn*, 282 F.3d at 1088. *But see id.* at 1089 (Fernandez, J. dissenting) (finding employee not *needed* to care for father because father was self-providing and his wife was fully able to care for him).

91. *Lane v. Pontiac Osteopathic Hosp.*, No. 09-12634, 2010 U.S. Dist. LEXIS 61003 (E.D. Mich. June 21, 2010).

92. *Id.* at \*2-3.

93. *Id.* at \*2.

94. *Id.* at \*3-4.

95. *Id.* at \*11.

Whether providing care is an incidental benefit when the activity involves travel can be tricky.<sup>96</sup> In *Leakan v. Highland Companies*, the employee took a trip to visit her in-laws with her newborn son, believing her baby should visit with his grandparents.<sup>97</sup> After being terminated for the missed work, the employee claimed that she was needed to care for her son on the trip.<sup>98</sup> The court found that caring for her son was incidental to the employee's desire to take a vacation to visit family, and her actions were not covered by the FMLA's care provision.<sup>99</sup>

### 3. *Timing of Care Is Relevant*

A court is unlikely to find caregiving falls within the scope of the FMLA when the care could easily be provided without disrupting the employee's work schedule.<sup>100</sup> In *Overley*, the Sixth Circuit found that the employee's involvement in her disabled daughter's living situation did not constitute care under the FMLA because, in part, the activities were not "time sensitive."<sup>101</sup> The court commented that the record gave no reason why the employee's activities needed to conflict with her work commitments.<sup>102</sup> This factor also played a significant role in *Lane*. That court found that the employee was unable to show how cleaning his mother's flooded basement needed to be done *immediately*.<sup>103</sup> The issue of urgency appears nowhere in the plain language of the FMLA or any DOL regulations.<sup>104</sup>

Mere visitation, care as an incidental benefit, and timing issues each offer insight into courts' decisions on what constitutes care under the

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96. See Collinet, *supra* note 7, at 361. See also Lindsey, *supra* note 18, at 571.

97. No. 96-CV-75445-DT, 1997 U.S. Dist. LEXIS 20381, at \*11 (E.D. Mich. Nov. 19, 1997).

98. *Id.*

99. *Id.* at \*12–13. *But see* Briones v. Genuine Parts Co., 225 F. Supp. 2d 711 (E.D. La. 2002) (holding that employee's leave to babysit his children so his wife could provide care to their hospitalized child was within the scope of the FMLA).

100. See, e.g., *Overley v. Covenant Transp., Inc.*, 178 F. App'x 488 (6th Cir. 2006); *Pang v. Beverly Hosp., Inc.*, 94 Cal. Rptr. 2d 643 (Ct. App. 2000); *Lane v. Pontiac Osteopathic Hosp.* No. 09-12634, 2010 U.S. Dist. LEXIS 61003, at \*1 (E.D. Mich. June 21, 2010); see also Lindsey, *supra* note 18, at 578–79.

101. *Overley*, 178 F. App'x at 495.

102. *Id.* (“[T]he meeting . . . was not time sensitive and could have been held later . . . the record gives no indication of an immediate need to move her daughter . . .”).

103. *Lane*, 2010 U.S. Dist. LEXIS 61003, at \*11 (“Plaintiff is required to present evidence that his mother's basement had to be immediately cleaned for her basic medical, hygienic, or safety needs . . . Plaintiff fails to make any such demonstration.”); see also *Pang*, 94 Cal. Rptr. 2d at 649 (finding no reason employee needed to take leave to move her mother into a smaller apartment when the task could easily have waited).

104. Lindsey, *supra* note 18, at 579.

FMLA, but these factors provide little more than a smell test. The lack of clarity creates opportunities for inconsistency among the courts and uncertainty for employers. The *Ballard* decision pounces on the uncertainty and introduces a form of hospice care, specifically an end-of-life trip, into the realm of FMLA-approved caregiving activities.

### III. *BALLARD V. CHICAGO PARK DISTRICT*

#### A. *Background*

Beverly Ballard worked for the Chicago Park District when her mother was diagnosed with end-stage congestive heart failure, a terminal disease.<sup>105</sup> Ballard, as her mother's primary caregiver, cooked her mother meals, administered medications, injections, and oxygen, bathed and dressed her mother, and even drained fluids from her mother's failing heart.<sup>106</sup> Her mother also received services from a palliative care organization, Horizon Hospice.<sup>107</sup> When discussing end-of-life goals with Horizon Hospice's social worker, Ballard's mother said that she always wanted to take a family vacation to Las Vegas, but she would only be able to go if her daughter could accompany her since her daughter was her primary caregiver.<sup>108</sup> The social worker secured funding for the trip through the Fairygodmother Foundation, a nonprofit organization that provides funding for terminally ill adults to make one last dream a reality.<sup>109</sup>

Ballard requested unpaid FMLA leave to accompany her mother on the vacation,<sup>110</sup> but the Chicago Park District denied the request.<sup>111</sup> Ballard, claiming that she did not receive the denial prior to her departure, traveled with her mother as planned in January 2008.<sup>112</sup> The two "participated in typical tourist activities," and Ballard continued to provide the same sort

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105. *Ballard v. Chi. Park Dist.*, 741 F.3d 838, 839 (7th Cir. 2014).

106. *Id.*; *Ballard v. Chi. Park Dist.*, 900 F. Supp. 2d 804, 806 (N.D. Ill. 2012).

107. *Ballard*, 900 F. Supp. 2d at 806.

108. *Ballard*, 741 F.3d at 839.

109. *Id.*

110. Parties dispute whether there was sufficient notice to the employer. This issue was addressed in the trial court, *Ballard*, 900 F. Supp. 2d at 813–14, but was not addressed on appeal. *Ballard*, 741 F.3d at 839–40 ("The parties dispute . . . whether Ballard gave the Park District sufficient notice, but these issues are not germane to this appeal and we will ignore them."). Thus, it is not an issue relevant to this Note.

111. *Ballard*, 741 F.3d at 839–40.

112. *Id.* at 840.

of care she had been giving her mother at home.<sup>113</sup> At one point during the trip, Ballard had to take her mother to the local hospital for additional and unanticipated medication.<sup>114</sup> However, Ballard and her mother had no plans to seek any medical treatment related to her heart condition while in Las Vegas, and Horizon Hospice had not arranged or suggested any services throughout the trip.<sup>115</sup>

Ballard returned to work, but several months later she was fired.<sup>116</sup> Chicago Park District cited her “unauthorized absences accumulated during her trip” as the reason for her termination,<sup>117</sup> following 25 years of employment.<sup>118</sup> Ballard filed a lawsuit against the Chicago Park District for intentional interference with her FMLA rights.<sup>119</sup> Chicago Park District moved for summary judgment, arguing that Ballard did not provide care for her mother in Las Vegas because “the trip was not related to a continuing course of medical treatment.”<sup>120</sup>

### *B. District Court*

The District Court for the Northern District of Illinois addressed whether Ballard could be entitled to take FMLA leave to care for her dying mother in Las Vegas as a matter of law.<sup>121</sup> In an attempt to clarify the meaning of care under the FMLA, the district court made two major delineations: the care given did not need to correspond to any treatment,<sup>122</sup> and acceptable care under the FMLA is not confined to any location.<sup>123</sup> Both of these conclusions broaden the scope of care to include an end-of-life trip so long as the level of physical care provided on the trip would be enough to satisfy care requirements had the same care been administered at home.<sup>124</sup>

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113. *Id.* The District Court for the Northern District of Illinois elaborated on the activities, stating “Ballard spent time with her mother playing slots, shopping on the Strip, people-watching, and dining at restaurants.” *Ballard*, 900 F. Supp. 2d at 807.

114. *Ballard*, 741 F.3d at 840.

115. *Ballard*, 900 F. Supp. 2d at 807.

116. *Ballard*, 741 F.3d at 840.

117. *Id.*

118. *Ballard*, 900 F. Supp. 2d at 806–07 (explaining that Ballard began employment for Chicago Park District in 1983 and was fired in 2008).

119. *Id.* at 808.

120. *Ballard*, 741 F.3d at 840.

121. *Ballard*, 900 F. Supp. 2d at 808.

122. *Id.*

123. *Id.* at 808–09.

124. *Id.* at 810.

The district court rejected Chicago Park District's argument that providing care to a family member with a serious health condition means that the care must relate to the treatment of the condition.<sup>125</sup> The district court found no evidence of such connection in the wording of the statute or in the regulations issued by the DOL.<sup>126</sup> The regulations also do not provide any relationship between care and a particular location.<sup>127</sup> In addition, the court found that the literal reading of 29 U.S.C. § 2612(a)(1)(C) indicates no direct relationship between caring for the family member and the family member's condition.<sup>128</sup> A serious health condition is simply a prerequisite that enables the eligible employee to take leave to provide care to his or her family member.<sup>129</sup>

This fact is particularly relevant for a family member who is terminally ill, such as Ballard's mother. An individual who is terminally ill may not be under any medical treatment during a given time.<sup>130</sup> A condition that entails "continuing treatment by a health care provider" is considered a serious health condition under the FMLA.<sup>131</sup> The district court pointed to regulatory guidance that "continuing treatment" does not necessitate *active* treatment.<sup>132</sup> The district court concluded that requiring care to somehow relate to "active medical treatment" runs counter to the definition of a serious health condition.<sup>133</sup>

The district court found "no question" that Ballard's dying mother suffered from a serious health condition and that the care Ballard provided to her mother at home was well within the meaning of care under the FMLA.<sup>134</sup> As a result, the district court addressed whether the meaning of care changes if the care occurs away from home.<sup>135</sup> On the trip, Ballard provided the identical kind of care she gave her mother at home: helping with basic needs such as providing meals, helping with transportation, and tending to her mother's hygienic needs.<sup>136</sup> The district court also

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125. *Id.* at 810.

126. *Id.* ("[T]here is no statutory or regulatory text stating . . . that 'care' must involve some level of participation in the ongoing treatment of the family member's condition under the FMLA.")

127. *Id.* (citing 29 C.F.R. § 825.116(a) (2007)). The regulation cited in *Ballard* has been amended and now appears in 29 C.F.R. § 825.124 (2016) with only minor modifications. *See Ballard*, 741 F.3d at 841 n.1.

128. *Ballard*, 900 F. Supp. 2d at 810.

129. *Id.* at 809.

130. *Id.*

131. *Id.* (quoting 29 C.F.R. § 825.114(a)(2) (1995)).

132. *Id.*

133. *Id.*

134. *Id.* at 810.

135. *Id.* at 810–12.

136. *Id.* at 810.



acknowledged that the trip was planned and executed without any intent to seek medical treatment.<sup>137</sup> In addition, the district court agreed with Chicago Park District that this fact would be fatal to the plaintiff's claim in other circuits, where travel during FMLA leave must relate to medical treatment.<sup>138</sup> Nevertheless, the district court found this rule unpersuasive.<sup>139</sup> To justify this divergence, the district court explained its departure from the case law in other circuits.<sup>140</sup>

Chicago Park District cited to a Ninth Circuit case,<sup>141</sup> *Marchisheck v. San Mateo County*,<sup>142</sup> which held that an employee was not entitled to FMLA leave when she moved her son to the Philippines.<sup>143</sup> The district court acknowledged that *Marchisheck* holds that some medical treatment must be involved to justify caring for a family member while traveling away from home, but the district court disagreed with the basis of the Ninth Circuit's holding.<sup>144</sup> The Ninth Circuit found support for this holding based on an administrative rule that "suggests" that care would incorporate involvement in ongoing treatment.<sup>145</sup> Even though the Eighth and First Circuits have followed this rationale and adopted *Marchisheck*'s holding,<sup>146</sup> the *Ballard* district court found that there is not enough textual support for this rule in what the regulation "suggest[s]."<sup>147</sup> The district court also highlighted the Ninth Circuit's dependency on examples of care given in the regulations, but the district court maintained that examples cannot create rules without more explicit guidance from the DOL, especially when the geographic limitation or ongoing medical treatment characteristic is not present in all the examples.<sup>148</sup>

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137. *Id.* at 812–13 (“Ballard has failed to show . . . the end-of-life trip to Las Vegas was part of her mother’s ongoing treatment.”).

138. *Id.* at 810–11.

139. *Id.* at 812.

140. *Id.* at 811–12.

141. *Id.* at 810.

142. 199 F.3d 1068 (9th Cir. 1999).

143. *Id.* at 1076 (“Plaintiff’s act of taking [her son] to a foreign country and leaving him with relatives . . . did not amount to ‘caring for’ [him] for purposes of the FMLA.”).

144. *Ballard*, 900 F. Supp. 2d at 810–11.

145. *Id.* (citing *Marchisheck*, 199 F.3d at 1076).

146. The Eighth Circuit adopted the *Marchisheck* holding in *Miller v. State Department of Economic Development*, 467 F. App’x. 536, 540–41 (8th Cir. 2012). See *Ballard*, 900 F. Supp. 2d at 810. The First Circuit adopted the *Marchisheck* holding in *Tayag v. Lahey Clinic Hospital*, 632 F.3d 788, 791 n.2 (1st Cir. 2011). See *Ballard*, 900 F. Supp. 2d at 810.

147. *Ballard*, 900 F. Supp. 2d at 811.

148. “It would be a mistake to use non-exclusive examples to impose limits on that broad and direct definition.” *Id.* at 811–12 (citing the Ninth Circuit’s interpretation of 29 C.F.R. §825.116 (2008) in *Gradilla v. Ruskin Manufacturing*, 320 F.3d 951 (9th Cir. 2003), *withdrawn per stipulation of parties*, 328 F.3d 1107 (9th Cir. 2003)).

The district court concluded its analysis of the meaning of care under the FMLA and denied summary judgment to Chicago Park District by stating:

That Ballard provided [care] to her mother while [her mother] went on an end-of-life trip does not detract from the fact that her mother's basic medical, hygienic, and nutritional needs could not be met without Ballard's assistance. So long as the employee provides "care" to the family member, where the care takes place has no bearing on whether the employee receives FMLA protections.<sup>149</sup>

The district court altered the meaning of care used in other circuits by holding two bright line rules: care provided need not correspond to any ongoing treatment and acceptable care under the FMLA is not confined by location.<sup>150</sup> The district court's decision ignored the burden its new broad expansion would thrust upon employers, and it missed an easy opportunity to limit the holding to the facts of the case, namely, that the purpose of the end-of-life trip itself was a form of care.<sup>151</sup>

### C. Seventh Circuit

Chicago Park District appealed the issue of whether an employee is eligible for FMLA leave when the employee's care occurs while traveling but is unrelated to any ongoing medical treatment.<sup>152</sup> The Seventh Circuit affirmed the decision of the district court, holding that it would not limit the meaning of care in circumstances involving travel.<sup>153</sup>

Reiterating the sentiments of the lower court, the Seventh Circuit found no evidence within the FMLA statute indicating that providing care adjusts in meaning when there is an adjustment in geography.<sup>154</sup> The court noted that if Congress truly meant to limit care to one place, Congress would have legislated as much.<sup>155</sup> Since Congress did not provide a definition of care within the statute, the court also turned to the DOL's

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149. *Id.* at 812 (footnote omitted).

150. *Id.* at 809.

151. The court openly acknowledges the possibility that an end-of-life-trip is a rational form of psychological care when it suggested this argument could have possibly defeated defendant's lack of ongoing treatment argument. *Id.* at 813.

152. Chicago Park District did not appeal whether all forms of care must require a connection to ongoing medical treatment. Rather, the defendant narrowed its issue to the context of travelling. *Ballard v. Chi. Park Dist.*, 741 F.3d 838, 839–40 (7th Cir. 2014).

153. *Id.* at 840.

154. *Id.* (citing 29 U.S.C. § 2612).

155. *Id.* (noting 29 U.S.C. § 2612(a)(1)(C) does not say "to care *at home* for").

regulations,<sup>156</sup> specifically 29 C.F.R. § 825.116.<sup>157</sup> Once again, the court agreed with the district court that section 825.116 fails to express any geographic limitations on providing care.<sup>158</sup> Instead, the Seventh Circuit found that the regulations express an “expansive[.]” definition of care by including both “physical and psychological care.”<sup>159</sup> However, the Seventh Circuit adopted a slightly different interpretation of section 825.116(a). The regulation provides, in part, “[t]he term [‘needed to care for’] also includes providing psychological comfort and reassurance which would be beneficial to a [family member] with a serious health condition who is receiving inpatient or home care.”<sup>160</sup> Inpatient care and home care both suggest specific places—either in a hospital, a hospice, a residential medical care facility,<sup>161</sup> or within one’s own home.<sup>162</sup> While the district court found this location-specific language to offer nothing more than illustrative examples of what might constitute care,<sup>163</sup> the Seventh Circuit suggested that location may be relevant in cases where the employee is providing psychological care.<sup>164</sup> Ballard provided physical care to her mother.<sup>165</sup> Even though the court used this logic to further distance the facts of the case with the example in the regulation, this seemingly lends some credibility to the holdings in other circuits that location may be relevant when determining if the provided care qualifies under the FMLA.<sup>166</sup> Regardless of this dictum, the Seventh Circuit found that the care Ballard provided to her mother in Las Vegas fell well within the meaning of care under the FMLA.<sup>167</sup>

By reaching the same conclusion as the district court, the court also needed to explain its conscious split from the First and Ninth Circuits.<sup>168</sup> Like the district court, the Seventh Circuit based its rationale on the language of the statute and in the regulations, highlighting the other circuit

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156. *Id.* at 840–41 (“Still, the FMLA does not define ‘care’. . . . We therefore turn to the Department of Labor’s regulations to clear away any lurking ambiguity.”).

157. 29 C.F.R. § 825.116 (2008).

158. *Ballard*, 741 F.3d at 841.

159. *Id.* (citing 29 C.F.R. § 825.116).

160. *Id.* at 841 (citing 29 C.F.R. § 825.116(a)).

161. 29 U.S.C. § 2611(11)(a) (2012) (confining the meaning of inpatient care to “a hospital, hospice, or residential medical care facility”).

162. 29 C.F.R. § 825.116(a).

163. *Ballard v. Chi. Park Dist.*, 900 F. Supp. 2d 804, 811–12 (N.D. Ill. 2012).

164. *See Ballard*, 741 F.3d at 841 (“[T]his example only concerns psychological care.”).

165. *Id.*

166. *See, e.g., Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045 (9th Cir. 2005). For a more in depth discussion of traveling during FMLA leave, see Collinet, *supra* note 7.

167. *Ballard*, 741 F.3d at 843.

168. *Id.* at 842 (“We respectfully part ways with the First and Ninth Circuit on this point.”).

decisions' failure to "explain why certain services provided . . . at home should be considered 'care,' but those same services provided away from home should not be."<sup>169</sup>

The court missed an important opportunity to justify the decision and distinguish it from other circuits' decisions. Instead of disregarding the travel component, the court should have emphasized that, while the physical care provided in both Chicago and Sin City was the same legitimate physical care eligible for FMLA leave, the purpose of the trip itself was a legitimate form of psychological care. In fact, the court acknowledges that had the employer inquired with Ballard's mother's health care providers, the employer would have learned that the purpose of the trip was in the hospice care "context," which the court implies is not an abuse of the FMLA.<sup>170</sup>

After concluding that Ballard's help for her mother in Las Vegas fell within the meaning of care under the FMLA, the Seventh Circuit addressed concerns that this precedent would encourage "opportunistic leave-taking."<sup>171</sup> First, the court specified that the appeal of summary judgment was not an appropriate forum to debate whether Ballard used the FMLA to take her own vacation, rather than to be a caregiver to her mother.<sup>172</sup> Second, the court noted that certification requirements from a health care provider under the FMLA still apply.<sup>173</sup> An employer concerned about FMLA abuse is still able to request certification of the need for care and the serious health condition by a health care provider.<sup>174</sup> The court followed this point with the aside, "any worries about opportunistic leave-taking in this case should be tempered by the fact that this dispute arises out of the hospice and palliative care context."<sup>175</sup>

In summary, the Seventh Circuit took a much broader view on the meaning of care than the First and Ninth Circuits<sup>176</sup> by holding an eligible employee may use FMLA leave under section 2612(a)(1)(C)<sup>177</sup> to take a trip unrelated to any medical treatment so long as the employee is still providing a level of physical or psychological care that satisfies the statute. While the holding seems innocuous, forms of care that could be

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169. *Id.*

170. *Id.* at 843.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* (citing 29 U.S.C. §2613 (2012)).

175. *Id.*

176. See discussion *supra* Part III.b.

177. 29 U.S.C. § 2612(a)(1)(C).

provided without much interference in the workplace, such as meal planning and administering medication, could now justify an entire week away from work. Like the district court, the Seventh Circuit makes no reference to the new burden that this expansive rule places on employers. It, too, misses the opportunity to justify its expansion with the very important fact that the trip itself was a form of psychological care.

#### IV. ANALYSIS

Both the district court and the Seventh Circuit failed to explicitly state that the hospice care factor justifies such an expansion. Yet the courts clearly relied on the end-of-life trip factor to justify its decision.<sup>178</sup> Its failure to tie this unique factor to its decision to expand the meaning of care beyond that of other circuits creates opportunities for abuse and takes the meaning of care, now unbridled from solely the hospice end-of-life trip context, beyond the intent of Congress.<sup>179</sup> However, when the *Ballard* decision is re-examined in the end-of-life care context it becomes much more rational and consistent with the FMLA .

The *Ballard* decision sent employers spinning into uncertainty, as the meaning of care under the FMLA plunged further into fragmented confusion.<sup>180</sup> Employers likely struggle with this Seventh Circuit decision because *Ballard* broadens the meaning of care under the FMLA,<sup>181</sup> provides the opposite holding of a First Circuit case with near identical facts,<sup>182</sup> and offers no reference to the balance between employer economic interest and employee health and family demands.<sup>183</sup>

##### *A. Expanding the Meaning of Care by Incorporating Theories of Hospice Care*

*Ballard* expanded the meaning of care beyond its existing interpretation in other circuits.<sup>184</sup> In essence, the decision disregards other

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178. See note 176 and accompanying text.

179. See discussion *infra* Part IV.c.

180. See *supra* note 2.

181. 29 U.S.C. § 2612(a)(1)(C).

182. *Tayag v. Lahey Clinic Hosp., Inc.*, 632 F.3d 788 (1st Cir. 2011).

183. 29 U.S.C. § 2601(b) (2015) (the purpose of the FMLA is “to balance the demands of the workplace with the needs of families”); see discussion *infra* Part IV.b.

184. *Ballard v. Chi. Park Dist.*, 741 F.3d 838 (7th Cir. 2014); see *supra* Part II. Despite the circuit split on the issue of providing care while traveling, some argue there is a trend among employers and legislators to lessen the burden on employees with family care-giving duties. See Margaret Wright, Comment, *A Caring Definition of “Care”*: *Why Courts Should Interpret the FMLA to Cover*

circuits' guideline that when care is an incidental benefit of some other activity, such as a vacation, that care falls outside the scope of the FMLA.<sup>185</sup> However, the fact that Ballard's mother was terminally ill and under hospice care becomes crucial to understanding how the Seventh Circuit reached its decision and how that decision can be squared with the purpose of the FMLA. Not only is the employee continuing to provide the same level of care to the family member,<sup>186</sup> but the purpose of the trip, an end-of-life trip, also begins to resemble a form of care itself due to the involvement and recommendations of health care professionals.<sup>187</sup>

*Ballard* reiterated and adhered to the DOL's construction of care as consisting of two camps: physical care and psychological care, both of which are meant to be interpreted broadly.<sup>188</sup> While the court asserts that the care Ballard provided was physical care, it omitted the discussion of the actual purpose of the trip itself, which was to offer legitimate psychological care.<sup>189</sup> The court avoided overtly expanding the meaning of care but added new activities into the allowable forms of care.<sup>190</sup> A closer look at American moral values surrounding end-of-life care support the court's implied rationale that hospice care, with its non-traditional methods, provides a powerful form of care worthy of inclusion under 29 U.S.C. §2612.

Hospice care, a form of care that seeks to meet the needs of terminally ill patients,<sup>191</sup> is a less clinical form of care with a focus on less aggressive

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*Unconventional Treatment of Seriously Ill Family Members*, 32 T.M. COOLEY L. REV. 35, 53–59 (2015).

185. See discussion *supra* II.c.ii; *Tellis v. Alaska Airlines, Inc.*, 414 F.3d 1045, 1048 (9th Cir. 2005) (finding employee's leave to retrieve family vehicle had only an indirect benefit to his wife's serious health condition and thus does not constitute care); *Leakan v. Highland Cos.*, No. 96-CV-75445-DT, 1997 U.S. Dist. LEXIS 20381 (E.D. Mich. Nov. 19, 1997) (finding care provided to employee's newborn baby was incidental to the main purpose of the employee's trip, which was to introduce newborn to employee's in-laws).

186. *Ballard*, 741 F.3d at 841.

187. Ballard's mother's trip was planned by a hospice social worker with consultation from a physician and paid for by a non-profit organization. *Id.* at 843. See *supra* note 89 for a discussion on the role of health care professionals' recommendations and certification.

188. *Ballard*, 741 F.3d at 841–42. 29 C.F.R. § 825.124(a) (2015); see *supra* Part II.b; 29 C.F.R. § 825.124 (2015); see also *Ballard v. Chi. Park Dist.*, 900 F. Supp. 2d 804, 809 (N.D. Ill. 2012) (finding the definition of care in 29 C.F.R. § 825.116 (2008) to be “expansive”).

189. See *supra* note 244; discussion Part III.b.

190. *Ballard*, 741 F.3d at 842 (“Ballard requested leave in order to provide physical care. That, in turn, is enough to satisfy 29 U.S.C. § 2612(a)(1)(C).”).

191. Hospice care applies when the patient has received a prognosis of death within six months and agrees to forgo life-prolonging treatments. Kathleen Tschantz Unroe and Diane E. Meier, *Palliative Care and Hospice: Opportunities to Improve Care for the Sickest Patients*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 413, 415 (2011).

medical intervention.<sup>192</sup> This form of care emphasizes alternative care methods that cannot be met in the traditional medical system, such as at a hospital.<sup>193</sup> Hospice care incorporates a wide variety of professionals that seek to maximize the dying patient's comfort while also meeting the patient's "physical, psychological, social and spiritual needs."<sup>194</sup> Beginning in the mid-twentieth century, policy makers and healthcare professionals began to view hospice care as the morally responsible form of care for people who are dying and terminally ill, and this ideology has drastically changed how Americans view dying.<sup>195</sup> By 2007, 1.4 million Americans had used hospice services,<sup>196</sup> and national healthcare reform has demonstrated Congressional support for the hospice ideology.<sup>197</sup> In addition to meeting a patient's medical needs, such as medication management, hospice care incorporates psychosocial care, such as addressing the patient's spiritual well-being and end-of-life goals, and often involves teams of professionals across disciplines.<sup>198</sup> Hospice care has become an important value in American society today as the population ages.<sup>199</sup> Not only does hospice care fit into society's concept of morality, but hospice care is also financially wise because it usually requires less aggressive medical treatment and less time in a hospital.<sup>200</sup> In fact, hospice care can even be made available in one's private home.<sup>201</sup>

The relationship between hospice care and acceptable forms of care under the FMLA had never been fully explored until *Ballard* framed a seemingly recreational vacation as a component of an end-of-life plan, worthy of being classified as care under the FMLA.<sup>202</sup> The only other case that addresses an employee seeking FMLA leave to care for a family

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192. Livne, *supra* note 15, at 889.

193. Melissa D.A. Carlson et. al., *Hospice Care: What Services Do Patients and Their Families Receive?*, 42 HEALTH SERVS. RES. 1672, 1673 (2007).

194. Mayo Clinic, *Hospice Care: Comforting the Terminally Ill*, MAYO CLINIC (Jan. 16, 2016), <http://www.mayoclinic.org/healthy-lifestyle/end-of-life/in-depth/hospice-care/art-20048050>.

195. Livne, *supra* note 15, at 889.

196. Kathy L. Cerminara, *Hospice and Health Care Reform: Improving Care at the End of Life*, 17 WIDENER L. REV. 443, 445 (2011).

197. Congress drastically increased patient access to hospice care in the Affordable Care Act. Cerminara, *supra* note 196, at 451 & n.52 (citing Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 3140(a), 2302, 124 Stat. 119, 440, 293 (2010)).

198. Carlson et. al., *supra* note 193.

199. See Samar M. Aoun et. al., *Caregiving for the Terminally Ill: At What Cost?*, 19 PALLIATIVE MED. 551 (2005).

200. Hospice care has been shown to reduce health care costs. See Unroe and Meier, *supra* note 191; Livne, *supra* note 15.

201. Paula Lusardi et. al., *The Going Home Initiative: Getting Critical Care Patients Home With Hospice*, CRITICAL CARE NURSE, Aug. 2011, at 46.

202. *Ballard v. Chi. Park Dist.*, 741 F.3d 838 (7th Cir. 2014).

member in hospice care is *Mora v. Chem-Tronics, Inc.*<sup>203</sup> In *Mora*, the defendant employer attempted to argue that its employee was not needed to care for his dying son because “hospice care may have sufficed.”<sup>204</sup> The District Court for the Southern District of California rejected the employer’s argument finding no evidence that an employee can only be granted FMLA leave if no other options for care exist.<sup>205</sup> Similar to *Ballard*, the *Mora* court referenced a physician’s professional opinion of the advantages of family care when it declared that the employee’s presence provides psychological comfort to his son “who faced death on a daily basis.”<sup>206</sup> *Mora*, however, did not expand upon the meaning of care because the psychological care coincided with medical treatment.<sup>207</sup> Furthermore, the employee participated in medicine administration and symptom observation.<sup>208</sup> This level of involvement in his son’s care, even though largely consisting of psychological care, falls in line with the Ninth Circuit’s interpretation that care under the FMLA necessitates involvement in ongoing treatment.<sup>209</sup>

Ballard’s caregiving was unrelated to any treatment. Rather, the activity was a component of an end-of-life plan devised by her mother’s hospice care providers.<sup>210</sup> When the focus shifts from the activity of vacationing in Las Vegas to the goal of providing hospice care to a dying woman, Ballard’s leave becomes more in line with the meaning of care.<sup>211</sup> Creating an end-of-life plan is well in line with the definition of psychological care in 29 C.F.R. §825.124.<sup>212</sup> Furthermore, hospice care, as a practice, has the overwhelming support of both the general public and the medical community, which has a legitimizing effect on hospice care’s

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203. 16 F. Supp. 2d 1192 (S.D. Cal. 1998).

204. *Id.* at 1206.

205. *Id.* at 1206–07.

206. Compare *id.* at 1207 (citing declaration of son’s physician attesting to psychological comfort that employee provided his son during his son’s life-threatening treatment), with *Ballard*, 741 F.3d at 839, 843 (emphasizing social worker’s role in planning and securing funding for Ballard’s mother’s trip and conversations about trip with mother’s physician).

207. The employee provided critical psychological care to his son during his son’s painful spinal taps. *Mora*, 16 F. Supp. 2d at 1207.

208. *Id.*

209. See *Marchisheck v. San Mateo Cty.*, 199 F.3d 1068 (9th Cir. 1999); see also discussion *supra* II.c.

210. *Ballard*, 741 F.3d at 839.

211. *Id.* at 842–43.

212. 29 C.F.R. § 825.124(a) (2016) defines psychological comfort as “comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.” For more information about the purpose of an end-of-life trip and its impact on the life of the terminally-ill, see the major motion picture *THE BUCKET LIST* (Warner Bros. 2007).



non-traditional approach to care.<sup>213</sup> Finally, the federal government not only approves of hospice care as a practice but also provides funding and access for hospice care through Medicare.<sup>214</sup> While Medicare is unlikely to fund end-of-life vacations, the concept of planning for a “good death” is an important aspect of hospice care, and it should be incorporated into the meaning of care under the FMLA, as it was in *Ballard*.<sup>215</sup>

### B. Solidifying Circuit Split

One of the most startling aspects of *Ballard* is its eerily similar fact-pattern to *Tayag v. Lahey Clinic Hospital, Inc.*, decided by the First Circuit only three years prior.<sup>216</sup> The employee in *Tayag* served as the primary caregiver for her husband who suffered from a variety of health issues including chronic heart disease, a recent kidney transplant, and end-stage renal failure.<sup>217</sup> The employee frequently sought FMLA leave for caregiving activities such as transportation to doctor appointments and administering medication.<sup>218</sup> Her employer always approved her requests for leave, which usually lasted one to two days, until the request in question.<sup>219</sup> The employee’s husband sought to visit his native country, the Philippines, for a seven-week spiritual healing trip, but he could not travel without his wife due to his need of care.<sup>220</sup> The employee accompanied her husband on the trip, providing the same care she provided him at home.<sup>221</sup> The court found the complete absence from work to be beyond the scope of the FMLA because the healing pilgrimage did not involve any medical treatment and the employee could offer no reason why the trip needed to be seven weeks long.<sup>222</sup>

The First Circuit refused to extend FMLA leave to *Tayag* on the basis that *Tayag*’s provided care was not enough to justify a seven-week burden

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213. Livne, *supra* note 15, at 889.

214. CTRS. FOR MEDICARE AND MEDICAID SERVS., DEPT OF HEALTH & HUMAN SERVS., MEDICARE HOSPICE BENEFITS 4 (2016), <https://www.medicare.gov/Pubs/pdf/02154.pdf>; *see also* Cerminara, *supra* note 196, at 451.

215. Daren K. Heyland et. al., *What Matters Most in End-of-Life Care: Perceptions of Seriously Ill Patients and Their Family Members*, 174 CAN. MED. ASS’N J. 627 (2006), <http://www.cmaj.ca/content/174/5/627.full.pdf>; *see Ballard*, 741 F.3d at 838.

216. 632 F.3d 788 (1st Cir. 2011).

217. *Id.* at 789; *Tayag v. Lahey Clinic Hosp., Inc.*, 677 F. Supp. 2d 446, 448 (D. Mass. 2010).

218. *Tayag*, 632 F.3d at 789.

219. *Id.* at 790.

220. *Tayag*, 677 F. Supp. 2d at 449.

221. *Tayag*, 632 F.3d at 790.

222. *Id.* at 792–93.

to her employer,<sup>223</sup> but the court also rejected the argument that the purpose of the trip, a spiritual healing journey, merited FMLA coverage.<sup>224</sup> Spiritual healing during end-stage renal failure may draw some parallels to a last-chance vacation for end-stage congestive heart failure.<sup>225</sup> Perhaps the lack of participation from an institutional care provider delegitimized Tayag and her husband's trip.<sup>226</sup>

### C. Legislative Intent to Balance Interests

The *Ballard* decision omits any discussion of the burden this expanded interpretation places on employers. By expanding the meaning of care, employees will be able to leave work more often and for longer periods of time.<sup>227</sup> Presumably, Ballard was not taking FMLA leave in weekly increments.<sup>228</sup> While a family member might require intermittent care or care that occurs outside the employee's work commitments, traveling requires the employee to take a continuous period of absence.<sup>229</sup> As was the case in *Ballard*, the amount of care provided remains identical when in town and when travelling, but the difference is the detriment to the employer.<sup>230</sup> The employer has lost more work-product even though the employee's caregiving duties have not changed.<sup>231</sup> This surely burdens the employer.

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223. *Id.* at 793.

224. *Id.* at 791–92.

225. *Compare Tayag*, 677 F. Supp. 2d at 448, with *Ballard v. Chi. Park Dist.*, 900 F. Supp. 2d 804, 806 (N.D. Ill. 2012).

226. *Tayag*, 632 F.3d at 793 (finding health care provider certification was insufficient and spiritual healing was distinct from employee's husband's treatment plan).

227. Ballard was out of town for an entire week. It is unlikely that the kind of care she provided would normally require her to take a full week of leave had she remained at home. *Ballard*, 900 F. Supp. 2d at 807.

228. *Id.* at 806. Ballard served as her mother's primary caregiver, and her duties "included preparing healthy meals; administering her mother's insulin shots and medicine; operating a pump to remove fluids from her mother's heart; bathing her mother; pushing her in a wheelchair; administering oxygen when her mother needed it; providing her mother with transportation; and making sure her mother was comfortable." *Id.* Ballard did not request FMLA leave from her employer until she began planning the trip to Las Vegas. *Id.* at 806–07.

229. The FMLA enables employees to take leave on an intermittent schedule or for a specific amount of time up to twelve weeks. 29 U.S.C. § 2612(b) (2012). For a discussion on leave schedules, see Megan E. Hladilek, Comment, *Can I Go to Chemo?: Protecting Employee Rights to Intermittent and Reduced Leave Under the Family and Medical Leave Act*, 29 HAMLINE L. REV. 377 (2006).

230. Both at home and while traveling to Las Vegas, Ballard "continued to serve as her mother's caretaker during the trip . . . performing her usual responsibilities." *Ballard v. Chi. Park Dist.*, 741 F.3d 838, 840 (7th Cir. 2014).

231. Ballard had to request additional FMLA leave in order to make the trip. *Ballard*, 741 F.3d at 839–40.

The FMLA was designed to balance the needs of the employer with the demands of employees who must balance work and family.<sup>232</sup> The statute specifically identifies the need for balancing between the needs of the employer and the need for an employee to meet family demands.<sup>233</sup> In addition, much of the legislative history focuses on the economic impact that the FMLA will likely have on the economy and inside individual workplaces.<sup>234</sup> Congress did not intend for the FMLA to overly burden employers.<sup>235</sup> Despite legislative intent to balance employer and employee opposing interests, the *Ballard* decision makes no reference to any balancing mechanism.

## V. IMPORTANCE OF THE BALLARD DECISION

### A. *Demonstrating Social Values Surrounding Dying*

*Ballard* not only altered the meaning of care under the FMLA but also suggested that caring for a dying family member may not need to be balanced against the economic interests of an employer.<sup>236</sup> The court's heavy reference to Ballard's mother's terminal state suggests that care in the mother's final days need not be checked by the economic interests of an employer.<sup>237</sup> Economic costs may be less important when society views caring for those who are terminally ill as a moral duty.<sup>238</sup> Therefore, the *Ballard* decision is best understood in the context of hospice care. Compassion and morality support the holding that Ballard indeed provided care to her mother, even if that care occurred in a happier place than a hospital.<sup>239</sup> The *Ballard* decision's interpretation of care under the FMLA was influenced by social values that the dying deserve dignity and care, even if it is not economical.<sup>240</sup> This compassion likely takes the meaning of care beyond the intentions of Congress, who sought to balance

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232. 29 U.S.C. § 2601(b)(1) ("It is the purpose of this Act—to balance the demands of the workplace with the needs of families . . .").

233. *Id.*

234. See 139 CONG. REC. 1691 (1993); H.R. REP. NO. 103-8, pt. 1, at 60 (1993).

235. 29 C.F.R. § 825.101 (2015) ("It was intended that the [FMLA] accomplish [its] purposes in a manner that accommodates the legitimate interests of employers . . .").

236. See discussion *supra* Part III.b.

237. *Ballard*, 741 F.3d at 839 (emphasizing the trip's role in the mother's end-of-life plan, the mother's fatal diagnosis, and the role of charity work and hospice care).

238. See Livne, *supra* note 15.

239. See *Ballard*, 741 F.3d at 839–43.

240. See Livne, *supra* note 15.

economic impact with family needs, but it is well in line with social values in the United States.<sup>241</sup>

More Americans are choosing to die at home or outside of hospitals.<sup>242</sup> In addition, 75% of American deaths result from chronic illnesses, and these individuals often seek hospice and palliative care in their final days.<sup>243</sup> The changing scenery of the dying process has shifted the focus away from medicine and towards non-medical intervention, such as spiritual and emotional care.<sup>244</sup> Instead of hospitals filled with doctors, those dying in a hospice care environment are likely to interact with social workers.<sup>245</sup> Ballard's mother planned her trip to Las Vegas with the help of a social worker.<sup>246</sup> Finally, the popularity of hospice care and end-of-life planning is likely to grow as the American population ages, with the baby boomers entering their elder years.<sup>247</sup> This form of care is growing in both popularity and credibility within the medical community and greater public. Thus, *Ballard* was able to trace its understanding of care to evolved public perceptions of care and modern medical professional opinions, both of which bolster the holding's credibility. This cultural, moral, and healthcare trend helps reinforce the *Ballard* rationale that the physical care during the trip meets the kind of care the FMLA seeks to cover<sup>248</sup> and the purpose of the trip draws a direct connection to the mother's chosen line of care for her terminal condition.<sup>249</sup>

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241. See Lindsey, *supra* note 18, at 560–61 (arguing that a broad interpretation of care takes the FMLA beyond the scope intended by Congress); see also Collinet, *supra* note 7, at 384 (“[U]nder the current circuit split, lack of clear guidance on the permissibility of traveling ‘to care for’ a family member under the FMLA encourages employees to explore limits. This requires employers – as a means of minimizing their risk exposure for noncompliance – to adopt policies and processes that in some instances exceed that which Congress had in mind when it passed the FMLA.”); 139 CONG. REC. 1691 (1993) (demonstrating the minor burden or even economic benefit the FMLA would have on employers); H.R. REP. NO. 103-8, pt. 1, at 60.

242. Nancy Aldrich & William F. Benson, *Advance Care Planning: Ensuring Your Wishes Are Known and Honored If You Are Unable to Speak for Yourself*, CTR. FOR DISEASE CONTROL (2012), <http://www.cdc.gov/aging/pdf/advanced-care-planning-critical-issue-brief.pdf>.

243. Carlson et. al., *supra* note 193, at 1673.

244. See Andrew M. Seaman, *Hospice Patients More Likely to Die at Home, Receive Efficient Care*, REUTERS (Nov 11, 2014 4:25 PM), <http://www.reuters.com/article/us-hospice-care-cost-idUSKCN0IV25C20141111>. See also Amy S. Kelley & Diane E. Meier, *Palliative Care—A Shifting Paradigm*, 363 NEW ENG. J. MED. 781 (2010).

245. Louise Brown & Tony Walter, *Towards a Social Model of End-of-Life Care*, 44 BRIT. J. SOC. WORK 2375 (2014).

246. *Ballard v. Chi. Park Dist.*, 741 F.3d 838, 839 (7th Cir. 2014).

247. ORTMAN ET. AL., *supra* note 13.

248. *Ballard*, 741 F.3d at 842 (“Thus, at the very least, Ballard requested leave in order to provide physical care. That, in turn, is enough to satisfy 29 U.S.C. § 2612(a)(1)(C).”).

249. *Id.* at 839 (Ballard's mother met with social worker and planned trip as an end-of-life goal).

### B. Risk of Abuse

While scholars can rationalize *Ballard* by emphasizing the legitimacy of hospice care and terminally ill care, *Ballard* does not explicitly limit its decision to cases involving people who are terminally-ill.<sup>250</sup> Employers' biggest concern likely surrounds the precedent that the *Ballard* decision sets.<sup>251</sup> This fear has likely already been realized in *Gienapp v. Harbor Crest*, a subsequent Seventh Circuit case applying *Ballard* to a non-terminal case.<sup>252</sup> In *Gienapp*, an employer terminated an employee who had taken FMLA leave to care for her adult daughter during her daughter's battle with thyroid cancer.<sup>253</sup> The daughter was not terminally ill, but she needed her mother to babysit her children, the employee's grandchildren.<sup>254</sup> *Gienapp*'s employer claimed that providing childcare to grandchildren made the employee ineligible for FMLA leave.<sup>255</sup> The Seventh Circuit relied on *Ballard* in holding that the employee met the definition of care under the FMLA because her childcare services provided relief and rest for the employee's daughter.<sup>256</sup>

*Gienapp* follows the broad understanding of care that was championed in *Ballard*, but it also failed to address concerns of abuse and the added detriment this expanded definition places on employers. In many ways, *Gienapp* presents a weaker case. First, the care the employee provided to her daughter was not as central to the daughter's cancer battle as the care that *Ballard* provided to her dying mother.<sup>257</sup> But for *Ballard*'s presence, *Ballard*'s mother would never have been able to go to Las Vegas.<sup>258</sup> But for *Gienapp*'s babysitting, *Gienapp*'s daughter's battle against thyroid cancer would have continued, and *Gienapp*'s daughter likely would have

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250. *Id.* at 838 (articulating its understanding of care without specific reference to care for the terminally ill).

251. *See, e.g.*, Jeff Nowak, *supra* note 2.

252. *Gienapp v. Harbor Crest*, 756 F.3d 527 (7th Cir. 2014).

253. *Id.* at 528.

254. *Id.* at 531.

255. *Id.* at 532.

256. *Id.* (“[T]he issue [is] whether a combination of assistance to one’s daughter, plus care of grandchildren that could take a load off the daughter’s mind and feet, counts as ‘care’ under the [FMLA]. To this the answer must be yes. *Ballard* explains that care includes psychological as well as physical assistance . . .”).

257. The court acknowledged that *Gienapp* was not her daughter’s primary caregiver, yet this did not disqualify her eligibility to take FMLA leave because the FMLA does not specify the employee must be the primary caregiver. *Id.* at 531 (discussing 29 U.S.C. §2612(a)(1)(c)). *Ballard*, on the other hand, was her mother’s primary caretaker. *Ballard v. Chi. Park Dist.*, 900 F. Supp. 2d 804, 806 (N.D. Ill. 2012).

258. *Ballard*, 900 F. Supp. 2d at 812 (“[*Ballard*’s] mother’s basic medical, hygienic, and nutritional needs could not be met without *Ballard*’s assistance.”).

managed her childcare.<sup>259</sup> Therefore, the necessity of the care appears much weaker in *Gienapp*.<sup>260</sup> Second, the *Gienapp* decision does not offer any evidence from a medical professional regarding the grandmother's contributions. In *Ballard*, the trip to Las Vegas was planned, in part, by key professionals who were actively involved in Ballard's mother's care.<sup>261</sup> Instead, the *Gienapp* decision states, "[a] person who knows that her family is well looked-after has an important resource in trying to recover from a medical challenge."<sup>262</sup> Instead of relying on the heavy involvement of healthcare professionals, as was the case in *Ballard*, *Gienapp* does not rely on any expert testimony regarding the positive effect of the employee's care.

The absence of a healthcare professional's opinion regarding *Gienapp*'s care highlights the detriment that a broad definition of care may have on an employer, and such precedent increases the likelihood of FMLA abuse.<sup>263</sup> *Ballard* attempted to calm fears of abuse by drawing direct lines between the care provided by Ballard with the care plan devised by the patient's healthcare providers.<sup>264</sup> In addition, *Ballard* also references the employer's right to healthcare-provider certification.<sup>265</sup> *Gienapp* took the expanded understanding of care adopted in *Ballard* but the *Gienapp* court did not incorporate any direct support for the employee's care from a healthcare professional.

Under the FMLA, an employer has the right to request that the leave-seeking employee obtain and submit supporting certification from the family member's physician.<sup>266</sup> The employer may also request recertification at various points throughout the leave.<sup>267</sup> Certification asks the physician to affirm that the employee is indeed needed to care for the employee's eligible family member and provide an estimated length of

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259. *Gienapp*, 756 F.3d at 531.

260. *Id.* at 532.

261. *Ballard v. Chi. Park Dist.*, 741 F.3d 838, 839, 843 (7th Cir. 2014).

262. *Gienapp*, 756 F.3d at 532.

263. See Jeff Nowak, *Did a Court Just Allow an Employee FMLA Leave to Care for Her Grandchild?* FMLA INSIGHTS (July 11, 2014) <http://www.fmlainsights.com/did-a-court-just-allow-an-employee-fmla-leave-to-care-for-her-grandchild/> (arguing the "Seventh Circuit's expansive reading of the "caring for" provision of the FMLA takes the [FMLA] statute too far.").

264. *Ballard*, 741 F.3d at 843 ("[A]ny worries about opportunistic leave-taking in this case should be tempered by the fact that this dispute arises out of the hospice and palliative care context.").

265. *Id.* at 841 ("[A]n employer concerned about the risk that employees will abuse the FMLA's leave provisions may of course require that requests be certified by the family member's health care provider." (referencing 29 U.S.C. § 2613 (2012))).

266. 29 U.S.C. § 2613.

267. See *Parsley v. City of Columbus*, 471 F. Supp. 2d 858 (S.D. Ohio 2006). For an in-depth discussion on the certification provision of the FMLA, see Kalich, *supra* note 89.

time that the care will be needed.<sup>268</sup> Encouraging skeptical employers to request certifications could help curtail the potential for FMLA-leave abuse, and its absence in *Gienapp* suggests that caring for a family member with a serious health condition is held to less scrutiny in the Seventh Circuit as compared to other circuits.

*Gienapp* erodes any notion that *Ballard* expanded upon the FMLA's meaning of care when applied to family members who are terminally ill.<sup>269</sup> Instead, it supports the conclusion that *Ballard* interpreted the meaning of care in the FMLA to be applied broadly and subject to minimal oversight from medical professionals.<sup>270</sup> Finally, *Gienapp* confirmed that the *Ballard* decision expanded the meaning of care beyond the interpretations of other circuits without clear boundaries.

## VI. CONCLUSION

The Family and Medical Leave Act enables *Ballard* to take time off from her job to care for her mother who was terminally ill by escorting her mother on an end-of-life trip to Las Vegas, Nevada. The *Ballard* decision enabled the Seventh Circuit to incorporate aspects of end-of-life care that ordinarily would not meet the meaning of care under the FMLA, resulting in a split among the circuits on the meaning of care while traveling. Yet, both the district court and the Seventh Circuit failed to explicitly state that the hospice care factor justifies such an expansion in the meaning of care. When the *Ballard* decision is re-examined in the end-of-life care context, the holding becomes much more rational and consistent with the FMLA.

When viewed in the light of hospice care, *Ballard* conforms to societal views that the dying deserves compassion and dignity, even when medical intervention ceases. However, the Seventh Circuit's ruling failed to place any limitation on its expanded definition or offer guidance on where the line should be drawn. This absence disregards Congress's intent to balance needs of employees with the needs of employers. As a result, *Ballard* has already been used as precedent to further stretch the meaning of care beyond that of any other circuit, likely going beyond Congress's intentions for the FMLA. Until the Seventh Circuit delineates the meaning of care, perhaps by narrowing its meaning in the hospice and non-hospice context,

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268. 29 U.S.C. § 2613(b)(4)(a).

269. While *Gienapp*'s daughter was facing a life-threatening medical battle, she was never considered terminally ill. At the time the case was published, *Gienapp*'s daughter was in remission. *Id.* at 529.

270. *Ballard*, 741 F.3d at 843.

employers should be wary of denying FMLA leave to an employee caring for a family member who is terminally ill or even a dangerously ill.

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\* Juris Doctor candidate at Washington University School of Law. The author would like to thank her mother, Debbie, who has cared for her aging parents with strength and love while still providing amazing support, encouragement, and motivation to her children and granddaughter. This note is dedicated to the sandwiched generation who balances aging parents, children, and employment.