

AID IN DYING: NOT LEGAL IN IDAHO; NOT ABOUT CHOICE

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“Those who believe that legalizing euthanasia and/or assisted-suicide will assure their ‘choice,’ are naive.”

-William Reichel, MD
Coeur d’Alene Press
June 30, 2010¹

Introduction

Last month, *The Advocate* ran an article by Kathryn Tucker, Director of Legal Affairs for Compassion & Choices, a successor organization to the Hemlock Society.² Tucker argued that “aid in dying” is legal in Idaho such that “physicians should feel safe to provide [it]” and that this option will give patients “choice.”³

“Aid in dying” is a euphemism for euthanasia and physician-assisted suicide.⁴ Tucker’s article appears to be limited to physician-assisted suicide. Regardless, an Idaho doctor who undertakes such practice is subject to criminal and civil liability. It is also untrue that legalization will assure patient choice.

Physician-assisted suicide

The American Medical Association (AMA) defines physician-assisted suicide, as follows: “Physician-assisted suicide occurs when a physician facilitates a patient’s death by providing the necessary means and/or information to enable the patient to perform the life-ending act (e.g., the physician provides sleeping pills and information about the lethal dose, while aware that the patient may commit suicide).”⁵

The AMA rejects assisted suicide.⁶ Assisted suicide is also opposed by disability rights groups such as the Disability Rights Education and Defense Fund, and Not Dead Yet.⁷

Most states and Canada do not allow assisted suicide

The vast majority of states to consider assisted suicide, have rejected it.⁸ This year, New Hampshire and Canada rejected it by wide margins.⁹

There are just two states where assisted suicide is legal: Oregon and Washington. These states have statutes, which give



Julie Brown of Seattle holds a sign she used at a protest against a Washington law that allows assistance for suicide.

doctors immunity from criminal and civil liability.¹⁰ In Montana, there is a court decision, which gives doctors a potential defense to criminal prosecution, but does not legalize assisted suicide by giving doctors criminal and civil immunity.¹¹

Not what the voters were promised

The Oregon and Washington acts were passed via initiatives in which voters were promised that their “choice” would be assured.¹² Both acts, however, have significant gaps so that patient choice is not assured. For example, neither act requires witnesses at the death.¹³ Without disinterested witnesses, the opportunity is created for someone to administer the lethal dose to the patient without his consent. Even if he struggled, who would know?

Oregon and Washington are also “Don’t Ask, Don’t Tell” states. Required official forms and reports do not ask about or report on whether the patient consented at the time of death.¹⁴ Consent at the time of death is also not required by the language of the acts themselves.¹⁵ Once again and contrary to marketing rhetoric, patient “choice” is not assured.

New Hampshire

In January 2010, an assisted suicide bill was defeated in the New Hampshire House of Representatives, 242 to 113.¹⁶ The major reason was elder abuse.¹⁷ New Hampshire Representative Nancy Elliott

states: “These acts empower heirs and others to pressure and abuse older people to cut short their lives. This is especially an issue when the older person has money. There is no assisted-suicide bill that you can write to correct this huge problem.”¹⁸

Patients are not necessarily dying

Oregon and Washington’s acts apply to “terminal” patients, defined as having no more than six months to live.¹⁹ Such patients are not necessarily dying. Doctor prognoses can be wrong.²⁰ Moreover, treatment can lead to recovery. Oregon resident, Jeanette Hall, who was diagnosed with cancer and told that she had six months to a year to live, states:

I wanted to do our law and I wanted my doctor to help me. Instead, he encouraged me to not give up and ultimately I decided to fight. I had both chemotherapy and radiation...

It is now nearly 10 years later. If my doctor had believed in assisted suicide, I would be dead.²¹

Expanded definitions of “terminal”

Compassion & Choices has proposed expanded definitions of terminal for the purpose of assisted suicide laws, which, if enacted, will cause these laws to apply to people who are clearly not dying. This was the case with the New Hampshire bill described above. When originally introduced, it contained the following definition of “terminal condition”:

XIII. "Terminal condition" means an incurable and irreversible condition, for the end stage of which there is no known treatment which will alter its course to death, and which, in the opinion of the attending physician and consulting physician competent in that disease category, will result in premature death.²²

Commentator Stephen Drake explains the definition's ramifications, as follows: "[T]erminality is defined as having a condition that is irreversible and will result in a premature death. My partner [a motorized wheelchair user] would fit that definition. Many people I work with also fit the definition. . . . None of them are dying."²³

In Montana, Compassion & Choices proposed another broad definition of "terminally ill adult patient," as follows: "[An adult] who has an incurable or irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of his or her attending physician, result in death within a relatively short time."²⁴ Attorney Theresa Schrempp and doctor Richard Wonderly provide this analysis:²⁵

[The] definition is broad enough to include an 18 year old who is insulin dependent or dependent on kidney dialysis, or a young adult with stable HIV/AIDS. Each of these patients could live for decades with appropriate medical treatment. Yet, they are "terminally ill" according to the definition promoted by [Compassion & Choices].

It's not about choice

Once a patient is labeled "terminal," the argument can be made that his treatment should be denied in favor of someone more deserving.²⁶ This has happened in Oregon where patients labeled "terminal" have not only been denied coverage for treatment, they have been offered coverage for assisted suicide instead.²⁷ The most well known case involves Barbara Wagner, who had lung cancer.²⁸ The Oregon Health Plan refused to pay for a drug to possibly prolong her life and offered to pay for her assisted suicide instead.²⁹

After Wagner's death, Compassion & Choices's president, Barbara Coombs Lee, published an editorial in *The Oregonian* arguing against Wagner's choice to try and beat her cancer.³⁰ Coombs Lee also defended the Oregon Health Plan and argued for a public policy change to discourage people from seeking cures.³¹

This editorial, combined with Compassion & Choices' expanded definitions of terminal, provide a glimpse into Compassion & Choices' true agenda: It's not the promotion of personal choice.

According to Donna Cohen, an expert on murder-suicide, the typical case involves a depressed, controlling husband who shoots his ill wife...

In Idaho, assisted suicide is prohibited by the common law

Criminal Liability

The Idaho Code provides that when there is no statute governing a matter, the common law of England applies.³² "At common law, an aider and abettor [of suicide] was guilty of murder . . ."³³

Prior to 1994, there were no statutes in Idaho addressing assisted suicide. Assisted suicide was prohibited by the common law and chargeable as murder.

In 1994, the Idaho Legislature passed an act to establish procedures for Do Not Resuscitate Orders.³⁴ As part of this act, the legislature included a provision that assisted suicide was not being made legal. The provision stated: "This act does not make legal and in no way condones, mercy killing, assisted suicide or euthanasia."³⁵

In 2001 and 2007, the provision was re-codified.³⁶ Now part of the Medical Consent and Natural Death Act, it states: "This chapter does not make legal, and in no way condones, euthanasia, mercy killing, or assisted suicide or permit an affirmative or deliberate act or omission to end life, other than to allow the natural process of dying."³⁷

Per the above provision and common law, assisted suicide remains a crime in Idaho. Assisted suicide can also be statutorily charged as murder. Idaho Code § 18-4001 defines "murder" as the "unlawful killing of a human being . . . with malice aforethought," while Idaho Code § 18-4002 states that "malice" is a "deliberate intention unlawfully to take away the life of a fellow creature."³⁸ With assisted suicide prohibited by common law and not subsequently made legal, a doctor who assists a suicide with "deliberate intention" is guilty of such unlawful killing. He can be statutorily charged with murder.

Civil liability

In 2009, the Idaho Supreme Court decided *Cramer v. Slater*, which states that doctors "can be held liable for [a] patient's suicide."³⁹ In *Cramer*, doctors negligently informed a patient about his HIV/

AIDS status, which allegedly caused him to commit suicide.⁴⁰

Tucker does not address *Cramer*. She argues instead that Idaho doctors are free to perform assisted suicide due to the law in Oregon, Washington and Montana.⁴¹ Ignoring for the moment that assisted suicide is not actually legal in Montana, this is like saying that because a brothel is legal in Nevada, the same brothel is legal in Utah. This is obviously not the case.

Tucker also argues that the above provision in the Medical Consent and Natural Death Act does not prohibit "aid in dying" because aid in dying is not "suicide."⁴² She made a similar argument as counsel for the plaintiffs in *Blick v. Connecticut*.⁴³ The Court disagreed and dismissed the case.⁴⁴ Judge Aurigemma stated:

[T]he legislature intended the statute to apply to physicians who assist a suicide and intended the term "suicide" to include self-killing by those who are suffering from unbearable terminal illness.

The language and legislative history of § 53a-56 compel the conclusion that the defendants [state's attorneys] would not be acting in excess of their authority if they prosecuted the plaintiffs under § 53a-56 for providing "aid in dying."⁴⁵

Tucker concludes her article by holding out assisted suicide as a solution to murder-suicide in elderly couples. According to Donna Cohen, an expert on murder-suicide, the typical case involves a depressed, controlling husband who shoots his ill wife: "The wife does not want to die and is often shot in her sleep. If she was awake at the time, there are usually signs that she tried to defend herself."⁴⁶ If assisted suicide were legal, the wife, not wanting to die, would still be a victim.

Conclusion

Physician-assisted suicide is not legal in Idaho. A doctor who engages in such practice is subject to criminal and civil liability.

About the Author

Margaret Dore is an attorney in Washington state, where assisted suicide is legal. Her publications include *Death with Dignity: A Recipe for Elder Abuse and Homicide (Albeit not by Name)*, 11 *MARQUETTE ELDER'S ADVISOR* 387 (2010), available at http://www.margaret-dore.com/pdf/Dore-Elder-Abuse_001.pdf For further information see www.margaret-dore.com.

Endnotes

¹ William Reichel, MD, Letter to the Editor, *Aid in Dying: See Dutch for Disasters*, Coeur d'Alene Press, June 30, 2010, at A9.

² Kathryn Tucker & Christine Salmi, *Aid in Dying: Law, Geography and Standard of Care in Idaho*, 53 *THE ADVOCATE: OFFICIAL PUBLICATION OF THE IDAHO STATE BAR* No. 8, 42-45, 45 (2010); IAN DOWBIGGIN, *A CONCISE HISTORY OF EUTHANASIA* 129 (2007) (The Hemlock Society was formed in 1980 and "dedicated to the decriminalization of assisted suicide and active voluntary euthanasia"); *id.* at 146 (In 2003, Hemlock changed its name to End-of-Life Choices, which merged with Compassion in Dying in 2004, to form Compassion & Choices.)

³ Tucker, *Aid in Dying*, at 43.

⁴ See, e.g., 1990 Petition to put Initiative 119 on the ballot in Washington State (defining "aid-in-dying" as euthanasia "provided in person by a physician") (copy on file with author); Int'l Task Force on Euthanasia & Assisted Suicide, *Attempts to Legalize Euthanasia/Assisted Suicide in the United States* (2009), http://www.internationaltaskforce.org/pdf/200906_attempts_to_legalize_assisted_suicide.pdf (regarding Initiative 119, referring to "aid-in-dying" as "euthanasia and physician-assisted suicide"); video transcript of Barbara Wagner, <http://www.katu.com/news/26119539.html?video=YHI&t=a> (last visited Aug. 8, 2010) ("physician aid in dying" [is] better known as assisted suicide").

⁵ A.M.A. Code of Medical Ethics, Opinion 2.211, available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion2211.shtml> (last visited August 7, 2010).

⁶ *Id.*

⁷ See http://www.dredf.org/assisted_suicide/index.shtml; see also www.notdeadyet.org.

⁸ Int'l Task Force, cited at note 4 ("Between January 1994 and June 2009, there were 113 legislative proposals in 24 states. All were either defeated, tabled for the session, or languished with no action taken.")

⁹ On January 13, 2010, the New Hampshire House of Representatives defeated an assisted suicide bill, 242 to 113. See Roll Call for H.B. 304, at <http://www.gencourt.state.nh.us>. In April 2010, the Canadian Parliament defeated a bill that would have legalized assisted suicide, 228 to 59. See NATIONAL POST, *The Week in Letters: Readers give a big thumbs down to 'death with dignity'*, April 26, 2010, available at <http://www.nationalpost.com/Week+Letters+Readers+give+thumbs+down+death+with+dignity/2951087/story.html>

¹⁰ See OR. REV. STAT. § 127.800-995 (2005); WASH. REV. CODE ANN. § 70.245.010-904 (2009).

¹¹ See, e.g., Greg Jackson & Matt Bowman, *Analysis of Implications of the Baxter Case on Potential Criminal Liability, for the Montana Family Foundation* (April 2010), available at http://www.montana-family.org/portfolio/pdfs/Baxter_Decision_Analysis_v2.pdf

¹² See e.g. Margaret Dore, "Death with Dignity": A Recipe for Elder Abuse and Homicide (Albeit not by Name), 11 *MARQUETTE ELDER'S ADVISOR* 387, 387 (2010), available at http://www.margaret-dore.com/pdf/Dore-Elder-Abuse_001.pdf

¹³ OR. REV. STAT. § 127.800-.995 (2005); WASH. REV. CODE ANN. § 70.245.010-904 (2009).



Photos courtesy of Rani Kay Sampson

On March 5, 2010, demonstrators protest Washington Assisted Suicide Act in front of the University of Washington Hospital in Seattle while several TV stations interview Eileen Geller.

¹⁴ *Id.* See also ALL official forms and reports for both acts, which can be viewed at <http://www.oregon.gov/DHS/ph/pas/index.shtml> and <http://www.doh.wa.gov/dwda/>.

¹⁵ Both acts contain provisions requiring that a determination of whether a patient is acting "voluntarily" be made in conjunction with the lethal dose request, not later. For more information, see Dore, *A Recipe for Abuse*, cited at note 12, 390.

¹⁶ Roll Call for New Hampshire H.B. 304 (January 13, 2010), cited at note 9.

¹⁷ New Hampshire State Representative Nancy Elliott and other sources.

¹⁸ Nancy Elliott, Letter to the Editor, *Right to Die is Prescription for Abuse*, HARTFORD COURANT, May 28, 2010.

¹⁹ OR. REV. STAT. § 127.800 § 1.01(12); WASH. REV. CODE ANN. § 70.242.010(13).

²⁰ Nina Shapiro, *Terminal Uncertainty*, SEATTLE WEEKLY, January 14, 2009, available at www.seattleweekly.com/2009-01-14/news/terminal-uncertainty (Last visited August 8, 2010).

²¹ Jeanette Hall, Letter to the Editor, *Second life*, MISSOULA INDEPENDENT, June 17, 2010. Author confirmed accuracy with both Ms. Hall and her doctor.

²² New Hampshire Bill, H.B. 304.

²³ Stephen Drake, *New Hampshire Poised to Redefine "Terminally Ill" to PWDs and others for Assisted Suicide Eligibility*, January 30, 2009, <http://notdeadyetnewscommentary.blogspot.com/2009/01/new-hampshire-poised-to-redefine.html>. Drake's partner is Diane Coleman, founder of the disability rights organization, Not Dead Yet, who uses a motorized wheelchair.

²⁴ *Plaintiffs' Responses to State of Montana's First Interrogatories, Baxter v. Montana*, No 2007-787, (Mont. 1st Dist., May 16, 2008). Copy attached to letter from Richard Wonderly, MD, and Theresa Schrempf, Esq., to Alex Schadenberg, Executive Director of the Euthanasia Prevention Coalition, October 22, 2009, <http://www.euthanasiaprevention.on.ca/ConnMemo02.pdf>

²⁵ Wonderly & Schrempf, note 24.

²⁶ *Id.*

²⁷ *Id.*; Susan Donaldson James, *Death Drugs Cause Uproar in Oregon*, ABC News, Aug. 6, 2008, <http://www.abcnews.go.com/Health/Story?id=5517492&page=> (last visited Aug. 9, 2010)[A-52]; video transcript at note 4.

²⁸ Susan Donaldson James, at note 27; video transcript at note 4.

²⁹ *Id.*

³⁰ Barbara Coombs Lee, *Sensationalizing a sad*

case cheats the public of sound debate, *THE OREGONIAN*, November 29, 2008, available at http://www.oregonlive.com/opinion/index.ssf/2008/11/sensationalizing_a_sad_case_ch.html

³¹ *Id.* She stated: "The burning health policy question is whether we inadvertently encourage patients to act against their own self interest, chase an unattainable dream of cure, and foreclose the path of acceptance that curative care has been exhausted. . . . Such encouragement serves neither patients, families, nor the public."

³² IDAHO CODE ANN. § 73-116 (1919) states: "The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state."

³³ *In re Joseph G.*, 667 P.2d 1176, 1179 (Cal. 1983).

³⁴ 1994 Idaho Sess. Laws, Ch. 298, H.B. 881, Sec. 1, § 39-150.

³⁵ *Id.*, Sec. 1, § 39-152.

³⁶ 2001 Idaho Sess. Laws, Ch. 110 (H.B. 198)(re-designating § 39-152, as § 56-1022); and 2007 Idaho Sess. Laws, Ch. 196 (H.B. 119)(re-designating § 56-1022 as § 39-4514(2)).

³⁷ IDAHO CODE ANN. § 39-4514(2).

³⁸ IDAHO CODE ANN. § 18-4001 (2002); IDAHO CODE ANN. § 18-4002 (1972).

³⁹ Cramer, 146 Idaho 868, 878, 204 P.3d 508 (2009), states:

[T]he district court found "that when a psychiatrist, psychologist, or doctor fails to properly assess a patient's suicidal ideations and consequently fails to take steps to prevent the suicide, these professionals can be held liable for the patient's suicide." (Citing 81 A.L.R. 5th 167 § 6[a] (2000)). This analysis is supported by the Court's decision in *Brooks*.

⁴⁰ 146 Idaho at 868.

⁴¹ Tucker, cited at note 2, 44.

⁴² *Id.*, 43.

⁴³ *Blick & Levine v. Office of the Division of Criminal Justice*, et al. (*Blick v. Connecticut*) (Conn. Super. Ct.), CV-09-5033392, Memorandum of Decision on Motion to Dismiss, filed June 2, 2010, at 1, *id.* at 8.

⁴⁴ *Id.*, 13-14, 16, 22, 24-26.

⁴⁵ *Id.*, at 25.

⁴⁶ WebMD, *Murder-Suicides in Elderly Rise: Husbands commit most murder suicides—without wives' consent*, January 30, 2005, <http://www.medicinenet.com/script/main/art.asp?articlekey=50782> See also Cohen's biography, <http://amhd.cbcs.usf.edu/vita.php?t=60089779199be42cd7b05>