"DEATH WITH DIGNITY": A RECIPE FOR ELDER ABUSE AND HOMICIDE (ALBEIT NOT BY NAME)

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INTRODUCTION

Death with Dignity Acts in Oregon and Washington authorize physicians to write life-ending prescriptions for their patients.[1] Oregon's Act went into effect thirteen years ago.[2] Washington's Act was passed as a citizen's initiative in 2008 and went into effect in 2009.[3] Both Acts are touted as providing "choice" and "control" for end-of-life decisions. During Washington's election, the "For Statement" in the voters' pamphlet declared: "Only the patient – and no one else – may administer the [lethal dose]."[4] Washington's Act, however, does not say this

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1. OR. REV. STAT. § 127.815 § 3.01(1)(k) (2009); WASH. REV. CODE ANN. § 70.245.040(1)(k) (West 2009).

2. OR. REV. STAT. §§ 127.800-995. Oregon's Death with Dignity Act was passed as Ballot Measure 16 in 1994 and went into effect in 1997. *See* Death With Dignity Act, *available at* http://www.oregon.gov/DHS/ph/pas/ors.shtml (last visited Jan. 10, 2010).

3. WASH. REV. CODE ANN. § 70.245.903. Washington's Death with Dignity Act was passed as Initiative 1000 on November 4, 2008 and went into effect on March 5, 2009. *See* Washington State Dept. of Health, Ctr. for Health Statistics, *Death with Dignity Act*, *available at* http://www.doh.wa.gov/dwda/default.htm (last visited Jan. 10, 2010). The full text of the Act is available at http://apps.leg.wa.gov/RCW/default.aspx?cite=70.245 (last visited Jan. 10, 2010).

4. The voters' pamphlet for Initiative 1000 can be viewed on the website for the Washington State Secretary of State, 2008 General Election Voter's Guide –

anywhere. In fact, neither Act even requires the patient's consent when the lethal dose is administered.[5] This problem and other problems are discussed below.

HOW THE ACTS WORK

Both Acts have an application process to obtain the lethal dose, which includes a written request form with two required witnesses.[6] One of these witnesses is allowed to be the patient's heir, who will benefit from the death.[7] Once the lethal dose is issued by the pharmacy, there is no supervision over its administration.[8] The death is not required to be witnessed by disinterested persons.[9] No one is required to be present.[10]

A COMPARISON TO PROBATE LAW

When signing a will, having an heir act as one of the witnesses can support a finding of undue influence. Washington's probate code, for example, states that when one of two witnesses is a taker under the will, there is a rebuttable presumption that the taker/witness "procured the gift by duress, menace, fraud, or

Initiative Measure 1000, *available at* http://wei.secstate.wa.gov/osos/en/Pages/OnlineVoterGuideGeneral2008.aspx?electionid=26#ososTop (last visited April 10, 2010).

5. *See* WASH. REV. CODE ANN. § 70.245.010-904 and OR. REV. STAT. § 127.800-995.

6. WASH. REV. CODE ANN. § 70.245.030(1); OR. REV. STAT. § 127.810 § 2.02(1). *See* the Acts' official lethal dose request forms requiring two witnesses, Washington State Dept. of Health, *Request for Medication to End My Life in a Humane and Dignified Manner* (July 1, 2009), *available at* http://www.doh.wa.gov/dwda/forms/WrittenRequest.pdf; Oregon State Dept. of Health, *Request for Medication to End My Life in a humane and Dignified Manner* (Apr. 2006), *available at* http://www.oregon.gov/DHS/ph/pas/docs/pt-req.pdf/pdf.

7. *See* WASH. REV. CODE ANN. §§ 70.245.030 and 70.245.220; *see also* OR. REV. STAT. §§ 127.810 § 2.02, 127.897 § 6.01 (providing that one of two required witnesses on the lethal dose request form cannot be a patient's heir or other person who will benefit from the patient's death; the other witness may be an heir or other person who will benefit from the death).

8. *See generally* WASH. REV. CODE ANN. §§ 70.245.010-904 and OR. REV. STAT. §§ 127.800-995.

9. *Id.*

10. *Id.*

undue influence."[11]

Other states have similar laws. Consider *Burns v. Kabboul*, which states: "[i]t will weigh heavily against the proponent [of the will] on the issue of undue influence when the proponent was . . . present at [its] dictation . . . ."[12] The lethal dose request process, which allows an heir to act as a witness on the request form, does not promote patient choice. It invites coercion.

A RELAXED STANDARD OF COMPETENCY

In Washington, patients signing the lethal dose request form are required to be "competent."[13] In Oregon, patients are required to be "capable."[14] Regardless of the term used, this is a relaxed standard *in which someone other than the patient is allowed to speak for the patient.* For example, the Washington Act states: "'Competent' means . . . a patient has the ability to make and communicate an informed decision . . . , *including communication through persons familiar with the patient's manner of communicating . . . .*"[15]

There is no requirement that the person speaking for the patient be a designated agent such as an attorney-in-fact.[16] The person could be an heir or a new "best friend."[17]

Regardless, without a requirement of strict competency,

11. WASH. REV. CODE ANN. § 11.12.160(2).

12. Burns v. Kabboul, 595 A.2d 1153, 1163 (Pa. Super. Ct. 1991).

13. WASH. REV. CODE ANN. § 70.245.010(11) (defining a "qualified patient" as a "competent adult.")

14. OR. REV. STAT. § 127.800 § 1.01(11) (defining a "qualified patient" as a "capable adult.")

15. WASH. REV. CODE ANN. § 70.245.010(3) (emphasis added). The Oregon Act has similar language. *See* OR. REV. STAT. § 127.800 § 1.01(3) (stating "'[c]*apable' means* . . . a patient has the ability to make and communicate health care decisions . . . , *including communication through persons familiar with the patient's manner of communicating* . . . ." (Emphasis added).

16. *See generally* WASH. REV. CODE ANN. §§ 70.245.010-904 and OR. REV. STAT. §§ 127.800-995.

17. *Id.* For a discussion of new "best friends" and other signs of elder financial abuse, see METLIFE MATURE MARKET INSTITUTIONS, STUDY: BROKEN TRUST: ELDERS, FAMILY, AND FINANCES: A STUDY ON ELDER FINANCIAL ABUSE PREVENTION, March 2009, at 22-23, *available at* http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf.

both Acts set the stage for undue influence by heirs and others who will benefit from the patient's death.[18]

NO MENTAL STANDARD OF CONSENT REQUIRED AT THE TIME OF ADMINISTRATION

Neither Act requires that the patient be competent, capable, or even aware when the lethal dose is administered.[19] There is also no language requiring the patient's consent at the time of administration.[20] Without these requirements, when the lethal dose is administered, the Acts again set the stage for undue influence and worse.

"DOCTOR SHOPPING"

Under both Acts, the initial decision as to whether the patient is "competent" or "capable" is made by the doctor who will be prescribing the lethal dose (the "attending physician").[21] As a safeguard, this doctor is required to obtain a second opinion from a "consulting physician."[22] In practice, this requirement is

18. *See e.g.*, MONT. CODE ANN. § 28 2-407(2) (2009) (defining undue influence as "taking an unfair advantage of another's weakness of mind"); Burns v. Kabboul, 595 A.2d at 1162 (describing "weakened intellect" as a factor for undue influence).

19. Both Acts only address whether the patient is "competent" or "capable" in conjunction with the lethal dose request, and not later at the time of administration. *See* WASH. REV. CODE ANN. §§ 70.245.010(3)(5)(11), 70.245.020(1), 70.245.030(1), 70.245.040(1)(a)(d), 70.245.050, 70.245.120(3)(4), 70.245.220 (regarding "sound mind"); OR. REV. STAT. §§ 127.800 § 1.01(3)(5)(11), 127.805 § 2.01(1), 127.810 § 2.02(1), 127.815 § 3.01(1)(a)(d), 127.820 § 3.02, 127.855 § 3.09(3), 127.855 § 3.09(3), 127.897 § 6.01 (regarding "sound mind.")

20. 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. *See* WASH. REV. CODE ANN. §§ 70.245.020(1), 70.245.030(1), 70.245.040(1)(a)(d), 70.245.050, 70.245.120(3)(4), 70.245.220; OR. REV. STAT. §§ 127.805 § 2.01(1), 127.810 § 2.02(1), 127.815 § 3.01(1)(a)(d), 127.820 § 3.02, 127.855 § 3.09(3), 127.855 § 3.09(4), 127.897 § 6.01.

21. WASH. REV. CODE ANN. § 70.245.040(1)(a); OR. REV. STAT. § 127.815 § 3.01(1)(a).

22. WASH. REV. CODE ANN. § 70.245.040(1)(d) (requiring the attending physician to refer the patient to a consulting physician to confirm that the patient is "competent"); OR. REV. STAT. § 127.815 § 3.01(1)(d) (requiring the attending physician to refer the patient to a consulting physician "for a determination that the patient is capable . . . .")

circumvented through "doctor shopping." Dr. Charles Bentz describes the following incident:

> [My patient's cancer specialist] asked me to be the "second opinion" for his suicide . . . I told her that assisted-suicide was not appropriate for this patient and that I did NOT concur . . . [A]pproximately two weeks later my patient was dead from an overdose prescribed by this doctor . . . .[23]

In other words, the prescribing doctor asks multiple doctors to give the second opinion until one agrees to do so.

"SELF-ADMINISTER" DOES NOT NECESSARILY MEAN THAT A PATIENT ADMINISTERS THE LETHAL DOSE TO HIMSELF

Both acts imply that patients administer the lethal dose to themselves. There is, however, nothing in either Act that requires this. There is no language that "only" the patient can administer the lethal dose to himself.[24]

The Washington Act instead states that the patient may "self-administer" the dose.[25] In an Orwellian twist, the term "self-administer" does not mean that administration will necessarily be by the patient. "Self-administer" is instead defined as the patient's "act of ingesting." The Washington Act states: "'*Self-administer' means a qualified patient's act of ingesting* medication to end his or her life . . ." (Emphasis added).[26]

In other words, someone else putting the lethal dose in the patient's mouth qualifies as proper administration because the patient will thereby "ingest" the dose.[27] Someone else putting

23. Charles Bentz, *Don't Follow Oregon's Lead: Say No to Assisted Suicide*, HAWAII REPORTER, Feb. 13, 2009, at ¶¶ 3, 4, http://www.hawaiireporter.com/story.aspx?4048b066-5612-4ede-86d6-c7fd385703d1 (last visited Jan. 10, 2010).

24. *See supra* at Introduction, note 5 and accompanying text. *See also* WASH. REV. CODE ANN. §§ 70.245.010-904 and OR. REV. STAT. §§127.800-995.

25. *See* WASH. REV. CODE ANN. §§ 70.245.010(7)(11)(12), 70.245.020(1), 70.245.090, 70.245.170, 70.245.220.

26. WASH. REV. CODE ANN. § 70.245.010(12).

27. Neither Act defines "ingest." *See* WASH. REV. CODE ANN. §§ 70.245.010-904 and OR. REV. STAT. §§127.800-995. Dictionary definitions include "*to take* (food, drugs, etc.) *into the body, as by swallowing,* inhaling, *or absorbing*" (emphasis added). WEBSTER'S NEW WORLD COLLEGE DICTIONARY, www.yourdictionary.com/ingest

the lethal dose in a feeding tube or IV nutrition bag will also qualify because the patient will thereby "absorb" the dose, *i.e.*, "ingest" it.[28]

Oregon's Act does not use the term "self-administer."[29] The Act does, however, refer to administration as the "act of ingesting."[30] Official forms for both Acts also refer to administration as "ingestion," "ingesting," and other forms of the word "ingest."[31] With administration defined as mere ingestion, someone else is allowed to administer the lethal dose to the patient.

BOTH ACTS ALLOW INVOLUNTARY KILLING

In summary, someone other than the patient is allowed to administer the lethal dose.[32] The Acts contain no requirement that the patient be competent, capable, or even aware when the lethal dose is administered.[33] There is no requirement that the patient consent when the lethal dose is administered.[34]

Intentionally killing an incompetent or unaware person, or intentionally killing some other person without his consent, is homicide.[35] Both Acts, however, allow this result as long as the

(last visited Jan. 23, 2010).

28. WEBSTER'S NEW WORLD COLLEGE DICTIONARY, *supra* note 27.

29. *See* OR. REV. STAT. §§ 127.800-995.

30. OR. REV. STAT. § 127.875 § 3.13 (stating "[n]either shall a qualified patient's *act of ingesting* medication to end his or her life in a humane and dignified manner have an effect upon a life, health, or accident insurance or annuity policy." (Emphasis added)).

31. *See* Washington State Dept. of Health, *Attending Physician's After Death Reporting Form*, *available at* http://www.doh.wa.gov/dwda/forms/AfterDeath ReportingForm.pdf (referring to administration of the lethal dose as "ingestion," "ingesting," and other forms of the word "ingest"); *see also* Oregon Dept. of Human Servs., *Oregon's Death With Dignity Act Attending Physician Interview Form*, *available at* http://www.Oregon.gov/DHS/ph/pas/docs/mdintdat.pdf (referring to administration of the lethal dose as "ingestion," "ingesting," and other forms of the word "ingest.")

32. *Supra* notes 24-31 and accompanying text.

33. *Supra* notes 19-20 and accompanying text.

34. *Id.*

35. *Cf.* WASH. REV. CODE ANN. §§ 9A.32.010 (defining "homicide"), 9A.32.020 (regarding "premeditation"), 9A.32.030 (defining "murder in the first degree") and OR. REV. STAT. § 163.005 (defining "criminal homicide.")

action taken is "in accordance with" the Act. For example, Washington's Act states: "Actions taken in accordance with this chapter do not, for any purpose, constitute . . . homicide, under the law."[36]

THE ACTS' OFFICIAL REPORTS AND FORMS PROVIDE FURTHER SUPPORT THAT THE ACTS ALLOW INVOLUNTARY KILLING

Under both Acts, physicians and pharmacists who participate in the lethal dose request process are required to complete official forms. The data collected is summarized in annual statistical reports, which are displayed on official web sites.[37]

None of these official forms and reports ask about, or report on, patient competency, consent, or awareness at the time of administration, or whether the patient administered the lethal dose to himself.[38] These factors are not relevant to compliance with either Act.

COUNTER ARGUMENTS

Proponents sometimes argue that "only" the patient can administer the lethal dose because both Acts prohibit mercy killing and active euthanasia (another name for mercy killing).[39] This argument is word play. The prohibition against mercy killing and euthanasia is defined away in the next sentence. For example, the Washington Act states: "Nothing in this chapter authorizes . . . mercy killing, or active euthanasia. Actions taken

36. WASH. REV. CODE ANN. § 70.245.180(1); OR. REV. STAT. § 127.880 § 3.14 (stating that "[a]ctions taken in accordance with [this Act] shall not for any purpose, constitute . . . homicide, under the law.")

37. Oregon Dep't of Human Servs., *Death With Dignity Act*, *available at* http://www.oregon.gov/DHS/ph/pas/ (last visited Mar. 22, 2010); Washington State Dep't of Health Ctr. For Health Statistics, *Death with Dignity Act*, *available at* http://www.doh.wa.gov/dwda (last visited Mar. 22, 2010).

38. *Id.*

39. WEBSTER'S NEW WORLD COLLEGE DICTIONARY, http://www.yourdictionary.com/mercy-killing (last visited Apr. 3, 2010) (defining "mercy killing" as "euthanasia.")

in accordance with this chapter do not, for any purpose, constitute . . . mercy killing [also known as 'euthanasia'] . . . ."[40]

Proponents may also argue that patient consent is required because patients may rescind the request for the lethal dose "at any time."[41] A provision that a patient "may" rescind is not, however, the same thing as a right to give consent when the lethal dose is administered. Consider, for example, a patient who obtained the dose on a "just-in-case" basis without consenting to taking it. If such patient would later become incompetent, be sedated, or simply be sleeping, he would not have the ability to rescind. Without the right to consent, someone else could, nonetheless, administer the lethal dose to him. Without the right to consent, the patient's promised control over the "time, place, and manner" of his death is an illusion.

Finally, proponents may argue that the Acts protect patients due to provisions that impose civil and criminal liability.[42] None of these provisions penalize administration of the lethal dose without the patient's consent.[43]

NO WITNESS AT THE DEATH

If, for the purpose of argument, the Acts do not "allow" a patient's death without his consent, patients are, nonetheless, unprotected from this result due to the lack of required witnesses at the death.[44] Without witnesses, the opportunity is created for someone other than the patient to administer the lethal dose to the patient without his consent. Even if he

40. WASH. REV. CODE ANN. § 70.245.180(1); OR. REV. STAT. § 127.880 § 3.14 (stating that "[n]othing in [this chapter] shall be construed to authorize . . . mercy killing or active euthanasia. *Actions taken in accordance with [this chapter] shall not, for any purpose, constitute . . . mercy killing* [also known as 'euthanasia'] . . . ." (Emphasis added)).

41. WASH. REV. CODE ANN. § 70.245.100; OR. REV. STAT. § 127.845 § 3.07.

42. WASH. REV. CODE ANN. § 70.245.200; OR. REV. STAT. § 127.890 § 4.02.

43. *Id.*

44. *See* Washington and Oregon Acts in their entirety. WASH. REV. CODE ANN. §§ 70.245.010-904; OR. REV. STAT. §§ 127.800-995 (lacking a requirement that administration be witnessed by a disinterested party or anyone at all).

struggled, who would know? The lethal dose request would provide the alibi.

This scenario would seem especially significant for patients with money. A California case, *People v. Stuart*, states: "[F]inancial considerations [are] an all too common motivation for killing someone . . . ."[45]

OFFICIAL COVER

In Washington, a further alibi is provided by a reporting requirement that medical examiners, coroners, and even prosecuting attorneys treat the death as "natural."[46] Any death certificate not complying with this requirement is to be rejected by the Washington State Registrar.[47] In Oregon, the Act does not require the death to be treated as natural.[48] This is, however, local practice.[49]

ILLUSORY LIABILITY FOR UNDUE INFLUENCE

Both Acts impose criminal, but not civil liability for undue influence in connection with the lethal dose request.[50] Undue influence is a civil concept, which is not capable of being criminally enforced.

Neither Act defines undue influence or provides elements of proof.[51] Undue influence is, regardless, a traditionally

45. People v. Stuart, 67 Cal. Rptr. 3d 129, 143 (Cal. App. 2007).

46. *See* Washington State Dep't of Health, *Instructions for Medical Examiners, Coroners, and Prosecuting Attorneys: Compliance with the Death with Dignity Act* (revised Apr. 8, 2009), *available at* http://www.doh.wa.gov/dwda/forms/MEsAndCoroners.pdf.

47. *Id.*

48. OR. REV. STAT. §§ 127.800-995.

49. *See* Bentz, *supra* note 23, at ¶ 4.

50. WASH. REV. CODE ANN. § 70.245.200(2) (stating that "[a] person who coerces or exerts undue influence on a patient to request medication to end the patient's life . . . is guilty of a Class A felony.") The Oregon statute has nearly identical language. *See* OR. REV. STAT. § 127.890 § 4.02(2) (stating that "[a] person who coerces or exerts undue influence on a patient to request medication for the purpose of ending the patient's life . . . shall be guilty of a Class A felony.")

51. *See* Washington and Oregon Acts in their entirety. WASH. REV. CODE ANN. §§70.245.010-904; OR. REV. STAT. §§ 127.800-995.

equitable concept "not susceptible of precise definition . . . ."[52] For example, in Washington, the test for undue influence consists of multiple nonexclusive factors.[53] With this situation, the "crime" of undue influence is too undefined and/or vague to be enforced.[54]

Both Acts also allow conduct that would generally provide proof of undue influence (allowing an heir to act as a witness on the lethal dose request form).[55] How do you prove beyond a reasonable doubt that undue influence occurred when the Act prohibiting undue influence also specifically allows conduct used to prove undue influence? It is hard to say. The purported criminal liability is, regardless, illusory.

THE ANNUAL REPORTS ARE CONSISTENT WITH ELDER ABUSE

As noted above, both Acts require annual statistical reports.[56] Washington has generated one report.[57] In Oregon, there have been twelve reports.[58]

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52. Mark Reutlinger, *Washington Law of Wills and Intestate Succession*, WASHINGTON BAR ASSOCIATION 88 (2006).

53. Estate of Lint, 957 P.2d 755, 764 (Wash. 1998) (stating the test for undue influence:

> The most important of such facts are (1) that the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations, such as the age or condition of health and mental vigor of the testator, . . .)

54. *See* City of Tacoma v. Luvene, 827 P.2d 1374, 1384 (Wash. 1992) (stating that prohibited conduct must be defined "with sufficiently specificity to put citizens on notice of what conduct they must avoid . . ."); *see also* Mays v. State, 68 P.3d 1114, 1120-21 (Wash. App. 2003) (holding a statute unconstitutionally vague where "reasonably intelligent persons must guess at its meaning.")

55. *Supra* notes 6-12 and accompanying text.

56. WASH. REV. CODE ANN. § 70.245.150(3); OR. REV. STAT. § 127.865 § 3.11(3).

57. Washington State Dep't of Health, *Washington State Department of Health 2009 Death with Dignity Act Report* (2009), *available at* http://www.doh.wa.gov/dwda/forms/DWDA_2009.pdf.

58. Oregon has generated twelve annual reports. Oregon Dep't of Human Servs., *Death with Dignity Annual Reports, available at* http://www.oregon.gov/DHS/ph/pas/ar-index.shtml (last visited Apr. 15, 2010).

In Oregon and Washington, the annual reports do not track income or net worth.[59] They do, however, show that the majority of people who have died under the Acts have been well-educated and covered by private insurance.[60] Typically, people with these attributes would be those with money, *i.e.*, the middle class and above. The statistics also show that the majority of persons dying have been age sixty-five or older.[61]

These statistics can be explained by older persons with money feeling a "duty to die" so as to pass on funds to their heirs.[62] The statistics are also consistent with elder abuse. A recent MetLife Mature Market Institute Study states that "[e]lders' vulnerabilities and larger net worth make them a prime target for financial abuse . . . [v]ictims may even be murdered by perpetrators who just want their funds and see them as an easy mark."[63]

THE BARBARA WAGNER SCENARIO

The statistics, which also show poor people dying, are also consistent with the "Barbara Wagner" scenario. Wagner was an

59. *Id.*; *see* Washington State Dep't of Health, *supra* note 57.

60. In Oregon, 67.3% of the 460 people who died as of the most recent report, had some college or higher education; in Washington, 61% of the 47 people who died had some college or higher education. *See* Oregon Dep't Of Human Servs., *Table 1: Characteristics and End-of-Life care of 460 DWDA Patients Who Died After Ingesting a Lethal Dose of Medication, By Year, Oregon, 1998-2009*, *available at* http://www.oregon.gov/DHS/ph/pas/docs/yr12-tbl-1.pdf [hereinafter *Table 1*]. *See also* Washington State Dep't of Health, *supra* note 57, at 5. To date, 507 people have died in Oregon and Washington combined, of which 355 (70%) have had private insurance.

61. *Table 1*, *supra* note 60; Washington State Dep't of Health, *supra* note 57, at 5.

62. *See, e.g.*, Licia Corbella, *If Doctors Who Won't Kill are 'Wicked,' the World Is Sick*, THE CALGARY HERALD, Jan. 10, 2009, *available at* http://www.canada.com/calgaryherald/news/story.html?id=83835868-7f89-40bd-b16e-8bc961d41b39 (last visited Jan. 10, 2010); *see* Dr. Margaret White, *Letter in Response to Nurses, Undertakers, and the Duty to Die*, THE TIMES, July 30, 2009, *available at* http://www.timesonline.co.uk/tol/comment/letters/article6732198.ece (stating "I am happy here in the nursing home with no wish to die, but were voluntary euthanasia to be made legal I would feel it my absolute duty to ask for it as I now have 19 descendents who need my legacy.")

63. MetLife Mature Market Institutions, *supra* note 17, at 4, 24.

indigent resident of Oregon who had lung cancer.[64] The Oregon Health Plan refused to pay for a drug to possibly prolong her life and offered to pay for her assisted suicide instead.[65] Unable to afford the drug, she was steered to suicide.[66]

CITIZENS ARE "BURDENS"

In both Washington and Oregon, the official reporting forms include a check-the-box question with seven possible "concerns" that contributed to the lethal dose request.[67] These concerns include the patient's feeling that he was a "burden."[68] The prescribing doctor is instructed: "Please check 'yes,' 'no,' or 'don't know' depending on whether or not you believe that a concern contributed to the request."[69]

In other states, a person being described as a "burden" is a warning sign of abuse. For example, Sarah Scott of Idaho Adult Protection Services describes the following "warning sign": "*Suspect behavior by the caregiver . . . [d]escribes the vulnerable adult as a burden* or nuisance."[70]

The recommendation is that when such "warning signs" exist, a report should be made to law enforcement and/or to the local adult protective services provider.[71] Washington and

64. For articles discussing Wagner, see Margaret Datiles, *A Price on your Head*, WASH. TIMES, Nov. 2. 2008, *available at* http://www.washingtontimes.com/news/2008/nov/02/a-price-on-your-head/ (last visited Jan. 15, 2010); Susan Donaldson James, *Death Drugs Cause Uproar in Oregon* 1, ABC NEWS, Aug. 6, 2008, *available at* http://www.abcnews.go.com/Health/Story?id=5517492&page= (last visited Jan. 15, 2010); and Katu.com, *Letter Noting Assisted Suicide Raises Questions* (July 30, 2008), *available at* http://www.katu.com/news/26119539.html?video=YHI&t=a (last visited Jan. 15, 2010) (video transcript of Barbara Wagner).

65. *Id.*

66. *Id.*

67. *See Attending Physician's After Death Reporting Form*, *supra* note 31, at question 7; *see also Oregon's Death With Dignity Act Attending Physician Interview Form*, *supra* note 31, at Question 13.

68. *Id.*

69. *Id.*

70. Sarah Scott, *Adult Protection: Safeguarding Every Person's Basic Human Right to a Safe and Decent Life, Regardless of Age, Regardless of Condition* 3 (on file with author) (emphasis added).

71. *Id.* (stating that these "'warning signs' should . . . serve as indicators that a problem may exist and a report should be made to law enforcement or to the local

Oregon, by contrast, instruct its doctors to check a "burden" box.

Washington and Oregon promote the idea that its citizens are burdens, which justifies the prescription of lethal drugs to kill them. Washington's and Oregon's Acts do not promote patient "control," but officially sanctioned abuse of vulnerable adults.

INDIVIDUAL "OPT OUTS" ARE NOT ALLOWED

Neither state's Act allows patients to opt out of its provisions. The Washington Act states that any provision that affects whether a person may make or rescind a lethal dose request "is not valid."[72] Oregon's Act has a similar provision.[73] So, if a person knows he gets talked into things, and he doesn't want to get talked into requesting the lethal dose, committing suicide and/or facilitating his own homicide, he is not allowed to make legal arrangements to try and prevent it. So much for personal "choice" and "control."

PEOPLE COMMIT SUICIDE ANYWAY

It should be remembered that patients have the "choice" to commit suicide without legalization. Vermont resident, Kelly Bartlett, states "[s]uicide advocates talk about the 'right to suicide,' forgetting that patients . . . already can and do commit suicide."[74]

Adult Protection service provider.")

72. WASH. REV. CODE ANN. § 70.245.160(1) (stating that "[*a*]*ny provision in a contract, will, or other agreement,* whether written or oral, *to the extent the provision would affect whether a person may make or rescind a request for medication* to end his or her life in a humane and dignified manner, *is not valid.*" (Emphasis added)).

73. OR. REV. STAT. § 127.870 § 3.12(1) (stating "[*n*]*o provision in a contract, will, or other agreement,* whether written or oral, *to the extent the provision would affect whether a person may make or rescind a request for medication* to end his or her life in a humane and dignified manner, *shall be valid.*" (Emphasis added)).

74. Kelly Bartlett, *Letter to Editor in Response to Legalizing Suicide Draws in Others*, BURLINGTON FREE PRESS, Dec. 9, 2008 (on file with author).

THE BIG PICTURE

SIGNING THE FORM WILL LEAD TO A LOSS OF CONTROL

By signing the lethal dose request form, the patient takes an official position that if he dies suddenly, no questions should be asked. He will be unprotected against others in the event he obtains the dose on a "just-in-case" basis or changes his mind and decides that he wants to live. This would seem especially important for older people with money. There is, regardless, a loss of control.

PROGNOSES CAN BE WRONG

Both Acts apply to adults determined by an "attending physician" and a "consulting physician" to have a disease expected to produce death within six months.[75] But, what if the doctors are wrong? This is the point of a 2008 *Seattle Weekly* article.[76] The article states: "Since the day [the patient] was given two to four months to live, [she] has gone with her children on a series of vacations. . . . '[w]e almost lost her because she was having too much fun, not from cancer' [her son] chuckles."[77]

CONCLUSION

Death with Dignity Acts in Oregon and Washington State are not about patient "choice" and "control." These laws instead enable people to pressure others to an early death or to even cause that death on an involuntary basis. What was previously

75. WASH. REV. CODE §§ 70.245.040(1)(a), 70.245.050, 70.245.010(13); OR. REV. STAT. §§ 127.815 § 3.01(a), 127.820 § 3.02, 127.800 § 1.01(12).

76. Nina Shapiro, *Terminal Uncertainty: Washington's New "Death with Dignity" Law Allows Doctors to Help People Commit Suicide – Once They've Determined That the Patient Has Only Six Months to Live. But what if they're wrong?*, THE SEATTLE WEEKLY, Jan. 14, 2009, *available at* http://www.seattleweekly.com/2009-01-14/news/terminal-uncertainty/ (last visited Jan. 10, 2010).

77. *Id.*

"homicide" is now "death with dignity." Elderly persons with money, *i.e.*, the middle class and above, appear to be especially at risk. Don't let "death with dignity" come to your state.

POSTSCRIPT

Shortly after Washington's Act was passed in 2008, a Montana district court held that there was a constitutional right to physician assisted suicide, which was vacated by the Supreme Court of Montana on December 31, 2009.[78] *Per that decision, physician-assisted suicide is, instead, decriminalized under certain narrow conditions.*[79] *The court held that "a terminally ill patient's consent to physician aid in dying constitutes a statutory defense to a charge of homicide against the aiding physician when no other consent exceptions apply."*[80]

On January 13, 2010, a proposed Death with Dignity Act similar to the Oregon and Washington Acts was defeated in the New Hampshire State House, 242 to 113.[81]

Between January 1994 and June 2009, there were 113 legislative proposals to legalize physician-assisted suicide and/or euthanasia in twenty-four states, all of which were defeated, tabled for the session, and/or languished with no action taken.[82]

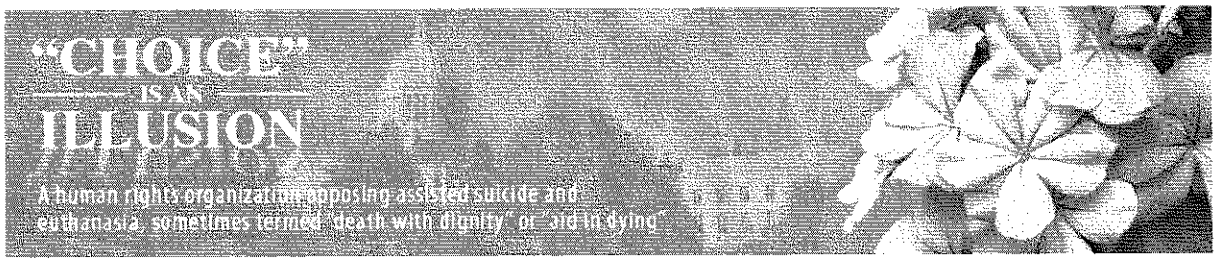
78. *See* Baxter v. State, 224 P.3d 1211, 1222, ¶ 51 (Mont. 2009).

79. *See* 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.montanafamily.org/portfolio/pdfs/Baxter_Decision_Analysis_v2.pdf.

80. *Id. See Baxter*, 224 P.3d at 1214, 1221, ¶¶ 11, 50. The court also commented that the only person who might conceivably be prosecuted for criminal behavior is the physician who prescribes a lethal dose of medication." The court thereby overlooked the issue of elder abuse perpetrated by family members, new "best friends," and others.

81. *See* H.R. 304, 161st Leg., 2d Sess. (N.H. 2010), *available at* http://www.gencourt.state.nh.us/ (last visited Apr. 11, 2010).

82. Int'l Task Force on Euthanasia & Assisted Suicide, *Attempts to Legalize Euthanasia/Assisted Suicide in the United States* (2009), *available at* http://www.internationaltaskforce.org/pdf/200906_attempts_to_legalize_assisted_suicide.pdf.



ASSISTED SUICIDE BATTLE MOVES BACK TO COURT

Click on the photo to find out more about the battle to prevent assisted suicide from becoming legal in Montana

VOICES AGAINST ASSISTED SUICIDE AND EUTHANASIA

- "I was afraid to leave my husband alone"
- "In Oregon, the only help my patient received was a lethal prescription, intended to kill him."
- "It wasn't the father saying that he wanted to die"
- "He made the mistake of asking for information about assisted suicide"
- "If Dr. Stevens had believed in assisted suicide, I would be dead"
- "Mild stroke led to mother's forced starvation"

WEDNESDAY, FEBRUARY 5, 2014

Preventing Abuse and Exploitation: A Personal Shift in Focus. An article about guardianship, elder abuse and assisted suicide.

http://choiceisanillusion.files.wordpress.com/2014/02/dore-preventing-abuse-and-exploitation-aba.pdf

By Margaret K. Dore, Esq., MBA
The Voice of Experience, American Bar Association
Volume 25, No. 4, Winter 2014

I graduated from law school in 1986. I first worked for the courts and then for the United States Department of Justice. After that, I worked for other lawyers, and then, in 1994, I officially started my own practice in Washington State. Like many lawyers with a new practice, I signed up for court-appointed work in the guardianship/probate context. This was mostly guardian ad litem work. Once in awhile, I was appointed as an attorney for a proposed ward, termed an "alleged incapacitated person." In other states, a guardianship might be called a "conservatorship" or an "interdiction." A guardian ad litem might be called a "court visitor."

My Guardianship Cases

Most of my guardianship cases were straightforward. There would typically be a elderly person who could no longer handle his or her affairs. I would be the guardian ad litem. My job would be to determine whether the person needed a guardian, and if that were the case, to recommend a person or agency to fill that role.

My work also included private pay cases with moderate estates. With these cases, I would sometimes see financial abuse and exploitation. For example, there was an elderly woman whose nephew took her to the bank each week to obtain a large cash withdrawal. She had dementia, but she could pass as "competent" to

WELCOME

Legal assisted suicide encourages people with years to live to throw away their lives. See here.

In Oregon where assisted suicide is legal, the Oregon Health Plan (Medicaid) uses coverage incentives to steer patients to suicide. See Id.

In Oregon and Washington State, where assisted suicide is legal, there is no oversight over administration of the lethal dose. Even if the patient struggled, who would know? See here.

Legalization especially invites abuse of seniors, for example, in an inheritance situation. See here.

Jurisdictions without legal assisted suicide already have a significant problem with palliative care abuse by some doctors and nurses. If you can't control the abuse now, when assisted suicide is not legal, why would you

ISSUES BY STATE & CANADA

AK AL AR AZ CA CO CT
DC DE FL GA HI IA ID
IL IN KS KY LA MA MD
ME MI MN MO MS MT NC
ND NE NH NJ NM NV NY
OH OK OR PA RI SC SD
TN TX UT VA VI VT WA
WI WV WY CANADA
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MAJOR TOPICS

- U.S. Overview
- Canada Overview
- The Oregon and Washington Assisted Suicide Laws
- Idaho Strengthens its Law Against Assisted Suicide
- New Hampshire Defeats Assisted Suicide Again
- Hawaii AG Rejects Claim That Assisted Suicide is "Already Legal"
- What People Mean When They Say They Want to Die
- Who is at Risk?
- Definitions

NO ASSISTED SUICIDE

Demonstration at University of Washington Hospital - Seattle WA

LABELS

- aid in dying (16)
- Alex Schadenberg (3)
- annual report (3)
- assisted dying (3)
- assisted suicide (96)
- assisted suicide; physician-assisted suicide (5)
- australia (1)
- Ballot Question 2 (1)
- Baloney (2)
- Barbara Coombs Lee (6)
- Barbara Wagner (2)
- Baxter (14)
- Bennett Blum MD (1)
- Blewett (3)

get the money. In another case, "an old friend from 30 years ago" took "Jim," a 90 year old man, to lunch. The friend invited Jim to live with him in exchange for making the friend sole beneficiary of his will. Jim agreed. The will was executed and he went to live with the friend in a nearby town. A guardianship was started and I was appointed guardian ad litem. I drove to the friend's house, which was dilapidated. Jim did not seem to have his own room. I asked him if he would like to go home. He said "yes" and got in my car. He was not incompetent, but he had allowed someone else to take advantage of him. In another case, there was a disabled man whose caregiver had used his credit card to remodel her home. He too was competent, but he had been unable to protect himself.

In those first few years, I loved my guardianship cases. I had been close to my grandmother and enjoyed working with older people. I met guardians and other people who genuinely wanted to help others.

But then I got a case involving a competent man who had been railroaded into guardianship. The guardian, a company, refused to let him out. The guardian also appeared to be churning the case, i.e., causing conflict and then billing for work to respond to the conflict and/or to cause more conflict. I have an accounting background and also saw markers of embezzlement. I tried to tell the court, but the supervising commissioner didn't know much about accounting. She allowed the guardian to hire its own CPA to investigate the situation, which predictably exonerated the guardian. The guardian had many cases and if what I said had been proved true, there would have been political fallout. There were also conflicts of interest among the lawyers.

At this point, the scales began to fall from my eyes. My focus started to shift from working within the system to seeing how the system itself sometimes facilitates abuse. This led me to write articles addressing some of the system's flaws. See e.g., Margaret K. Dore, Ten Reasons People Get Railroaded into Guardianship, 21 AM. J. FAM. L. 148 (2008), available at www.margaretdore.com/pdf/Dore_AJFL_Winter08.pdf; Margaret K. Dore, The Time is Now: Guardians Should be Licensed and Regulated Under the Executive Branch, Not the Courts, WASH. ST. B. ASS'N B. NEWS, Mar. 2007 at 27-9, available at http://maasdocuments.files.wordpress.com/2013/08/dore-the-time-is-now-ashx.pdf

The MetLife Studies

In 2009, the MetLife Mature Market Institute released its landmark study on elder financial abuse. See www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf The estimated financial loss by victims in the United States was $2.6 billion per year.

The study also explained that perpetrators are often family members, some of whom feel themselves "entitled" to the elder's assets. The study states that perpetrators start out with small crimes, such as stealing jewelry and blank checks, before moving on to larger items or coercing elders to sign over the deeds to their homes, change their wills or liquidate their assets.

In 2011, Met Life released another study available at www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf, which described how financial abuse can be catalyst for other types of abuse and which was illustrated by the following example. "A woman barely came away with her life after her caretaker of four years stole money from her and pushed her wheelchair in front of a train. After the incident the woman said, "We were so good of friends . . . I'm so hurt that I can't stop crying."

Failure to Report

A big reason that elder abuse and exploitation are prevalent is that victims do not report. This failure to report can be for many reasons. A mother being abused by her son might not want him to go to jail. She might also be humiliated, ashamed or embarrassed about what's happening. She might be legitimately afraid that if she

give these doctors and nurses even more power to abuse patients by legalizing it? See here.

Being steered to suicide, killed and/or abused is not "choice."

"Choice" is an illusion.

DO YOU HAVE A STORY TO TELL?

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ARTICLES AGAINST ASSISTED SUICIDE

- Preventing Abuse and Exploitation: A Personal Shift in Focus
- Aid in Dying: Not Legal in Idaho; Not About Choice
- "Death with Dignity": What Do We Advise Our Clients?
- Assisted Suicide: A Recipe for Elder Abuse and the Illusion of Personal Choice
- Assisted-Suicide Report Lacks Information about Consent
- Death with Dignity: What do we Tell our Clients?

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reveals the abuse, she will be put under guardianship.

The statistics that I've seen on unreported cases vary, from only 2 in 4 cases being reported, to one in 20 cases. Elder abuse and exploitation are, regardless, a largely uncontrolled problem.

A New Development: Legalized Assisted Suicide

Another development relevant to abuse and exploitation is the ongoing push to legalize assisted suicide and euthanasia in the United States. "Assisted suicide" means that someone provides the means and/or information for another person to commit suicide. If the assisting person is a physician who prescribes a lethal dose, a more precise term is "physician-assisted suicide." "Euthanasia," by contrast, is the direct administration of a lethal agent with the intent to cause another person's death.

In the United States, physician-assisted suicide is legal in three states: Oregon, Washington and Vermont. Eligible patients are required to be "terminal," which means having less than six months to live. Such patients, however, are not necessarily dying. One reason is because expectations of life expectancy can be wrong. Treatment can also lead to recovery. I have a friend who was talked out of using Oregon's law in 2000. Her doctor, who did not believe in assisted suicide, convinced her to be treated instead. She is still alive today, 13 years later.

Oregon's law was enacted by a ballot measure in 1997. Washington's law was passed by another measure in 2008 and went into effect in 2009. Vermont's law was enacted on May 20, 2013. All three laws are a recipe for abuse. Onw reason is that they allow someone else to talk for the patient during the lethal dose request process. Moreover, once the lethal dose is issued by the pharmacy, there is no oversight over administration. Even if the patient struggled, who would know? [See e.g., http://www.choiceillusion.org/2013/11/quick-facts-about-assisted-suicide_11.html]

Here in Washington State, we have already had informal proposals to expand our law to non-terminal people. The first time I saw this was in a newspaper article in 2011. More recently, there was a newspaper column suggesting euthanasia "if you couldn't save enough money to see yourself through your old age," which would be involuntary euthanasia. Prior to our law being passed, I never heard anyone talk like this.

I have written multiple articles discussing problems with legalization, including Margaret K. Dore, "Death with Dignity": What Do We Advise Our Clients?," King Co. B. ASS'N, B. BULL., May 2009, available at www.kcba.org/newsevents/barbulletin/BView.aspx?Month=05&Year=2009&AID=article5.htm; Margaret K. Dore, Aid in Dying: Not Legal in Idaho; Not About Choice, 52 THE ADVOCATE [the official publication of the Idaho State Bar] 9, 18-20 (Sept. 2013) available at www.margaretdore.com/pdf/Not_Legal_in_Idaho.pdf

My Cases Involving the Oregon and Washington Assisted Suicide Laws

I have had two clients whose parents signed up for the lethal dose. In the first case, one side of the family wanted the father to take the lethal dose, while the other did not. He spent the last months of his life caught in the middle and traumatized over whether or not he should kill himself. My client, his adult daughter, was also traumatized. The father did not take the lethal dose and died a natural death.

In the other case, it's not clear that administration of the lethal dose was voluntary. A man who was present told my client that the father refused to take the lethal dose when it was delivered ("You're not killing me. I'm going to bed"), but then took it the next night when he was high on alcohol. The man who told this to my client later recanted. My client did not want to pursue the matter further.

Conclusion

- Bradley Williams (10)
- Brian Purdy (1)
- California (2)
- Canada (22)
- Capital Punishment (2)
- Carter case (7)
- Charles Bentz (2)
- Choice is an Illusion (4)
- Compassion and Choices (12)
- Connecticut (1)
- Constitution (1)
- death with dignity (14)
- dehydration (4)
- depression (2)
- Derek Humphry (2)
- diability (4)
- Diane Coleman (2)
- doctors wrong (1)
- Donations (1)
- Donna Cohen (1)
- DPOA (1)
- Dying with Dignity (1)
- Elder abuse (44)
- England (1)
- euhanasia (4)
- euthanasia (19)
- Euthanasia Prevention Coalition (1)
- EXIT (1)
- FBI (1)
- FEN (2)
- Final Exit Network (2)
- Forms (1)
- Georgia (2)
- Greg Hinkle (2)
- Greg Jackson (6)
- Guardianship Abuse, Elder abuse; Margaret Dore (1)
- H.3884 (2)
- Hawaii (8)
- HB 505 (6)
- Hellum hood (4)
- Hemlock Society (2)
- HIV/AIDS (2)
- Hospice Abuse (2)
- Huffington Post (1)
- I-1000 (1)
- Idaho (3)
- Initiative 1000 (2)
- Ira Byock (1)
- Jeanette Hall (6)
- John Coppard (2)
- John Coppard; assisted suicide (1)
- Karen DiCostanzo (1)
- Kate Kelly (9)
- Kathryn Tucker (5)
- Kenneth Stevens MD (9)
- Lazy doctoring (1)
- Leblanc (2)
- Lisa Lehmann (2)
- Liverpool Pathway (4)
- Louisiana (2)
- Lynn Smith (1)
- Maine (1)

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NEW JERSEY AGAINST ASSISTED SUICIDE

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Margaret Dore
Not Dead Yet: "American Bar Association Newsletter Features Margaret Dore Article on Elder Financial Abuse and Assisted Suicide"

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- 2014 (26)
  - March 2014 (8)
  - February 2014 (7)
    - Concerns about assisted suicide include hiding mal...
    - Not Dead Yet: "American Bar Association Newslette...
    - New Swiss Study Misses the Obvious: Wealthy Older...
    - Montana Group Appeals Medical Examiner Board

- Margaret Dore (35)
- Massachusetts (23)
- Massachusetts Medical Society (2)
- Matt Bowman (4)
- Meichert-Dinkel (2)
- Mexico (1)
- Michael Cook (1)
- Montana (27)
- Montanans Against Assisted Suicide (20)
- murder (2)
- Murder-suicide (4)
- Nadia Kajouji (2)
- NEJM (3)
- New England Journal of Medicine (3)
- New Hampshire (9)
- no consent (1)
- Not Dead Yet (10)
- Oregon (33)
- pain (2)
- physician-assisted suicide (51)
- POLST (1)
- power of attorney (1)
- RCW 70 245 (1)
- Redefining Physicians' (1)
- Religion (1)
- reporting (1)
- S.77 (5)
- Second Thoughts (3)
- Senator Hinkle (1)
- Senator Shockley (2)
- starvation (4)
- steerage (5)
- Stephen Mikochik (1)
- suicide (4)
- suicide contagion (7)
- suicide kit (1)
- Suicide Prevention (1)
- The Carter Case (2)
- Tony Nicklinson (1)
- Utah (2)
- Utah Against Assisted Suicide (1)
- Vermont (12)
- Vermont Bar Journal (2)
- VSED (9)
- Wales (1)
- Wanda Morris (1)
- Washington (21)
- Welcome (1)
- William Reichel MD (2)
- William Toffler (4)

In my guardianship cases, people were financially abused and sometimes treated terribly, but nobody died and sometimes we were able to make their lives much better. With legal assisted suicide, the abuse is final. Don't make Washinton's mistake.

Margaret K. Dore (margaretdore@margaretdore.com) JD, MBA, is an attorney in private practice in Washington State where assisted suicide is legal. She is a former Law Clerk to the Washington State Supreme Court and the Washington State Court of Appeals. She worked for a year with the U.S. Department of Justice and is president of Choice is an Illusion, www.choiceillusion.org, a nonprofit corporation opposed to assisted suicide and euthanasia.

Labels: euthanasia, Guardianship Abuse, Elder Abuse, Margaret Dore, Oregon, physician-assisted suicide, Vermont, Washington

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- January 2014 (11)

- 2013 (46)
- 2012 (73)
- 2011 (41)

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May 2009 Bar Bulletin

May 2009 Bar Bulletin

'Death with Dignity':

What Do We Advise Our Clients?

By Margaret Dore

A client wants to know about the new Death with Dignity Act, which legalizes physician-assisted suicide in Washington.[1] Do you take the politically correct path and agree that it's the best thing since sliced bread? Or do you do your job as a lawyer and tell him that the Act has problems and that he may want to take steps to protect himself?

Patient "Control" is an Illusion

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The new act was passed by the voters as Initiative 1000 and has now been codified as Chapter 70.245 RCW.

During the election, proponents touted it as providing "choice" for end-of-life decisions. A glossy brochure declared, "Only the patient — and no one else — may administer the [lethal dose]."[2] The Act, however, does not say this — anywhere. The Act also contains coercive provisions. For example, it allows an heir who will benefit from the patient's death to help the patient sign up for the lethal dose.

How the Act Works

The Act requires an application process to obtain the lethal dose, which includes a written request form with two required witnesses.[3] The Act allows one of these witnesses to be the patient's heir.[4] The Act also allows someone else to talk for the patient during the lethal-dose request process, for example, the patient's heir.[5] This does not promote patient choice; it invites coercion.

Interested witness

By comparison, when a will is signed, having an heir as one of witnesses creates a presumption of undue influence. The probate statute provides that when one of the two required witnesses is a taker under the will, there is a rebuttable presumption that the taker/witness "procured the gift by duress, menace, fraud, or undue influence."[6]

Once the lethal dose is issued by the pharmacy, there is no oversight. The death is not required to be witnessed by disinterested persons. Indeed, no one is required to be present. The Act does not state that "only" the patient may administer the lethal dose; it provides that the patient "self-administer" the dose.

"Self-administer"

For the Public Good

Charitable Arm of the Bar

PRO BONO DICTA

In an Orwellian twist, the term "self -administer" does not mean that administration will necessarily be by the patient. "Self-administer" is instead defined as the act of ingesting. The Act states, "'Self-administer' means a qualified patient's act of ingesting medication to end his or her life."[7]

In other words, someone else putting the lethal dose in the patient's mouth qualifies as "self-administration." Someone else putting the lethal dose in a feeding tube or IV nutrition bag also would qualify. "Self-administer" means that someone else can administer the lethal dose to the patient.

No witnesses at the death

If, for the purpose of argument, "self-administer" means that only the patient can administer the lethal dose himself, the patient still is vulnerable to the actions of other people, due to the lack of required witnesses at the death.

With no witnesses present, someone else can administer the lethal dose without the patient's consent. Indeed, someone could use an alternate method, such as suffocation. Even if the patient struggled, who would know? The lethal dose request would provide an alibi.

This situation is especially significant for patients with money. A California case states, "Financial reasons [are] an all too common motivation for killing someone."[8] Without disinterested witnesses, the patient's control over the "time, place and manner" of his death, is not guaranteed.

If one of your clients is considering a "Death with Dignity" decision, it is prudent to be sure that they are aware of the Act's gaps.

What to Tell Clients

1. Signing the form will lead to a loss of control

By signing the form, the client is taking an official position that if he dies suddenly, no questions should be asked. The client will be unprotected against others in the event he changes his mind after the lethal prescription is filled and decides that he wants to live. This would seem especially important for clients with money. There is, regardless, a loss of control.

2. Reality check

The Act applies to adults determined by an "attending physician" and a "consulting physician" to have a disease expected to produce death within six months.[9] But what if the doctors are wrong? This is the point of a recent article in The Seattle Weekly: Even patients with cancer can live years beyond expectations[10]. The article states:

> Since the day [the patient] was given two to four months to live, [she] has gone with her children on a series of vacations . . . .
>
> "We almost lost her because she was having too much fun, not from cancer," [her son chuckles].[11]

Conclusion

As lawyers, we often advise our clients of worst-case scenarios. This is our obligation regardless of whether it is politically correct to do so. The Death with Dignity Act is not necessarily about dignity or choice. It also can enable people to pressure others to an early death or even cause it. The Act also may encourage patients with years to live to give up hope. We

should advise our clients accordingly.

Margaret Dore is a Seattle attorney admitted to practice in 1986. She is the immediate past chair of the Elder Law Committee of the ABA Family Law Section. She is a former chair of what is now the King County Bar Association Guardianship and Elder Law Section. For more information, visit her website at www.margaretdore.com.

1 The Act was passed by the voters in November as Initiative 1000 and has now been codified as RCW chapter 70.245.

2 I-1000 color pamphlet, "Paid for by Yes! on 1000."

3 RCW 70.245.030 and .220 state that one of two required witnesses to the lethal-dose request form cannot be the patient's heir or other person who will benefit from the patient's death; the other may be.

4 id.

5 RCW 70.245.010(3) allows someone else to talk for the patient during the lethal-dose request process; for example, there is no prohibition against this person being the patient's heir or other person who will benefit from the patient's death. The only requirement is that the person doing the talking be "familiar with the patient's manner of communicating."

6 RCW 11.88.160(2).

7 RCW 70.245.010(12).

8 People v. Stuart, 67 Cal. Rptr. 3rd 129, 143 (2007).

9 RCW 70.245.010(11) & (13).

10 Nina Shapiro, "Terminal Uncertainty," Washington's new "Death with Dignity" law allows doctors to help people commit suicide - once they've determined

that the patient has only six months to live. But what if they're wrong? The Seattle Weekly, January 14, 2009. http://www.seattleweekly.com/2009-01-14/news/terminal-uncertainty.

11 id.

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