Recent Developments in Physician-Assisted Suicide

October 2004

LITIGATION

1. *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004), aff'd 192 F.Supp.2d 1077 (D.Or. 2002)

   Case filed

(3) Dissenting opinion. Judge Wallace dissented on the ground that the Attorney General's directive was an interpretive rule entitled to substantial deference.

e. Ninth Circuit denies review. On 7/12/04, the Attorney General requested a rehearing by the three-judge panel or an en banc review by an 11-judge panel. On 8/11/04, the three-judge panel denied a rehearing by a vote of 2 to 1; en banc review also was denied because no active judge had requested it.

f. Further review. The Attorney General may request review by the U.S. Supreme Court within 90 days after final disposition by the Ninth Circuit (by 11/9/04). The Attorney General is expected to request review despite a 9/27/04 letter from Oregon Governor Ted Kulongoski urging him not to do so.

LEGISLATION

1. North Carolina. On 2/20/03, Senators Jim Forrester and Bill Purcell, both physicians, filed S.B. 145, which would make assisted suicide by a licensed health care professional a Class D felony. Subsequently, the Executive Council of the Elder Law Section of the North Carolina Bar Association adopted a resolution "oppos[ing] enactment of S. 145 or any other felony law that purports to bar 'assisted suicide,'" primarily due to concern that the bill might affect the quality of end-of-life care. The bill was referred to the Judiciary Committee and was not considered further in the 2003-04 session. The Health Law Section and the Estate Planning Section also voted to oppose the bill, and the North Caroline Bar Association's Board of Governors voted in April 2004 to oppose it when reintroduced in the 2004-05 legislative session.

2. Oregon.

   a. Deaths during 2003. On 3/10/04, the Oregon Department of Human Services issued a report on deaths during 2003 under the Oregon Death with Dignity Act. The complete report is available on-line at www.ohd.hr.state.or.us/chs/pas/ar-index.cfm. The report included the following information:

      (1) Prescriptions written. In 2003, 67 prescriptions were written for lethal doses of medication, an increase from 24 prescriptions in 1998, 33 in 1999, 39 in 2000, 44 in 2001, and 58 in 2002.

      (2) Number of patients. In 2003, 42 patients died after taking lethal medication, as compared to 16 patients in 1998, 27 in 1999, 27 in 2000, 21 in 2001, and 38 in 2002. However, the number has remained small compared to the total number of deaths in Oregon, with about 1/7 of 1% of Oregonians dying by physician-assisted suicide. Of the 67 persons who received prescriptions under the Act during 2003, 39 died after taking lethal medication, 18 died from their underlying illness, and 10 were alive as of the end of 2003. An additional two persons who received prescriptions during 2002 and one person who received a prescription during 2001 died after taking their medications in 2003.

      (3) Patient characteristics. Median age of the 42 patients who died was 73, 98% were white, 55% were female, 36% were married, 45% lived in the Portland metropolitan area, and 48% were college graduates. Eighty-three percent of the patients who died had cancer, 93% were enrolled in a hospice program (the other patients were offered hospice but declined), and all patients had health insurance.

      (4) Patient concerns. The most common reasons for choosing assisted suicide expressed by patients to their physicians were loss of autonomy (93%), inability to participate in activities that make life enjoyable (93%), loss of dignity (82%), loss of control of bodily functions (57%), and being a burden on family, friends, or caregivers (38%). Nine patients cited concerns about pain control, and one patient voiced concern about the financial implications of treatment.

      (5) Mental health evaluations. Two of the 42 patients (5%) received a psychiatric or psychological consultation.

      (6) Medical information. The lethal medications used were pentobarbital (88% of patients), secobarbital (10%), and tuinal (2%). The physician was present when the medication was ingested in 29% of cases, with other health care providers present in 48% of cases. Median time from taking the medication to unconsciousness was four minutes (individual times ranged from 1-20 minutes). Median time from taking the medication to death was 20 minutes (individual times ranged from 5 minutes to 48 hours). No patient regained consciousness after taking the medication. Three patients vomited after taking the medication, including one who lived for 48 hours after having ingested only about one-third of the intended dose. One patient fell asleep before taking the entire dose, but died 40 minutes later.

      (7) Physician characteristics. A total of 42 physicians prescribed lethal medications to 67 persons. The physicians' median years in practice was 21.5.

   Oregon Health Division statistics for 2003 generally were consistent with statistics for 1998-2002, although referral to a specialist for a psychiatric or psychological consultation has declined, falling from 31% in 1998 to 5% in 2003. Rates of participation in physician-assisted suicide decrease with age, but are higher among those patients who are divorced or never married, those with more years of education, and those with amyotrophic lateral sclerosis

(Lou Gehrig's disease), HIV/AIDS, or cancer.

b. Statistics from Compassion in Dying. Compassion in Dying of Oregon, which represents almost 80% of the patients who use the Oregon Death with Dignity Act, has additional statistics not charted by the state. Of the 131 people the organization has tracked who have used the law, 50 said they were Republicans, 49 Democrats, 15 other, and 17 unknown. As to religious affiliation, 41 said they were nonsectarian, 20 Protestant, six Jewish, six Catholic, 55 no preference, and three unknown.

c. New York Times. On 6/1/04, the New York Times published an article by John Schwartz and James Estrin on Oregon's experience under the Oregon Death with Dignity Act. The article quoted Ann Jackson, executive director of the Oregon Hospice Association, who said that the organization initially opposed the Act but that hospices now work directly with Compassion in Dying, after surveys showed that half the people who rejected hospice care did so because "they thought that hospice was condescending or arrogant."

d. Constitutional initiative. New Covenant Ministries, a religious organization formed by Oregon Citizens Alliance founder Lon Mabon in 2002, sought to sponsor a citizens' initiative (known as the Divine Sovereignty Life Amendment) to make abortion and physician-assisted suicide unconstitutional in Oregon. However, the organization failed to collect enough signatures to qualify the initiative for the November 2004 ballot.

e. Senator Don Nickles drops fight against Oregon law. Retiring Senator Don Nickles, who tried for years to block implementation of the Oregon Death with Dignity Act, has announced that he will forgo efforts to pass federal legislation similar to prior bills that Congress failed to pass. Senator Nickles said that he saw no need for federal legislation because he expects the law to be declared invalid by the U.S. Supreme Court.

Families report greater pain or distress in dying Oregon ck

patient is in cardiopulmonary arrest, only 63% found it useful in determining treatments when a patient has a pulse and is breathing. Twenty-five percent of respondents reported difficulty in locating the patient's POLST form.

3. Vermont

    a. Reported abuse. At the American Psychiatric Association meeting in May 2004, psychiatrist N. Gregory Hamilton (a vocal opponent of the Oregon Death with Dignity Act) and his wife Catherine presented a paper claiming that the case of Michael Freeland illustrated the potential for serious abuse under the Act.

    b. Prevention of elderly suicides. Oregon is launching a new program aimed at preventing elderly suicide. The Department of Human Services is holding a series of community meetings around Oregon focusing on the issue and seeking to increase awareness of the problem. Program administrators emphasize the difference between elderly suicide and physician-assisted suicide, which is legal in Oregon.

4. Vermont

    a. Two bills introduced. Two bills relating to assisted suicide were introduced in the Vermont General Assembly in February 2003. H. 275 would criminalize assisted suicide. H. 318 was patterned after the Oregon Death with Dignity Act. After considerable public debate, both bills were carried over to the 2004 legislative session.

    b. Current status. In light of the controversy over H. 318, Vermont Senator James Leddy and Representative Thomas Koch, chairs of the Senate and House Health and Welfare Committees, announced in January 2004 that their committees would not take up the bill this year. However, supporters of H. 318 are expected to introduce it again next year.

    c. Hearings held. Legislative hearings were held during February 2004 on H. 318 and on ways to improve end-of-life care. In response, the legislature agreed to support an effort by Attorney General William Sorrell to draft a comprehensive end-of-life policy for Vermont. The legislature asked Sorrell to finish his report by 11/15/04.

    d. Legislative research. A letter signed by 78 members of the Vermont House has asked the Legislative Council's office to analyze Oregon's experience with physician-assisted suicide, but to refrain from making any policy recommendations on the matter. William Russell, who heads the Legislative Council, said that his staff would go forward with the analysis despite orders to the contrary from the House Health and Welfare Committee.

OTHER NATIONAL DEVELOPMENTS

1. Organizations to merge. The boards of the Compassion in Dying Federation and End-of-Life Choices (formerly the Hemlock Society) voted in June 2004 to continue negotiating a formal merger, which probably will take place early in 2005. An initial board was formed with equal representation from both organizations. The working name for the new organization is Compassion and Choices. End-of-Life Choices brings 30,000 members and national legislative expertise to the merged organization, while Compassion in Dying brings Oregon's experience with the Oregon Death with Dignity Act and other approaches to good palliative care. One of the goals of the merged group will be to lobby state legislatures to consider proposals for legalizing physician-assisted suicide. A final decision about the proposed merger is expected in late October 2004.

    Catholic health care providers. On 3/20/04, Pope John Paul II reversed prior Catholic doctrine by announcing that Catholics are "morally obligated" to continue artificial feeding and hydration for patients in a persistent vegetative state, even if they remain so for years. The pope declared that removing feeding tubes is "euthanasia by omission." The decree could affect more than 565 Catholic hospitals, as well as Catholic health care professionals. Compassion in Dying Federation, together with the National Women's Law Center, are conducting a survey to determine the extent to which church doctrine affects respect of patients' wishes about end-of-life care. A copy of the survey can be obtained by calling (503) 221-9556 or downloading it from

doses of narcotics from a wholesale drug distributor over a year without proper documentation of their intended use. As a result of the DEA investigation, Bischoff's controlled substance registration was suspended in June 2004 and he is charged with three felony counts for the fraudulent obtaining, possession, and illegal distribution of prescription drugs.

5. Gallup poll. In a survey of 1,000 Americans conducted by the Gallup Organization in early May 2004, 53% of respondents said that physician-assisted suicide is morally acceptable, while 41% disagreed. The poll results were released on 6/22/04.

6. Poll of Catholic voters. In a recent poll of Catholic voters on social issues, which was conducted by Catholics for Free Choice, 70% of respondents said that U.S. bishops have little influence on most Catholics in the current political season. Fifty-three percent supported "making it legal for doctors to assist in the death of a terminally ill patient."

MEDICAL DEVELOPMENTS

1. Revised pain treatment policy approved by Federation of State Medical Boards. In May 2004, the House of Delegates of the Federation of State Medical Boards (FSMB) approved revised pain management guidelines, called the Model Policy for the Use of Controlled Substances for the Treatment of Pain. The revised Model Policy replaces FSMB's Model Guidelines, which were approved in April 1998 and subsequently adopted in whole or part by 24 state medical boards. The Model Policy stresses the importance of pain management in the practice of medicine, updates criteria for evaluating the appropriate management of pain, and revises definitions of terms such as addiction, chronic pain, and physical dependence to reflect current consensus in the medical community. Beginning in fall 2004, a series of regional workshops will be offered on "Promoting Balance and Consistency in the Regulatory Oversight of Pain Care."

2. New DEA guidelines on prescribing painkillers. On 8/11/04, the federal Drug Enforcement Administration and top pain specialists jointly issued detailed new guidelines spelling out proper prescribing of morphine-based painkillers, including how to diagnose severe pain. The guidelines, which will be distributed to law enforcement agencies and to all physicians who apply for DEA approval to prescribe controlled substances, are intended to reassure physicians that they will not be prosecuted for prescribing high doses to patients in intractable pain.

3. Margaret Furlong. On 9/8/04, lawyers representing the son of Margaret Furlong argued before the California Second District Court of Appeal that a trial court improperly dismissed claims of elder abuse and unfair business practices in connection with Mrs. Furlong's death on 3/12/02 at St. John's Regional Medical Center in Oxnard, which is operated by Catholic Healthcare West. Ventura County Superior Court Judge Steven Hintz held that the action could only be based on medical negligence. Patrick Furlong claims that the hospital and three physicians acted recklessly in resuscitating Mrs. Furlong after she suffered respiratory and cardiac arrest, and in then maintaining her on life support for 10 days while she was in significant untreated pain. Mrs. Furlong, who was lucid when admitted to the hospital, brought with her advance medical directive documents indicating her wish not to be resuscitated.

4. Recent articles

    a. Angela Fagerlin & Carl E. Schneider, *Enough: The Failure of the Living Will*, 34 Hastings Center Rep. 30 (Mar.-Apr. 2004) [argues that living wills (but not durable powers of attorney for health care) are a failure].

    b. Erik K. Fromme et al., *Increased Family Reports of Pain or Distress in Dying Oregonians: 1996 to 2002*, 7 J. Palliative Med. 431 (2004) [SEE DISCUSSION ABOVE].

    c. Steven B. Hardin & Yasmin A. Yusufaly, *Difficult End-of-Life Decisions: Do Other Factors Trump Advance Directives?*, 164 Archives Internal Med. 1531 (2004) [treatment decisions about six hypothetical seriously ill patients made by 117 internal medicine physicians and residents at three California medical centers revealed that decisions were inconsistent with the patient's advance directive in 65% of cases; respondents appeared to consider other factors such as prognosis, perceived quality of life, and the wishes of family or friends as more determinative than the directive].

    d. Susan W. Tolle et al., *Characteristics and Proportion of Dying Oregonians Who Personally Consider Physician-Assisted Suicide*, 15 J. Clinical Ethics 111 (2004) [SEE DISCUSSION ABOVE].

    e. Susan E. Hickman et al., *Use of the Physician Orders for Life-Sustaining Treatment Program in Oregon Nursing Facilities: Beyond Resuscitation Status*, 52 J. Am. Geriatrics Soc'y 1424 (2004) [SEE DISCUSSION ABOVE].

    f. Terri A. Schmidt et al., *The Physician Orders for Life-Sustaining Treatment Program: Oregon Emergency Medical Technicians' Practical Experiences and Attitudes*, 52 J. Am. Geriatrics Soc'y 1430 (2004) [SEE DISCUSSION ABOVE].

INTERNATIONAL DEVELOPMENTS

1. Australia. Greens party member Robin Chapple is sponsoring a private member's bill in the West Australian parliament that would permit terminally ill patients to choose to die by lethal injection, and would protect from prosecution anyone who witnessed their deaths. The bill is modeled after a bill sponsored by Norm Kelly, a former member of parliament, that failed to pass seven years ago. The Liberal and Labor parties will allow members to make a conscience vote on the issue, but the bill is unlikely to be considered by the parliament in the near future because of other controversial legislation that will be considered first.

2. Belgium. The first report of the Belgian euthanasia supervising committee about the new law legalizing euthanasia, which went into effect in September 2002, showed that 259 terminally ill patients had elected euthanasia through 12/31/03. Eighty-three percent of these patients were from the Flemish-speaking parts of Belgium that border the Netherlands. Forty-eight percent of the patients were age 60-79, 32% age 40-59, 16% above age 79, 3% age 20-39, and 0.5% less than age 20. Senators Jeannine Leduc and Paul Wille, who are members of the ruling Flemish Liberal party, have proposed that Belgium's euthanasia law be extended to terminally ill minors and expanded to cover assisted suicide.

3. Canada. On 6/26/02, Vancouver Island police arrested 71-year-old Evelyn Martens of Langford, British Columbia, on charges of counseling suicide and aiding and abetting suicide in the deaths of Monique Charest on 1/7/02 in Duncan and Leyanne Burchell on 6/26/02 in Vancouver. On 6/27/02, police seized from Martens' home a computer and publications, videos, "exit bags," and other supplies belonging to the Right to Die Network of Canada and Last Rights Publications. Preliminary arguments in Martens' trial began in Duncan on 9/20/04, and the jury trial began on 10/12/04. Trial is expected to last three weeks, and the judge has ordered a publication ban until the jury has reached a verdict. The maximum penalty on each charge is 14 years imprisonment. Right-to-die groups across Canada have raised about $170,000 for a defense fund for Martens.

4. China. A subcommittee of the Law Reform Commission in South China (Hong Kong) recommended in a report in July 2004 that citizens be permitted to execute living wills and that the Mental Health Ordinance be amended to permit family members of comatose patients to seek legal guardianship to make medical decisions. However, legislators decided that the subcommittee should focus on educating the public about advance directives and only consider legislation when there was a demand. The public is being consulted for three months about the report, which is available at www.info.gov.hk/hkreform.

5. France. France's Health Minister Philippe Douste-Blazy is supporting new laws to assure patients a dignified and painless death after issuance of a parliamentary report commissioned following the highly publicized death of 22-year-old Vincent Humbert, whose mother allegedly gave him a lethal injection after President Jacques Chirac denied his request to die. The report said that France should not legalize voluntary euthanasia as Belgium and the Netherlands had done, but instead should allow patients or their families to choose to end treatments that simply delay death. Jean Leonetti, former chief of the parliamentary commission on euthanasia and a member of the majority UMP party, said that legislation proposed by his party would respect the autonomy of patients and provide legal protection to physicians. The draft law would change the code of medical ethics and the public health code. The measure is expected to be discussed in the National Assembly by the end of 2004. Faut qu'on s'active! (We have to take action!), an association backed by Humbert's mother, says that the proposal is not sufficient and has presented its own initiative that would authorize euthanasia under the French penal code.

Great Britain

Proposed assisted suicide legislation. In September 2004, a select committee of the House of Lords began considering testimony on the issues raised by the Patient (Assisted Dying) Bill (HL 37) introduced on 2/20/03 by Lord Joffe. One of the experts submitting evidence was Dr. Hazel Biggs, director of medical law at the University of Kent and one of the country's leading experts on euthanasia, who claimed in an article submitted to the European Journal for Health Law that British physicians help at least 18,000 terminally ill patients to die each year. The Royal College of Nursing agreed to reconsider its opposition to voluntary euthanasia after pressure from members, but decided not to change its position after a large majority of its members voted against doing so. The Church of England House of Bishops and the Roman Catholic Bishops' Conference of England and Wales made a joint submission to the select committee arguing that Lord Joffe's bill was misguided and unnecessary. Win Crew, the widow of a motor-neurone patient who flew to Switzerland to commit assisted suicide, presented a petition to the committee signed by more than 80,000 supporters of the bill. The Vessary. orgthanasia uSciaet

current law should not be changed.

Scotland. Liberal Democrat Jeremy Purvis has announced that he intends to draft a bill patterned after the Oregon

Socialist party of Spanish prime minister Jose Luis Rodriguez Zapatero, backed by some opposition groups, wanted him to deliver on an election pledge and set up a parliamentary commission to investigate legalizing euthanasia, but a motion to do so was withdrawn after it was opposed by the opposition Popular party. Spanish law currently penalizes euthanasia and assisted suicide with prison sentences of five to 10 years.

12. Switzerland. The canton of Zurich is considering introducing a law in the regional parliament that would limit assisted suicide in that canton to Swiss residents, require patients to see two physicians rather than one and get a certificate of mental fitness, mandate testing of staff at suicide clinics, and require organizations assisting in a suicide to contribute towards the forensic medical costs incurred. A debate on the issue is expected in the regional parliament before the end of 2004. On 9/3/04, the Zurich prosecution office confirmed that 22 people from Great Britain have gone to Zurich to end their lives with the help of the controversial group Dignitas following the huge interest of British media in the Diane Pretty right-to-die case.

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* Some information obtained from media reports has not been independently verified.