

“Montana Becomes Third U.S. State To Allow Physician Aid In Dying”
By Kristine S. Knaplund
Co-Chair, ABA Committee on Bioethics
Professor of Law, Pepperdine University School of Law

Synopsis

On December 31, 2009, the Montana Supreme Court issued its decision in *Baxter v. State of Montana*, 2009 MT 449, regarding physician aid in dying (PAD). While the lower court had found a state constitutional right for such aid, a majority of the Supreme Court expressly declined to reach the constitutional issue. Rather, the majority found that the consent of a terminally ill, competent adult to lethal medication would protect the physician from liability for homicide. Montana joins Oregon and Washington in legalizing PAD, but is the only state to do so by judicial decision. Oregon’s statutory scheme, the Death With Dignity Act, has been in place for over ten years; Washington’s statute, modeled on Oregon’s, was passed by the voters last year. Montana’s recent decision leaves open serious questions regarding the use of PAD.

Basic Facts

The lead plaintiff in the case, Robert Baxter, was a 75-year-old retired truck driver with lymphocytic leukemia, a terminal form of cancer. He was treated with multiple rounds of chemotherapy which typically become less effective as time passes. Suffering from anemia, chronic fatigue, nausea, night sweats, infections, massively swollen glands, significant digestive problems, and pain, he wanted the option of assisted death when his suffering became unbearable. Other named plaintiffs were board certified physicians who frequently treat terminally ill patients, and a national non-profit group, Compassion and Choice.

Plaintiffs sued the state of Montana and Attorney General Mike McGrath to declare the homicide statutes unconstitutional as a denial of their right to aid in dying.

The trial court's opinion

Both sides filed motions for summary judgment in the trial court. Judge Dorothy McCarter first determined that the plaintiff doctors had standing, and then reviewed federal and state cases on the issue of PAD and assisted suicide. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the United States Supreme Court held that a Washington statute criminalizing assisted suicide did not violate the Due Process clause because, while terminal patients have a cognizable interest in obtaining relief from suffering, that interest is met with palliative care. A companion case to *Glucksberg*, *Vacco v. Quill*, 521 U.S. 793 (1997), held that New York's prohibition against assisted suicide did not violate the Equal Protection clause of the Fourteenth Amendment. Cases from Florida, Alaska and California all held that statutes prohibiting assisted suicide were constitutional, and did not violate state (as opposed to federal) rights to privacy, liberty and equal protection.

Judge McCarter then turned to the plaintiffs' claims based on equal protection, personal dignity and individual privacy found in the Montana constitution. For the equal protection claim, the classes asserted in *Baxter* were the same as those in *Vacco v. Quill*: terminally ill patients who wish for aid in dying through lethal medication, and terminally ill patients who seek aid in withdrawing life sustaining measures. As in *Vacco*, the Montana trial court found

that the two groups were not similarly situated. The manner of death was different: with PAD, the patient dies from the lethal medication, not from the underlying disease as is the case when life sustaining measures are withdrawn. Second, the doctor's intent in the two situations is different: lethal in writing the prescription, but palliative in carrying out the patient's request to withdraw treatment. The trial court next turned to the individual dignity clause and the right to privacy in the Montana constitution, finding that these two rights were "intertwined" and holding that, "Taken together, this Court concludes that the right of personal autonomy included in the constitutional right to privacy, and the right to determine 'the most fundamental questions of life' inherent in the state constitutional right to dignity, mandate that a competent terminally ill person has the right to choose to end his or her life." 2008 Mont. Dist. LEXIS 482, paragraph 47. This right "necessarily incorporates the assistance of his doctor, as part of a doctor-patient relationship, so that the patient can obtain a prescription for drugs that he can take to end his own life, if and when he so determines." Because the right is fundamental, the state was required to show a narrowly tailored compelling state interest. While the state's interest in preserving human life was found to be compelling, it was overcome by the terminal patients' rights of privacy and dignity. Two other compelling state interests, protecting vulnerable groups, and protecting the integrity and ethics of the medical profession, could be accomplished by legislation. Plaintiff Robert Baxter died the same day the trial court issued its opinion.

Montana Supreme Court opinion

On appeal, the Montana Supreme Court noted the judicial principle that cases should be resolved on a statutory basis, not on constitutional grounds, if possible, and thus framed the issue as “whether the consent of the patient to the physician’s aid in dying could constitute a statutory defense to a homicide charge.” Montana law codifies four exceptions to the defense of consent, only one of which is relevant here: “it is against public policy to permit the conduct or the resulting harm, even though consented to.” MCA Section 45-2-211)(2)(d). The court reviewed the sole Montana case addressing the public policy exception to consent, and found that the exception applies to “conduct that disrupts public peace and physically endangers others.” The court surveyed similar cases from the state of Washington with the same result. As opposed to defendants who committed violent acts that directly caused harm, in PAD the patient himself, not the doctor, administers the lethal dose, and every step in PAD is private. Thus the court found no parallel to the “bar brawler, prison fighter, BB gun shooter and domestic violence aggressor” who previous cases had found to come within the public policy exception. In addition, the court found evidence that prescribing lethal medication did not violate Montana public policy by looking at the state’s Terminally Ill Act, which allows terminally ill patients to withdraw life sustaining treatments and immunizes doctors from liability for the patients’ deaths when the directives are followed. Because the Terminally Ill Act gives patients the right to have their end-of –life wishes followed even where it requires direct participation

by a doctor in withdrawing treatment, the court found no violation of public policy by a doctor following end-of-life wishes through prescribing lethal medications.

The Montana Supreme Court also examined the Terminally Ill Act's prohibition on mercy killing and euthanasia, noting that "Physician aid in dying is, by definition, neither of these." As the court stated, "Neither [mercy killing nor euthanasia]... is consent-based, and neither involved a patient's autonomous decision to self-administer drugs that will cause his own death."

Finally, the court reversed the award of attorneys' fees.

In a concurring opinion, Justice Warner emphasized the wisdom of avoiding the constitutional issue, and noted that the majority's opinion "is not necessarily limited to physicians." He urged the legislature to act on the matter. A second concurrence, by Justice Nelson, concluded that physician aid in dying is protected by the provisions on privacy and individual dignity in the Montana constitution. Justice Rice, dissenting, would find no statutory or constitutional basis for physician aid in dying.

What's next for Montana?

Amednews.com has reported that Montana Democratic State Representative Dick Barrett plans to propose a statute based on Oregon's "Death with Dignity Act" when the legislature reconvenes in January 2011. Until then, what questions remain as to criminal liability for PAD, and who will be able to use it? The questions arise because, unlike Oregon and Washington, no statutory provisions are in place to determine how and when PAD may occur.

The Montana Supreme Court repeatedly referred to two parties in its analysis: a terminally ill, mentally competent adult who requests medication to aid in dying, and a physician who prescribes but does not administer the drug. Thus, as long as the state agrees with the doctor that the patient is competent and terminally ill, and the patient herself takes the lethal dose, it appears that the defense of consent is available to the Montana physician who wrote the prescription. But what if we go slightly beyond these facts? Can a resident of another state travel to Montana to get the prescription, for example? The Oregon statute limits requests to its residents as demonstrated by such things as an Oregon driver license, registration to vote in Oregon, evidence that the person owns or leases property in the state, or filing an Oregon tax return in the most recent tax year. ORS Section 127.860.3.10. In addition, Oregon defines “attending physician” as the physician who has “primary responsibility for the care of the patient and treatment of the patient’s terminal disease.” ORS Section 127.800 Sec. 1.01(2). Thus, an out-of-state resident would not be able to demand a lethal prescription from an Oregon physician, as the patient would not qualify as a resident, and the doctor would not qualify as his or her attending physician. (In addition, Oregon requires multiple requests for the medication, concurrence by a second physician, and waiting periods before the prescription can be written or filled). With none of these statutory provisions in Montana, what about the out-of-stater seeking a prescription? The answer may turn on how willing the Montana medical profession is to write these prescriptions. Four physicians were named plaintiffs in *Baxter*, but the position of most Montana

doctors is at present unknown. While the American Medical Association has adopted Opinion E- 2.211, stating that physician assisted suicide is “fundamentally incompatible with the physician’s role as healer, would be difficult or impossible to control, and would pose serious societal risks,” the Montana Medical Association has taken no position on PAD, and did not file an amicus brief in *Baxter*.

Other scenarios for Montana residents:

Oregon law includes as one of the duties of the attending physician to “Counsel the patient about the importance of having another person present when the patient takes the medication ... and of not taking the medication in a public place.” ORS 127.815.3.01(1)(g). What might happen if a terminally ill Montana patient follows this advice? What if the Montana patient *doesn’t* follow it? First, suppose the terminally ill patient takes the advice, and a friend or family member (not a physician) is present when he or she takes the lethal dose in a private place. Could the friend or family member be charged with homicide if he or she assisted the patient in any way? *Baxter* held that the physician could claim the defense of consent, but it is not clear that others could claim it as well. In contrast, the Oregon statute states that “No person shall be subject to civil or criminal liability... for participating in good faith compliance with [the Death with Dignity Act]. This includes being present when a qualified patient takes the prescribed medication to end his or her life in a humane and dignified manner.” ORS 127.884 Sec. 4.01(1).

Alternatively, suppose the terminally ill Montanan does not follow Oregon's advice, and takes the medication in a public place, or privately with no one else present. If taken in a public place, two dangers potentially emerge. First, the Montana Supreme Court emphasized the private nature of physician aid in dying in finding that the conduct does not disrupt public peace. The court therefore concluded that the patient's consent to the prescription would immunize the doctor. What if the manner of carrying out the death does disrupt public peace? It is out of the physician's control where the patient takes the medication. Should the physician's defense of consent turn on where the patient administers the drug? The other potential danger is to the patient. If the patient takes the drug in a public place, strangers not aware of the plan might intervene to try to save him or her. The same result could occur if the patient is alone; someone encountering the patient could summon emergency help and the patient's wishes would not be carried out. Oregon's statistics indicate that, while death generally occurred within 25 minutes of ingestion and sometimes as quickly as one minute, in a few cases death occurred as much as 48 hours after ingestion, thus increasing the likelihood in Montana that a stranger might intervene.

What about a terminally ill patient who is not physically capable of administering the medication himself or herself? Picture a person with Amyotrophic Lateral Sclerosis (ALS, or "Lou Gehrig's disease"), a progressive disease which usually has no effect on the ability to think or reason, but can make it increasingly difficult to swallow and breathe. (30 of the 401 Oregon patients who have died after ingesting lethal medication were diagnosed with

ALS). If the terminally ill patient is unable to swallow and uses a feeding tube, would a friend or family member be liable for homicide if s/he were the one to place the lethal medication in the feeding tube? The Montana Supreme Court emphasized the importance of the terminally ill patient taking the medication him- or her-self; would this count?

Would a terminally ill patient who takes the medication be classified as a suicide, or would the person be deemed as dying from the underlying disease? Oregon has clarified the matter by statute, especially for life, health or accident insurance or annuity policies. ORS 127.875 Sec. 3.13. Section 3.14 makes clear that ingesting a lethal prescription under Oregon's Death With Dignity Act "shall not, for any purpose, constitute suicide, assisted suicide, mercy killing or homicide."

These are a few of the questions that Montana doctors and the terminally ill must face in the next year. Once the legislature reconvenes, other questions arise, such as whether to declare PAD as against the public policy of the state of Montana, or to expand PAD to include those who are not terminally ill but wish to die, those who are mentally competent but unable to make a written request for the medication or unable to take it themselves, plus whether to enact the procedural safeguards (written and oral requests, two physicians, right to rescind, and so on) found in the Oregon and Washington statutes.