

MEMORANDUM

TO: The Vermont House of Representatives

FROM: Margaret Dore, Esq.

RE: Vote "No" on S.77; No Assisted Suicide;
A Legal and Policy Analysis

DATE: April 29, 2013

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I. INTRODUCTION

I am an attorney in Washington State where physician-assisted suicide is legal.¹ Our law is similar to a law in Oregon. Both laws are similar to S.77.²

This memo discusses why the claim that S.77 will assure patient control is untrue. S.77 is instead a recipe for elder abuse. The bill has other problems.

II. FACTUAL AND LEGAL BACKGROUND

A. Physician-assisted Suicide

The American Medical Association (AMA) defines physician-assisted suicide as occurring "when a physician facilitates a patient's death by providing the necessary means and/or information to enable the patient to perform the life-ending act."³ An example would be a doctor's prescription of a lethal dose to facilitate a patient's suicide.⁴ The AMA rejects this practice, stating:

¹ I am an elder law/appellate attorney in Washington state who has been licensed to practice law since 1986. I am a former Law Clerk to the Washington State Supreme Court. I am a former Chair of the Elder Law Committee of the American Bar Association Family Law Section. I am also President of Choice is an Illusion, a nonprofit corporation opposed to assisted suicide. See www.margaretdore.com and www.choiceillusion.org

² A copy of S.77 as amended by the House Judiciary Committee as of April 25, 2013 is attached hereto at A-1 through A-24.

³ AMA Code of Medical Ethics, Opinion 2.211, available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion2211.page>

⁴ Id.

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.⁵

B. Most States Reject Assisted Suicide

Oregon and Washington are the only states where physician-assisted suicide is legal. Oregon's law was enacted by a ballot initiative in 1997.⁶ Washington's law was enacted by another initiative in 2008 and went into effect in 2009.⁷ No such law has made it through the scrutiny of a legislature despite more than 100 attempts.⁸ In a third state, Montana, there is a court decision that gives doctors who assist a suicide a defense to prosecution for homicide. The meaning of this decision is subject to ongoing controversy.⁹

In the last two years, three states have strengthened their laws against assisted suicide.¹⁰ These states are: Idaho;

⁵ Id.

⁶ Oregon's physician-assisted suicide act was passed as Ballot Measure 16 in 1994 and went into effect after a referendum in 1997.

⁷ Washington's act was passed as Initiative 1000 on November 4, 2008 and went into effect on March 5, 2009. See <http://www.doh.wa.gov/dwda/default.htm>

⁸ See tabulation at http://epcdocuments.files.wordpress.com/2011/10/attempts_to_legalize_001.pdf

⁹ See e.g., Cover Story, "The Aid-in-Dying Debate: Can a physician legally help a patient die in Montana? Court ruling still leaves issue open to argument," *The Montana Lawyer*, November 2011, available at http://maasdocuments.files.wordpress.com/2011/11/mt-lawyer-cover-story_001.pdf

¹⁰ See Margaret Dore, "US Overview," updated July 30, 2012, at <http://www.choiceillusion.org/p/us-overview.html>

Georgia; and Louisiana.¹¹

III. THE BILL

A. Patients are Not Necessarily Dying

S.77 applies to patients with a "terminal condition," defined as having less than six months to live.¹² Such patients are not necessarily dying and may have years to live. This is because doctor predictions of life expectancy can be wrong.¹³ Moreover, the requirement of six months to live is based on the patient not being treated. Consider Oregon resident, Jeanette Hall, who was diagnosed with cancer in 2000 and wanted to do assisted suicide.¹⁴ Her doctor convinced her to be treated instead.¹⁵ In a 2012 affidavit, she states:

This July, it was 12 years since my diagnosis. If [my doctor] had believed in assisted suicide, I would be dead.¹⁶

¹¹ Id.

¹² S.77, § 5281(16). (Attached at A-5)

¹³ 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?*, Seattle Weekly, January 14, 2009, available at www.seattleweekly.com/2009-01-14/news/terminal-uncertainty. (Attached at A-25 to A-30). See also Affidavit of Kenneth Stevens, MD, September 18, 2012 (attached at A-31 to A-37); and Affidavit of John Norton (when he was eighteen years old, he was told that he would die of ALS and paralysis in three to five years; he is now 75 years old). (Attached at A-38).

¹⁴ Affidavit of Kenneth Stevens, MD, ¶¶ 3-7, described above at note 13; Affidavit of Jeanette Hall Opposing Assisted Suicide, August 17, 2012 (Attached at A-41).

¹⁵ Id.

¹⁶ Affidavit of Jeanette Hall, ¶ 4. (Attached at A-41)

B. How the Bill Works

S.77 has an application process to obtain a lethal dose, which includes a written lethal dose request form with two required witnesses.¹⁷

Once the lethal dose is issued by the pharmacy, there is no oversight. The death is not required to be witnessed.¹⁸ No one, not even a doctor, is required to be present.¹⁹

IV. ARGUMENT

A. Patient "Control" is an Illusion

1. No witnesses at the death

As noted above, S.77 does not require witnesses at the death. Without disinterested witnesses, the opportunity is created for the patient's heir, or for another person who will benefit from the death, to administer the lethal dose to the patient without his consent. Even if he struggled, who would know?

This situation is especially significant for patients with money. A California case states, "Financial reasons [are] an all too common motivation for killing someone."²⁰ Without disinterested witnesses, the patient's control over his death is

¹⁷ The request form can be viewed at § 5297. (Attached at A-20)

¹⁸ See S.77 in its entirety. (Attached at A-1 through A-24).

¹⁹ *Id.*

²⁰ *People v. Stuart*, 67 Cal. Rptr. 3rd 129, 143 (2007).

not guaranteed.

2. Someone else is allowed to talk for the patient

Under S.77, patients obtaining the lethal dose are required to be "capable."²¹ This is, however, a relaxed standard in which someone else is allowed to talk for the patient. S.77 states:

"Capable" means that . . . a patient has the ability to make and communicate health care decisions to health care providers, *including communication through persons familiar with the patient's manner of communicating . . .*" (Emphasis added).²²

The person talking for the patient is not required to be a trusted person designated by the patient, for example, an agent under an advanced directive.²³ Indeed, such persons are prohibited from speaking for the patient.²⁴ S.77 states:

Under no circumstances shall an agent under an advance directive be permitted to act on behalf of a principal for the purposes of this chapter.

²¹ § 5281(15)(A)(i) (Attached at A-4).

²² § 5281(1) states:

"Capable" means that in the opinion of a court or in the opinion of the patient's prescribing physician, consulting physician, psychiatrist, psychologist, or clinical social worker, the patient has the ability to make and communicate health care decisions to health care providers, including communication through persons familiar with the patient's manner of communicating if those persons are available.

Attached at A-1.

²³ See S.77 in its entirety.

²⁴ § 5282(f)(2), attached at A-7.

The person talking for the patient can, however, be someone not designated as an agent. Such non-agents would include heirs who benefit financially from the patient's death. They are allowed to talk for the patient .

3. Heirs are allowed to procure the patient's signature

S.77 prohibits an heir from acting as a witness on the lethal dose request form.²⁵ S.77 does not, however, prohibit heirs from procuring the patient's signature.²⁶ An example of procurement would be: providing the lethal dose request form to the patient; recruiting the witnesses; and supervising the signing.

In the context of signing a will, a beneficiary's participation in the procurement of the will is a "suspicious circumstance," capable of supporting a presumption of undue influence. The Vermont Supreme Court in *Estate of Raedel* states: "[I]n cases of suspicious circumstances, usually 'the beneficiary [of the will] has procured the will to be made or has advised as to its provisions.'" ²⁷

S.77, which allows heirs to procure the patient's signature, does not promote patient choice and control. It invites coercion.

²⁵ See § 5282(1)(c)(3). (Attached at A-6).

²⁶ See S.77 in its entirety, attached hereto at A-1 through A-24.

²⁷ 152 Vt. 478, 483-4, 568 A.2d 331 (1989).

B. Legalization will Create New Paths of Elder Abuse

In Vermont, there are an estimated 3,750 cases of violence and abuse against elders each year.²⁸ Nationwide, elder financial abuse is a crime growing in intensity, with perpetrators often family members, but also strangers and new "best friends."²⁹ Victims are even murdered for their funds.³⁰

Elder abuse is often difficult to detect. This is largely due to the unwillingness of victims to report. "Shame, dependence on the abuser, fear of retribution, and isolation from the community are significant obstacles that discourage elders from reporting these crimes."³¹

In Vermont, preventing abuse of vulnerable adults, which includes the elderly, is official state policy.³² If assisted

²⁸ Elder Abuse Public Education Campaign, Vermont Center for Crime Victim Services, at http://www.ccvvs.state.vt.us/pub_ed/index.html (last visited April 29, 2013). (Attached at A-43)

²⁹ See MetLife Mature Market Institute, *Broken Trust: Elders, Family and Finances, A Study on Elder Abuse Prevention*, March 2009, at <http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf> (last visited April 29, 2013); Miriam Hernandez, 'Black Widows' in court for homeless murders, March 18, 2008, ABC Local, <http://abclocal.go.com/kabc/story?section=news/local&id=6027370> (last visited October 2, 2010) (elderly homeless men killed as part of an insurance scam); and *People v. Rutterschmidt*, 98 Cal.Rptr.3d 390 (2009) (regarding this same case).

³⁰ See MetLife, *supra* note 29, at 24; and *People v. Stuart*, 67 Cal. Rptr. 3d 129, 143 (where daughter killed her mother with a pillow, "financial considerations [are] an all too common motivation for killing someone . . .").

³¹ *Elder Abuse Public Education Campaign, supra* note 28.

³² See, e.g., Vermont Adult Protective Services Statute, "Reports of Abuse, Neglect and Exploitation of Vulnerable Adults," 33 V.S.A. § 6902(14)(D) (defining a "[v]ulnerable adult" as a person 18 years of age or older who "is impaired due to . . . infirmities of aging . . .").

suicide is legalized via S.77, new paths of abuse will be created against the elderly, which is contrary to that policy. Alex Schadenberg, chair for the Euthanasia Prevention Coalition, International, states:

With assisted suicide laws in Washington and Oregon, perpetrators can . . . take a "legal" route, by getting an elder to sign a lethal dose request. Once the prescription is filled, there is no supervision over the administration. . . . [E]ven if a patient struggled, "who would know?"³³

In Oregon, the Thomas Middleton case provides an example of how physician-assisted suicide can be used to facilitate a fraud. An article from KTVZ.com states:

Middleton, who suffered from Lou Gehrig's disease, moved into Sawyer's home in July 2008, months after naming her trustee of his estate. . . . Middleton deeded his home to the trust and directed her to make it a rental until the real estate market improved.

Instead, Sawyer signed documents . . . to list the property for sale two days after Middleton died by physician-assisted suicide. The property sold in October . . . for more than \$200,000 [which] was deposited into an account for one of Sawyer's businesses . . .

.³⁴

³³ Alex Schadenberg, Letter to the Editor, *Elder abuse a growing problem*, *The Advocate*, October 2010, page 14, available at [http://www.margaretdore.com/info/October Letters.pdf](http://www.margaretdore.com/info/October%20Letters.pdf) (Attached at A-44).

³⁴ To read the entire article, go here:
<http://www.ktvz.com/news/Sawyer-Arraigned-on-State-Fraud-Charges/-/413192/619440/-/view/print/-/1w9ly3z/-/index.html>

C. Any Study Claiming that Oregon's Law is Safe, is Invalid

During Montana's 2011 legislative session, the lack of oversight over administration in Oregon's law prompted Senator Jeff Essmann to make this observation: the Oregon studies are invalid. He stated:

[All] the protections end after the prescription is written. [The proponents] admitted that the provisions in the Oregon law would permit one person to be alone in that room with the patient. And in that situation, there is no guarantee that that medication is self administered.

So frankly, any of the studies that come out of the state of Oregon's experience are invalid because no one who administers that drug . . . to that patient is going to be turning themselves in for the commission of a homicide.³⁵

D. Oregon's Annual Report

The preamble to Oregon's most recent annual report implies that the deaths under Oregon's act were voluntary (self-administered).³⁶ The information provided in the report does not, however, address whether the deaths were voluntary.³⁷ For

³⁵ See link to hearing transcript for SB 167, February 10, 2011, http://www.margaretdore.com/pdf/senator_essmann_sb_167_001.pdf

³⁶ The report is attached hereto at A-45.

³⁷ The report (at A-45 though A-50) instead focuses on the patient's "ingestion" of the lethal dose, *i.e.*, whether the patient swallowed, inhaled or absorbed the dose, which as described above, would not necessarily require a volitional act by the patient. A patient could also voluntarily swallow the lethal dose, but not know what it was, or be drunk, or be otherwise incapacitated so as to "ingest" the lethal dose, but not give consent.

example, there is no information provided as to whether patients consented to administration of the lethal dose.³⁸ This, of course, only makes sense given the lack of oversight at the time of death. How would the authorities know?

The report does, however, provide the following demographics. Most of the persons who died under Oregon's act were age 65 and older.³⁹ They were also white and well-educated; many had private insurance.⁴⁰

Typically, persons with these attributes would be seniors with money, which would be the middle class and above, a group disproportionately at risk of financial abuse and exploitation.⁴¹ Oregon's recent annual report is thereby statistically consistent with elder financial abuse.

³⁸ Id.

³⁹ Oregon's report for 2012 states: "Of the 77 DWDA deaths during 2012, most (67.5%) were aged 65 years or older." (Attached at A-46)

⁴⁰ Oregon's report states: "As in previous years, most were white (97.4%), [and] well-educated (42.9% had at least a baccalaureate degree)." (Attached at A-46). The report also states: "Excluding unknown cases, all (100.0%) had some form of health insurance, although the number of patients who had private insurance (51.4%) was lower than in previous years(66.2%) . . ." Id.

⁴¹ See "Broken Trust: Elders, Family, and Finances, a Study on Elder Financial Abuse Prevention, by the MetLife Mature Market Institute, page 4 ("Elders' vulnerabilities and larger net worth make them a prime target for financial abuse"), available at <http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf>

E. Guardians and Conservators Will Not be Able to Protect Their Wards

S.77 states:

Under no circumstances shall a guardian or conservator be permitted to act on behalf of a ward for the purposes of this chapter.⁴²

With the above phrase, "[u]nder no circumstances," a guardian or conservator will not be able to intercede on behalf of a ward to protect him or her from being pushed into suicide or other involuntary death. Guardians and conservators will not be able to protect their wards.

F. The Oregon Health Plan Steers Patients to Suicide

In Oregon, legalization of physician-assisted suicide has also empowered the Oregon Health Plan (Medicaid) to steer patients to suicide. The most well known cases are Barbara Wagner and Randy Stroup.⁴³ Each wanted treatment.⁴⁴ The Plan denied coverage and offered to pay for their suicides instead.⁴⁵ Wagner was devastated.⁴⁶ She said "I'm not ready to die."⁴⁷

⁴² § 5282 (f)(1), attached at A-7.

⁴³ See Susan Donaldson James, "Death Drugs Cause Uproar in Oregon," ABC News, August 6, 2008 (attached at A-51 to A-54), available at <http://abcnews.go.com/Health/story?id=5517492&page=1> and KATU TV, "Letter noting assisted suicide raises questions," KATU TV, July 30, 2008 (attached at A-55), at <http://www.katu.com/news/specialreports/26119539.html>

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ KATU TV supra.

Stroup said "This is my life they're playing with."⁴⁸

Today, the Oregon Health Plan continues to use financial incentives to steer patients to suicide.⁴⁹

G. Legalization of Assisted Suicide will Bring Stress, Trauma and Fear

In 2012, a study on assisted suicide was released in Switzerland, one of four small countries where assisted suicide is legal.⁵⁰ The study found that 1 out of 5 family members or friends present at an assisted suicide were traumatized. These persons "experienced full or sub-threshold [Post Traumatic Stress Disorder] related to the loss of a close person through assisted suicide."

Consider also the letter below by nurse Marlene Deakins, and her brother, Ron Olfert. Their letter describes the "unnecessary stress" and "fear" of their brother, Wes Olfert, after he asked a question about assisted suicide in Washington State. Their letter states:

Our brother, Wes Olfert, . . . died in Washington State where assisted suicide is legal. When he was first admitted to the hospital, he made the mistake of asking for

⁴⁸ ABC News, supra.

⁴⁹ See the Affidavit of Kenneth Stevens, MD (Leblanc v. Attorney General) with attachments, September 18, 2012, ¶¶ 8 to 12. (Attached at A-31 to A-37).

⁵⁰ "Death by request in Switzerland: Posttraumatic stress disorder and complicated grief after witnessing assisted suicide," B. Wagner, J. Muller, A. Maercker; *European Psychiatry* 27 (2012) 542-546, available at <http://choiceisanillusion.files.wordpress.com/2012/10/family-members-traumatized-eur-psych-2012.pdf> (First page attached at A-57).

information about assisted suicide. We say a mistake, because this set off a chain of events that interfered with his care and caused him unnecessary stress in what turned out to be the last months of his life.

By asking the question, he was given a "palliative care" consult by a doctor who heavily and continually pressured him to give up on treatment before he was ready to do so. It got so bad that Wes actually became fearful of this doctor and asked us and a friend to not leave him alone with her.⁵¹

Kathryn Judson, of Oregon, similarly, became afraid for her husband. This was after his doctor gave him an unsolicited pitch for suicide. She states:

We got a different doctor, and David lived another five years or so. But after that nightmare in the first doctor's office, and encounters with a 'death with dignity' inclined nurse, I was afraid to leave my husband alone again with doctors and nurses, for fear they'd morph from care providers to enemies, with no one around to stop them.⁵²

H. Proposals for Expansion in Washington State

In Washington State, where assisted suicide was legalized just four years ago, there has already been a push to expand that

⁵¹ Ron Olfert and Marlene Deakins RN, Letter to the Board of Medical Examiners, "He made the mistake of asking for information about assisted suicide," June 29, 2012 (Attached at A-58), available at <http://www.montanansagainstassistedsuicide.org/2012/06/dear-board-of-medical-examiners-we-are.html> (Accuracy confirmed by Margaret Dore, the writer of this memo, who spoke with both Ron Olfert and Marlene Deakins).

⁵² Kathryn Judson, "I was afraid to leave my husband alone," Hawaii Free Press, February 15, 2011, (Attached at A-59), available at <http://www.montanansagainstassistedsuicide.org/2013/01/i-was-afraid-to-leave-my-husband-alone.html>

law to direct euthanasia of non-terminal people.⁵³ Indeed, last year, there was a newspaper column suggesting euthanasia for people unable to afford care, which would be involuntary euthanasia. See Jerry Large, "Planning for old age at a premium," *The Seattle Times*, March 8, 2012 ("After Monday's column, . . . a few [readers] suggested that if you couldn't save enough money to see you through your old age, you shouldn't expect society to bail you out. *At least a couple mentioned euthanasia as a solution.*") (Emphasis added).⁵⁴

I. No Factual Support for Murder-Suicide Claim; In Oregon, Firearms are the Dominant Mechanism Among Male Suicides; In Oregon, Other Suicide has Increased with the Legalization of Assisted Suicide

Suicide proponents sometimes claim that legalizing assisted suicide will prevent murder-suicide and other violent suicides.⁵⁵ In Oregon where assisted-suicide has been legal since 1997,

⁵³ See .e.g, Brian Faller, "Perhaps it's time to expand Washington's Death with Dignity Act," *The Olympian*, November 16, 2011, ("To improve the chances of passage, [Washington's] Death with Dignity Act was written to apply only to the choices of the terminally ill . . . This raises the question whether, if the act continues to work as intended, we should extend the choice of voluntary euthanasia to: . . . Persons who are not terminally ill . . .") Available at <http://www.theolympian.com/2011/11/16/1878667/perhaps-its-time-to-expand-washingtons.html>

⁵⁴ Attached hereto at A-60, available at <http://seattletimes.nwsourc.com/text/2017693023.html>

⁵⁵ See e.g. Michael Jamison, "Libby shooting, arson tragedy puts focus on 'aid in dying,'" *The Missoulian*, September 4, 2010, available at http://missoulian.com/news/local/article_14e5e9b6-b7db-11df-aalc-001cc4c03286.html.

murder-suicide has not been eliminated.⁵⁶ Murder-suicide instead follows "the national pattern."⁵⁷ The claim that legal assisted suicide prevents murder-suicide is without factual support.

Moreover, Oregon's overall suicide rate, which excludes suicide under Oregon's assisted suicide act, is 35% above the national average.⁵⁸ This rate has been "increasing significantly since 2000."⁵⁹ Just three years prior, in 1997, Oregon legalized assisted suicide.⁶⁰ Suicide thus increased, not decreased with

⁵⁶ See Don Colburn, "Recent murder-suicides follow the national pattern," *The Oregonian*, November 17, 2009 ("In the span of one week this month in the Portland area, three murder-suicides resulted in the deaths of six adults and two children"), article available at http://www.oregonlive.com/health/index.ssf/2009/11/recent_murder-suicides_follow.html; "Murder-suicide suspected in deaths of Grants Pass [Oregon] couple," *Mail Tribune News*, July 2, 2000 (regarding husband, age 77, and wife, age 76) at <http://archive.mailtribune.com/archive/2000/july/070200n6.htm>; and Colleen Stewart, "Hillsboro [Oregon] police investigating couple's homicide and suicide," *The Oregonian*, July 23, 2010 ("Wayne Eugene Coghill, 67, shot and killed his wife, Nyla Jean Coghill, 65, before taking his own life in their apartment"), at http://www.oregonlive.com/hillsboro/index.ssf/2010/07/hillsboro_police_investigating_homicide_and_suicide.html. See also 2010 Annual Report, Oregon's Death with Dignity Act (stating that Oregon's assisted suicide law was "enacted in late 1997"). (Attached at A-45).

⁵⁷ Don Colburn, "Recent murder-suicides follow the national pattern," above at note 56.

⁵⁸ See "Suicides in Oregon, Trends and Risk Factors," Oregon Department of Human Services, Public Health Division, September 2010 (Attached at A-61 to A-64) ("In 2007, the age-adjusted suicide rate . . . was 35% higher than the national average." (Attached at A-62). "Deaths relating to the death with Dignity Act (physician-assisted suicides) are not classified as suicides by Oregon law and therefore are excluded from this report") (Attached at A-63).

⁵⁹ Oregon Health Authority, News Release, *Rising suicide rate in Oregon reaches higher than national average*, September 9, 2010, available at <http://www.oregon.gov/DHS/news/2010news/2010-0909a.pdf>. (Attached at A-64).

⁶⁰ See 2010 Annual Report, Oregon's Death with Dignity Act, (stating that Oregon's assisted suicide law was "enacted in late 1997"). (Attached at A-45).

legalization of assisted suicide. Many of these deaths are violent. For 2007, which is the most recent year reported, "[f]irearms were the dominant mechanism of suicide among men."⁶¹ In Vermont, preventing suicide is official state policy.⁶² Vermont should not enact a proposal that contradicts this policy.

V. CONCLUSION

S.77's promise of patient control is untrue. The bill is instead a recipe for elder abuse, especially for persons with money. The most obvious problem is the lack of witnesses at the death. Even if the patient struggled, who would know?

Don't make Oregon and Washington's mistake. Reject S.77.

Respectfully submitted April 29, 2013

_____/s/_____
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⁶¹ Excerpt, "Suicides in Oregon, Trends and Risk Factors," (Attached at A-62).

⁶² See, e.g., 18 V.S.A. § 7101(17)(defining a "person in need of treatment" in terms of "a person who has threatened or attempted suicide") and 28 V.S.A. § 907(6)(G) (regarding training of medical and correctional staff in "[s]uicide potential and prevention").

