

THE MONTANA MEDICAL EXAMINER BOARD

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In re the Matter of:

Position Statement No. 20,

relating to "aid in dying" (assisted suicide and euthanasia)

**SUMMARY OF LEGAL ARGUMENTS
REQUIRING POSITION STATEMENT
NO. 20 TO BE VACATED AS A MATTER
OF LAW**

1. On March 16, 2012, the Board adopted a revised version of Position Statement No. 20, which refers to "aid in dying" as a "medical procedure or intervention."¹
2. The term, "aid in dying," means assisted suicide and euthanasia.²
3. On December 31, 2009, the Montana Supreme Court issued *Baxter v. State*, 354 Mont. 234 (2009), which addresses a narrow form of "aid in dying." *Baxter* did not legalize "aid in dying,"

¹ The revised statement says:

The Montana Board of Medical Examiners has been asked if it will discipline physicians for participating in aid-in-dying. This statement reflects the Board's position on this controversial question.

The Board recognizes that its mission is to protect the citizens of Montana against the unprofessional, improper, unauthorized and unqualified practice of medicine by ensuring that its licensees are competent professionals. 37-3-101, MCA. In all matters of medical practice, including end-of-life matters, physicians are held to professional standards. If the Board receives a complaint related to physician aid-in-dying, it will evaluate the complaint on its individual merits and will consider, as it would any other medical procedure or intervention, whether the physician engaged in unprofessional conduct as defined by the Board's laws and rules pertinent to the Board.

² Model Aid-in-Dying Act, § 1-102(3), at www.uiowa.edu/~sfklaw/euthan.html Note the letters "euthan" in the link.

although that fact is disputed by some proponents.³

4. Position Statement No. 20 implies that “aid in dying” is confined to “end-of-life” matters.⁴

In *Baxter*, however, the plaintiffs sought to legalize assisted suicide for people who were not necessarily at the “end of life,” for example, an 18 year old who is insulin dependent.⁵

5. In the last legislative session, a bill seeking to legalize aid in dying, SB 167, was defeated.⁶

6. The Medical Examiner Board derives its power from the Administrative Procedure Act, §§ 2-4-101 to 2-4-711, MCA, and other statutes such as § 37-1-307, MCA, which defines the authority of Boards in general.⁷ These statutes do not grant the Medical Examiner Board authority to interpret the meaning of a court decision such as *Baxter*.⁸ These statutes do not grant the Board the power to enact new legislation, for example, to legalize “aid in dying” as a medical procedure or intervention.

³ See Greg Jackson Esq. and Matt Bowman Esq., “Analysis of Implications of the Baxter Case on Potential Criminal Liability,” Spring 2010 (“the Court’s narrow decision didn’t even “legalize” assisted suicide”), available at <http://www.montanansagainstassistedsuicide.org/p/baxter-case-analysis.html>; statement by Dr. Stephen Speckart conceding that assisted suicide is not legal under *Baxter* (“[M]ost physicians feel significant dis-ease with the limited safeguards and possible risk of criminal prosecution after the *Baxter* decision”), at http://maasdocuments.files.wordpress.com/2011/07/blewett_speckhart_trans_001.pdf; statement by Senator Anders Blewett conceding that a doctor who assisted a suicide could be prosecuted under the *Baxter* decision (“under current law, ... there’s nothing to protect the doctor from prosecution”), at http://maasdocuments.files.wordpress.com/2011/07/blewett_speckhart_trans_001.pdf; and *The Montana Lawyer*, November 2011 (featuring pro-con articles by Senator Blewett and Senator Jim Shockley), available at <http://www.montanabar.org/associations/7121/November%202011%20mt%20lawyer.pdf>.

⁴ Id.

⁵ See opinion letter from attorney Theresa Schrempp and Dr. Richard Wonderly to the Euthanasia Prevention Coalition, October 22, 2009 (attaching the plaintiffs’ interrogatory answers with a definition of “terminally ill adult patient” broad enough to include “an 18 year old who is insulin dependent”). (Attached hereto at B-1 to B-3).

⁶ See Detailed bill information page, attached hereto at B-4.

⁷ For more information about the Administrative Procedure Act and other statutes, see Memorandum dated May 2, 2012, pp. 1-2, pp. 8-10. A copy of the Act and other statutes are attached thereto at A-1 through A-28.

⁸ Id.

7. Interpreting court decisions and enacting legislation are the province of the Judiciary and the Legislature, not the Board. With these circumstances, the Board had no authority to adopt Position Statement No. 20, which effectively interpreted *Baxter* and/or effectively enacted legislation to legalize “aid in dying.” Position Statement 20 is null and void.

8. The Board’s lack of authority is a lack of subject matter jurisdiction and requires Position Statement No. 20 to be vacated to the extent that it purports to legalize “aid in dying” and/or refers to “aid in dying” as an “end-of-life” matter.

9. Position Statement No. 20 is also invalid and/or void in its entirety because it is a “rule” under the Administrative Procedure Act, which was adopted without attempting to comply with rulemaking procedures.⁹

10. Position Statement No. 20 is also invalid and/or void in its entirety because there was no oral argument scheduled for members of the public to speak prior to its enactment. § 2-4-302(4), MCA states: “If the proposed rulemaking involves matters of significant interest to the public, the agency *shall* schedule an oral hearing.” (Emphasis added). A matter is of “significant interest to the public” if the agency knows it “to be of widespread citizen interest.”¹⁰ In the case at hand, the record is overflowing with citizen input including more than 3000 signatures opposed to assisted suicide.¹¹ The Board knew of “widespread citizen interest” as a matter of law. The Board adopted Position Statement No. 20 without previously scheduling oral argument for the public. For this reason also, the statement is null and void.

⁹ See Memorandum dated May 2, 2012, pp. 8-10.

¹⁰ § 2-4-102(12)(a).

¹¹ Memorandum dated May 2, 2012, p. 3; attachments at A-37 to A-45.

11. Position Statement No. 20 is also null and void because it purports to expand a physician's scope of practice to include "aid in dying." This is the function of the Legislature, not the Board.

Board of Optometry v. Florida Medical Association, 463 So.2d 1213, 1215 (1985).

12. Position Statement No. 20 puts physicians and/or the public at risk by encouraging them to engage in illegal and tortious conduct that could result in their being charged with a crime and/or sued. Statement No. 20 also puts vulnerable people at risk of being killed or steered to suicide by their heirs or predators. With these circumstances, the Board's enactment of Statement No. 20 violates its duty to protect the public (and puts the Board itself at risk of liability).

13. For the above reasons, Position Statement No. 20 is null and void as a matter of law. It must be vacated and removed from the Board's website.

Dated this 6th of July, 2012



Craig D. Charlton, Attorney for Montanans Against
Assisted Suicide & For Living with Dignity

Exhibits B-1 thru B-4

Richard Wonderly, M. D.
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Alex Schadenberg
Executive director
Euthanasia Prevention Coalition
P. O. Box 25033
London, ON N6C 6A8

October 22, 2009

Dear Mr. Schadenberg:

We are a physician and an attorney in Washington State where assisted suicide is regrettably legal. We write to comment on the lawsuit in Connecticut which seeks to legalize "aid in dying" for "terminally ill patients."

The terms "aid in dying" and "terminally ill" imply that legalization would apply only to dying patients. Don't count on it. In Montana, where there is another lawsuit involving "aid in dying", assisted suicide advocates define the phrase "terminally ill patient" as follows:

[A] person 18 years of age or older who has an incurable or irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of his or her attending physician, result in death within a relatively short time.
(See, Enclosed Interrogatory Responses from Montana Plaintiffs)

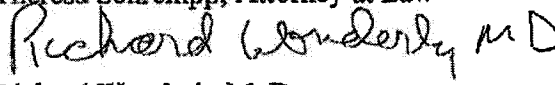
Shockingly, this definition is broad enough to include an 18 year old who is insulin dependent or dependent on kidney dialysis, or a young adult with stable HIV/AIDS. Each of these patients could live for decades with appropriate medical treatment. Yet, they are "terminally ill" according to the definition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

Once someone is labeled "terminal," an easy justification can be made that their treatment or coverage should be denied in favor of someone more deserving. In Oregon, where assisted suicide has been legal for years, "terminal" patients have not only been denied coverage for treatment, they have been offered assisted suicide instead. The most well-known cases involve Barbara Wagner and Randy Stroup, reported at <http://www.abcnews.go.com/Health/comments?type=story&id=5517492>.

Those who believe that assisted suicide promotes free choice may discover that it does anything but.

Very truly yours,


Theresa Schrempp, Attorney at Law


Richard Wonderly M. D.

Enclosure

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11 MONTANA FIRST JUDICIAL DISTRICT COURT,
12 LEWIS AND CLARK COUNTY

13 ROBERT BAXTER, STEVEN STOELB,
14 STEPHEN SPECKART, M.D., C. PAUL
LOEHNEN, M.D., LAR AUTIO, M.D.,
15 GEORGE RISI, JR., M.D. and
COMPASSION & CHOICES,

X 16 Plaintiffs,

17 v.

18 STATE OF MONTANA and MIKE
MCGRATH, ATTORNEY GENERAL,

19 Defendants.
20

Judge: Dorothy McCarter
Cause No. ADV 2007-787

PLAINTIFFS' RESPONSES TO
STATE OF MONTANA'S FIRST
DISCOVERY REQUESTS

21 Plaintiffs respond to Defendant State of Montana's First Discovery Requests as follows:
22

23 **INTERROGATORY NO. 1:** Define "aid in dying" as it is used in the Complaint,
24 including the specific medication(s) and process(es) involved, any differences between the type,
25 dose, and amount of medication prescribed for palliative care and "aid in dying," the resulting

PLAINTIFFS' RESPONSES TO STATE OF MONTANA'S FIRST DISCOVERY REQUESTS

Page 1

1 person understands what he or she is doing and the probable consequences of his or her acts.
2 Mental competence will be determined by the person's attending physician based upon the
3 physician's professional judgment and assessment of the relevant medical evidence.
4

5 **INTERROGATORY NO. 4:** Define "terminally ill adult patient" as it is used in the
6 Complaint, including the specific class that Plaintiff Patients' purport to represent, the diseases
7 that may qualify for terminal illness, expected terminal prognosis, who will determine the
8 diagnosis and prognosis, and any other objective standards that delimit the definition.

9 **ANSWER:** The term "terminally ill adult patient", as used in the complaint, means a
10 person 18 years of age or older who has an incurable or irreversible condition that, without the
11 administration of life-sustaining treatment, will, in the opinion of his or her attending physician,
12 result in death within a relatively short time. This definition is not limited to any specific set of
13 illnesses, conditions or diseases. The patient plaintiffs in this case represent the class of Montana
14 citizens who are mentally competent, adult, terminally ill under this definition, and wish to avail
15 themselves of the right to aid in dying. The patient's diagnosis and prognosis will be determined
16 by his or her attending physician.
17

18 **INTERROGATORY NO. 5:** Define "a dying process the patient finds intolerable" as it
19 is used in the Complaint; including any objective standards that delimit the definition.

20 **ANSWER:** This is a subjective determination made by the individual patient based upon
21 his or her medical condition and circumstances, symptoms, and personal values and beliefs.
22

23 **INTERROGATORY NO. 6:** Define how a patient seeking "aid in dying" "requests such
24 assistance" as it is described in the Complaint.
25

Bill Draft Number: LC0177**Bill Type - Number:** SB 167**Short Title:** Implement ruling on aid in dying for terminally ill patients**Primary Sponsor:** Anders Blewett**Bill Actions - Current Bill Progress:** Probably Dead**Bill Action Count:** 23

Action - Most Recent First	Date	Votes Yes	Votes No	Committee
X (S) <u>Died in Standing Committee</u>	<u>04/28/2011</u>			
(S) Missed Deadline for General Bill Transmittal	02/24/2011			
(S) <u>Tabled in Committee</u>	02/10/2011			(S) Judiciary
(S) Hearing	<u>02/09/2011</u>			(S) Judiciary
(C) Introduced Bill Text Available Electronically	01/13/2011			
(S) First Reading	01/13/2011			
(S) Referred to Committee	01/13/2011			(S) Judiciary
(S) Introduced	01/13/2011			
(C) Draft Delivered to Requester	01/10/2011			
(C) Draft Ready for Delivery	12/30/2010			
(C) Pre-Introduction Letter Sent	12/22/2010			
(C) Draft in Assembly/Executive Director Review	12/22/2010			
(C) Draft in Final Drafter Review	12/20/2010			
(C) Draft in Input/Proofing	12/20/2010			
(C) Draft in Final Drafter Review	12/20/2010			
(C) Bill Draft Text Available Electronically	12/17/2010			
(C) Draft in Input/Proofing	12/17/2010			
(C) Draft to Drafter - Edit Review [JLN]	12/17/2010			
(C) Draft in Legal Review	12/11/2010			
(C) Draft to Requester for Review	12/10/2010			
(C) Draft Taken Off Hold	12/01/2010			
(C) Draft On Hold	07/12/2010			
(C) Draft Request Received	07/12/2010			

Sponsor, etc.

Sponsor, etc.	Last Name/Organization	First Name	Mi
Requester	Barrett	Dick	
Drafter	O'Connell	Sue	

B-4