LAW OFFICES OF
MARGARET K. DORE, P.S.

1001 FOURTH AVENUE, 44TH FLOOR
SEATTLE, WASHINGTON 98154

MARGARET K. DORE

TELEPHONE (206) 389-1754
FACSIMILE (206) 389-1530
margaretdore@margaretdore.com
www.margaretdore.com

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Re: Vote "No" on ABX2-15 (Assisted Suicide). The "Baker" amendments do not fix the bill's problems: ABX2-15 STILL allows non-voluntary and involuntary patient killing behind closed doors.

Dear Assemblymembers:

On September 3, 2015, ABX2-15 was amended at the request of Assemblymember Baker with the goal of assuring voluntary patient consent to administration of the lethal dose. The amendments create a "final attestation form" and two new felonies. The amendments, while well meaning, do not achieve their intended goal. Indeed, ABX2-15 still allows non-voluntary and involuntary patient killing behind closed doors.

A. The Amendments.

1. The final attestation form

ABX2-15, § 443.5(a)(12), requires the attending physician to provide the patient with a final attestation form during the lethal dose request process.[1] A copy of the form is set forth in § 443.11(c) and attached hereto at A-2.

The form is to be filled out by the patient within 48 hours prior to his or her ingestion of the lethal dose.[2] The patient is to sign and date the form, which states:

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[1] A copy of § 443.5(a)(12) is attached hereto at A-1 and A-2.

[2] § 443.11(c)(1), attached hereto at A-3.

> I make this decision to ingest the aid-in-dying drug to end my life in a humane and dignified manner."[3]

After the death, the form is to be returned to the attending physician by the patient's representative. See § 443.11(c)(1). The attending physician is then required to add the form to the patient's medical record. § 443.11(c)(2), attached hereto at A-3.

2. The two felonies

The felonies were created by amending § 443.17(b), to make it a felony: (1) to exert undue influence on a patient to "ingest" the lethal dose; or (2) "to administer an aid-in-dying drug to an individual without his or her knowledge or consent." (Attached hereto at A-5).

B. Why the Amendments Do Not Work.

1. The most obvious problem with the form and the felony for administering an aid-in-dying drug without consent is that there is no required oversight when the form is executed by the patient and/or when the lethal dose is administered. Not even a witness is required.[4] If the patient protested about signing the form or even struggled against administration of the lethal dose, who would know?

The signed attestation form would also provide an alibi that everything was in order - no matter what the actual facts.

2. Under ABX2-15, the attending physician is not actually "required" to give the form to the patient given that health care professionals are merely held to a "good faith" standard under the bill.[5] This standard is not defined, but common meanings include that the person in question need not comply with legal technicalities when he or she has honest intent. See for example, this legal dictionary definition:

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[3] Id.

[4] See ABX2-15 in its entirety. (Attached hereto at A-1 to A-12).

[5] See ABX@-15, §§ 443.19(d), 443.14(b), 443.14(d)(1) and 443.15(c) (setting forth a "good faith" standard).

> [Good faith means an] honest intent to act without taking an unfair advantage over another person or to fulfill a promise to act, even when some legal technicality is not fulfilled. (Emphasis added).[6]

With the physician not actually required to give the patient the form, any purported protection it provides is illusory.

3. There is no enforcement mechanism for the patient's representative to return the attestation form to the attending physician. Indeed, the patient may have no such person to do it.

4. If the signed form is provided to the attending physician, the bill merely "requires" that he or she place the form in the in the patient's medical record as opposed to providing it to law enforcement to verify the signature, investigate, etc. Moreover, and once again, the physician is not actually "required" to do anything.

5. The other felony, concerning undue influence in the context of ingesting the lethal dose, is also unenforceable. This is because the felony of undue influence is not defined and otherwise vague. See below for more detail.

C. The Provision Making Undue Influence a Felony is Too Vague to be Enforced.

ABX2-15 imposes criminal liability for "undue influence," which is not defined. ABX2-15 merely states:

> Knowingly coercing or exerting undue influence on an individual to request or ingest an aid-in-dying drug for the purpose of ending his or her life or to destroy a withdrawal or rescission of a request, or to administer an aid-in-dying drug to an individual without his or her knowledge or consent, is punishable as a felony. (Emphasis added).[7]

In California's Welfare and Institutions Code, by contrast, a determination of undue influence is based on a list of

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[6] http://legal-dictionary.thefreedictionary.com/good+faith (Copy attached hereto at A-6)

[7] ABX2-15, § 443.17(b), attached at A-5

enumerated factors, for example, that the victim was ill and the person influencing her was a health care professional.[8]

This scenario is specifically allowed by ABX2-15. Under ABX2-15, an "attending physician" is permitted to "counsel" (influence) an ill person to end his or her life.[9]

How do you prove that criminal "undue influence" occurred under ABX2-15, when the bill does not define it and specifically allows conduct used to prove undue influence in another context? It's hard to say.

When reasonable people must guess at the meaning of a criminal statute, which is the case here, the statute is too vague to be enforced. *People v. Acosta*, 226 Cal.App.4th 108, 116-117, 171 Cal.Rptr.3d 774 (2014), states:

> A statute which . . . forbids . . . the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the due process requirement of adequate notice. (Internal punctuation removed).

With ABX2-15's prohibition against undue influence too vague to be enforced, a purported patient protection is once again illusory.

D. ABX2-15 Allows Non-voluntary and Involuntary Killing.

Under the current version of ABX2-15, there continues to be a complete lack of oversight at the death. Not even a witness is required. Even if the patient struggled, who would know?

The bill thus STILL allows non-voluntary and involuntary killing. ABX2-15 must be rejected.

Please contact me with any questions or concerns at 206 697 1217. Thank you.

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[8] Welfare and Institutions Code, § 15610.70(a). (Attached at A-55)

[9] See e.g., ABX2-15, § 443.5(a)(5). (Attached at A-2).

Sincerely,

/S/

Margaret K Dore, Esq., MBA

(2) The request shall be signed and dated, in the presence of two witnesses, by the individual seeking the aid-in-dying drug.

(3) The request shall be witnessed by at least two other adult persons who, in the presence of the individual, shall attest that to the best of their knowledge and belief the individual is all of the following:

(A) An individual who is personally known to them or has provided proof of identity.

(B) An individual who voluntarily signed this request in their presence.

(C) An individual whom they believe to be of sound mind and not under duress, fraud, or undue influence.

(D) Not an individual for whom either of them is the attending physician, consulting physician, or mental health specialist.

(c) Only one of the two witnesses at the time the written request is signed may:

(1) Be related to the qualified individual by blood, marriage, registered domestic partnership, or adoption or be entitled to a portion of the individual's estate upon death.

(2) Own, operate, or be employed at a health care facility where the individual is receiving medical treatment or resides.

(d) The attending physician, consulting physician, or mental health specialist of the individual shall not be one of the witnesses required pursuant to paragraph (3) of subdivision (b).

443.4. *(a) An individual may at any time withdraw or rescind his or her request for an aid-in-dying drug, or decide not to ingest an aid-in-dying drug, without regard to the individual's mental state.*

(b) A prescription for an aid-in-dying drug provided under this part may not be written without the attending physician directly, and not through a designee, offering the individual an opportunity to withdraw or rescind the request.

443.5. *(a) Before prescribing an aid-in-dying drug, the attending physician shall do all of the following:*

(1) Make the initial determination of all of the following:

(A) (i) Whether the requesting adult has the capacity to make medical decisions.

(ii) If there are indications of a mental disorder, the physician shall refer the individual for a mental health specialist assessment.

(iii) If a mental health specialist assessment referral is made, no aid-in-dying drugs shall be prescribed until the mental health specialist determines that the individual has the capacity to make medical decisions and is not suffering from impaired judgment due to a mental disorder.

(B) Whether the requesting adult has a terminal disease.

(C) Whether the requesting adult has voluntarily made the request for an aid-in-dying drug pursuant to Sections 443.2 and 443.3.

(D) Whether the requesting adult is a qualified individual pursuant to subdivision (o) of Section 443.1.

(2) Confirm that the individual is making an informed decision by discussing with him or her all of the following:

(A) His or her medical diagnosis and prognosis.

(B) The potential risks associated with ingesting the requested aid-in-dying drug.

(C) The probable result of ingesting the aid-in-dying drug.

(D) The possibility that he or she may choose to obtain the aid-in-dying drug but not take it.

(E) The feasible alternatives or additional treatment options, including, but not limited to, comfort care, hospice care, palliative care, and pain control.

(3) Refer the individual to a consulting physician for medical confirmation of the diagnosis and prognosis, and

for a determination that the individual has the capacity to make medical decisions and has complied with the provisions of this part.

(4) Confirm that the qualified individual's request does not arise from coercion or undue influence by another person by discussing with the qualified individual, outside of the presence of any other persons, except for an interpreter as required pursuant to this part, whether or not the qualified individual is feeling coerced or unduly influenced by another person.

(5) Counsel the qualified individual about the importance of all of the following:

(A) Having another person present when he or she ingests the aid-in-dying drug prescribed pursuant to this part.

(B) Not ingesting the aid-in-dying drug in a public place.

(C) Notifying the next of kin of his or her request for an aid-in-dying drug. A qualified individual who declines or is unable to notify next of kin shall not have his or her request denied for that reason.

(D) Participating in a hospice program.

(E) Maintaining the aid-in-dying drug in a safe and secure location until the time that the qualified individual will ingest it.

(6) Inform the individual that he or she may withdraw or rescind the request for an aid-in-dying drug at any time and in any manner.

(7) Offer the individual an opportunity to withdraw or rescind the request for an aid-in-dying drug before prescribing the aid-in-dying drug.

(8) Verify, immediately before writing the prescription for an aid-in-dying drug, that the qualified individual is making an informed decision.

(9) Confirm that all requirements are met and all appropriate steps are carried out in accordance with this part before writing a prescription for an aid-in-dying drug.

(10) Fulfill the record documentation required under Sections 443.8 and 443.19.

(11) Complete the attending physician checklist and compliance form, as described in Section 443.22, include it and the consulting physician compliance form in the individual's medical record, and submit both forms to the State Department of Public Health.

(12) Give the qualified individual the final attestation form, with the instruction that the form be filled out and executed by the qualified individual within 48 hours prior to the qualified individual choosing to self-administer the aid-in-dying drug.

(b) If the conditions set forth in subdivision (a) are satisfied, the attending physician may deliver the aid-in-dying drug in any of the following ways:

(1) Dispensing the aid-in-dying drug directly, including ancillary medication intended to minimize the qualified individual's discomfort, if the attending physician meets all of the following criteria:

(A) Is authorized to dispense medicine under California law.

(B) Has a current United States Drug Enforcement Administration (USDEA) certificate.

(C) Complies with any applicable administrative rule or regulation.

(2) With the qualified individual's written consent, contacting a pharmacist, informing the pharmacist of the prescriptions, and delivering the written prescriptions personally, by mail, or electronically to the pharmacist, who may dispense the drug to the qualified individual, the attending physician, or a person expressly designated by the qualified individual and with the designation delivered to the pharmacist in writing or verbally.

(c) Delivery of the dispensed drug to the qualified individual, the attending physician, or a person expressly designated by the qualified individual may be made by personal delivery, or, with a signature required on

form followed consultations with an attending and consulting physician.
I declare that I am fluent in English and (insert target language) and further declare under penalty of perjury that the foregoing is true and correct.
Executed at (insert city, county, and state) on this (insert day of month) of (insert month), (insert year).
X_____Interpreter signature
X_____Interpreter printed name
X_____Interpreter address

(3) An interpreter whose services are provided pursuant to paragraph (2) shall not be related to the qualified individual by blood, marriage, registered domestic partnership, or adoption or be entitled to a portion of the person's estate upon death. An interpreter whose services are provided pursuant to paragraph (2) shall meet the standards promulgated by the California Healthcare Interpreting Association or the National Council on Interpreting in Health Care or other standards deemed acceptable by the department for health care providers in California.

(c) The final attestation form given by the attending physician to the qualified individual at the time the attending physician writes the prescription shall appear in the following form:

FINAL ATTESTATION FOR AN AID-IN-DYING DRUG TO END MY LIFE IN A HUMANE AND DIGNIFIED MANNER I, ..., am an adult of sound mind and a resident of the State of California.
I am suffering from ....., which my attending physician has determined is in its terminal phase and which has been medically confirmed.
I have been fully informed of my diagnosis and prognosis, the nature of the aid-in-dying drug to be prescribed and potential associated risks, the expected result, and the feasible alternatives or additional treatment options, including comfort care, hospice care, palliative care, and pain control.
I have received the aid-in-dying drug and am fully aware that this aid-in-dying drug will end my life in a humane and dignified manner.
INITIAL ONE:
..... I have informed one or more members of my family of my decision and taken their opinions into consideration.
..... I have decided not to inform my family of my decision.
..... I have no family to inform of my decision.
My attending physician has counseled me about the possibility that my death may not be immediately upon the consumption of the drug.
I make this decision to ingest the aid-in-dying drug to end my life in a humane and dignified manner. I understand I still may choose not to ingest the drug and by signing this form I am under no obligation to ingest the drug. I understand I may rescind this request at any time.
Signed:.....
Dated:.....
Time:.....

(1) Within 48 hours prior to the individual self-administering the aid-in-dying drug, the individual shall complete the final attestation form. If aid-in-dying medication is not returned or relinquished upon the patient's death as required in Section 443.20, the completed form shall be delivered by the individual's health care provider, family member, or other representative to the attending physician to be included in the patient's medical record.

(2) Upon receiving the final attestation form the attending physician shall add this form to the medical records

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of the qualified individual.

443.12. *(a) A provision in a contract, will, or other agreement executed on or after January 1, 2016, whether written or oral, to the extent the provision would affect whether a person may make, withdraw, or rescind a request for an aid-in-dying drug is not valid.*

(b) An obligation owing under any contract executed on or after January 1, 2016, may not be conditioned or affected by a qualified individual making, withdrawing, or rescinding a request for an aid-in-dying drug.

443.13. *(a) (1) The sale, procurement, or issuance of a life, health, or annuity policy, health care service plan contract, or health benefit plan, or the rate charged for a policy or plan contract may not be conditioned upon or affected by a person making or rescinding a request for an aid-in-dying drug.*

(2) Pursuant to Section 443.18, death resulting from the self-administration of an aid-in-dying drug is not suicide, and therefore health and insurance coverage shall not be exempted on that basis.

(b) Notwithstanding any other law, a qualified individual's act of self-administering an aid-in-dying drug shall not have an effect upon a life, health, or annuity policy other than that of a natural death from the underlying disease.

(c) An insurance carrier shall not provide any information in communications made to an individual about the availability of an aid-in-dying drug absent a request by the individual or his or her attending physician at the behest of the individual. Any communication shall not include both the denial of treatment and information as to the availability of aid-in-dying drug coverage. For the purposes of this subdivision, "insurance carrier" means a health care service plan as defined in Section 1345 of this code or a carrier of health insurance as defined in Section 106 of the Insurance Code.

443.14. *(a) Notwithstanding any other law, a person shall not be subject to civil or criminal liability solely because the person was present when the qualified individual self-administers the prescribed aid-in-dying drug. A person who is present may, without civil or criminal liability, assist the qualified individual by preparing the aid-in-dying drug so long as the person does not assist the qualified person in ingesting the aid-in-dying drug.*

(b) A health care provider or professional organization or association shall not subject an individual to censure, discipline, suspension, loss of license, loss of privileges, loss of membership, or other penalty for participating in good faith compliance with this part or for refusing to participate in accordance with subdivision (e).

(c) Notwithstanding any other law, a health care provider shall not be subject to civil, criminal, administrative, disciplinary, employment, credentialing, professional discipline, contractual liability, or medical staff action, sanction, or penalty or other liability for participating in this part, including, but not limited to, determining the diagnosis or prognosis of an individual, determining the capacity of an individual for purposes of qualifying for the act, providing information to an individual regarding this part, and providing a referral to a physician who participates in this part. Nothing in this subdivision shall be construed to limit the application of, or provide immunity from, Section 443.16 or 443.17.

(d) (1) A request by a qualified individual to an attending physician to provide an aid-in-dying drug in good faith compliance with the provisions of this part shall not provide the sole basis for the appointment of a guardian or conservator.

(2) No actions taken in compliance with the provisions of this part shall constitute or provide the basis for any claim of neglect or elder abuse for any purpose of law.

(e) (1) Participation in activities authorized pursuant to this part shall be voluntary. Notwithstanding Sections 442 to 442.7, inclusive, a person or entity that elects, for reasons of conscience, morality, or ethics, not to engage in activities authorized pursuant to this part is not required to take any action in support of an individual's decision under this part.

(2) Notwithstanding any other law, a health care provider is not subject to civil, criminal, administrative, disciplinary, employment, credentialing, professional discipline, contractual liability, or medical staff action, sanction, or penalty or other liability for refusing to participate in activities authorized under this part, including, but not limited to, refusing to inform a patient regarding his or her rights under this part, and not referring an individual to a physician who participates in activities authorized under this part.

(3) If a health care provider is unable or unwilling to carry out a qualified individual's request under this part

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(3) "Participating, or entering into an agreement to participate, in activities under this part" does not include doing, or entering into an agreement to do, any of the following:

(A) Diagnosing whether a patient has a terminal disease, informing the patient of the medical prognosis, or determining whether a patient has the capacity to make decisions.

(B) Providing information to a patient about this part.

(C) Providing a patient, upon the patient's request, with a referral to another health care provider for the purposes of participating in the activities authorized by this part.

(g) Any action taken by a prohibiting provider pursuant to this section shall not be reportable under Sections 800 to 809.9, inclusive, of the Business and Professions Code. The fact that a health care provider participates in activities under this part shall not be the sole basis for a complaint or report by another health care provider of unprofessional or dishonorable conduct under Sections 800 to 809.9, inclusive, of the Business and Professions Code.

(h) Nothing in this part shall prevent a health care provider from providing an individual with health care services that do not constitute participation in this part.

443.16. *(a) A health care provider may not be sanctioned for any of the following:*

(1) Making an initial determination pursuant to the standard of care that an individual has a terminal disease and informing him or her of the medical prognosis.

(2) Providing information about the End of Life Option Act to a patient upon the request of the individual.

(3) Providing an individual, upon request, with a referral to another physician.

(b) A health care provider that prohibits activities under this part in accordance with Section 443.15 shall not sanction an individual health care provider for contracting with a qualified individual to engage in activities authorized by this part if the individual health care provider is acting outside of the course and scope of his or her capacity as an employee or independent contractor of the prohibiting health care provider.

(c) Notwithstanding any contrary provision in this section, the immunities and prohibitions on sanctions of a health care provider are solely reserved for actions of a health care provider taken pursuant to this part. Notwithstanding any contrary provision in this part, health care providers may be sanctioned by their licensing board or agency for conduct and actions constituting unprofessional conduct, including failure to comply in good faith with this part.

443.17. *(a) Knowingly altering or forging a request for an aid-in-dying drug to end an individual's life without his or her authorization or concealing or destroying a withdrawal or rescission of a request for an aid-in-dying drug is punishable as a felony if the act is done with the intent or effect of causing the individual's death.*

(b) Knowingly coercing or exerting undue influence on an individual to request or ingest an aid-in-dying drug for the purpose of ending his or her life or to destroy a withdrawal or rescission of a request, or to administer an aid-in-dying drug to an individual without his or her knowledge or consent, is punishable as a felony.

(c) For purposes of this section, "knowingly" has the meaning provided in Section 7 of the Penal Code.

(d) The attending physician, consulting physician, or mental health specialist shall not be related to the individual by blood, marriage, registered domestic partnership, or adoption, or be entitled to a portion of the individual's estate upon death.

(e) Nothing in this section shall be construed to limit civil liability.

(f) The penalties in this section do not preclude criminal penalties applicable under any law for conduct inconsistent with the provisions of this section.

443.18. *Nothing in this part may be construed to authorize a physician or any other person to end an individual's life by lethal injection, mercy killing, or active euthanasia. Actions taken in accordance with this part shall not, for any purposes, constitute suicide, assisted suicide, homicide, or elder abuse under the law.*

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443.19. *(a) The State Department of Public Health shall collect and review the information submitted pursuant to Section 443.9. The information collected shall be confidential and shall be collected in a manner that*

make, when sufficient evidence demonstrates that those transactions were made in good faith. As in commercial law, the use of good faith in this case enhances corporate business practices, as agents of a corporation are free to act quickly, decisively, and sometimes wrongly to advance the interests of the corporation. Good faith insulates corporate officers from disgruntled shareholders.

Further readings

Bristow, David I., and Reva Seth. 2000. "Good Faith in Negotiations." *Dispute Resolution Journal* 55 (November): 17.

Carter, Roger L. 2002. "Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations." *Journal of Dispute Resolution* 2002 (fall): 367–405.

good faith

n. honest intent to act without taking an unfair advantage over another person or to fulfill a promise to act, even when some legal technicality is not fulfilled. The term is applied to all kinds of transactions.

good faith *noun* bona fide, goodness, honest effort, probity, rectitude, sanctity, uprightness

Associated concepts: good faith attempt, good faith estiiate, good faith purchaser, offer in good faith

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See also: **fidelity, integrity, loyalty, probity**

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Effective: January 01, 2014

West's Annotated California Codes Currentness
Welfare and Institutions Code (Refs & Annos)
Division 9. Public Social Services (Refs & Annos)
Part 3. Aid and Medical Assistance (Refs & Annos)
Chapter 11. Elder Abuse and Dependent Adult Civil Protection Act (Refs & Annos)
Article 2. Definitions (Refs & Annos)

→ § 15610.70. Undue influence

(a) "Undue influence" means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:

(1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.

(2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.

(3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:

(A) Controlling necessaries of life, medication, the victim's interactions with others, access to information, or sleep.

(B) Use of affection, intimidation, or coercion.

(C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

(4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

(b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

CREDIT(S)

(Added by Stats.2013, c. 668 (A.B.140), § 3.)