



**DEPARTMENT OF THE ATTORNEY GENERAL**

**DAVID Y. IGE**  
GOVERNOR

**DOUGLAS S. CHIN**  
ATTORNEY GENERAL

For Immediate Release  
July 14, 2017

News Release 2017-91

**STATE CIRCUIT COURT DISMISSES MEDICAL AID-IN-DYING CASE**

HONOLULU – Today an Oahu circuit judge dismissed a lawsuit asking the court to prevent existing Hawaii criminal laws from being applied to medical aid in dying practices. In its decision, the court relied upon state legal precedent that prohibited it from issuing such relief.

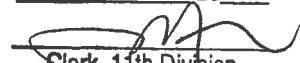
Legislation was introduced this year to legalize medical aid in dying in Hawaii and establish a regulatory process under which an adult resident of the state with a medically confirmed terminal disease may obtain a prescription for medication to be self-administered to end the patient's life. The bill was deferred on March 23, 2017. Noting that the legislation generated 2,613 pages of testimony and comments, the court said "this underscores that the relief sought by the plaintiffs is political, not judicial, in nature and should be addressed by the political branches of government."

A copy of the court's decision is attached.

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Clark, 1st Division

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

JOHN RADCLIFFE, CHARLES  
MILLER, M.D., and COMPASSION &  
CHOICES,

Plaintiffs,

vs.

STATE OF HAWAI'I, DOUGLAS CHIN,  
Attorney General, and KEITH M.  
KANESHIRO, Prosecuting  
Attorney for the City and  
County of Honolulu,

Defendants.

CIVIL NO. 17-1-0053-01 (KKH)

ORDER GRANTING ATTORNEY  
GENERAL'S MOTION TO DISMISS  
AND PROSECUTING ATTORNEY'S  
JOINDER, AND DENYING  
PROSECUTING ATTORNEY'S MOTION  
TO DISMISS AS MOOT; NOTICE OF  
ENTRY

ORDER GRANTING ATTORNEY GENERAL'S MOTION TO DISMISS  
AND PROSECUTING ATTORNEY'S JOINDER, AND DENYING  
PROSECUTING ATTORNEY'S MOTION TO DISMISS AS MOOT

This case involves the subject referred to as "physician aid-in-dying."<sup>1</sup> Accepting the allegations made in the complaint as true and viewing them in the light most favorable to the plaintiffs, Hungate v. Law Office of David B. Rosen, 139 Hawai'i 394, 401 (2017), plaintiff John Radcliffe has incurable, terminal cancer. He is a mentally competent adult and wants to end his life when, in his opinion, his suffering becomes unbearable. The current and a former Hawai'i Attorney General have formally

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<sup>1</sup> E.g., [www.nytimes.com/2017/01/16/health/physician-aid-in-dying.html](http://www.nytimes.com/2017/01/16/health/physician-aid-in-dying.html).

opined that a physician who provides assistance with dying could be criminally charged under Hawai'i law. Plaintiff Charles Miller is a licensed physician who, but for potentially being subject to criminal prosecution, would issue Mr. Radcliffe a prescription for a drug which would cause death when self-administered by Mr. Radcliffe. Plaintiff Compassion & Choices is a non-profit organization dedicated to improving care and expanding choice at the end of life.<sup>2</sup>

Plaintiffs' complaint was filed on January 11, 2017. It seeks a judgment declaring that **(1)** Haw. Rev. Stat. §§ 707-701.5<sup>3</sup> and 707-702<sup>4</sup> are unconstitutional as applied to the acts of a physician who provides medical aid in dying to a mentally competent, terminally ill adult patient facing a dying process that the patient finds intolerable, **(2)** Haw. Rev. Stat. § 453-1 ("Practice of medicine defined.") permits medical aid in dying,

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<sup>2</sup> Compassion & Choices was recently granted leave to file an amicus brief for the New York Supreme Court's consideration in an appeal from Myers v. Schneiderman, 31 N.Y.S.3d 45 (App.Div. 2016) (holding that New York laws prohibiting licensed physician from providing aid in dying do not violate New York state constitution). Myers v. Schneiderman, 75 N.E.3d 673 (N.Y. 2017).

<sup>3</sup> **§ 707-701.5. Murder in the second degree**

(1) Except as provided in section 707-701 [murder in the first degree], a person commits the offense of murder in the second degree if the person intentionally or knowingly causes the death of another person.

<sup>4</sup> **§ 707-702. Manslaughter**

(1) A person commits the offense of manslaughter if:

\* \* \*

(b) The person intentionally causes another person to commit suicide.

and (3) no Hawai'i statute bars the acts of a physician who provides medical aid in dying to a mentally competent, terminally ill adult patient facing a dying process that the patient finds intolerable. The complaint also seeks an injunction and an award of attorneys fees.

Defendants State of Hawai'i and its attorney general, Douglas S. Chin, filed a Rule 12(b)(6) motion to dismiss on March 9, 2017. Defendant Keith M. Kaneshiro, the prosecuting attorney for the City and County of Honolulu, joined in the Attorney General's motion. The Prosecuting Attorney filed his own Rule 12(b)(6) motion to dismiss on March 10, 2017. Both motions were heard on July 13, 2017. For the reasons explained below, the court GRANTS the Attorney General's motion to dismiss and the Prosecuting Attorney's joinder, and DENIES the Prosecuting Attorney's motion to dismiss as moot since the court declines to address the constitutional issues raised by the latter motion.

#### I.

Although only mentioned in passing by the Attorney General's motion, the issue of standing must be addressed first because it implicates the court's jurisdiction. McDermott v. Ige, 135 Hawai'i 275, 283 (2015). Legal standing requirements promote the separation of powers between the three branches of government by limiting the availability of judicial review. Id., 135 Hawai'i at 278.

[J]udicial power to resolve public disputes in a system of government where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context. For prudential rules of judicial self-governance founded in concern about the proper and properly limited role of courts in a democratic society are always of relevant

concern. And even in the absence of constitutional restrictions, courts still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government.

Life of the Land v. Land Use Comm'n, 63 Haw. 166, 171-72 (1981) (citations and internal quotation marks omitted). Legal standing is evaluated using the three-part injury-in-fact test; the plaintiff must allege that: **(1)** he or she has suffered an actual or threatened injury as a result of the defendant's wrongful conduct; **(2)** the injury is fairly traceable to the defendant's actions; and **(3)** a favorable decision would likely provide relief for the plaintiff's injury. McDermott, 135 Hawai'i at 284.

The complaint in this case seeks declaratory relief pursuant to Hawai'i Revised Statutes Chapter 632. Section 632-1 provides, in relevant part:

(a) In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right[.] \* \* \* Controversies involving the interpretation of . . . statutes . . . may be so determined[.]

(b) Relief by declaratory judgment may be granted in civil cases where . . . a party asserts a . . . right . . . in which the party has a concrete interest and that there is a challenge or denial of the asserted . . . right . . . by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.

"[F]or the purposes of establishing standing in an action for declaratory relief, HRS § 632-1 interposes less stringent requirements for access and participation in the court process." Citizens for Protection of North Kohala Coastline v. County of Hawai'i, 91 Hawai'i 94, 100 (1999). Chapter 632 is remedial in nature; "Its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle the party to maintain an ordinary action therefor." HRS § 632-6. It is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people. Citizens for Protection, 91 Hawai'i at 100 (citations and alterations omitted). For that reason, "[t]he standing doctrine should not create a barrier to justice where one's legitimate interests have, in fact, been injured." McDermott, 135 Hawai'i at 284.

Mr. Radcliffe contends that he, as a mentally competent but terminally ill adult, has a fundamental right under the Hawai'i Constitution to obtain Dr. Miller's aid in dying, and that the Hawai'i murder and manslaughter statutes are unconstitutionally depriving him of that right. The defendants are the chief law enforcement officer for the state, who has formally opined that a physician who provides assistance with dying could be criminally charged under Hawai'i law, and the prosecuting attorney with the primary authority and responsibility for initiating and conducting criminal prosecutions within the county in which Dr. Miller practices. Amemiya v. Sapienza, 63 Haw. 424, 427 (1981).

Mr. Radcliffe has alleged an actual injury-in-fact fairly traceable to the defendant Attorney General's allegedly wrongful legal opinion for which a favorable court decision would likely provide relief. The court concludes that Mr. Radcliffe has standing to maintain this declaratory judgment action. Having determined that

Mr. Radcliffe has legal standing, the court can proceed to a decision on the merits of the case and need not determine whether the other plaintiffs also have standing. McDermott, 135 Hawai'i at 284.

## II.

### A.

The Attorney General argues, with the Prosecuting Attorney joining, that a declaratory relief action is not the appropriate vehicle to challenge a criminal statute, citing Kahaikupuna v. State, 109 Hawai'i 230 (2005). In Kahaikupuna the plaintiffs were descendants of native Hawaiians who sought a judgment declaring that they had the right to raise and fight roosters as a "traditional native Hawaiian cultural practice," 109 Hawai'i at 232, notwithstanding the state and Maui county criminal laws prohibiting cockfighting. The plaintiffs had not actually been charged with any criminal offense. The circuit court granted the county's motion to dismiss (which was treated as a motion for summary judgment) and the state's joinder on substantive grounds. The court concluded that the plaintiffs "failed to overcome the presumption that state and county laws that prohibit cockfighting are constitutional, or [establish] that the constitutional defect in such laws is clear, manifest, and unmistakable." 109 Hawai'i at 232 n.9. The plaintiffs appealed.

The Supreme Court first noted that Hawai'i law follows the traditional view "that declarative relief is inappropriate as to criminal matters . . . but allows for certain exceptions." 109 Hawai'i at 235. The Court cited Pacific Meat Co. v. Otagaki, 47 Haw. 652, 655 (1964) for the proposition that a declaratory judgment action "cannot be utilized to circumvent the general rule that equity will not enjoin the enforcement of a valid criminal statute; neither will it be used to determine in advance

precise rights existing between the public and law violators on particular facts where no special circumstances require it." 109 Hawai'i at 235 (alteration omitted). The "special circumstances" present in Pacific Meat Co. were (1) the criminal statute at issue<sup>5</sup> was malum prohibitum,<sup>6</sup> (2) the statute directly affected the plaintiff's property rights in a continuing course of business,<sup>7</sup> and (3) a method of testing the statute was not in fact available in criminal court because the defendants<sup>8</sup> refused to initiate criminal proceedings. Kahaikupuna, 109 Hawai'i at 236 (citing Pacific Meat Co., 47 Haw. at 656).

The Supreme Court observed that only one of the three Pacific Meat Co. factors was present in Kahaikupuna - the cock-fighting laws were malum prohibitum. 109 Hawai'i at 236. The challenge in Kahaikupuna did not "involve a continuing course of business," and there was no indication that the state or county had refused to prosecute the plaintiffs for cockfighting. Id. Under those circumstances, the Supreme Court held:

[D]eclaratory relief will not ordinarily be employed to determine the enforcement of criminal statutes, and ***in the absence of the particular circumstances like those in***

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<sup>5</sup> Act 109, S.L.H. 1961, requiring uncooked poultry to be labeled with its geographic origin.

<sup>6</sup> Malum prohibitum describes "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral. Misdemeanors such as jay-walking and running a stoplight are mala prohibita, as are many regulatory violations." Kahaikupuna, 109 Hawai'i at 236 n.11 (quoting Black's Law Dictionary 978 (8th ed. 2004)).

<sup>7</sup> Pacific Meat Co. was a wholesaler of food products.

<sup>8</sup> The chair and members of the Hawai'i state board of agriculture.



Pacific Meat Co., we believe it is inappropriate here.

109 Hawai'i at 237 (emphasis added).

None of the Pacific Meat Co. factors are present in this case. The murder and manslaughter statutes at issue here are malum in se,<sup>9</sup> not malum prohibitum. They do not affect property rights in a continuing course of business.<sup>10</sup> And there is no allegation that law enforcement officials declined to prosecute Dr. Miller or any other physician who provided aid in dying.<sup>11</sup>

The plaintiffs in this case contend, as did Justice Levinson in his concurring and dissenting opinion in Kahaikupuna, that "the threat of prosecution, in the absence of an actual case pending against the same plaintiff, may justify a declaratory judgment action." 109 Hawai'i at 237 (emphasis added). In this case the party claiming the right to a physician's aid in dying -

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<sup>9</sup> Malum in se describes an act that is "inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state. Such are most or all of the offenses cognizable at common law (without the denouncement of a statute); as murder, larceny, etc." State v. Torres, 66 Haw. 281, 287 n.7 (1983) (quoting Black's Law Dictionary 865 (5th ed. 1979)). Although not explicitly stated in Kahaikupuna, the rationale appears to be that a purely regulatory statute is more likely to be arbitrary or unconstitutional than a law which prohibits an inherent evil.

<sup>10</sup> The court recognizes that Dr. Miller claims the murder and manslaughter statutes "deter [him] from providing medical aid in dying to [his] qualifying patients[.]" Complaint, ¶23. Even if Dr. Miller's medical practice qualifies as "a continuing course of business," Dr. Miller does not allege that he regularly provides aid in dying to his patients as part of that business. Nor is he the party claiming to have the constitutional right to receive a physician's aid in dying.

<sup>11</sup> Were that the case, there would arguably be no "actual controversy" to trigger jurisdiction under HRS § 632-1.

Mr. Radcliffe - is not "the same plaintiff" who would be prosecuted under the criminal statutes being challenged. Whether that or any of the other facts alleged in the complaint constitutes "other circumstances [as] would justify declaratory relief" in the absence of any of the three Pacific Meat Co. circumstances, Kahaikupuna, 109 Hawai'i at 237, n.13, is for the appellate courts to decide. The Supreme Court's directive is binding on this circuit court:

While criminal proceedings may be inconvenient and costly . . . it is the best forum to resolve all of the factual,<sup>12</sup> statutory<sup>13</sup> and constitutional questions that may arise in this case. \* \* \* The relief that Plaintiffs request is essentially one of injunctive relief and would prohibit the State and County from enforcing [the cock-fighting statutes] against them. Such an injunction would greatly interfere with the enforcement of the law, especially in the determination of who should or should not be prosecuted. A declarative judgement [sic] in favor of Plaintiffs in this context would likely hinder enforcement of what are presumptively valid laws. \* \* \* As noted above, declaratory relief will not ordinarily be

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<sup>12</sup> For example, whether the patient was in fact mentally competent and terminally ill when the physician's aid in dying was requested, or given, or acted upon by the patient, whether the physician knew or reasonably should have known that the patient would not be physically able to self-administer the prescribed medication, or whether it was actually the patient or another person who administered or aided in administering the lethal dose of medication.

<sup>13</sup> For example, whether and under what circumstances a physician who prescribes medication "intentionally causes" a patient's subsequent suicide, whether and under what circumstances accessory liability under HRS §§ 702-221 and 222 could also apply, and whether and under what circumstances the defenses of consent (HRS § 702-233) or choice of evils/necessity (HRS § 703-302) could apply.

employed to determine the enforcement of criminal statutes, and in the absence of the particular circumstances like those in Pacific Meat Co., we believe it is inappropriate here.

Kahaikupuna, 109 Hawai'i at 237 (citations omitted) (footnotes added). Accordingly, the complaint for declaratory and injunctive relief as to HRS §§ 707-701.5 and 707-702 is dismissed.

**B.**

Plaintiffs also seek a judgment declaring that Haw. Rev. Stat. § 453-1 permits medical aid in dying. Chapter 453 of the Hawai'i Revised Statutes regulates the practice of medicine. The enforcement entity is the Hawai'i Department of Commerce and Consumer Affairs. HRS § 453-7.5. The regulatory authority is the Hawai'i Medical Board. HRS §§ 453-5, 453-5.1, 453-8, et seq. Neither of these governmental entities is a party to this action. The court has not been asked to review a final decision or order in a contested case before the medical board pursuant to HRS § 91-14. The Hawai'i Supreme Court has held that a declaratory judgment is a discretionary equitable remedy, which a court should be reluctant to grant, especially where governmental action is involved, unless the need for an equitable remedy is clear:

A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. **Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.**

Application of Air Terminal Services, Inc., 47 Haw. 499, 531 (1964) (formatting altered, emphasis added) (quoting Eccels v. Peoples Bank of Lakewood Village, 333 U.S. 426, 431 (1948)). Under the circumstances of this case, the court declines to interfere with the function and primary jurisdiction of the medical board and the DCCA, the governmental entities charged with regulation and enforcement under HRS Chapter 453.<sup>14</sup>

C.

Plaintiffs seek a judgment declaring that no Hawai'i statute bars the acts of a physician who provides medical aid in dying to a mentally competent, terminally ill adult patient facing a dying process that the patient finds intolerable. For the reasons set forth in sections A. and B. above, the court is not authorized to grant declaratory relief on any criminal statutes that might apply, and the court declines to interfere with the function and primary jurisdiction of the governmental entities charged with regulation and enforcement under HRS Chapter 453. As to the potential applicability of any other yet-to-be-identified statute, the issue is not ripe for decision and the court is not authorized to give advisory opinions. Kapuwai v. City and County of Honolulu, 121 Hawai'i 33, 41 (2009).

D.

Plaintiffs seek an order enjoining the defendants from enforcing HRS §§ 707-701.5 and 707-702 against Hawai'i physicians who provide medical aid in dying to mentally-competent,

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<sup>14</sup> Although the issue was not raised by either defendant's motion to dismiss, the court questions whether the DCCA and the Medical Board are necessary parties under Haw. R. Civ. P. 19(a) to the extent plaintiffs seek a declaratory judgment concerning HRS § 453-1.

terminally-ill patients who request such assistance. Since "equity will not enjoin the enforcement of a [presumptively] valid criminal statute[,]” Kahaikupuna, 109 Hawai‘i at 235 (quoting Pacific Meat Co., 47 Haw. 652, 655 (1964)) (alteration omitted) the court cannot issue the injunction requested by the plaintiffs.

**E.**

Finally, plaintiffs’ complaint alleges:

16. It is, or in light of the rights guaranteed by the Hawai‘i Constitution should be declared to be, the public policy of the State of Hawai‘i to allow physicians to provide medical aid in dying to their mentally-competent, terminally ill adult patients who are experiencing severe suffering at the end of life and request such assistance.

The complaint cites the Hawai‘i Uniform Health-Care Decisions Act (Modified), Haw. Rev. Stat. Chapter 327E, as an example of the public policy promoting the rights of privacy and autonomy in end-of-life care decisions. But see HRS § 327E-13© (“This chapter shall not authorize . . . assisted suicide”) and HRS § 703-308 (use of force to prevent suicide justified). The court notes that Senate Bill No. 1129 SD2 (2017), the proposed Medical Aid in Dying Act, generated 2,613 pages of testimony and comments from diverse organizations and individuals before ultimately being deferred by the House Health Committee. All of this underscores that the relief sought by the plaintiffs is political, not judicial, in nature and should be addressed by the political branches of government. See, TMJ Hawaii, Inc. v. Nippon Trust Bank, 113 Hawai‘i 373, 384 & n.6 (“the legislature . . . is better positioned to balance the policy considerations and

potential consequences that will flow from such a decision.”) (citing cases). Accord, Myers v. Schneiderman, 31 N.Y.S.3d 45, 55 (“the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government. Considering the complexity of the concerns presented here, we defer to the political branches of government on the question of whether aid-in-dying should be considered a prosecutable offense.”) (citation omitted).

For the foregoing reasons and any other good cause appearing in the record, the Attorney General’s motion to dismiss and the Prosecuting Attorney’s joinder are granted. The Prosecuting Attorney’s motion to dismiss is denied as moot.

Dated: Honolulu, Hawai‘i, July 14, 2017.

  
Judge of the Above-Entitled Court 

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Order Granting Attorney General’s Motion to Dismiss and Prosecuting Attorney’s Joinder, and Denying Prosecuting Attorney’s Motion to Dismiss as Moot: Radcliffe, et al. vs. State of Hawai‘i, et al., Civil No. 17-1-0053-01(KKH), Circuit Court of the First Circuit, State of Hawai‘i.

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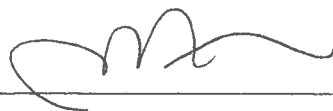
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NOTICE OF ENTRY

The foregoing Order in Civil No. 17-1-0053-01 (KKH) has been entered and copies thereof served on the above-identified parties by placing the same in their Circuit Court jackets or U.S. Postal Mail, on July 14, 2017.

A handwritten signature in black ink, appearing to be 'JMA', is written above a horizontal line.

Clerk of the Above-Entitled Court



