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Death with Dignity

What Do We Tell Our Clients?

In April 2009,* Bar News *ran an article by Pamela Hanlon on Washington's new Death with Dignity Act. This article presents an additional view.

by Margaret Dore

A client wants to know about the new Death with Dignity Act, which legalizes physician-assisted suicide in Washington state. Do you take the politically correct path and agree that it's the best thing since sliced bread? Or, do you do your job as a lawyer and tell him that the Act has problems and that he may want to take steps to protect himself? I would hope the latter.

Not What the Voters Were Promised

The new Act was passed by the voters as Initiative 1000 and has now been codified as Chapter 70.245 RCW. During the election, proponents touted it as providing "choice" for end-of-life decisions. A glossy brochure declared: "Only the patient and no one else may administer the [lethal dose]."[1]

The Act, however, doesn't say this anywhere. The Act also contains potentially coercive provisions. For example, it allows an heir who will benefit from the patient's death to help the patient sign up for the lethal dose.

How the Act Works

The Act has an application process to obtain the lethal dose, which includes a written request form with two required witnesses.[2] The Act allows one of these witnesses to be the patient's heir.[3] Once the lethal dose is issued by the pharmacy, there is no oversight.[4] The death is not required to be witnessed by disinterested persons.[5] Indeed, no one is required to be present.[6]

A Comparison to Probate Law

When signing a will, having an heir act as one of the witnesses creates a presumption of undue influence. The probate statute states that when one of two required witnesses is a taker under the will, there is a rebuttable presumption that the taker/witness: "…procured the gift by duress, menace, fraud, or undue influence." RCW 11.12.160(2). The Act's lethal dose request process, which allows an heir to be a witness on the lethal dose request form, does not promote patient choice. It invites coercion.

No Mental Standard or Consent Is Required at the Time of Administration

Under the Act, an "attending physician" and a "consulting physician" are required to determine whether the patient is competent at the time of the lethal dose request.[7] The Act does not, however, require that the patient be competent or even aware when the lethal dose is administered.[8] There is also no language requiring the client's consent at the time of administration.[9] Without a requirement of

competency, consent, or even awareness when the lethal dose is administered, the stage is set for undue influence and worse.

"Self-administer" Does Not Necessarily Mean that a Patient Administers the Lethal Dose to Himself

The Act does not state that "only" the patient may administer the lethal dose.[10] The Act instead provides that the patient "self-administer" the dose.[11] In an Orwellian twist, the term "self-administer" does not mean that administration will necessarily be by the patient. "Self-administer" is instead defined as the act of ingesting. The Act states:

"*Self-administer" means a qualified patient's act of ingesting* medication to end his or her life . . . . (Emphasis added). RCW 70.245.010(12).

In other words, someone else putting the lethal dose in the patient's mouth qualifies as "self-administration."[12] Someone else putting the lethal dose in a feeding tube or IV nutrition bag would also qualify.[13] "Self-administer" means that someone else can administer the lethal dose to the patient.

In summary, someone other than the patient is allowed to administer the lethal dose. The Act contains no requirement that the patient be competent or even aware when the lethal dose is administered. There is no requirement that the patient consent when the lethal dose is administered.

Intentionally killing an incompetent person, or intentionally killing some other person without his consent, is homicide.[14] The Act, however, allows this result, as long as the action taken is according to the Act. The Act states:

Actions taken in accordance with this chapter do not, for any purpose, constitute suicide, assisted suicide, mercy killing, or *homicide*, under the law. (Emphasis added). RCW 70.245.180(1).

The Right to Rescind Is Not a Substitute for Requiring Consent

The Act's proponents may counter that consent is actually required because patients have a right to rescind a request for the lethal dose "at any time."[15] A right to rescind is not the same thing as a right to consent when the lethal dose is administered. Consider, for example, an incompetent or unaware patient who obtained the lethal dose on a "just-in-case basis" and has not consented to taking it. He would not have the ability to rescind because he is incompetent, sedated, or simply sleeping. Without the right to consent, someone else would, nonetheless, be free to administer the lethal dose to him. Without the right to consent, the client's control over the "time, place, and manner" of his death is an illusion.

No Witnesses at the Death

If, for the purpose of argument, the Act does not "allow" a patient's death without consent, patients are, nonetheless, unprotected from this result, due to the lack of required witnesses at the death. Without witnesses, the opportunity is created for someone other than the patient to administer the lethal dose to the patient without his consent. Even if he struggled, who would know? The lethal dose request would provide the alibi. This scenario would seem especially significant for patients with money. A California case, *People v. Stuart*, 67 Cal Rptr. 3rd 129, 143 (2007), states: "Financial reasons [are] an all too common motivation for killing someone…"

No Liability for Administration Without Consent

Proponents may counter that the Act protects patients from wrongdoing due to provisions imposing civil and criminal liability in RCW 70.245.200. None of these provisions purports to prohibit administration of the lethal dose without the patient's consent. These provisions are instead concerned with the lethal dose request and general issues.[16]

Illusory Liability for Undue Influence

In connection with the lethal dose request, the Act purports to impose criminal liability for undue influence.[17] This purported liability is illusory because the concept of undue influence is too vague to be criminally enforced. (See *City of Tacoma v. Luvene*, 118 Wn.2d 826, 844-5, 827 P.2d 1374 (1992) (citizens must be given clear notice of prohibited conduct); and *Mays v. State*, 116 Wn. App. 864, 876, 68 P.3d 1114 (2003) (statute unconstitutionally vague where "reasonably intelligent people must guess as to its meaning").) As noted above, the Act specifically allows conduct that would normally create a presumption of undue influence (allowing an heir to act as a witness on the lethal dose request form). In addition, the Act's prohibition against undue influence is not defined and has no elements of proof.[18] Undue influence is also a traditionally equitable concept, which is "not susceptible of precise definition and must depend heavily on the facts of each case."[19] What elements would a prosecutor be required to prove for the purported "crime" of undue influence? It's hard to say.

Official Cover

In the event anyone questions a patient's death, a meaningful response from law enforcement, generally, seems unlikely. This is because medical examiners, coroners, and prosecuting attorneys are required to treat deaths under the Act as "natural."[20] The death certificate is required to list an underlying disease as the official cause of death.[21]

What to Tell Clients

1. Signing the form will lead to a loss of control

By signing the lethal dose request form, the client is taking an official position that if he dies suddenly, no questions should be asked. The client will be unprotected against others in the event he changes his mind after the lethal prescription is filled and decides that he wants to live. This would seem especially important for patients with money. There is, regardless, a loss of control.

2. Prognoses can be wrong

The Act applies to adults determined by an "attending physician" and a "consulting physician" to have a disease expected to produce death within six months.[22] But what if the doctors are wrong? This is the point of a recent *Seattle Weekly* article: Even patients with cancer can live years beyond expectations.[23] The article states:

Since the day [the patient] was given two to four months to live, [she] has gone with her children on a series of vacations . . . . "We almost lost her because she was having too much fun, not from cancer" [her son chuckles].[24]

Conclusion

As lawyers, we often advise our clients of worst-case scenarios. This is our obligation, regardless of whether it is politically correct to do so. The Death with Dignity Act is not about dignity or choice. It is about enabling people to pressure others to an early death or even cause it. The Act may also encourage patients with years to live to give up hope. We should advise our clients accordingly.

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NOTES

1. I-1000 Pamphlet, "Paid for by Yes! on 1000."
2. RCW §§ 70.245.030 and .220 state that one of two required witnesses to the lethal dose request form cannot be the patient's heir or other person who will benefit from the patient's death; the other witness may be an heir or other person who will benefit from the death.
3. *Id.*
4. See Entire Act, Chapter 70.245 RCW.
5. *Id.*
6. *Id.*
7. RCW 70.245.040(1)(a) and RCW 70.245.050.
8. The following Act provisions address the issue of competency in conjunction with the lethal dose request, not later. See: RCW 70.245.010(3); RCW 70.245.010(5); RCW 70.245.010(11); RCW 70.245.020; RCW 70.245.030(1); RCW 70.245.040(1)(a); RCW 70.245.040(1)(d); RCW 70.245.050; RCW 70.245.120(3) & (4); and RCW 70.245.220 (regarding the patient's appearing to be of "sound mind"). There is no provision that requires the patient to be competent or even aware at the time of administration. See Entire Act, Chapter 70.245 RCW.
9. The following provisions require that a determination of whether a patient is acting "voluntarily" be made in conjunction with the lethal dose request, not later. See RCW 70.245.020(1); RCW 70.245.030(1); RCW 70.245.040(1)(a); RCW 70.245.040(1)(d); RCW 70.245.050; RCW 70.245.120(3) and (4); and RCW 70.245.220. There is no provision that requires the patient to be acting voluntarily and/or give consent at the time of administration. See Entire Act, Chapter 70.245 RCW ("consent" not mentioned).
10. See Entire Act, Chapter 70.245 RCW.
11. See RCW 70.245.010(7); RCW 70.245.010(12); RCW 70.245.020(1); RCW 70.245.090; RCW 70.245.140; RCW 70.245.170; RCW 70.245.180(1); and RCW 70.245.220.
12. *Webster's New World College Dictionary* at www.yourdictionary.com/ingest defines "ingest" as: "to take (food, drugs, etc.) into the body, as by swallowing, inhaling or absorbing." Someone putting the lethal dose in the patient's mouth qualifies as "self-administration" because the patient will thereby "ingest" the dose.
13. Someone putting the lethal dose in a feeding tube or IV nutrition bag qualifies as "self-administration" because the patient will thereby "ingest" the dose.
14. Cf. RCW 9A.32.010 (defining "homicide"); RCW 9A.32.020 (regarding premeditation); and RCW 9A.32.030 (defining "murder").
15. RCW 70.245.100.
16. RCW 70.245.200 states:

(1) A person who without authorization of the patient willfully alters or forges a *request for medication* or conceals or destroys a *rescission of that request* with the intent or effect of causing the patient's death is guilty of a class A felony.

(2) A person who coerces or exerts undue influence on a patient to *request medication* to end the

patient's life, or to destroy a *rescission of a request*, is guilty of a class A felony.
(3) This chapter does not limit further liability for civil damages resulting from other negligent conduct or intentional misconduct by any person.
(4) The penalties in this chapter do not preclude criminal penalties applicable under other law for conduct that is inconsistent with this chapter. (Emphasis added).

17. The Act states: "A person who coerces or exerts undue influence on a patient to request medication to end the patient's life, or to destroy a rescission of a request, is guilty of a class A felony." RCW 70.245.200(2).

18. See 70.245.200(2) and Entire Act, Chapter 70.245 RCW.

19. Reutlinger, Mark, "Washington Law of Wills and Intestate Succession," Washington State Bar Association, 2006, p.88.

20. "Instructions for Medical Examiners, Coroners, and Prosecuting Attorneys: Compliance with the Death with Dignity Act," Washington State Department of Health, revised April 8, 2009, at www.doh.wa.gov/dwda/forms/mesandcoroners.pdf.

21. *Id.*, RCW 70.245.040(2) and RCW 70.245.180(1).

22. RCW 70.245.040(1)(a); RCW 70.245.050; and RCW 70.245.010(13).

23. Shapiro, Nina, "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, www.seattleweekly.com/2009-01-14/news/terminal-uncertainty.

24. *Id.*