MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

ROBERT BAXTER, STEVEN STOELB, STEPHEN SPECKART, M.D., C. PAUL LOEHNEN, VM.D., LAR AUTIO, M.D., GEORGE RISI, JR., M.D., and COMPASSION & CHOICES, Plaintiffs, v. STATE OF MONTANA and MIKE MCGRATH, Attorney General, Defendants.	Cause No. ADV-2007-787 **DECISION AND ORDER**

Defendants (hereinafter the State) and Plaintiffs have filed cross-motions for summary judgment. Hearing on the motions was held October 10, 2008. Plaintiffs were represented by Mark S. Connell and Kathryn Tucker, and the State was represented by Jennifer M. Anders and Anthony Johnstone. The motions have been fully briefed and are ready for decision.

The complaint in this action challenges the constitutionality of the application of the homicide statutes to physician-assisted suicide. The complaint alleges that competent terminally ill patients and their physicians have rights under the Montana Constitution to "aid in dying." Specifically, Plaintiffs assert that the terminal competent patient has the right to obtain a prescription for drugs to take if and when the patient chooses to end his life . They ask the Court to declare the homicide statutes unconstitutional as applied to them and enjoin the application of those statutes to them.

Plaintiff Baxter is a 75-year-old retired truck driver from Billings, Montana. He suffers from lymphocytic leukemia with diffuse lymphadenopathy, a terminal form of cancer. He is being treated with multiple rounds of chemotherapy, which typically become less and less effective as time passes. He has a medical history that includes another form of cancer as well as heart and other disorders. As a result of his disease and the treatment necessary to combat it, he has suffered from many symptoms including anemia, chronic fatigue and weakness, nausea, night sweats, intermittent and persistent infections, massively swollen glands, easy bruising, significant ongoing digestive problems, and generalized pain and discomfort. These symptoms, as well as others, are expected to increase in frequency and intensity as the chemotherapy loses its effectiveness and the disease progresses. There is no cure and no prospect of recovery. Baxter wants the option of assisted death when his suffering

becomes unbearable.

Plaintiffs Speckart, Loehnen, Autio, and Risi are Montana board certified physicians who frequently treat terminally ill patients as part of their practices.

Compassion & Choices is a national non-profit organization which is dedicated to improving and expanding choices at the end of life and which advocates for the rights of terminally ill people.

/////

/////

During the hearing, it became evident that Plaintiff Steven Stoelb=s medical condition presented a contested issue of material fact, and Plaintiffs= counsel advised the Court that Stoelb was withdrawing from the case as a party Plaintiff.

ISSUES RAISED IN THE MOTIONS

Plaintiffs assert that competent terminally ill patients must be permitted to use the assistance of a physician to obtain drugs that the patients can self-administer if and when those patients decide to terminate their lives. Their authority lies in the Montana Constitution=s rights to individual privacy, to personal dignity, and to equal protection.[1]

The State in its motion contests the assertions raised in Plaintiffs= motion and also challenges Plaintiff physicians= standing to pursue this action.

DISCUSSION

---

[1] Plaintiffs have withdrawn their claims based on substantive due process and the right to seek safety, health, and happiness. (See Pls.= Reply Br., at 30.)

Standing

The State argues that Plaintiff physicians lack standing in this case pursuant to the limited holding of ***Armstrong v. State***, 1999 MT 261, 296 Mont. 361, 989 P.2d 364. ***Armstrong*** involved a challenge to the constitutionality of a statute prohibiting certified physician assistants from performing abortions. In addressing the standing of the healthcare providers in the lawsuit, the Montana Supreme Court noted the criteria to be satisfied in establishing standing: (1) the complaining party must clearly allege past, present, or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party. ***Id.***, & 6. The alleged injury may be injury that is common to the public but that can still harm the complaining party in ways that are not applicable to the public. ***Id.***, & 7. The court referred to United States Supreme Court cases which recognized that the special relationship between patients and their physicians will often be encompassed within the domain of private life protected by the Due Process Clause. ***Id.***, & 9 (citing, *inter alia*, ***Griswold v. Conn.***, 381 U.S. 479 (1965)). In the context of a woman=s right to obtain an abortion, the Montana Supreme Court quoted from ***Singleton v. Wulff***,[2] 428 U.S. 106, 117-18 (1976):

> A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician=s being paid by the State. The woman=s exercise of her right to an abortion, whatever its dimension, is therefore necessarily at stake here. Moreover, the constitutionality protected abortion decision is one in which the physician is intimately involved. See *Roe v. Wade*, 410 U.S. [113,] 153-56[, 93 S.Ct. 705, 726-28]. Aside from the woman herself, therefore, the physician is uniquely qualified to litigate the

[2] ***Singleton*** involved a challenge by physicians to a state statute excluding from Medicaid coverage abortions that were not medically indicated.

> constitutionality of the State=s interference with, or discrimination against, that decision.
> . . .
> For these reasons, we conclude that it generally is appropriate to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision. . . .

Armstrong, & 10.

With respect to the instant case, the activity addressed in the complaint has not yet been determined to be a constitutional right. In contrast to the cases discussed above, which address the State=s attempt to restrict activity already determined to be constitutional, the activity propounded by Plaintiffs is only alleged to be constitutional. However, the reasoning set forth in those cases applies here with equal importance. The patients/physicians are adjudicating the constitutionality of activity that involves their special relationship and the State=s criminalization of that activity. There is no reason to deny standing to a physician in this situation any more than there is reason to deny standing to a physician in the abortion cases.

Returning to Montana=s general test for standing, the physicians satisfy the two criteria in that test: (1) the physicians= actions in prescribing lethal doses of drugs to the terminal patients would be subject to prosecution under Montana=s homicide statutes, and they, therefore, face a very real harm to their liberty and profession; and (2) the conviction, imprisonment, and loss of profession is specific to the physicians and not applicable to the general public. The alleged injury to the patients is entirely different B they would be denied the opportunity to die with dignity and without prolonged suffering.

The Court concludes that Plaintiff physicians have standing to pursue the

challenges contained in the complaint.

Whether a Competent Terminal Individual Has a Constitutional Right to Choose the Time and Manner of His Death Without Government Intrusion

Although Plaintiffs have brought their claims specifically under the Montana Constitution, it is helpful before beginning that analysis to review the status of this issue in other jurisdictions.

Modern medical and scientific technologies have enabled people to live longer with chronic diseases. Thus, in contrast to earlier decades when sick people in general died more quickly, patients with the same illnesses, such as cancer, now live a longer time and spend more time disabled and in pain and discomfort.

Courts have over the last few decades increasingly extended the concepts of individual dignity, informed consent, and the right to bodily self-determination to the arena of end-of-life decisions, and it is now well accepted that generally an individual has a constitutionally-protected right to refuse life-extending medical treatment. This has been codified in many states, including Montana which has legislatively carved out an exception to the homicide statute to protect physicians who, in compliance with a patient's wishes, withhold or remove unwanted life-extending treatment.

To date, however, no court of final jurisdiction has determined that an individual has a right, under either federal or state constitutional protections, to "physician-assisted suicide" under even the limited circumstances here B i.e. a competent person with a terminal medical condition expected to end in death within six months who wishes to obtain a prescription for a lethal dose of drugs to be self-administered, if and when the individual elects to hasten death rather than await an inevitable end to life.

In 1997, the United States Supreme Court held that no such right is found under either the Due Process Clause or the Equal Protection Clause of the United States Constitution. ***Washington v. Glucksberg***, 521 U.S. 702 (1997), involved a challenge by several doctors and terminally ill plaintiffs to a Washington statute criminalizing assisting a suicide. They asserted the statute violated their liberty interest protected by the Fourteenth Amendment=s Due Process Clause. The Ninth Circuit Court of Appeals held that the Due Process Clause encompasses a due process liberty interest in controlling the time and manner of one=s death, which includes a Aright to die,@ and found Washington=s assisted-suicide ban unconstitutional as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians. ***Compassion in Dying v. Wash.***, 79 F.3d 790 (9th Cir. 1996). The United States Supreme Court overruled the Ninth Circuit and held that the statute did not violate the Due Process Clause. ***Glucksberg***, 521 U.S.
at 735.

The Supreme Court reviewed the history of suicide and assisted suicide bans, noting that for over 700 years, the Anglo-American tradition has disapproved of or punished suicides and assisted suicides. ***Glucksberg,*** 521 U.S. at 711 (citing ***Cruzan v. Dir., Mo. Dep=t of Health***, 497 U.S. 261, 294-95 (1990)). In reviewing the Due Process Clause, the Court stated that the clause guarantees more than fair process, and the liberty it protects includes more than the absence of physical restraint. ***Glucksberg***, 521 U.S. at 719. The clause protects the individual against certain governmental actions regardless of the fairness of the procedures used to implement them. It also provides heightened protection against government interference with certain fundamental rights

and liberty interests. ***Id.*** at 720. Some of the rights protected by the Due Process Clause are the right to marry, to have children, to direct the upbringing and education of one=s children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted lifesaving medical treatment. ***Id.*** at 721.

The Court applied a two-tier test in its substantive due process analysis: (1) whether the right asserted is a fundamental liberty interest which is objectively Adeeply rooted in this Nation=s history and tradition," and (2) a careful description of the asserted fundamental liberty interest. ***Glucksberg***, 521 U.S. at 720-21. If the interest is a fundamental one, the Court must then determine whether its infringement is narrowly tailored to serve any compelling state interest. ***Id.*** at 721.

The Court identified numerous state interests, including preventing suicide, protecting the integrity and ethics of the medical profession, and protecting vulnerable groups from abuse, neglect, or mistakes. The Court identified the patients= interest as one for relief of suffering during the last days of their lives and concluded that terminal patients do have a cognizable interest in obtaining relief from suffering, and that interest is met with palliative care. Therefore, the state=s ban on assisting suicide was not violative of the patients= due process rights. ***Glucksberg***, 521 U.S. at 738.

In a companion case, ***Vacco v. Quill***, 521 U.S. 793 (1997), the United States Supreme Court held that the state of New York=s prohibition of assisting suicide does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The asserted classes of persons were terminally ill patients who wished to hasten their deaths by self-administering drugs and those who wish to do so by

directing the removal of life-support systems. The Court held that the legislative classifications are different, and thus may be treated differently.

The Court reviewed the basic rule that the Equal Protection Clause requires the states to treat like cases alike but may treat unlike cases accordingly. ***Vacco***, 521 U.S. at 799. AIf a legislative classification or distinction >neither burdens a fundamental right nor targets a suspect class, we will uphold it so long as it bears a rational relation to some legitimate end.=@ ***Id.*** (quoting ***Romer v. Evans,*** 517 U.S. 620 (1996)).

The Court stated that on their faces, neither the state=s ban on assisting suicide nor its statutes permitting patients to refuse medical treatment treat anyone differently from anyone else B no one is permitted to assist suicide and everyone is permitted to refuse lifesaving treatment. ***Vacco***, 521 U.S. at 800. Generally speaking, laws that apply evenhandedly to all unquestionably comply with the Equal Protection Clause. ***Id.*** The Court stated that Athe distinction between assisting suicide and withdrawing life support, a distinction widely recognized and endorsed by the medical profession, and in our legal traditions, is both important and logical; it is certainly rational.@ ***Id.*** at 800-01.

With regard to state constitutions, three states that have an explicit right to privacy in their state constitutions have considered whether that encompasses the right sought by Plaintiffs here. In ***Krischer v. McIver***, 697 So. 2d 97 (Fla. 1997), the Florida Supreme Court upheld the constitutionality of the state=s statute prohibiting assisting suicide. The plaintiffs in that case alleged that Florida=s constitutional right to privacy extended to the patients= right to have a physician assist them in committing suicide.

Florida also has a statute outlawing assisting a suicide. Under that state=s privacy provision, once a privacy right has been implicated, the state must establish a compelling interest to justify intruding into the privacy rights of the individual. ***Id.*** at 102. The court recognized the state=s compelling interest in the preservation of life, preventing the affirmative destruction of human life, the prevention of suicide, and the maintenance of ethical integrity of the medical profession. The court held that those compelling state interests supported the constitutionality of the assisted suicide statute. Interestingly, the court ended its discussion with the following statement: AWe do not hold that a carefully crafted statute authorizing assisted suicide would be unconstitutional.@ ***Id.*** at 104. The court preferred to leave the moral and social issues to the legislature. ***Id.***

Alaska also has a constitutional right of privacy. In ***Sampson v. State***, 31 P.3d 88 (Alaska 2001), the plaintiffs challenged the state=s homicide statute on the basis that it deprived them of their right to physician-assisted suicide under the state=s constitutional rights to privacy, liberty, and equal protection. Like Montana, Alaska requires that when the state encroaches on fundamental aspects of the rights to privacy or liberty, it must demonstrate a compelling governmental interest and the absence of a less restrictive means to advance that interest. ***Id.*** at 91.

/////

The plaintiffs in that case asserted that their strong interest in personal autonomy encompasses physician-assisted suicide. After a lengthy discussion of Alaska=s legal history, including the fact that a bill similar to Oregon=s Death with Dignity Act failed in the legislature, the Alaska court determined that personal autonomy does not include the right to physician-assisted suicide and is not a fundamental right.

The Alaska court also addressed the equal protection allegation in which the plaintiffs alleged the same classification distinctions as in ***Vacco*** and the present case. The court based its decision to uphold the assisted suicide ban on the distinction between action and forbearance from action on the part of the physician.

One California court has also declined to expand the state=s constitutional right to privacy to encompass Aa shield for third persons who end [the patient=s] life.@ ***Donaldson v. Lungren***, 2 Cal. App. 4th 1614, 1622; 4 Cal. Rptr. 2d 59, 63 (1992).

With regard to legislation on this issue, two states, Oregon and Washington, have enacted voter-approved measures providing for physician-assisted suicide in the circumstances sought here. Oregon's "Death with Dignity Act" was passed in 1997, and voters in Washington recently passed a similar act. Similar measures in other states, however, have either failed in the legislature or did not win approval from voters. In addition, a plethora of commentators, including several in Montana, have analyzed, criticized, advocated for, and/or generally discussed the issue. See e.g., James E. Dallnern & D. Scott Manning, Death with Dignity in Montana, 65 Mont. L. Rev. 309 (2004); Kathryn L. Tucker, The Hon. James R. Browning Symposium, The Right to Privacy: Symposium Article: Privacy and Dignity at the End of Life: Protecting the Right of Montanans to Choose Aid in Dying, 68 Mont. L. Rev. 317 (2007); Scott A. Fisk, The Last Best Place to Die: Physician-Assisted Suicide and Montana=s Constitutional Right to Personal Autonomy Privacy, 59 Mont. L. Rev. 301 (1998).

Analysis of Plaintiffs' Claims

Plaintiffs' assertion of a right to assisted death is based on three explicit rights in the Montana Constitution: equal protection, personal dignity, and individual

privacy.

1. Equal Protection

Plaintiffs assert that prohibiting physician assistance to Baxter and similarly situated citizens is a violation of the equal protection clause of the Montana Constitution. Article II, section 4, reads in relevant part, "No person shall be denied the equal protection of the laws." Plaintiffs argue that individuals such as Baxter are treated differently from those whose condition brings them within the Montana Rights of the Terminally Ill Act, under which a terminally ill citizen can choose to have life-sustaining procedures withheld or removed by medical care providers, thus avoiding continued suffering by precipitating death. As noted above, death resulting from the withholding of life-sustaining treatment has been specifically excepted from the homicide statute by the legislature. Section 50-9-205, MCA. That statute has not been legally challenged.

In both instances, Plaintiffs argue, the individual is seeking physician assistance in ending his or her life. However, in one circumstance such assistance is legal while in the other circumstance it is not. This different treatment, they assert, violates the basic rule of equal protection that persons similarly situated must receive like treatment.

/////

The classes asserted by Plaintiffs are the same as those considered by the United States Supreme Court in ***Vacco***: terminally ill patients who wish to hasten their deaths by self-administering drugs and those who wish to do so by directing the removal of life-support systems. As discussed above, the Court held that the legislative classifications are different, and thus may be treated differently.

The Court found that one difference that justifies the distinction between the two groups of patients is that when a patient refuses life sustaining treatment, he dies from an underlying fatal disease, but if a patient ingests a lethal drug, he dies by that medication. ***Vacco***, 521 U.S. at 801. Another distinction is that a physician who withdraws or honors a patient=s refusal to use life sustaining treatment purposely intends to respect his patient=s wishes and ceases doing useless or degrading things to the patient when the patient no longer can benefit from it. Even when a doctor gives such aggressive pain killing medication that it hastens the patient=s death, the doctor=s intent is palliative only. However a doctor who assists a suicide purposely intends that the patient will die. ***Id.*** at 802.

Plaintiffs in this case challenge the homicide laws as they pertain to assisting a terminal patient=s death under the Equal Protection Clause of the Montana Constitution, and Montana applies broader equal protection rights to its citizens than that provided by the United States Constitution. ***Bean v. State***, 2008 MT 67, & 11, 342 Mont. 85, & 11, 179 P.3d 524 & 11. Montana requires a strict scrutiny analysis to state infringement of an individual=s fundamental rights. ***Davis v. Union Pac. R.R.***, 282 Mont. 233, 241, 937 P.2d 27, 31 (citing ***Gulbrandson v. Carey***, 272 Mont. 494, 502, 901 P.2d 573, 579 (1995)). Strict scrutiny requires the government to show a compelling state interest for its action. ***Id.*** (citing ***Butte Cmty Union v. Lewis***, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986)).

However, under either constitution the court must determine whether the asserted classes are similarly situated, and thus the analysis by the United States Supreme Court in ***Vacco*** is helpful. Plaintiffs in the present case assert the same two

classifications, and the reasons the Court in ***Vacco*** concluded that they are not similarly situated under the equal protection analysis are logically the same in the present case.

The difference between the two classes lies in the difference in the character of the act sought. The citizen who chooses to refuse life-sustaining treatment is entitled to do so based on the right to be free from an intrusion on his or her bodily integrity without the individual's consent. What that individual seeks is essentially a negative act B that the physician refrain from action or curtail an action already taken, which permits nature to take its course. Baxter, however, seeks an affirmative act from his physician intended to hasten death.

Notwithstanding the broader equal protection rights under Montana law, the two classifications are still dissimilar. Thus, the Equal Protection Clause of the Montana Constitution cannot protect Plaintiffs from Montana=s homicide laws.

2. Individual Dignity

The individual dignity clause of the Montana Constitution, also found in Article II, section 4, states, "The dignity of the human being is inviolable." This language has been defined by the Montana Supreme Court on two occasions. In ***Armstrong***, the Court stated:

> Respect for the dignity of each individual - a fundamental right, protected by Article II, Section 4 of the Montana Constitution - demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions of life in general, answering to their own consciences and convictions.

Armstrong, & 72.

In a case involving application of the dignity clause to the treatment of a prison inmate, the Montana Supreme Court quoted the following statement from a

Montana Law Review article: Atreatment which degrades or demeans persons, that is, treatment which deliberately reduces the value of persons, and which fails to acknowledge their worth as persons, directly violates their dignity.@ ***Walker v. State***, 2003 MT 134, & 81, 316 Mont. 134, & 81, 68 P.3d 872, & 81. The authors of that law review article went on to summarize:

> [T]he meaning of the concept of individual dignity, in traditional Western ethics, imagines human beings as intrinsically worthy of respect, of having dignity, because of their capacity to live self-directed and responsible lives. Dignity may be directly assailed by treatment which degrades, demeans, debases, disgraces, or dishonors persons, or it may be more indirectly undermined by treatment which either interferes with self-directed and responsible lives or which trivializes the choices persons make for their own lives.

Matthew O. Clifford & Thomas P. Huff, Some Thoughts on the Meaning and Scope of the Montana Constitution=s Dignity Clause with Possible Applications, 61 Mont. L. Rev. 301, 308 (2000).

Even without an express dignity provision in the federal constitution, the United States Supreme Court has addressed human dignity in the context of certain rights as foundational of individual rights. See ***Cohen v. Cal.***, 403 U.S. 15, 24 (1971) (freedom of speech); ***Cruzan v. Dir., Mo. Dep=t of Health***, 497 U.S. 261, 289 (1990) (liberty right to refuse medical treatment); ***Planned Parenthood v. Casey***, 505 U.S. 833, 851 (1992) (right to determine whether to bear a child); ***Rosenblatt v. Baer***, 383 U.S. 75, 92 (1966) (right to protection of an individual=s reputation); ***Goldberg v. Kelly***, 397 U.S. 254, 265-66 (1970) (right of welfare recipients to be free from arbitrary government action).

/////

In ***Casey***, the Court acknowledged that the United States Constitution protects personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. The Court included these matters as

> the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy [that] are central to liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one=s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Casey, 505 U.S. at 851.

The Montana cases addressing the dignity provision have applied it in conjunction with other fundamental rights, such as the right to privacy in ***Armstrong***, and cruel and unusual punishment (Article II, section 22) in ***Walker***. Specific application of the dignity clause without the inclusion of other fundamental rights is yet to be addressed by the Montana Supreme Court.

3. Right of Privacy

Article II, section 10, of the Montana Constitution provides: AThe right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.@ This right has been addressed by the Montana Supreme Court on many occasions, and the court has acknowledged that Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States, exceeding even that provided by the United States Constitution. **Armstrong,** & 34 (and cases cited therein). In ***Gryczan v. State***, 283 Mont. 433, 455, 942 P.2d 112, 125 (1997), the court stated: AIt is, perhaps, one of the most important rights guaranteed to the citizens of this State, and its separate textual

protection in our Constitution reflects Montanans= historical abhorrence and distrust of excessive governmental interference in their personal lives.@

The right to privacy encompasses the right of personal autonomy, which includes the right of consenting adults to engage in homosexual activity in privacy without governmental interference. ***Id.***, at 455-56, 942 P.2d at 126. It also includes Athe right of each individual to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government.@ ***Armstrong***, & 39. The court held that the narrower right to seek and obtain pre-viability abortion services is a protected form of personal autonomy. ***Id.***

This concept of personal autonomy with regard to bodily integrity has also been discussed in the context of compelling an independent medical evaluation in a personal injury case. ***Simms v. Mont. Eighteenth Jud. Dist. Ct.***, 2003 MT 89, 315 Mont. 135, 68 P.3d 678. The court quoted the following statement from the United States Supreme Court: ANo right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear unquestionable authority of law.@ ***Id.***, & 27 (quoting ***Union Pac. Ry. Co. v Botsford***, 141 U.S. 250, 251 (1891)).

In the instant case, the constitutional rights to privacy and dignity are intertwined insofar as they apply to Plaintiffs= assertion that competent terminal patients have the constitutional right to determine the timing of their death and to obtain physician assistance in doing so. The decision as to whether to continue life for a few

additional months when death is imminent certainly is one of personal autonomy and privacy. Similarly, the logical extension of the meaning of Athe most intimate and personal choices a person makes in a lifetime@ stated by the ***Casey*** Court would apply to perhaps the most intimate and personal choice of all B the choice of when and how to end one=s life. Although the United States Supreme Court declined to make this extension under the due process and equal protection clauses of the federal constitution, the Montana constitution is more protective of a citizen's personal dignity because it provides that individual dignity is an explicit right which is "inviolable." It is also this addition of the personal integrity clause to the privacy clause that distinguishes the analysis in this case from that of the Florida, Alaska, and California decisions.

Taken together, this Court concludes that the right of personal autonomy included in the state constitutional right to privacy, and the right to determine "the most fundamental questions of life" inherent in the state constitutional right to dignity, mandate that a competent terminally ill person has the right to choose to end his or her life.

With regard to whether this includes the right to obtain assistance from a medical care provider in the form of obtaining a prescription for lethal drugs to be taken at a time of the patient's choosing, the Court concludes that it does. In ***Armstrong***, the Montana Supreme Court decided that a woman=s right to obtain a pre-viability abortion includes obtaining the assistance of a healthcare provider. The court examined the history of Montana's constitutional right to privacy, and stated:

> Importantly, there is nothing in the Constitutional Convention debates which would logically lead to the conclusion that Article II, Section 10,

> does not protect, generally, the autonomy of the individual to make personal medical decisions and to seek medical care in partnership with a chosen health care provider free from governmental interference.

Armstrong, & 45.

The State distinguishes ***Armstrong*** from the present case on the basis that obtaining an abortion is a legally recognized right in Montana and that a doctor may legally perform the abortion, whereas a physician has no legally recognized right to prescribe lethal medications. The Court notes that suicide is not legally prohibited, and the inclusion of physician assistance in the terminal patient=s decision to end his life is the very question before this Court. As discussed earlier, the ***Armstrong*** court relied, in part, on the reasoning of ***Singleton v. Wulff***, 428 U.S. 106, 117 (1976), with the following quote:

> A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician=s being paid by the State. The woman=s exercise of her right to an abortion, whatever its dimension, is therefore necessarily at stake here. Moreover, the constitutionally protected abortion decision is one in which the physician is intimately involved.

Armstrong, & 10. ***Singleton*** involved the legality of a physician asserting the right of his/her patient in challenges to abortion restrictions. The Montana Supreme Court noted that even the dissenters of that opinion conceded the correctness of the court=s analysis and holding in situations where the AState directly interdicted the normal functioning of the physician-patient relationship by criminalizing certain procedures." ***Armstrong***, & 11. The Montana court concluded: Ain the context of this case, Article II, Section 10 of the Montana Constitution broadly guarantees each individual the right to make medical

judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference.@ ***Id.,*** & 14.

The same rationale applies to the present case. Given a competent terminal patient=s right to determine the time to end his life, in consultation with his physician, the method of effecting the patient=s death with dignity would require the assistance of his medical professional. The physician-patient relationship would enable the terminal patient to consult with his doctor as to the progress of the disease and the expected suffering and discomfort, and would enable the doctor to prescribe the most appropriate drug for life termination, leaving the ultimate decision and timing up to the patient.

But for such a relationship, the patient would increasingly become physically unable to terminate his life, thus defeating his constitutional right to die with dignity. If the patient were to have no assistance from his doctor, he may be forced to kill himself sooner rather than later because of the anticipated increased disability with the progress of his disease, and the manner of the patient=s death would more likely occur in a manner that violates his dignity and peace of mind, such as by gunshot or by an otherwise unpleasant method, causing undue suffering to the patient and his family.

The Court concludes that a competent terminally ill patient has the constitutional right to die with dignity. This right is protected by Article II, sections 4 and 10, of the Montana Constitution and necessarily incorporates the assistance of his doctor, as part of a doctor-patient relationship, so that the patient can obtain a prescription for drugs that he can take to end his own life, if and when he so determines.

This right is fundamental and, therefore, cannot be limited by the State

without a showing of a compelling state interest. Any limitation on that right must be narrowly tailored to effectuate only that compelling interest. ***Gryczan***, 283 Mont. at 449, 942 P.2d at 122; ***State v. Pastos***, 269 Mont. 43, 47, 887 P.2d 199, 202 (1994).

Compelling State Interests

The State asserts numerous compelling state interests with respect to the terminal patient=s right to die with dignity.

1. **Preserving Human Life**

The first, and perhaps the foremost, compelling interest is the interest in protecting and defending human life. The State argues that the homicide statutes are narrowly tailored to effectuate the State=s interest in preventing intentional killing. The homicide statutes do not, however, address the terminal patient=s right to die with dignity. It is easy to acknowledge the State=s interest in preserving human life in general, but it is difficult to imagine a compelling interest in preserving the life of an individual who is suffering pain and the indignity of his disease; whose life is going to end within a relatively short period of time; and for whom palliative care is inadequate to satisfy his personal desire to die with dignity. In such a case, the State=s interest in preserving life in general diminishes in the delicate balance against the individual=s constitutional rights of privacy and individual dignity. The Court concludes that the competent terminal patient=s rights of privacy and dignity overcome the State=s general interest in preserving human life.

2. **Protecting Vulnerable Groups from Potential Abuses**

This concern was articulated by Justice O=Connor in her concurring opinion in ***Glucksberg***: AThe difficulty in defining terminal illness and the risk that a

dying patient=s request for assistance in ending his or her life might not be truly voluntary justifies the prohibition on assisted suicide we uphold here.@ 521 U.S. at 738. It is important to note at this point that the United States Supreme Court needed only to find a legitimate basis for such prohibition on assisted death. As discussed previously, Montana law requires a compelling state interest in such a prohibition, with limitations narrowly tailored to effectuate the State=s interest without unduly interfering with the individual=s constitutional rights.

Certainly the State has a compelling interest in preventing the abuses stated by Justice O=Connor. However, those abuses can be controlled by state law, such as requiring the written opinion of one or more physicians as to the medical status of the patient, his or her terminal state, and the patient=s competence to make the decision as to the time and manner to end his or her life.

The State of Oregon=s Death with Dignity Act contains numerous requirements to avoid such potential abuses: The individual must be an adult; be a legal resident of the state; be suffering from a terminal illness; must make two oral requests not less than fifteen days apart to receive a lethal dose of drugs; and must have executed a written request for such medication in the presence of two witnesses, one of whom is not a relative. The attending physician must confirm the diagnosis of terminal illness; must determine that the patient is mentally competent and that the request is voluntary; and must inform the patient of the diagnosis, his/her medical prognosis, the risk of lethal medication, the results of ingesting the lethal medication, the availability of Afeasible alternatives@ to taking the lethal drugs, and the patient=s right to rescind the request for the drugs. The physician must also refer the patient to another physician to confirm the

terminal diagnosis, the patient=s mental competence, and the voluntary nature of the decision; must refer the patient for counseling if the physician believes that the patient may be suffering from a psychiatric disorder or depression causing impaired judgment; and must verify immediately prior to writing the prescription for the lethal drugs that the patient is making an informed decision. Or. Rev. Stat. ' 127.800B.897.

The State of Montana can effectuate this compelling interest without denying the individual=s constitutional right to die with dignity.

3. **Protecting the Integrity and Ethics of the Medical Profession**

The United States Supreme Court has recognized a substantial state interest in protecting the integrity of the medical profession, and this Court would agree that the State has a compelling interest in protecting the integrity of the medical profession. Again, this concern can be addressed by the State. For example, the State can provide an express provision that excludes physicians who do not wish to participate and can further protect participating physicians with appropriate legislation and guidelines.

It is interesting to note at this point that the medical community shows growing support for dispensing prescriptions for lethal doses for terminal patients. An opinion poll was conducted in 2005 by an independent market research firm, HCD Research, of 677 randomly selected doctors. Fifty-nine percent of the doctors answered Ayes@ when asked if physicians should be given the right to dispense prescriptions to patients to end their lives. Forty-one percent of the doctors answered Ano.@ When asked who should decide whether physician-assisted suicide is a legitimate medical

purpose, fifty-four percent of the doctors said that the issue should not be decided by either state or federal government. Kevin O=Reilly, *Doctors Favor Physician-Assisted Suicide Less Than Patients Do*, Am. Med. News, Nov. 21, 2005, *available at* amednews.com. That poll showed doctors= support up two percentage points from a poll taken earlier that year.

The State contends that declaring constitutional rights for a competent terminally ill patient is premature because there is no definition of Acompetent@ or Aterminally ill.@ Competency is easily determined by the patient=s doctor. Treating physicians are frequently called upon to determine competency of their patients for purposes of guardianship and other legal proceedings. Whether a patient is terminally ill can also be determined by the physician as an integral component of the physician-patient relationship. These issues are insufficient to impinge on the patient=s right to die with dignity.

The State also urges this Court to decline to rule that Plaintiffs have a constitutional right to die with assistance of their physicians, asserting that the issue is properly determined by the legislature. The Court acknowledges that the issues raised in this lawsuit contain a mixture of legal and non-legal decisions. The question of whether Plaintiffs have a fundamental right to die with dignity, with assistance, is a constitutional question to be decided by the courts. The question of whether the homicide statute is unconstitutional as applied to these Plaintiffs is also a legal one to be decided by the courts. Where, as here, the Court has concluded that Plaintiffs do have a fundamental right as they request, the implementation of that right to effect the compelling state interests as discussed herein is properly left to the legislature.

If we were to wait for the legislature to enact a death with dignity law that permits assistance in dying, similar to the Oregon statute, then the Court would eventually be considering the validity of that statute in light of the various provisions of the Montana Constitution. Here, the Court is simply the first in line to deal with the issue, followed by the legislature to implement the right. Thus, both the courts and the legislature are involved either way.

CONCLUSION

The Montana constitutional rights of individual privacy and human dignity, taken together, encompass the right of a competent terminally patient to die with dignity. That is to say, the patient may use the assistance of his physician to obtain a prescription for a lethal dose of medication that the patient may take on his own if and when he decides to terminate his life. The patient=s right to die with dignity includes protection of the patient=s physician from liability under the State=s homicide statutes.

The Court recognizes compelling State interests in protecting patients and their loved ones from abuses, in protecting life in general, and in protecting the integrity and ethics of the medical profession. However, those interests can be protected while preserving a patient=s right to die with dignity.

The constitution=s equal protection provision does not apply to Plaintiffs because their asserted classifications are not similarly situated to meet the requirements of the equal protection test.

Finally, the constitutional issues are properly before the Court. The implementation of this Court=s decision, including provisions to protect the compelling state interests, remains a function of the legislature.

ORDER

Summary judgment is GRANTED to Plaintiffs in accordance with this decision. Let judgment be entered accordingly.

DATED this __ day of December 2008.

DOROTHY McCARTER
District Court Judge

pcs: Mark S. Connell
Kathryn Tucker
Mike McGrath/Jennifer Anders/Anthony Johnstone

T/DMc/baxter v state d&o.wpd