

May 2009 Bar Bulletin

**'Death with Dignity':**

## **What Do We Advise Our Clients?**

**By Margaret Dore**

A client wants to know about the new Death with Dignity Act, which legalizes physician-assisted suicide in Washington.<sup>1</sup> 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?

### **Patient "Control" is an Illusion**

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]."<sup>2</sup> The Act, however, does not say this — anywhere. The Act also contains 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 requires an application process to obtain the lethal dose, which includes a written request form with two required witnesses.<sup>3</sup> The Act allows one of these witnesses to be the patient's heir.<sup>4</sup> The Act also allows someone else to talk for the patient during the lethal-dose request process, for example, the patient's heir.<sup>5</sup> This does not promote patient choice; it invites coercion.

### **Interested witness**

By comparison, when a will is signed, having an heir as one of witnesses creates a presumption of undue influence. The probate statute provides that when one of the 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."<sup>6</sup>

Once the lethal dose is issued by the pharmacy, there is no oversight. The death is not required to be witnessed by disinterested persons. Indeed, no one is required to be present. The Act does not state that “only” the patient may administer the lethal dose; it provides that the patient “self-administer” the dose.

### **“Self-administer”**

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.”<sup>7</sup>

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

### **No witnesses at the death**

If, for the purpose of argument, “self-administer” means that only the patient can administer the lethal dose himself, the patient still is vulnerable to the actions of other people, due to the lack of required witnesses at the death.

With no witnesses present, someone else can administer the lethal dose without the patient’s consent. Indeed, someone could use an alternate method, such as suffocation. Even if the patient struggled, who would know? The lethal dose request would provide an alibi.

This situation is especially significant for patients with money. A California case states, “Financial reasons [are] an all too common motivation for killing someone.”<sup>8</sup> Without disinterested witnesses, the patient’s control over the “time, place and manner” of his death, is not guaranteed.

If one of your clients is considering a “Death with Dignity” decision, it is prudent to be sure that they are aware of the Act’s gaps.

### **What to Tell Clients**

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

By signing the 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 clients with money. There is, regardless, a loss of control.

#### **2. Reality check**

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.<sup>9</sup> But what if the doctors are wrong? This is the point of a recent article in *The Seattle Weekly*: Even patients with cancer can live years beyond expectations<sup>10</sup>. 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].<sup>11</sup>

## 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 necessarily about dignity or choice. It also can enable people to pressure others to an early death or even cause it. The Act also may encourage patients with years to live to give up hope. We should advise our clients accordingly.

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1 The Act was passed by the voters in November as Initiative 1000 and has now been codified as RCW chapter 70.245.

2 I-1000 color pamphlet, “Paid for by Yes! on 1000.”

3 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 may be.

4 id.

5 RCW § 70.245.010(3) allows someone else to talk for the patient during the lethal-dose request process; for example, there is no prohibition against this person being the patient’s heir or other person who will benefit from the patient’s death. The only requirement is that the person doing the talking be “familiar with the patient’s manner of communicating.”

6 RCW § 11.88.160(2).

7 RCW § 70.245.010(12).

8 *People v. Stuart*, 67 Cal. Rptr. 3rd 129, 143 (2007).

9 RCW § 70.245.010(11) & (13).

10 Nina Shapiro, “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? *The Seattle Weekly*, January 14, 2009. <http://www.seattleweekly.com/2009-01-14/news/terminal-uncertainty>.

11 id.

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