Medical Aid in Dying in Minnesota: Legal Landscape and Ethical Justifiability

Hennepin County Medical Center
December 8, 2017

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Mitchell Hamline School of Law

Thank you

Death is not always bad

Life is not always good

For many, the alternative to death is worse

Control time & manner of death
MAID
End-of-life option

For small number of patients

Who

Adults
Terminally ill with capacity

How
Ask & receive prescription drug
  – To self-administer
  – To hasten death

Disclosures

Op-eds

The New York Times

The Opinion Pages
ROOM for DEBATE

Oregon Shows That Assisted Suicide Can Work Sensibly and fairly

Thaddaeus Mason Pope is the director of the Health Law Institute at Hamline University, and a frequent legal commentator and blogger on end-of-life medical issues.

The Changing Legal Climate for Physician Aid in Dying

While once widely rejected as a health care option, physician aid in dying is receiving increased recognition as a response to the suffering of patients at the end of life. With aid in dying, a physician writes a prescription for life-ending medication for an eligible patient. Following the recommendation of the American Public Health Association, the term aid in dying rather than “assisted suicide” is used to describe the practice. In the Viewpoint, we describe the changing legal climate for physician aid in dying occurring in several states (Table). Voters in Oregon and Washington have legalized aid in dying by public referendum, legislators in Vermont have done so by statutory enactment, and courts in Montana and New Mexico have done so by judicial rulings. Support for aid in dying is increasing, and it would not be surprising to see voters, legislators, or courts in an advance directive statute in California, court decisions concluded that patients may reject certain treatment recommendations even when necessary to prolong life. Reform of the right to refuse life-sustaining treatment reflected societal consensus that people have the right to decline treatment when they are suffering from inescapable and severe illness. In such cases, burdens of continued treatment may outweigh benefits, and people should not be forced to prolong life and die from dying processes. The focus of the right to die is the right to choose to end life from intolerable suffering. How is it possible to decide when some illness is serious enough that treatment can be The Oregon case concluded that the right to die means that treatment should exist when the
MAID in Oregon

MAID in Minnesota

Paths to legalization

Access obstacles

MAID in Oregon

20 years
1997 to 2017
Who uses it

- 97% white
- 99% insured
- 90% hospice
- 70% college
- 75% cancer

How use it

Numerous safeguards

Model emulated by legislatures around the world
Multiple requests

Multiple counseling

Prescribing MD
Consulting MD
Mental health MD

Voluntary
Informed
Enduring

choice

MAID in Minnesota

34,000 deaths
132 (0.4%)
5.5m v. 4m

182 / year
MN MAID deaths

41,000 / year
Total MN deaths

CDC National Center for Health Statistics, Deaths: Final Data for 2013, 64(2) NATIONAL VITAL STATISTICS REPORTS (Feb. 16, 2016), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_02.pdf

99.6%
MN deaths unaffected

182

Most also make a deliberate decision to hasten death

40,818
Those dependent on dialysis, vents, CANH can hasten their deaths

Not only withholding & withdrawing LSMT

Palliative sedation to unconsciousness

VSED

Equal protection

Persons similarly situated should be treated alike
Every day, terminally ill patients in Minnesota hasten their deaths by withholding or withdrawing treatment.

But some patients have no treatment to turn off or refuse.

MAID gives these terminally ill, competent, adults the same freedom.

Legalization in MN

2017
Like almost all US bills, closely modeled on ODWDA

Politically safe

But ethically questionable

Return at end
DO NOT MOVE

2016

S.F. No. 1880

MINNESOTA SENATE COMMITTEE HEARING ATTENDANCE PASS
WEDNESDAY, MARCH 16, 2016
12 NOON-ROOM 1200
COMMITTEE ON HEALTH, HUMAN SERVICES, AND HOUSING
CHAIR: SENATOR KATHY SHEGAN
SF 1880-SENATOR EATON
MINNESOTA COMPASSIONATE CARE ACT

MINNESOTA SENATE BUILDING
95 UNIVERSITY AVENUE WEST
Doctor-assisted suicide proposal tabled after emotional hearing

Sen. Chris Eaton abruptly withdrew the measure in a hearing that drew hundreds of people and hours of wrenching testimony.

By Maya Rao Star Tribune | MARCH 17, 2016 — 10:26AM

February 20, 2018

Historic election puts Republicans in control of Minnesota House and Senate

By Brina Bierschbach and Greta Kaul | 11/09/16
Better prospects

1991
Follow AMA

Drops opposition

“Physicians must not . . . participate in assisted suicide. The societal risks . . . is too great to condone . . . .”
MMA will not oppose aid-in-dying legislation

“unless fails to adequately safeguard . . . patients or physicians.”

• Must not compel physicians or patients to participate . . . against their will
• Must require patient self-administration
• Must not permit patients lacking decisional capacity to utilize . . .
• Must require mental health referral of patients with a suspected psychological or psychiatric condition
• Must provide sufficient legal protection for physicians who choose to participate.

Included in MN bills
2
Track record even longer

OR 1998 → (20)
WA 2008 → (10)
VT 2013 → (5)
CA 2016 → (2)

More public support

3

73%
Gallup (June 2017)
4. More physician support

57%

Medscape (Dec. 2016)

5. More professional associations
Why do we need a statute

Need to legalize
“Assisted Suicide” Laws

Across USA, since 1800s, helping someone commit suicide is a crime

“assisted suicide prohibitions are deeply rooted in our nation’s legal history”

Minnesota Statutes
Chapter 609
Criminal Code
Minn. Stat. 609.215

“Whoever . . . assists another in taking the other’s life may be sentenced to . . . 15 years . . . $30,000”

Medical Practice Act

Minn. Stat. 147.091(1)(w)

“aiding suicide . . . is prohibited and is grounds for disciplinary action”

AS laws = obstacle to MAID
AS laws = obstacle to RTD

Foundation for MAID

Right to die

1950s & 1960s

Mechanical ventilators

Dialysis

Feeding tubes

Karen Quinlan
1976
Right to refuse treatment even if life-sustaining

>100 appellate cases

1990

Nancy Cruzan

1993

MINNESOTA STATUTES 2002

CHAPTER 14C
HEALTH CARE DIRECTIVES

14C.01 DEFINITIONS
14C.02 HEALTH CARE DIRECTIVE
14C.03 REQUIREMENTS
14C.04 REQUIREMENTS OF ANOTHER STATE
14C.05 SUGGESTED FORMS, PROVISIONS THAT MAY BE INCLUDED
14C.06 AUTHORITY AND DUTIES OF HEALTH CARE PROVIDER
14C.07 AUTHORITY AND DUTIES OF HEALTH CARE AGENT
14C.08 AUTHORITY TO REVISE MEDICAL RECORD
Is this “assisted suicide”?

609.215(3) “provider . . . who withholds or withdraws a life-sustaining procedure . . . does not violate this section”

MAID = AS
AS = felony
MAID = felony

Chill from 609.215

No such clarity re MAID

Minnesota v. Final Exit Network
Need to legalize

Attempts to legalize

Who else?
Where?
How?

Pathways

Path 1
Litigation
US Constitution

Due process
Equal protection
1st Amendment
D. Ore. (1994)  Y
9th Cir. (1995)  N
9th Cir. EB (1996)  Y
SCOTUS (1997)  N
NDNY (1994) N
2d Cir. (1996) Y
SCOTUS (1997) N

>15 appellate judges

1997: no US Const. right

Federal constitutional rights in other countries

Sue Rodríguez 1993
April 2015

BUT

Robert Stransham-Ford  

Ovidio González

Beyonder Nanjung
No federal constitutional right

Focus to states

“crafting appropriate procedures for . . . liberty interests is entrusted to the laboratory of the states . . .”

“States . . . undertaking extensive and serious evaluation . . . .”
Path 2
State statutes

Ballot initiatives
Legislation

Ballot initiatives

Early failures
- 1988 California
- 1991 Washington
- 1992 California
- 1994 Michigan

Problem
Legalize both euthanasia and medical aid in dying
MAID

**Self** ingestion

**Patient** takes the final overt act

Injunction 1994 to 1997

Figure 1: DWDA prescription recipients and deaths**, by year, Oregon, 1998–2016
Track record
Documented
Solid
Legislation

May 2013

Oct. 2015

Enacted

3 initiatives
3 bills

Feb. 2017

6 statutes
~20% population
Statutes in other countries

Australian Government

ONE WAY

1995

1997

2017

2014

Quebec
Ongoing

Bills ~25 states (2017)

Passed 1 chamber

Path 4
Litigation
state constitution
>15 cases

No “lasting” success

Trial court win

Appellate loss

3

Morris win
NM DCT

Reversed
NM SCT

McIver wins FL DCT

Reversed
FL SCT
Baxter wins MT DCT
Not reached MT SCT

Trial court loss
Appellate loss

>10
1992

Thomas Donaldson
No CA right
Most recently

Robert Sanderson
Colo. 2000

Christie White
CA

Christie O’Donnell
CA

John Jay Hooker
TN
Sara Myers
NY

No right under US constitution

No right under state constitutions

Active cases

John Radcliffe
HI

Roger Kligler
MA
Assisted suicide = Felony

“suicide and MAID are conceptually, medically, and legally different phenomena”

(Path 5
Litigation
State statute

Assisted suicide

Aid in Dying

George Bailey

Jennifer Holm
Iowa

American Association of Suicidology

(12/7/2017)
MAID is different

Still legally “assisted suicide”
Quasi success

MAID = AS

But MAID not prohibited
Mont. Code Ann. 45-2-211

“consent of the victim to conduct charged . . . is a defense”

Main paths
Legislation
Litigation

Path 6
Prosecutorial discretion

Not decriminalized
But guidance on MAID without penalty

Netherlands
1991 to 2002
factors that will influence whether or not someone is prosecuted for assisting suicide
“urges prosecutorial discretion by the Cochise County Attorney in de-prioritizing cases . . . imminent death . . . intolerable suffering.”

Not decriminalized

But de facto immunity

Path 7
Jury nullification

Tim Quill

Death and Dignity — A Case of Individualized Decision Making
Timothy E. Quill, M.D.

Grand jury clears Quill in dying patient’s suicide
### Recap

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<tr>
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<th>Succeed</th>
<th>Fail</th>
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<tr>
<td>Ballot</td>
<td>3</td>
<td>&gt;7</td>
</tr>
<tr>
<td>Bill</td>
<td>3</td>
<td>&gt;200</td>
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<tr>
<td>AS not apply</td>
<td>1</td>
<td>&gt;5</td>
</tr>
<tr>
<td>State const.</td>
<td>0</td>
<td>15</td>
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</table>

### Access

6 statutes

Nearly identical
Protect
Vulnerable
Uninsured
Minorities

Successful
No evidence of abuse

Too protective
Restricts access

Eligibility criteria
Process requirements
Eligibility criteria

Adult Terminally ill Capacity

1

Adult

18+

Assure voluntary & informed
BUT

Allow minors to make other healthcare decisions

2 stages

Mature minors

2

Terminal illness
“Terminal illness”
final stage of an incurable and irreversible medical condition . . . death within six months.”

Matches hospice eligibility

BUT

Temporally strict

unbearable suffering
(not necessarily “terminal”)

Reasonably predictable
Capacity

Sen. Chris Eaton

LISTENING SESSION
with Senator Chris Eaton
SATURDAY, JANUARY 30, 2016
1:00 - 3:00 P.M.
MINNESOTA SENATE BUILDING
(ROOM 1200)
95 UNIVERSITY AVE. W., ST. PAUL

Forums set on Minnesota bill to give terminally ill right to die

Most common question – by far?
Terminal → no capacity
Capacity → not terminal
Expand eligibility criteria
Relax process requirements
Advance directive
15 day waiting period

Assure request enduring

BUT

Undue burden
2 Self ingest

9g = 90 x 100mg Helps assure voluntary

BUT Lose ability
Some complications

<table>
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<tr>
<th>Complications</th>
<th>(N=133)</th>
<th>(N=694)</th>
<th>(N=127)</th>
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<tbody>
<tr>
<td>Difficulty ingesting/regurgitated</td>
<td>3</td>
<td>27</td>
<td>30</td>
</tr>
<tr>
<td>None</td>
<td>24</td>
<td>530</td>
<td>554</td>
</tr>
<tr>
<td>Unknown</td>
<td>106</td>
<td>437</td>
<td>543</td>
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<tr>
<td>Other outcomes</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Regained consciousness after ingesting DWDA medications</td>
<td>0</td>
<td>6</td>
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</tbody>
</table>

Complications may rise

Experimenting with NEW drugs
Avoid with clinician administration

Conclusion

Today

Tomorrow

Politically, follow OR model
But must discuss & debate amendments to that pattern