

A SHORT HISTORY OF ASSISTED SUICIDE IN MONTANA

By Margaret Dore, Esq.

A. Assisted Suicide

In 1895, the Montana Legislature enacted a criminal statute prohibiting assisted suicide as a "crime against the public safety."¹ In 1907, 1921 and 1947, this statute was re-codified, but its text remained unchanged.² The statute stated:

Every person who deliberately aids, or advises or encourages another to commit suicide is guilty of a felony.³

B. The Constitutional Convention

In 1972, Montana held its constitutional convention. At that time, the convention's Bill of Rights Committee considered and rejected a proposed "right to die."⁴ The testimony supporting this proposal had included an argument to allow physician-assisted suicide in the case of a painful death.⁵

On June 6, 1972, the constitution was ratified by the people

¹ Section 698, Pen. C. 1895.

² In 1907, § 698, Pen. C. 1895 was reenacted as § 8529, Rev. C. 1907. In 1921, the statute was reenacted as § 11261, R.C.M. In 1947, the statute was reenacted as § 94-35-215.

³ Id.

⁴ See Margaret Dore, "Montana Constitution Does Not Include a 'Right to Die,'" at, updated January 20, 2013, at www.montanansagainstassistedsuicide.org/p/no-right-to-die.html

⁵ Id, stating: "On February 3, 1972, the Committee held a hearing on the "right to die." [2] According to the Committee Minutes, "Mrs. Joyce Franks presented the theory to the Committee that all persons should be able to choose his own death with dignity." [3] The record also includes her seven page written submission, titled "Bill of Rights Speech." [4] In this document, she proposed wording for a constitutional right to die; she discussed her father's long and painful death, and the right to die in terms of physician-assisted suicide and/or euthanasia. [5]" (Mrs. Franks' testimony form and seven page document are available at <http://maasdocuments.files.wordpress.com/2012/10/archived-mrs-franks-materials-02-03-721.pdf>) Links to other archived documents are available here, in the footnotes: www.montanansagainstassistedsuicide.org/p/no-right-to-die.html

without the proposed right to die.⁶ This is the present Constitution of the State of Montana.⁷

C. A New Criminal Code

In 1973, the Legislature enacted a new criminal code drafted by the Criminal Law Commission. The new Code moved the prohibition against aiding a suicide to the homicide statutes.⁸ If the suicide occurred, the offense would be homicide.⁹ If the suicide did not occur, the offense would be "aiding or soliciting suicide."¹⁰ The Criminal Law Commission Comments stated that a victim's consent was not a defense, as follows:

If the conduct of the offender made him the agent of the death, the offense is criminal homicide, *notwithstanding the consent or even the solicitations of the victim.* (Emphasis added)¹¹

The new Code did not, however, provide this clarifying information in the statutes themselves.

In 1981, the Legislature added a monetary penalty.¹²

D. Civil Liability

In 1989, the Supreme Court of Montana issued *Krieg v.*

⁶ Margaret Dore, at www.montanansagainstassistedsuicide.org/p/no-right-to-die.html

⁷ Id.

⁸ 45-5-105, MCA, "Aiding or soliciting suicide," is part of Title 45, Crimes, Chapter 5, Offenses Against the Person, Part 1, Homicide. See Table of Contents attached hereto at A-64.

⁹ See Montana Legislative Services Division, *2012 Annotations to the Montana Code Annotated*, p. 271, Annotator's Note regarding 45-5-105, MCA, ("Under the new sections . . . a person may be convicted of Criminal Homicide . . . for causing another to commit suicide . . .") (Attached at A-67).

¹⁰ 45-5-105(1), MCA states: "A person who purposely aids or solicits another to commit suicide, but such suicide does not occur, commits the offense of aiding or soliciting suicide." (Attached at A-68).

¹¹ Montana Legislative Services Division, *2012 Annotations to the Montana Code Annotated*, p. 270, Criminal Law Commission Comments regarding 45-5-105, MCA. (Attached hereto at A-66)

¹² See 45-5-105(2) and 45-5-103(4), MCA. (Attached at A-68 & A-69).

Massey, describing that civil liability can be imposed against a person who causes or fails to prevent another person's suicide.¹³

E. *Baxter v. State*

On December 8, 2008, a Montana district court judge issued a decision holding that patients have a right to physician-assisted suicide under the Montana State Constitution.¹⁴ On December 31, 2009, the Supreme Court of Montana vacated this decision in *Baxter v. State*.¹⁵ The vote to vacate was six justices to one.¹⁶

In *Baxter*, the Supreme Court also held that a patient's consent to assisted suicide is a defense to a homicide charge against an assisting physician.¹⁷ The Court said that it was not bound by the Criminal Law Commission Comments, providing that a victim cannot consent, because that language did not appear in

¹³ *Krieg*, 239 Mont. 469, 472-3 (1989) states:

The general rule . . . is that "[n]egligence actions for the suicide of another will generally not lie since the act or suicide is considered a deliberate intervening act exonerating the defendant from legal responsibility . . .

There are two . . . exceptions to this rule. The first exception deals with causing another to commit suicide . . . The second exception allows the imposition of a duty to prevent suicide but only in a custodial situation where suicide is foreseeable. These situations typically involve hospitals or prisons.

¹⁴ *Baxter v. State*, 354 Mont. 234, ¶¶ 7 & 9, 224 P.3d 1211, 2009 MT 449,

¹⁵ *Id.*, ¶ 51

¹⁶ In *Baxter*, Justice James Nelson, specially concurring, was the only justice who voted to affirm a constitutional right to physician-assisted suicide under the Montana State Constitution. See his concurrence beginning at ¶ 64. The majority opinion issued by Justice William Leaphart vacated the district court's constitutional ruling at ¶ 51 ("The District Court's ruling on the constitutional issues is vacated . . .") Leaphart was joined by Justices Patricia O. Cotter, John Warner and Brian Morris. Warner's concurrence, ¶ 54, states "This Court correctly avoided the constitutional issue . . ." The dissent by Justice Jim Rice, joined by Joe L. Hegel, would have gone farther to state that there is no constitutional right to assisted suicide under the Montana State Constitution. See ¶¶ 111-116.

¹⁷ *Baxter*, 354 Mont. at 251, ¶ 50, states: "We . . . hold that under § 45-2-211, MCA, "a terminally ill patient's consent to physician aid in dying constitutes a statutory defense to a charge of homicide against the aiding physician when no other consent exceptions apply."

the statutes themselves.¹⁸ Again, the Criminal Law Commission Comments state:

If the conduct of the offender made him the agent of the death, the offense is criminal homicide, *notwithstanding the consent or even the solicitations of the victim.* (Emphasis added)¹⁹

The Supreme Court's decision was also based on a determination that assisted suicide is not against Montana public policy.²⁰ The Court, however, overlooked elder abuse. *Baxter* states that the only person "who might conceivably be prosecuted for criminal behavior is the physician who prescribes a lethal dose of medication."²¹ *Baxter* thereby overlooked criminal behavior by family members and others who benefit from a patient's death, for example, due to an inheritance. The Court thereby overlooked Montana's explicit public policy to prevent elder abuse.²²

The Court also failed to address its own precedent imposing liability on persons who cause or fail to prevent a suicide.²³

¹⁸ The Court stated: "[T]he comments analyze language, such as 'agent of death,' that does not even appear in the aid or soliciting statute or anywhere else in the Montana code." *Baxter*, 354 Mont. at 249, ¶ 42.

¹⁹ Montana Legislative Services Division, *2012 Annotations to the Montana Code Annotated*, p. 270, Criminal Law Commission Comments regarding 45-5-105, MCA. (Attached at A-66)

²⁰ *Baxter*, 354 Mont. at 250, ¶ 49.

²¹ *Baxter*, 354 Mont. at 239, ¶ 11.

²² See e.g., the Montana Elder and Persons With Developmental Disabilities Abuse Prevention Act, 52-3-801, MCA; the Protective Services Act for Aged Persons or Disabled Adults, 52-3-201, MCA; and the "Montana Older Americans Act," 52-3-501, et. al., MCA.

²³ *Baxter* does not mention civil liability or professional discipline.