

MEMORANDUM

To: Senate Judiciary Committee

From: Senator Greg Hinkle

Re: The Urgent Need to Now Enact SB 116, "An Act to Prohibit Aid in Dying."

Date: February 2, 2011

I. SUMMARY

SB 116 is needed now because Compassion & Choices, the former Hemlock Society, is openly encouraging doctors and the public to engage in assisted suicide. Someone is going to get hurt if they haven't been already. Indeed, Compassion & Choices is publicly claiming that Montana citizens are dying now.

This can be stopped with the passage of a simple, four sentence bill, SB 116.

II. DISCUSSION**A. Baxter Overlooks Montana Public Policy**

"Aid in dying" means assisted suicide and euthanasia.¹ In the context of assisted suicide, Baxter held that a patient's consent to "aid in dying" is a defense to a charge of homicide

¹ See e.g., Craig A. Brandt et. al., Model Aid-in-Dying Act, 75 IOWA L. REV. 125 (1989), available at <http://www.uiowa.edu/~sfklaw/euthan.html> (notice the letters "euthan" in the link). See also video transcript of Barbara Wagner, <http://www.katu.com/news/26119539.html?video=YHI&t=a> (last visited Nov. 4, 2010) ("'physician aid in dying' [is] better known as assisted suicide").

against an aiding physician.²

When making this ruling, the Montana Supreme Court overlooked its own precedent imposing civil liability against doctors and others who cause another person to commit suicide, typically in a hospital or jail setting.³ The Court also overlooked elder abuse by heirs and others who will benefit from the patient's death.⁴ Preventing elder abuse is official Montana State policy under at least two statutes.⁵ Preventing suicide for persons "of all ages" is an official state policy under another statute.⁶ *Baxter* nonetheless found that there was "nothing" in Montana statutes or precedent indicating that assisted suicide is against public policy.⁷

² *Baxter v. State*, 354 Mont. 234, 251, ¶ 50 (2009) 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."

³ *Baxter* does not mention *Krieg v. Massey*, 239 Mont. 469, 471-3, 781 P.2d 277 (1989), which allows civil liability for a suicide in two circumstances: (1) causing another to commit suicide; and (2) in a custodial situation where suicide is foreseeable, typically involving a hospital or prison.

⁴ *Baxter* states that the only person "who might conceivably be prosecuted for criminal behavior is the physician who prescribes a lethal dose of medication." *Baxter*, 354 Mont. at 239, ¶ 11. *Baxter* thereby overlooked criminal behavior by family members and others who benefit from an older person's death, for example, due to an inheritance.

⁵ See e.g., "Montana Elder and Persons With Developmental Disabilities Abuse Prevention Act," 52-3-801, MCA; and "Protective Services Act for Aged Persons or Disabled Adults," 52-3-201, MCA.

⁶ 53-21-1101, MCA (regarding a required suicide reduction plan, which is to address reducing suicides by Montanans "of all ages").

⁷ *Baxter*, 354 Mont. at 250, ¶49 ("we find nothing in Montana Supreme Court precedent or Montana statutes indicating that physician aid in dying is against public policy").

B. Compassion & Choices is Telling Doctors and the Public that Assisted Suicide is Legal and "Safe"

Compassion & Choices has been telling doctors and the public that assisted suicide is legal and that it's "safe" for a doctor to cause a patient's suicide. For example, Compassion & Choices' media package contains the following statement:

[T]he Montana Supreme Court ruled that terminally ill Montanans have the right to choose aid in dying under state law.⁸

Compassion & Choices also has this handout on its website: "Willing Providers in Montana are Safe to Practice Aid in Dying in Montana."⁹

C. Enticing the Public to Suicide

In 2010, the *Missoulian* ran an article featuring a Compassion & Choices' spokesman who claimed that assisted suicide prevents murder-suicide. He said: "We believe these tragic and violent deaths are 100 percent preventable."¹⁰ The article printed Compassion & Choices' toll free number, 1-800-247-7421, and indicated that callers would be able to prevent violent

⁸ Copy attached hereto at A-1.

⁹ Copy attached hereto at A-2 . See also <http://community.compassionandchoices.org/document.doc?id=454>

¹⁰ Michael Jamison, "Libby shooting, arson tragedy puts focus on 'aid in dying,'" *The Missoulian*, September 4, 2010. (Copy attached at A-3). Also available at http://missoulian.com/news/local/article_14e5e9b6-b7db-11df-aalc-001cc4c03286.html

deaths, apparently by signing up for the lethal dose.¹¹ The spokesperson stated: "Call us; we'll help you understand what's available, so you can make choices."¹²

In Oregon, where assisted-suicide has been legal since 1997, murder-suicide has not been eliminated.¹³ Indeed, murder-suicide follows "the national pattern."¹⁴ The claim that legal assisted suicide prevents murder-suicide is without factual support.

D. Compassion & Choices Claims That Montanans are Already Dying

On January 16, 2011, an AP article reported that physician-assisted suicide is occurring in Montana. The article states:

[M]ore than one terminally ill patient has died of a lethal ingestion of drugs, said Jessica Grennan, spokeswoman for the advocacy

¹¹ Id.

¹² Id.

¹³ See Don Colburn, "Recent murder-suicides follow the national pattern," *The Oregonian*, November 17, 2009 ("In the span of one week this month in the Portland area, three murder-suicides resulted in the deaths of six adults and two children") (Copy attached at A-5 and available at http://www.oregonlive.com/health/index.ssf/2009/11/recent_murder-suicides_follow.html); "Murder-suicide suspected in deaths of Grants Pass [Oregon] couple," *Mail Tribune News*, July 2, 2000 (regarding husband, age 77, and wife, age 76) at <http://archive.mailtribune.com/archive/2000/july/070200n6.htm>; and Colleen Stewart, "Hillsboro [Oregon] police investigating couple's homicide and suicide," *The Oregonian*, July 23, 2010 ("Wayne Eugene Coghill, 67, shot and killed his wife, Nyla Jean Coghill, 65, before taking his own life in their apartment"), at http://www.oregonlive.com/hillsboro/index.ssf/2010/07/hillsboro_police_investigating_homicide_and_suicide.html

¹⁴ Id.

group Compassion & Choices.¹⁵

The article also states:

The actual number of physician-assisted suicides is unclear because there are no state reporting requirements to the state. Compassion & Choices does not release statistics about its end-of-life consultation service.¹⁶

E. Enforcement Against Compassion & Choices is Not Guaranteed

With the above activities, Compassion & Choices would appear to be soliciting or causing suicide in violation of Montana state law.¹⁷ As a non-doctor, Compassion & Choices is ineligible for Baxter's defense.¹⁸ Compassion & Choices would also be subject to a wrongful death action by a complaining family member upset about the suicide.¹⁹ On the other hand, Baxter's erroneous

¹⁵ Matt Volz, "Legislature to take up assisted suicide bills," *The Associated Press*, January 16, 2011 (attached at A-8). Also available at http://www.mtstandard.com/news/local/article_ccdb7ca2-21e9-11e0-a8c9-001cc4c03286.html

¹⁶ *Id.*

¹⁷ See e.g. 45-5-105(1), MCA ("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"). When the suicide occurs, the charge is deliberate homicide under 45-5-102, MCA.

¹⁸ See *Baxter supra* at note 2. See also Greg Jackson & Matt Bowman, *Analysis of Implications of the Baxter Case on Potential Criminal Liability* (April 2010), available at http://www.montanafamily.org/portfolio/pdfs/Baxter_Decision_Analysis_v2.pdf (last visited October 22, 2010).

¹⁹ See *Krieg supra* at note 3 (allowing civil liability for a suicide in two circumstances: (1) causing another to commit suicide; and (2) in a custodial situation where suicide is foreseeable, typically involving a hospital or prison).

public policy determination is apparently giving Compassion & Choices comfort. In a recent bar article, Compassion & Choices' legal director featured these Baxter quotes:

[Baxter found:] no indication in Montana law that physician aid in dying provided to terminally ill, mentally competent adult patients is against public policy. . . .

Each stage of the physician-patient interaction is private, civil, and compassionate. . . .²⁰

With this language, will enforcement against Compassion & Choices, a "non-profit charity," be successful, especially, if there is no objecting family member available?²¹ Or what if the family members have been recruited by Compassion & Choices for an opposing media blitz? The outcome of any appeal would also seem uncertain. Would the Supreme Court really admit it was wrong? The taxpayers, regardless, will be picking up the cost to process the litigation.

Enacting SB 116 now, to overrule Baxter and clearly prohibit "aid in dying," will eliminate these problems. With Baxter gone, enforcement will be straight-forward: "Aid in dying" is prohibited. They can't do it.

²⁰ Kathryn Tucker & Christine Salmi, "Aid in Dying: Law, Geography and Standard of Care in Idaho," *The Advocate: Official Publication of the Idaho State Bar* No. 8, 42, at 44 (August 2010) (quotes attached at A-12; entire article attached at A-10 to A-13). Also available at <http://www.isb.idaho.gov/pdf/advocate/issues/adv10aug.pdf>

²¹ An excerpt from a Compassion & Choices brochure is attached at A-14.

F. How SB 116 Works

SB 116 is a four sentence bill that overrules *Baxter* and explicitly prohibits "aid in dying" (assisted suicide and euthanasia). The bill works by amending two existing statutes (amending or adding two sentences to each statute).²²

III. CONCLUSION

If SB 116 is not passed, we will soon be facing the issues of Washington and Oregon.²³ Our citizens will be at increased risk of abuse and worse at the hands of their relatives.²⁴ Our citizens will be steered to suicide.²⁵ There will be multiple other problems.²⁶

We must enact SB 116 now to overrule *Baxter* and clearly prohibit "aid in dying." Otherwise, we will lose our only chance.

²² A copy of SB 116 is attached at A-23.

²³ See Margaret K. Dore, "'Death with Dignity': What Do We Advise Our Clients?," King County Bar Association, *Bar Bulletin*, May 2009 (attached at A-15); Charles Bentz, MD, Letter to the Editor, "Don't follow Oregon's lead," *The Advocate*, November/December 2010 (attached at A-18); William Toffler, MD, Letter to the Editor, "Oregon's law doesn't work," Chris Carlson, Letter to the Editor, "Doctors not always right," Kenneth Stevens, MD, "Oregon mistake cost lives," *The Advocate*, September 2010 (attached at A-19); and Statement for the BBC from William Toffler, MD (attached at A-21).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

Dated this 1st day of February 2011

Senator Greg Hinkle

* * *

This memo was prepared by Margaret Dore, an elder law/appellate attorney in Washington state, where assisted suicide is legal. She has been licensed to practice law since 1986. She is a former Law Clerk to the Washington State Supreme Court for then Chief Justice Vernon Pearson. She is a former Law Clerk to the Washington State Court of Appeals to Judge John A. Petrich. She is a former Chair of the Elder Law Committee of the American Bar Association Family Law Section. She is admitted to practice in the United States Supreme Court, the Ninth Circuit Court of Appeals, the United States District Court of Western Washington and the State of Washington. For more information, see www.margaretdore.com.

Montana Aid in Dying – *Baxter v. Montana*

Background - Robert Baxter, a marine veteran, outdoorsman and career long haul truck driver was suffering from lymphocytic leukemia when he, along with four Montana doctors and Compassion & Choices, filed a case seeking recognition that the right to choose aid in dying is protected by the Montana Constitution's guarantees of privacy, dignity and equal protection.

On October 17th, 2007, Mr. Baxter asked the court to affirm his legal right to be able to hasten his inevitable death and die in a peaceful and dignified manner by taking medication prescribed by his doctor for that purpose. Physician plaintiffs who wanted to know that they could assist a patient with aid in dying and not be subject to criminal prosecution joined Mr. Baxter in this suit.

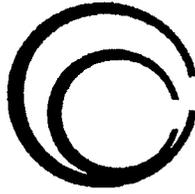
District Court Judgment and Appeal - On December 5 2008, Montana State District Court Judge Dorothy McCarter issued summary judgment to plaintiffs, holding that the state constitution's individual dignity clause and the constitution's "stringent" right of privacy are "intertwined insofar as they apply 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 State filed a notice of appeal. It also sought a stay of the lower court ruling pending the appeal. Judge McCarter denied the request for a stay in January 2009, meaning her ruling was fully effective and remained so unless and until the Montana Supreme Court ruled differently.

X **Montana Supreme Court Decision** - On December 31, 2009, in a 5 – 2 decision, the Montana Supreme Court ruled that terminally ill Montanans have the right to choose aid in dying under state law. The court ruled that public policy of Montana does not criminalize, and much in current public policy affirmatively supports, aid in dying. The court did not reach the question of whether the Montana constitution specifically protects aid in dying.

In a detailed review of Montana law on the "Rights of the Terminally Ill," the Court concluded that the legislature specifically defers to a patient's own decisions and affords patients the right to control their own bodies at the end of life. The decision to self-administer life-ending medication receives the same treatment as a decision to discontinue life sustaining therapies such as mechanical ventilation.

Learn more about *Baxter v. Montana* and Aid in Dying in Montana online at <http://www.compassionandchoices.org/montana>.



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Willing Providers in Montana Are Safe to Practice Aid in Dying

In December, a Montana District judge ruled that mentally competent, terminally ill Montanans have a fundamental right to a dignified death as protected by their state constitution. Yet four months into this ruling, two terminally ill Montana residents who wish to access this constitutional right cannot find a willing physician to help them. This is emotionally devastating for them both, as they had hoped to access the comfort and peace of mind the law would bring.

Janet Murdock, 67, of Missoula, has terminal ovarian cancer. "I was so hopeful when the court recognized my right to die with dignity," she said. "I feel as though my doctors do not feel able to respect my decision to choose aid in dying. Access to physician aid in dying would restore my hope for a peaceful, dignified death in keeping with my values and beliefs."

Doctors need not leave patients like her out in the cold.

X

Montana Physicians Are Free to Practice Aid in Dying without Fear of Prosecution

A physician prescribing life-ending medications to an eligible patient runs no risk of prosecution under Montana statutes.

X

"Physicians either have not heard about the decision or do not understand its implications for practice," said Compassion & Choices Legal Director Kathryn Tucker, who argued the case with Montana litigator Mark Connell. "We must remedy this. Surely in this context 'justice delayed is justice denied,' as patients who are currently confronting end-stage terminal illness will not live to see the Montana Supreme Court rule."

Professional Medical Groups Support Aid in Dying

Professional medical associations are increasingly adopting policies in support of aid in dying, reflecting a trend among major medical groups.

In 2008, the APHA, the nation's largest public health association, adopted policy supporting aid in dying. The policy supports "allowing a mentally competent, terminally ill adult to obtain a prescription for medication that the person could self-administer to control the time, place, and manner of his or her impending death ..."

The American Medical Women's Association adopted a position in March 2008 supporting the practice. According to the group's position statement, "The American Medical Women's Association supports patient autonomy and the right of terminally ill patients to hasten death."

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Missoulian

Libby shooting, arson tragedy puts focus on 'aid in dying'

By MICHAEL JAMISON of the Missoulian | Posted: Saturday, September 4, 2010 6:00 am

LIBBY - It was an act of love, Darryl Anderson said, an act of compassion and caring and bullets and arson and it didn't have to be that way.

"Basically," Anderson said, "it was a mercy killing, to end the pain. They were good people, but there was terrible pain."

William "Ted" Hardgrove used to visit Anderson - Lincoln County's sheriff - at work, showing off his inventions or detailing his own detective work on the latest unsolved case. He'd stay and chat and sometimes harangue, Anderson said, "and I thought he was just a super old guy."

Hardgrove was 81, just like his wife Swanie. She was known for her baking, and her gardening and her lace-making, and for the fact that she had cerebral palsy as well as other crippling medical problems. In recent weeks, the increasing pain had completely overwhelmed her medication.

On the last Saturday in August, Ted Hardgrove stopped the pain. He moved their valuables out of the Libby-area house and into the garage, then left a note explaining this final, desperate act of love.

He took the household chemicals from the home, took the hunting ammunition and anything else that might explode or burn too hot. Anderson figures Hardgrove was protecting the firemen he knew would come.

X Then Hardgrove went back inside, shot his wife, set their home afire and shot himself.

"It was a very carefully planned thing," Anderson said. "He left that note, said he was tired of seeing her suffer so badly, and there was a better place."

X But there was also, perhaps, a better way.

"What we want people to know," said Steve Hopcraft, "is there is help and information out there."

Hopcraft works with a nonprofit called Compassion and Choices, a group that offers free end-of-life planning, counseling and options.

"We believe that these tragic and violent deaths are 100 percent preventable," Hopcraft said. "It's a matter, really, of getting the information out."

Information such as the fact that Montana is among three states - Oregon and Washington are the other two - where doctors are allowed to provide what's known as "aid in dying." They can prescribe lethal drugs to terminally ill patients, who can then choose whether and when to use the pills.

Voters in Oregon and Washington approved such measures, which come with safeguards and careful case reporting. In Montana, no such structure exists. Instead, the state Supreme Court ruled last New Year's Eve that no public policy here prohibits aid in dying, so it's legal but largely unregulated.

It's also largely unknown, which is what Hopcraft hopes to change.

"Talking about death can't kill you," he said, "but it can help you have the peaceful death that everyone wants."

His group provides counseling, and help with wills and advance directives. They lay out options, such as hospice, and involve entire families. And they do it for free.

"It's just a phone call," Hopcraft said. A toll-free call to 1-800-247-7421. You can call any time, at each step along the way. Most of us are total amateurs when it comes to approaching death. We don't know what the options are, or where to get information. Call us; we'll help you understand what's available, so you can make choices."

Most of all, he said, Compassion and Choices helps people communicate. Doctors and patients, patients and family, family and physicians. "Because too often," he said, "failure to communicate ends in less than optimal care."

Or, more tragically, in an anguished couple choosing the only option they think is available.

"No one, no matter what their condition, should feel they have to resort to violence when confronting advanced illness," said Stephen Speckart, retired Missoula oncologist. "Patients need to feel safe talking with their doctors about unbearable symptoms and their feelings of desperation and desire for a peaceful death."

Sheriff Anderson understands, in an abstract kind of way, why his friends chose their end. He does not, however, understand why they chose that end.

"Why the fire?" he wonders. "I don't know. Maybe it was to wipe out everything and leave it clean. We'll never know."

And that, Hopcraft said, is precisely the problem. The friends and family will never know, because no one knew to sit down and consider all the options.

"We all want the same thing," Hopcraft said. "We want to die peacefully, at home, surrounded by the people we love. We want the chance to tell people goodbye."

Ted and Swanie Hardgrove didn't have that chance. Her body was found in an upstairs bathroom, his in the basement. A gun was at his side, the home still smoldering.

"It didn't have to be that way," Anderson said. "I think a lot of people wish it had been different."

Reporter Michael Jamison can be reached at 1-800-366-7186 or at mjamison@missoulian.com.



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Everything Oregon

Recent murder-suicides follow the national pattern

Published: Tuesday, November 17, 2009, 10:04 PM



By **Don Colburn, The Oregonian**

In a span of one week this month in the Portland area, three murder-suicides resulted in the deaths of six adults and two children.

While the three cases appear to have nothing to do with one another, they do match the national pattern for such lethal outbursts. In each case, the killer or suspect was a man -- either a husband, former husband or boyfriend -- and used a gun.

Experts caution against calling three separate incidents a "cluster" or trend.

"These are very difficult cases to understand, and each one is unique," said Mark S. Kaplan, professor of community health at Portland State University and an expert on suicide. "One needs to be very careful about generalizing."

But patterns do show up in large studies, he said. Murder-suicide is carried out predominantly by white males and almost always with a firearm.

"Distressingly simple"

"The pattern to murder-suicide is distressingly simple: a male offender, a female victim and a gun -- but literally anyone can be caught in its wake," concludes a 2002 report called "American Roulette: The Untold Story of Murder-Suicide in the United States," by the Violence Policy Center, an advocacy group in Washington, D.C.

"Unlike homicides, murder-suicides are far more likely to involve family or intimate acquaintances, and have different demographics than the typical homicide or suicide," the report states.

Nationwide, between 1,000 and 1,500 people a year die in murder-suicides, the Violence Policy Center estimates.

There were eight murder-suicides in Oregon in 2007, resulting in 16 deaths, said Lisa Millet, manager of the state Public Health Division's injury and violence prevention program.

Over the past five years, Oregon recorded 42 murder-suicides, totaling 88 deaths. Most of the murder victims were women; nearly all killers were men. A firearm was involved in 86 percent of the cases.

A-5

A study by the Centers for Disease Control and Prevention found that 88 percent of murder-suicides involve firearms and more than half the murders involved the killing of a former intimate partner.

Four common threads

The National Institute of Justice studied 591 murder-suicides and found four common threads: a prior history of domestic violence; access to a gun; repeated and increasingly specific threats; and a prior history of mental health problems and drug or alcohol abuse.

Of those murder-suicides, 92 percent involved use of a firearm.

The role of the economy is less clear.

"The very low number of murder-suicide incidents makes it hard for researchers to understand exactly what role the economy plays in these cases," the National Institute of Justice concluded. "What is known is that economic distress is a factor, but it is only one of several factors that trigger a man to murder his family. In most cases, the couple have a history of disagreement over many issues, most commonly money, sex and child-rearing."

Depression plays role

And depression can be a precipitating factor, as it is in most suicides.

"One of the untold stories about depression," Millet said, "is that it doesn't look the same in men as in women."

Depressed men are less likely than depressed women to get help for their emotional health, and they are more likely to try to control external factors. In extreme cases and under the effect of other stressors, that can lead to violent outbursts, she said.

She urged any woman threatened with domestic violence to seek help right away. The most dangerous time, when relationships are most likely to turn violent, is immediately after a breakup.

The Portland Women's Crisis Line is a private nonprofit that helps women who are in a violent or potentially violent relationship, referring them to a shelter if necessary. The Crisis Line takes calls 24 hours a day, seven days a week. Most of the roughly 26,000 calls to the Crisis Line last year were prompted by fear, threats or attacks of domestic violence.

To reach the Crisis Line: call 503-235-5333. Or check **online**.

By the numbers

Murder-suicides in Oregon, 2003 through 2007

42 murder-suicides (average: eight per year)

88 deaths

78 killed by a firearm

46 homicides (31 females, 15 males; 41 adults, five children)

42 homicide suspects (38 men, four women)

Source: Oregon Violent Death Reporting System, Public Health Division

Risk factors

The top five risk factors that tend to make domestic violence escalate into homicide. Experts say they are especially insidious because they don't leave any visible mark that could be noticed by another.

1. Has the abuser ever used, or threatened to use, a gun, knife or other weapon against the victim? (If yes, the victim is 20 times more likely to be killed than others who experience domestic violence.)
2. Has the abuser ever threatened to kill or injure the victim? (15 times more likely)
3. Has the abuser ever tried to strangle or choke the victim? (10 times more likely)
4. Is the abuser violently or constantly jealous? (Nine times more likely)
5. Has the abuser ever forced the victim to have sex? (Eight times more likely)

Source: U.S. Department of Justice

Don Colburn

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