

Draft report on the Legal Status of Aid in Dying in New Mexico – 2016

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One of the primary events leading to the creation of this task force was the New Mexico Supreme Court's decision on June 30, 2016, that there is no "absolute and fundamental" state constitutional right to aid in dying (*Morris v. Brandenburg*, 2016-NMSC-027). That decision upheld the constitutionality of NM Stat Ann Section 30-2-4 NMSA 1978 which prohibits "assisting suicide," which is defined as 'deliberately aiding another in the taking of his own life.' *Morris*, par. 15. The Supreme Court explicitly determined that physician aid in dying fell within that statutory proscription. On the other hand, the Supreme Court pointed out that the state had no "legitimate interest in preserving a painful and debilitating life that will imminently come to an end ..." *Morris*, par. 2.

The Supreme Court concluded that the issue was one for policymakers in New Mexico, and that the concerns about aid in dying "require robust debate in the legislative and executive branches of government." Thus, there would be no legal impediment to the State establishing a statutory or regulatory right to aid in dying even though it is not an "absolute, fundamental" state constitutional right. Without commenting on the wisdom of permitting aid in dying, the Supreme Court passed the issue on to other branches of government for resolution. Until those branches of government act, however, almost all forms of aid in dying remain illegal as violation of the state law prohibiting "assisting suicide."

A function of this Task Force is to help inform the "robust debate" that is about to take place in the legislative and executive branches. If availability of aid in dying, in the rare cases in which it would be appropriate, is a small but integral part of creating the best possible end of life care for New Mexicans, there are two primary ways to change the current law.

First, the Legislature could promulgate an Oregon-like statute that would provide (1) criteria for determining what cases are appropriate for aid in dying, and (2) a process through which all decisions regarding aid in dying are made and recorded. Four of the five states that now permit aid in dying (Oregon, Washington, Vermont and California) have followed this path and they have all adopted statutes based on the original Oregon statute which has been closely watched and carefully monitored over the past 18 years. Oregon state agencies have produced substantial data showing that the law has been used sparingly and that it has not been abused. All of the current state statutes limit aid in dying to competent adult state-resident terminally ill patients with less than six months to live, and they allow for the prescription of a lethal dose only after repeated and precisely informed requests for those prescriptions from the patients. These laws also permit any individual or institutional provider to opt out of participating in aid in dying. In another state to allow aid in dying, Montana, the state supreme court determined that the aid in dying was permitted under their unusual state law prohibiting assisting suicide, at least as long as it was subject to safeguards that were parallel to those in the Oregon law.

New Mexico could follow this path and create an Oregon-like statute. The path is well trod and the parameters of the debate over specific provisions of the law are well established. But there are

other statutory paths available in New Mexico as well. The impediment to aid in dying is New Mexico's assisting suicide statute which could be amended to make it clear that it does not apply to aid in dying.

For example, NM Stat Ann Section 30-2-4 could be amended to include, immediately following the current language, a statement such as "This statute does not extend to a person legally authorized to write prescriptions who writes a lethal prescription for a competent informed adult terminally ill patient, as long as that person acts consistently with the standard of care for medical practice." This would be a simpler, albeit more ambiguous, alternative to a full Oregon-like statute.

There are still other ways to amend the assisting suicide statute. The Legislature could provide that, "This statute does not extend to those who engage in the practice of aid in dying in compliance with regulations adopted by the Department of Health (or the Medical Board)." This approach would delegate the details of New Mexico's aid in dying process to an administrative agency. Such a delegation would result in formal notice-and-comment rulemaking by the relevant state agencies, and a chance for full public debate on the issues of eligibility and safeguard during the rulemaking processes. It would also allow for changes in regulatory processes that are more responsive to the needs of dying patients as those needs change over time.

Finally, the Legislature could place a New Mexico constitutional amendment creating a right to aid in dying on a general election ballot through a Concurrent Resolution, which would require action by both houses, but not the signature of the Governor. It would result in a new state constitutional provision. There has been considerable concern by some legislators about the proposed use of concurrent resolutions to bypass the participation of the executive branch, however. This is what makes state constitutions so rigid and unwieldy, and it seems inappropriate in this case.

In response to the *Morris* decision of the Supreme Court, the Legislature has the following options:

- (1) Do nothing, leaving virtually all aid in dying criminalized within the state;
- (2) Promulgate an Oregon-like statute;
- (3) Amend the Assisting Suicide statute to exclude aid in dying and leave it to subsequent judicial decision to clarify the limits of the exclusion;
- (4) Amend the Assisting Suicide statute to exclude aid in dying and delegate the details of the exclusion to an administrative agency, which would act only after full hearing; or
- (5) Propose a constitutional Amendment to create the New Mexico constitutional right to aid in dying that the Supreme Court found lacking.

Our question is which of these alternatives would make the best contribution to the creation of a good environment for end of life care within New Mexico.