

End-of-Life Options Act

Susie Germany, Esq.

The GERMANY LAW FIRM P.C.

- ▶ Ms. Germany is an attorney licensed in both Alaska and Colorado. She has practiced in the areas of criminal litigation, civil litigation and domestic law in addition to elder law, probate and estate planning. An active member of the Colorado Bar Association, Ms. Germany is the past co-chair of the Elder Law Section and is a director for the Colorado Fund for People with Disabilities and an advisory board member for Front Range Hospice. A frequent speaker and lecturer on elder law and probate matters, she has taught courses for attorneys and other legal professionals and for various community organizations.
- ▶ The Germany Law Firm is a full service law firm and a Deputy Public Administrator's office.
- ▶ We assist our clients by providing them with support and peace of mind through major life changes that involve estate planning, estate administration and probate issues. Our firm is experienced in assisting clients with estate administration, advanced directives, guardianships, conservatorships, trusts, wills and other probate matters. We are a resource for clients who need planning while undergoing major life changes such as death or divorce or assisting single parents in long-term planning for their children. We also assist with end-of-life decisions and ensuring someone of your choosing is appointed to care for you if you ever become incapacitated.

- ▶ **Denver Office**
600 17th Street
Suite 2800 South
Denver, Colorado 80202
Phone: 303-454-3711
Fax: 303-496-0752
Susie@coelderlaw.net
- ▶ **Erie Office**
77 Erie Village Square
Suite 100
Erie, Colorado 80516
- ▶ **Brighton Office**
195 Telluride Street
No. 5
Brighton, Colorado 80601
- ▶ **Loveland Office**
1635 Foxtrail Drive
Loveland, Colorado 80538

Colorado End-of-Life Options Act

- ▶ In November 2016 voters passed Ballot Initiative 106, the Colorado End-of-Life Options Act, by 65 to 35 percent. The new law allows terminally ill patients to request aid in dying in certain clearly defined situations.
- ▶ Because of the sensitivity of the topic, today I am sharing
 - ▶ the background of the law;
 - ▶ the legislative history of the law;
 - ▶ specific requirements of the law;
 - ▶ potential issues that have already arisen;
 - ▶ potential amendments to the law.
- ▶ This is a highly emotional topic, which causes everyone to have strong opinions, one way or the other.

Background of the Law

- ▶ “Death with dignity” is one of the most commonly accepted phrases describing the process by which a terminally ill person ingests prescribed medication to hasten death. Many people still think of this process as “assisted suicide” or “physician assisted suicide.”
- ▶ However, proponents argue that the term “suicide” doesn’t apply to terminally ill people who would prefer to live but, facing certain death within months, choose a more gentle way of dying.
- ▶ Colorado’s law states that terminating one’s life under this law is not suicide.
- ▶ The phrase “aid in dying” is becoming a more accepted way to refer to this process.

Background of the Law

- ▶ A poll conducted in 2014 showed that 62% of Colorado voters support death with dignity. ⁱ
- ▶ Recently, there's been a dramatic increase in the number of states considering death with dignity laws, since January 1, legislation has been introduced in 24 states regarding this issue. Sometimes called “assisted suicide” or “right to die” initiatives, these laws make it possible for terminally ill patients to use prescribed medication to end their lives peacefully rather than suffering a difficult death.

Background of the Law

- ▶ The catalyst for greater national attention to this issue was 29-year-old Brittany Maynard, a woman diagnosed with terminal brain cancer who moved from California to Oregon to end her life in 2014.
- ▶ Maynard chose Oregon because it was one of the few states that allow terminally ill patients to receive aid in dying.



Source: "My right to death with dignity at 29," Brittany Maynard. CNN Opinion. Nov. 2, 2014. Accessed July 26, 2017 <http://www.cnn.com/2014/10/07/opinion/maynard-assisted-suicide-cancer-dignity/index.html>

Timeline of Aid in Dying in the US

- ▶ **June 1997** - The US Supreme Court rules that state laws allowing physician-assisted suicide are Constitutional. Washington v. Glucksberg, 521 US 702 (1997).
- ▶ **October 27, 1997** - Oregon's Death with Dignity Act becomes law. Passed in a 1994 election with 51% of voters in favor, the law was delayed initially because US District Judge Michael Hogan issued an injunction, ruling it unconstitutional. The Ninth Circuit Court of Appeals reversed the ruling and the injunction was lifted in 1997. ⁱⁱⁱ
- ▶ **November 1998** - American pathologist and assisted suicide advocate Jack Kevorkian, known as "Dr. Death," videotapes the death of Thomas Youk, submits it to CBS's 60 Minutes and it is broadcast on television. The airing prompts murder charges against Kevorkian, rather than assisted suicide charges, because Kevorkian injected the drug into Youk, who had Lou Gehrig's disease.
- ▶ **March 26, 1999** - Kevorkian is convicted of second degree murder and delivery of a controlled substance. He served eight years of a 10 to 25 year sentence.

Timeline of Aid in Dying in the US

- ▶ **November 4, 2008** - Washington's initiative, the Death with Dignity Act, is passed with 57.91% of voters in favor. ^{iv}
- ▶ **March 5, 2009** - Washington's Death with Dignity Act goes into effect.
- ▶ **December 31, 2009** - A Montana Supreme Court ruling in the case Baxter v. Montana asserts that the Rights of the Terminally Ill Act protects a physician who prescribes aid from liability. ^v
- ▶ **November 2012** - In Massachusetts, a death with dignity initiative appears on the November 2012 ballot. It is defeated by a slim margin with 51% voting against it. ^{vi}
- ▶ **May 20, 2013** - Vermont signs the Patient Choice and Control at End of Life Act into law.
- ▶ **January 13, 2014** - New Mexico Second Judicial District Judge Nan Nash rules in favor of an individual's right to die in the case Morris v. Brandenburg. 356 P.3d 564 (N.M. Ct. App. 2015).

Timeline of Aid in Dying in the US

- ▶ **November 1, 2014** - Brittany Maynard, a 29 year-old with terminal brain cancer, ends her life under Oregon's "Death with Dignity Act." She had moved to Oregon from California. She garnered a large following advocating for physician-assisted suicide laws via social media.
- ▶ **October 5, 2015** - California governor, Jerry Brown signs into law the End of Life Option Act, which legalizes physician-assisted suicide for Californians with terminal illnesses. In a letter to members of the California State Assembly, Brown wrote that he thought about his own death while considering whether to sign the bill. "I do not know what I would do if I were dying in prolonged and excruciating pain. I am certain, however, that it would be a comfort to be able to consider the options afforded by this bill."^{vii}
- ▶ **March 10, 2016** - The California legislature convenes a special session, paving the way for the End of Life Option Act to take effect on June 9.
- ▶ **November 8, 2016** - Colorado voters approve Proposition 106, which includes the Colorado End of Life Options Act. It takes effect on December 16, 2016.
- ▶ **December 19, 2016** - The District of Columbia signs the Death with Dignity Act into law. The Act goes into effect February 18, 2017.^{viii}

Current Statistics

- ▶ Six states (California, Colorado, Montana, Oregon, Vermont, and Washington) as well as Washington, D.C. have laws regarding medical aid in dying.
- ▶ In Oregon, according to the 2016 Data Summary, as of January 23, 2017, prescriptions have been written for 1,749 people, and 1,127 patients have died from ingesting the drugs that were legally prescribed to them under the law. ^{ix}
- ▶ In Washington, according to the 2015 annual report, since 2009 prescriptions have been written for 938 people, and there have been 917 reported deaths. ^x
- ▶ In Vermont, as of June 8, 2017, physician reporting forms have been completed for 53 people, according to the Department of Health. ^{xi}

Current Statistics

- ▶ In California, During the half-year from the day the law took effect on June 9, 2016 until Dec. 31, 2016:
 - ▶ 191 terminally ill Californians received prescriptions from 173 doctors for aid-in-dying medication;
 - ▶ 111 of those individuals (58%) decided to self-ingest the medication.
 - ▶ The majority of people who received aid-in-dying prescriptions were insured (96.4%) and enrolled in hospice (83.8%).^{xii}
- ▶ Compassion & Choices, an advocacy group supporting Death with Dignity, released a June 1, 2017 report about the first year of California's End of Life Option Act which showed at least 504 terminally ill adults have received prescriptions for medical aid in dying.
- ▶ The report also showed about 80 percent of private insurance companies have covered the cost of medication, including Blue Cross, Blue Shield, Kaiser Permanente, Sutter, many local health plans and all Medi-Cal plans.^{xiii}

Current Statistics

- ▶ As of July 6, 2017, 10 prescriptions have been filled in Colorado, but only one confirmed death.
- ▶ Kathy Myers, of Aurora, Colorado



Source: “Colorado woman ends her life under physician-assisted suicide law.” Erin Powell. April 18, 2017. Accessed July 24, 2017 at <http://www.9news.com/news/local/next/colorado-woman-ends-her-life-under-physician-assisted-suicide-law/423477964>

Legislative History of the Law

- ▶ The 2015 session was the first time a Death with Dignity bill was considered in the Colorado legislature after the Oregon Death with Dignity Act went into effect.
- ▶ Colorado had considered physician-assisted dying bills in 1995 and 1996.
- ▶ HB 16-1054 (Death with Dignity bill) was introduced in January 2016. Known as the Colorado End-of-Life Options Act, the new law would allow terminally ill patients who meet certain requirements to request life-ending medication.

Legislative History of the Law

- ▶ The 2016 Colorado general election ballot included the “Colorado End-of-Life Options Act,” loosely patterned after Oregon’s doctor-prescribed suicide law.
- ▶ A patient requesting aid-in-dying medication would have to be:
 - ▶ at least 18 years old;
 - ▶ a Colorado resident;
 - ▶ mentally capable of making and communicating health care decisions,
 - ▶ and diagnosed with a terminal disease that will result in death within six months.

Specific Requirements of the Law

- ▶ See handout with full text of the End-of-Life Options Act, CRS 25-48-101 (2016)
- ▶ According to Colorado's law, a patient who meets the requirements above will be prescribed aid-in-dying medication only if:
 - ▶ The patient makes two verbal requests to their doctor, at least 15 days apart;
 - ▶ The patient gives a written request to the doctor, signed in front of two qualified, adult witnesses. The law sets out the specific form that the patient must use.
 - ▶ The prescribing doctor and one other doctor confirm the patient's diagnosis and prognosis. (continued on next slide)

Specific Requirements of the Law

- ▶ The prescribing doctor and one other doctor determine that the patient is capable of making medical decisions.
- ▶ The patient has a psychological examination, if either doctor feels the patient's judgment is impaired.
- ▶ The prescribing doctor confirms that the patient is not being coerced or unduly influenced by others when making the request.
- ▶ The prescribing doctor informs the patient of any feasible alternatives to the medication, including care to relieve pain and keep the patient comfortable.
- ▶ The prescribing doctor asks the patient to notify their next of kin of the prescription request. However, the doctor cannot require the patient to notify anyone.
- ▶ The prescribing doctor offers the patient the opportunity to withdraw the request for aid-in-dying medication before granting the prescription.

Requirements of Physician

- ▶ Determine whether individual has terminal illness, has prognosis of six months or less, mentally capable, informed decision and has made request voluntarily.
- ▶ Confirm residency of individual
- ▶ Provide disclosures to ensure informed decision by also discussing:
 - ▶ Medical diagnosis and prognosis of 6 months or less
 - ▶ Feasible alternatives
 - ▶ Hospice and palliative care
- ▶ Counsel patient as to importance of:
 - ▶ Not being alone when self-administering aid-in-dying medication
 - ▶ Not taking aid-in-dying medication in public place
 - ▶ Safe-keeping and disposal of aid-in-dying medication
 - ▶ Notifying next of kin of the request for medical aid-in-dying medication

Pharmacies and the Prescription

- ▶ Must verify identify of person or designee picking up prescription
- ▶ Will also require written consent
- ▶ There may be a delay in filling prescription, if pharmacy has to order in the quantity that the attending doctor has written for.
- ▶ Medicare and Medicaid will not pay for prescription, and it may be between \$4,000-5,000
- ▶ To use the medication, the patient must be able to ingest it on their own. The statute defines self-administer as a “qualified individual’s affirmative, conscious, and physical act of administering the medical aid-in-dying medication to himself or herself to bring about his or her own death.” CRS § 25-48-102(15)
 - ▶ A doctor or other person who administers the lethal medication may face criminal charges. **This must be self-administered.**

Death Certificate

- ▶ According to CRS § 25-48-109, the Death Certificate will be signed by the attending physician, or the Hospice medical director if hospice is involved.
- ▶ The cause of death will be listed as the terminal diagnosis (the underlying diagnosis, such as cancer), and must not include words such as:
 - ▶ Suicide
 - ▶ Assisted Suicide
 - ▶ Physician-assisted suicide
 - ▶ Death with Dignity
 - ▶ Mercy killing
 - ▶ Euthanasia
 - ▶ Medication
- ▶ The manner of death must be marked as “natural”
- ▶ A death under these circumstances does not constitute grounds for post-mortem inquiry.
- ▶ Note, not all county coroners have finalized how they will deal with deaths at home when a patient is not on hospice and the attending has not seen the patient within the last 30 days
- ▶ The intent of this is to ensure that life insurance policies are not affected by the use of the aid-in-dying medication

Potential Issues - Self-Administered

- ▶ The Aid-in-dying Prescription must be self-administered
- ▶ What does that mean exactly?
 - ▶ Is the patient required to prepare the slurry of medication to drink?
 - ▶ Or does it mean the patient must be able to hold the cup and drink the slurry?
- ▶ Many patients can't self-administer due to their diagnosis.



Potential Issues - Hospital Implications

- ▶ Some hospitals, health care systems and hospices have refused to offer this option to their patients. Participation by hospitals and physicians is entirely voluntary.
 - ▶ Colorado Hospital Association has urged hospitals to adopt policies governing actions that occur on hospital premises.
 - ▶ Policies must be in place to give the option to patients to take aid-in-dying medication on the hospital premises.
 - ▶ The majority of patients in other states who choose to take aid-in-dying medication do so at home, not in the hospital. ^{xiv}
- ▶ Many Faith-based health care systems have opted out of offering aid in dying to their patients. This includes Centura Health (Colorado's largest health system operated by Catholic Health Initiatives and Adventist Health System) and SCL Health.
- ▶ UCHHealth and Kaiser Permanente Colorado both plan to offer aid in dying.
- ▶ Individual doctors, nurses, and pharmacists can also voluntarily opt out of providing these services for religious or ethical reasons.

Potential Issues - Cost of Choosing the End-of-Life Options Act

- ▶ Those choosing to use the End-of-Life Options Act may need to privately pay doctors - Medicaid and Medicare won't bill for this, as they are federally funded
- ▶ Private pharmacies required to fill prescriptions, again, they can't be federally funded
- ▶ Could cost individuals between \$4,000 and \$5,000 for the prescription

Potential Issues - Lack of Oversight

- ▶ Can't track the use of prescriptions for the life-ending medications
- ▶ Because of the law requiring death certificates to list only the underlying condition, there is no way to track how many people have used the new law to terminate their life
- ▶ If prescription is unused, no way to track if it is disposed of properly or returned to pharmacy
 - ▶ May be potential issue if sold on open market
- ▶ No safeguards, diversions or mandatory reporting
- ▶ No accountability

Potential Issues - Lack of Counseling

- ▶ Doctor appointments must be 15 days apart, but there is no required counseling
- ▶ No counseling for family members as this cuts short natural grieving process
- ▶ The statute requires that the Attending Doctor “counsel the individual about the importance of:
 - ▶ Having another person present when the individual self-administers the medical aid-in-dying medication prescribed pursuant to this article;
 - ▶ Not taking the medical aid-in-dying medication in a public place
 - ▶ Safekeeping and proper disposal of unused medical aid-in-dying medication”

Potential Issues - Must have Capacity

- ▶ Patients wanting to implement the End-of-Life Options Act **MUST** have Decisional Capacity
- ▶ Medical Powers of Attorney cannot make the decision.
- ▶ Must be individual's decision
- ▶ Capacity must be determined by the doctor. The patient cannot be suffering from Alzheimer's or dementia

Potential Issues - Role of Hospice

- ▶ A basic element of hospice philosophy states that because dying is a natural process, hospice neither seeks to hasten nor postpone death.
- ▶ Hospice providers may choose to participate or not participate in a patient's pursuit of medical aid-in-dying
- ▶ Hospice providers will likely have procedures for staff involvement in discussions around requesting medical aid-in-dying medication, including:
 - ▶ Provide support for patients who choose to pursue the Act;
 - ▶ Staff presence with patients ingest medication;
 - ▶ Hospice responsibilities following death;
 - ▶ Documentation standards around discussions and patient requests for medical aid-in-dying medication; and
 - ▶ Staff ethical objections.

Potential Issues - Role of Hospice

- ▶ If a patient in hospice is considering using the End-of-Life Options Act because of suffering, consider:
 - ▶ Is pain management appropriate?
 - ▶ Should there be a change in hospice care provider?
 - ▶ The primary **goals of hospice care** are to provide comfort, relieve physical, emotional, and spiritual suffering, and promote the dignity of terminally ill persons.
 - ▶ **Hospice care** neither prolongs nor hastens the dying process.

Potential Issues - Determining Death

- ▶ In most cases, a patient will take the Aid-in-dying medication in the patient's home and hospice is often not involved -- how is death determined?
- ▶ Importance of having the Advanced Directive posted
 - ▶ If a family member calls non-urgent EMS to report the death, and a paramedic arrives, if a Advanced Directive and DNR is not posted clearly, the EMS personnel is required by law to attempt to revive the patient.

Potential Amendments to the Law

- ▶ There are expected future amendments, as well as a national discussion regarding Federal oversight and “national safeguards.” ^{xv}
- ▶ HB17-1368 (postponed indefinitely)
 - ▶ In the 2017 session, opponents of the new law introduced HB 1368, a bill that would amend the Act to allow, rather than require, the attending physician or hospice medical director to sign the death certificate of someone who used an aid-in-dying medication. The bill died in committee. ^{xvi}

Endnotes

- i. Polling on Voter Support for Medical Aid in Dying for Terminally Ill Adults.” CompassionAndChoices.org May 2017. Accessed July 25, 2017 <https://www.compassionandchoices.org/wp-content/uploads/2016/02/FS-Medical-Aid-in-Dying-Survey-Results-FINAL-5.19.17-Approved-for-Public-Distribution.pdf>.
- ii. “My right to death with dignity at 29,” Brittany Maynard. CNN Opinion. Nov. 2, 2014. Accessed July 26, 2017 <http://www.cnn.com/2014/10/07/opinion/maynard-assisted-suicide-cancer-dignity/index.html>
- iii. “Death with Dignity Act History” Accessed July 25, 2017 <http://www.oregon.gov/oha/ph/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/history.pdf>
- iv. “Death with Dignity Act” Washington State Department of Health. Accessed 7/26/2017 <http://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/DeathwithDignityAct>
- v. “Montana Becomes Third U.S. State to Allow Physician Aid in Dying” Kristine S. Knaplund. *American Bar Association*. Feb. 2010. Accessed July 25, 2017 at https://www.americanbar.org/content/dam/aba/publications/rpte_ereport/2010/february/te_knapland.pdf.authcheckdam.
- vi. “Question 2: Physician-assisted suicide.” Accessed July 25, 2017 at <http://archive.boston.com/news/special/politics/2012/general/mass-ballot-question-2-election-results-2012.html>
- vii. Letter. Edmund G. Brown Jr. October 5, 2015. Accessed July 25, 2017 at https://www.gov.ca.gov/docs/ABX2_15_Signing_Message.pdf.
- viii. “Physician-Assisted Suicide Fast Facts,” CNN Library, updated June 10, 2017, accessed 7/20/2017 at <http://www.cnn.com/2014/11/26/us/physician-assisted-suicide-fast-facts/index.html>
- ix. “Death with Dignity Act” Oregon Health Authority. Accessed 7/26/2017 <http://www.oregon.gov/oha/ph/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/index.aspx>
- x. “Death with Dignity Act” Washington State Department of Health. Accessed 7/26/2017 <http://www.oregon.gov/oha/ph/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/index.aspx>
- xi. “Physician-Assisted Suicide Fast Facts”
- xii. “California End of Life Option Act 2016 Data Report” California Department of Public Health accessed July 20, 2017 at <https://www.cdph.ca.gov/Programs/CHSI/CDPH%20Document%20Library/CDPH%20End%20of%20Life%20Option%20Act%20Report.pdf>
- xiii. “California Medical Aid-in-Dying Law Working Very Well as 1st Anniversary Approaches,” Compassion and Choices, June 1, 2017 accessed July 20, 2017 at <https://www.compassionandchoices.org/california-medical-aid-in-dying-law-working-very-well-as-1st-anniversary-approaches/>
- xiv. “End-of-Life Options Act Materials” Colorado Hospital Association. Accessed July 25, 2017 <https://cha.com/policy-advocacy/end-of-life-options-act-materials/>
- xv. “Federal threats to Colorado’s aid-in-dying law.” Barbara Coombs Lee. March 25, 2017. Accessed July 25, 2017 <http://www.denverpost.com/2017/03/25/federal-threats-to-colorados-aid-in-dying-law/>
- xvi. “Death with Dignity” <https://www.deathwithdignity.org/states/colorado/>