

RECENT DEVELOPMENTS IN PHYSICIAN-ASSISTED SUICIDE

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LITIGATION

Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach, 445 F.3d 470 (2006). The Alliance filed suit to enjoin the Food and Drug Administration (FDA) from barring access to potentially life-saving investigational drugs (already determined by the FDA to be sufficiently safe for expanded human testing) by mentally competent, terminally ill adult patients who have no alternative government-approved treatment options. On 5/2/06, the U.S. Court of Appeals for the District of Columbia Circuit issued a 2-to-1 decision finding that the complaint stated a claim and the District Court erred in dismissing the case. The appellate court concluded that cases such as *Glucksberg* and *Cruzan* established that the FDA's actions implicated fundamental substantive due process rights to privacy, liberty, and life of Alliance's terminally ill members. The court remanded the case to permit the trial court to determine whether the FDA's policy was narrowly tailored to serve a compelling governmental interest.

Raich v. Ashcroft, 248 F.Supp.2d 918 (N.D.Cal. 2003), *rev'd*, 352 F.3d 1222 (9th Cir. 2003), *rev'd sub nom. Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). On 6/6/05, the United States Supreme Court held in *Gonzales v. Raich* that application of Controlled Substances Act provisions criminalizing the manufacture, distribution, or possession of marijuana by intrastate growers and users of marijuana for medical purposes did not violate the Commerce Clause of the U.S. Constitution. In addition to the Commerce Clause claim, plaintiffs had alleged violation of state sovereignty under the Tenth Amendment, deprivation of liberty rights under the Due Process Clause of the Fifth Amendment and under the Ninth Amendment, and the defense of medical necessity. On 3/27/06, Judges C. Arlen Beam, Richard Paez, and Harry Pregerson of the Ninth Circuit Court of Appeals heard oral argument on the latter claims. *Raich v. Gonzales*, No. 03-15481 (9th Cir.). Case documents are available at Angel Raich's web site, <http://www.angeljustice.org>.

LEGISLATION

California

Bill introduced. On 2/17/05, Assemblywoman Patty Berg and Assemblyman Lloyd Levine introduced a bill in the California legislature, AB 654 (the California Compassionate Choices pvid ao 6/6205, that ahe

a different bill, AB 651, already pending before the Senate. Ultimately, backers of the California Compassionate Choices Act decided in July 2005 to abandon their efforts for the time being and to carry the proposed legislation over to the second year of the 2005-06 legislative session.

Senate. Supporters of AB 651 were optimistic that it would pass in the California legislature in 2006. On 6/27/06, hundreds of witnesses testified in a hearing before the Senate Judiciary Committee. At the conclusion of the hearing, the bill failed on a 3-2 vote when the committee's chair, Democratic Senator Joe Dunn, voted against it.

Oregon

Char Andrews. Char Andrews, a 68-year-old breast can

rejecting Kevorkian's request for commutation of his sentence for the fourth consecutive year. However, Governor Jennifer Granholm, who has ordered an independent medical examination to determine Kevorkian's medical condition, may still consider a commutation. Kevorkian's lawyer Mayer Morganroth has argued that Kevorkian is 78 years old, weighs only 113 pounds, suffers from Hepatitis C and diabetes, and will not live for another year. Readers responding to a Detroit News Cybersurvey voted 67% to 33% in favor of release.

Biography. Two of Dr. Jack Kevorkian's longtime friends, Neal Nicol and Harry Wylie, have written an authorized biography, *Between the Dying and the Dead: Dr. Jack Kevorkian's Life and the Battle to Legalize Euthanasia*, published by the University of Wisconsin Press. Film rights to the book have been purchased by Hollywood's Bee Holder Productions.

Documentary. Sophie Boudreau, a 14-year-old girl from Holland, Michigan, researched and produced a 10-minute documentary on the life of Dr. Jack Kevorkian, titled *Whose Death Is It, Anyway?* Boudreau's documentary was selected as the best history project from a Michigan middle school at the National History Day competition at the University of Maryland.

American Bar Association. On 8/4/06 in Honolulu, Hawaii, a panel at the American Bar Association annual meeting discussed "*Gonzales vs. Oregon—Lessons for States, Terminally Ill, and Schiavo Patients.*" Speakers included leaders in the fields of medicine, law, medical ethics, and patient advocacy.

Dr. Bernard Rottschaefer

solicited comments on the subject in 2005. The new policy statement responds to these comments, most of which sought clarification on the legal requirements governing the prescribing of Schedule II controlled substances by physicians. The policy statement says that federal law “should in no way interfere with the legitimate practice of medicine or cause any physician to be reluctant to provide legitimate pain treatment,” and that the DEA “wishes to dispel the mistaken notion among a small number of medical professionals that the agency

would be willing to use deep sedation, but there was less willingness to administer drugs to hasten death; the most important predictor of the physicians' willingness was a request from a patient with decisional capacity]

Harvey M. Chochinov et al., *Dignity in the Terminally Ill: Revisited*, 9 J. Palliative Med. 666 (2006) [researchers surveyed 211 patients receiving palliative care about the extent to which they believed various issues and concerns (physical, psychological, social, and existential) were related to or could influence their sense of dignity; quantitative data validated the Dignity Model, originally based on qualitative data; the two issues most often identified as having an influence on patients' sense of dignity were "not being treated with respect or understanding" (87.1%) and "feeling a burden to others" (87.1%)]

Erik K. Fromme et al., *Survival, Mortality, and Location of Death for Patients Seen by a Hospital-Based Palliative Care Team*, 9 J. Palliative Med. 903 (2006) [survey of the 292 patients seen over a one-year period by the inpatient palliative care team at Oregon Health

saying that the Bill of Rights Act guaranteed freedom of speech.

South Australia

Nembutal in order to smuggle it into Australia. The fine if she had been caught in Australia could have been as high as \$110,000, but the woman said she had no regrets. Dr. Philip Nitschke and his organization Exit International arranged the trip. Customs Minister Senator Chris Ellison admitted there was little the federal government could do about elderly people smuggling lethal drugs into the country.

Canada

exhumed body of an elderly woman following claims that a male nurse had helped her to die on 9/14/06. An investigation is under way.

Germany. At the annual meeting of the Association of German Law Professionals in September 2006, Justice Minister Brigitte Zypries told the *Stuttgarter Zeitung* that she supports the enactment of statutes authorizing the use of living wills, which already are recognized in case law. At the same time, however, Zypries said that there was no need for statutes explicitly decriminalizing the actions of medical personnel who assist in carrying out the patient's wishes. Criminal lawyer Torsten Verrel of Bonn said in response that such statutes were necessary to prevent inadequate relief from patients' suffering due to physicians' fear of liability.

Great Britain

Valerie Sliwinski. Valerie Sliwinski, a 58-year-old woman who suffered from cancer and multiple sclerosis, died at a Dignitas clinic in Switzerland on 4/28/06. She was driven to Switzerland by her 34-year-old son Stefan. After Valerie Sliwinski's sister contacted British police, Stefan was arrested and questioned by detectives in May. Documents and a computer were taken by police who raided the home he shared with his family and his mother. On 8/16/06, police said that Stefan would not face any further action.

Leslie Burke. Leslie Burke, who suffers from a degenerative brain condition known as cerebellar ataxia, challenged the General Medical Council guidelines on withholding and withdrawing life-sustaining treatment that were published in 2002, arguing that domestic and European human rights law is violated by the guidelines' provisions allowing physicians to withhold or withdraw artificial nutrition and hydration under certain conditions without court approval. High Court Justice Mummery upheld Burke's claim that he was entitled to treatment and ordered the GMC to redraft its guidelines, but also recognized the right of patients to refuse treatment. The GMC appealed, arguing that the initial ruling was too broad because it might allow a patient to demand treatment physicians did not believe was in the patient's interest. The Department of Health, which oversees the government-funded National Health

Gloria Thomson. Gloria Thomson, a 53-year-old woman with Huntington's disease, wrote to Scottish First Minister Jack McConnell asking him to pass legislation to make physician-assisted suicide lawful. Thomson's father died from the illness, and her sister also has it. The Scottish Executive replied saying that there were no plans to change Scottish law and the legalization of euthanasia would not be considered.

Assisted suicide pact. Jenni Murray, the presenter of BBC Radio 4's Woman's Hour, has entered into a pact with Sally Feldman (a former editor of Woman's Hour) and Jane Wilton (a mutual friend) in which they agreed to help each other to die if any of them develops a debilitating and incurable illness. They plan to draw up a written agreement. The pact arose out of a television documentary about euthanasia that Murray made.

Professor Len Doyal. Len Doyal, emeritus professor of medical ethics at Queen Mary, University of London, and a member of the British Medical Association medical ethics committee for nine years, argues that physicians are already effectively practicing euthanasia on patients who have no consciousness beyond the capacity to suffer pain and says that physicians also should be able to end the lives of some terminally ill patients "swiftly, humanely, and without guilt," even if the patients have not given consent. Doyal expressed his views in an article in Clinical Ethics, published by the Royal Society of Medicine, calling for the law and professional guidance to be changed.

Liberal Democrats. Chris Davies, Liberal Democratic MP for northwest England, recently organized a fringe meeting with Ludwig Minelli, the founder of the Swiss assisted suicide organization Dignitas. Although the Liberal Democrats backed assisted dying as official policy in 2004, the party has yet to promote the issue in or out of parliament. Davies said that the Liberal Democrats should "take the lead" on such a fundamental "human rights" issue, and he applauded the meeting between his party's home affairs spokesman, Nick Clegg, Minelli, and Sophie Pandit, the daughter of Anne Turner. Davies said that he would now "expect" to discuss the matter further with Clegg to ensure that the party pursued the issue. Both Davies and the chief executive for the British organization Dignity in Dying rejected Minelli's view that assisted suicide should be available to clinically depressed and mentally ill individuals.

Hong Kong. On 8/16/06, the Law Reform Commission of Hong Kong recommended that the city's hospitals draw up an advance medical directive form that all patients with terminal illness would sign before treatment, indicating their wishes if they become comatose or are in the terminal stages of their illness. There was no comment from the Health Department, which must decide whether to adopt the commission's recommendation. Cheung Tak-hair, chairman of the Alliance of Patients' Organization which represents 37 groups, attacked the proposal, while the Hong Kong Medical Association reacted cautiously.

India

Law Commission. A number of residents of India have requested that courts grant permission to die by euthanasia, but so far all the requests have been denied. However, the Law Commission of India recently recommended legislation that would permit a terminally

ill patient or the patient's family to request a physician's assistance in euthanasia. If the physician agrees, the request would be considered by a government-appointed committee of three expert physicians, who would have to concur before euthanasia would be allowed. According to Law Minister H.R. Bharadwaj, the commission's recommendation has been sent to the Health Ministry for their opinion.

Fasting with intent to die. Petitioner Nikhil Soni has challenged the Jain religious practice of Santhara, or fasting with the intent of dying.

majority cited the need for regulations (such as a law) defining when and how a patient should be placed on life support. Only 21 of the hospitals had drawn up their own guidelines on removing patients from life support. Seventy-two percent said that definite rules needed to be instituted nationwide for the purpose of gaining public consent and providing explanations to the families concerned.

Government guideline for end-of-life treatment. The Ministry of Health, Labor, and Welfare

400 to 16. No criminal cases have been brought.

Switzerland

Pending lawsuit. Ludwig Minelli, the founder of Dignitas, has called for assisted suicide to be made available to clinically depressed and mentally ill individuals. On 10/27/06, a case will be argued before the Swiss Supreme Court on behalf of a Dignitas member who has bipolar disorder and wants the option of assisted suicide to be available. The member is a Swiss national but is living abroad. Minelli has indicated that the case will be taken to the European Court of Human Rights in Strasbourg if the Supreme Court's ruling is adverse. Currently, a physician who prescribes lethal medication under such circumstances can lose his or her license. Dignitas wants access to barbiturates without the need for a prescription.

Parliamentary actions. In May 2006, the Swiss cabinet rejected a call by legislators to restrict assisted suicide. Christian Weber, a spokesman for the Radical Free Democratic Party (one of four governing parties), said recently that suicide tourism is making headlines and that his party will ask parliament for a commission to tighten oversight of assisted-suicide groups. In addition, Martin Schwyn, who has a seat in Zurich's city parliament, has asked the local government to stop Dignitas from operating in a building whose residents have complained about activities there.

Dignitas. Eight hundred British people are now members of Dignitas, the Swiss organization that helps terminally ill individuals (including those from foreign countries) end their lives. The chief executive of Dignity in Dying, a British organization, predicts that the number of British members will rise to 1,000 by the end of 2006. Dignitas had more than 4,000 total members at the end of 2004 and has assisted in 573 deaths.

Exit. Exit, a Swiss organization founded in 1982, has about 50,000 members (Dignitas split off from Exit in 1998). Unlike Dignitas, Exit does not take clients from other countries. Exit volunteers assisted in 162 suicides in 2005.

Documentary. Five European Public Broadcasters (from Switzerland, France, Germany, Denmark, and Finland) have co-produced a documentary called *EXIT, The Right to Die*. The documentary shows how volunteers from the organization Exit accompany individuals who want assisted suicide on their journey to Switzerland. The documentary has won awards in several festivals (including Visions du Réel, Etats Généraux du documentaire, FIPA, Swiss Cinema Awards, and 2005 Namur International Film Festival), and was awarded the 5th EBU Golden Link Award in June 2006 by the European Broadcasting Union, the largest professional association of national broadcasters in the world. In October 2006, the documentary was shown at the Vancouver International Film Festival in Canada.

Venezuela. In March 2006, the Venezuelan Association for the Right to Die with Dignity (Asociación Venezolana Derecho a Morir) became the second right-to-die group formed in South America. Professor Rafael Aguiar-Guevara is the president.

*Some information obtained from media reports has not been independently verified.