



# compassion & choices

Support. Educate. Advocate. Choice & Care at the End of Life.

## **BAXTER, ET AL V. MONTANA**

Compassion & Choices Legal Director Kathryn Tucker and Missoula litigator Mark S. Connell represent the plaintiffs in this case, filed October 2007. Two terminally ill Montanans, four physicians and Compassion and Choices sued under the state constitution to establish a right to aid in dying.

Robert Baxter was a 75-year-old retired truck driver and lymphocytic leukemia patient from Billings. The physician plaintiffs want to know that they can assist a patient with aid-in-dying and not be subject to criminal prosecution.

The right to privacy, personal autonomy and dignity are deeply rooted in the political and cultural heritage of Montana. Establishing the right of terminally ill patients to seek aid in dying is well within the Montana tradition of living with dignity and personal responsibility. The case asserts that terminally ill, mentally competent Montanans have a protected right to choose aid in dying under the Montana State Constitution.

The Montana Supreme Court reinforces living with dignity and personal responsibility saying, "We have chosen not to 'march lock-step' with the United States Supreme Court...we have held that Montana's unique constitutional language affords citizens (of Montana) a greater right to privacy." District Court Judge Jeffrey M. Sherlock wrote, "Montanans generally mind their own business and do not wish to restrict other people in their freedoms unless the exercise of those freedoms interferes with other members of society."

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. This means her ruling is fully effective and will remain so unless and until the Montana Supreme Court rules differently.

Montana is a leader in providing excellent pain management and palliative care for terminally ill patients. But even with excellent pain and symptom management, a fraction of dying patients face a situation they find unbearable and want aid in dying.

## **Friend of the Court Briefs Filed Monday, June 22, 2009**

A broad, diverse group of organizations and individuals have filed friend of the court briefs urging the Montana Supreme Court to uphold a lower-court ruling that terminally ill Montanans have the right to choose aid in dying. Family members of those who wanted aid in dying and could not access this choice told the court of unnecessarily painful, traumatic deaths in the absence of physician aid in dying in Montana. Medical associations, civil liberties and human rights organizations, bioethicists, religious leaders, constitutional law experts and thirty-one Montana State legislators all filed briefs arguing that terminally ill Montanans have the right to choose a dignified death, under the State Constitution's guarantees of privacy and dignity. The Montana Supreme Court will hear arguments later this year on whether to uphold the landmark decision issued last December by First Judicial Court Judge Dorothy McCarter.

Read full press release here:

[http://www.compassionandchoices.com/documents/Release\\_Montana\\_amici\\_rev.pdf](http://www.compassionandchoices.com/documents/Release_Montana_amici_rev.pdf)

Listen to Compassion & Choices' teleconference about the friend of the court briefs urging the Montana Supreme Court to uphold the right of Montanans to Aid in Dying here:

[http://www.compassionandchoices.com/documents/MT-Friends-of-the-Court\\_6.22.09.wav](http://www.compassionandchoices.com/documents/MT-Friends-of-the-Court_6.22.09.wav)

### **BAXTER FRIEND OF THE COURT AMICUS BRIEFS**

Human Rights Groups Amicus Brief (PDF):

<http://www.compassionandchoices.com/documents/BaxterHumanRightsAmicusBrief.pdf>

Women's Rights Groups Amicus Brief (PDF):

<http://www.compassionandchoices.com/documents/BaxterWomensRightsAmicusBrief.pdf>

AMSA/AMWA Amicus Brief (PDF):

<http://www.compassionandchoices.com/documents/BaxterAMSA:AMWA.AmicusBrief.pdf>

Religious Amicus Brief (PDF):

<http://www.compassionandchoices.com/documents/BaxterReligiousAmicusBrief.pdf>

Legal Scholars Amicus Brief (PDF):

<http://www.compassionandchoices.com/documents/BaxterLegalScholarsAmicusBrief.pdf>

Autonomy Amicus Brief (PDF)

<http://www.compassionandchoices.com/documents/AmicusCuriaeBriefAutonomy.pdf>

Montana Legislators Amicus Brief (PDF):

<http://www.compassionandchoices.com/documents/AmicusCuriaeMontanaLegislators.pdf>

Bioethicist Amicus Brief (PDF):

<http://www.compassionandchoices.com/documents/MontanaBioethicistsAmicusBrief.pdf>

Survivors Amicus Brief (PDF):

<http://www.compassionandchoices.com/documents/BaxterSurvivorsAmicusBrief.pdf>

ACLM Amicus Brief (PDF):

<http://www.compassionandchoices.com/documents/BaxterACLM.AmicusBrief.pdf>

ACLU Amicus Brief (PDF):

<http://www.compassionandchoices.com/documents/BaxterACLUAmicusBrief.pdf>

## AMICUS BRIEF EXCERPTS

### Excerpts from Survivors Amicus Brief:

- “the voices of their deceased loved ones, describing the differing realities of what happens to families when a competent, terminally-ill person is granted or forbidden the choice of a hastened death”
- “Montanan Doris Fischer witnessed her husband's horrible suffering, which medication could not ease: During the last two weeks of Richard's life, despite the conscientious efforts of his personal doctor, hospice nurses, and caregivers to provide comfort, he endured both physical and emotional pain of stunning magnitude. His mind was haunted by an acute awareness that his body was stiffening, becoming rigid, and rendering him immobile. He described a sense of being "stuck," "trapped," "chained to the bed," "tied down," "in prison." He suffered anxiety, panic attacks, and claustrophobia. In addition, he endured severe muscle spasms, frequent episodes of shortness of breath and the fear of suffocation, swallowing difficulty, and soreness of limbs. Richard had made a list of what he hoped to accomplish before he died. On the list was a series of good-bye telephone calls to friends and family. Richard mustered the strength and will to make most of his phone calls. He then said good-bye to me and pleaded, "Please Let Me Go." He stopped eating and drinking. For three more days, he suffered further emotional distress, physical pain and discomfort. On Day Four he went into a coma, received a morphine drip, and died shortly thereafter.”
- Todd Johnson/ father's death: “Dad wanted the option to shorten and relieve his suffering. He wanted to control his own destiny and die with his dignity intact. I visualized brains and blood the day dad asked for my help in hastening his death. I wanted to help him, but I felt constrained by the possibility of being prosecuted and sent to prison.

Soon, my father started hoarding his pain medications. He was stashing them in a bowl under his bed, grinding them with a spoon and slowly building his stockpile so he could hasten his death when he felt the suffering was unbearable. This perceived control of the situation gave him a great deal of comfort. My mother found this stash and disposed of it. Dad was angry with my mother and now felt powerless in his quest to take control of his suffering. I believe

that this conflict between them undermined the love they had shared for decades. My dad died unnecessarily angry at his faithful, loving partner.

Dad began investigating other ways to end his suffering. He looked for legal options. He considered going out on the porch in winter so he could freeze to death. We tried to figure out how to override the controls on the morphine pump so he could overdose. He was too weak to go the shotgun route, so with all of his options exhausted; he laid there, suffered and waited for the inevitable.

On the morning of my dad's day of death, he had a sudden burst of energy. He got out of bed, attempting to rip out his catheter, and tried to destroy his oxygen machine. In so doing, he revealed his deep anger and sense of frustration at his situation. He then collapsed and died in my arms.

He never did obtain the aid in dying he desperately sought. He suffered a long and slow death. My mother and I only wish that there had been a way for his doctors to help ease his suffering at the end of his life. As I look back on my father's life, it was a strong and dignified one until the end. He did his best to maintain his dignity but the State of Montana blocked his personal choice."

- Mary Fitzgerald/ sister: "Although Betty was a stoic person, she often pleaded with me—"This is no life and I cannot stand it." On more than one occasion, she begged me to help "slide her over the edge." In my wish to grant her peace in that request, I felt completely helpless. I was infuriated that we were caught in this No Man's Land of legal constraints. . . .

Our plan, then, was to move to Warren, Oregon. There, we hoped to establish residency for Betty, so that she could take advantage of Oregon's humane Death with Dignity protections. Just as we were finalizing this plan, only a few months before her death, the uncontrollable spasm mentioned above catapulted her from her wheelchair and threw her to the floor—resulting in her broken femur and subsequent hospitalization. She was hospitalized for a few weeks, and, ultimately, was unable to make the anticipated and final move to Oregon.

After her return from the hospital, Betty continued to beseech me to help her die. She could not eat or drink at all, at this point, and intravenous feeding was not an option. She was painfully wasting away and was exhausted—beyond imagination. Finally, Betty slipped into a coma and, if I remember correctly, died within two weeks of entering that coma.

It would have been a blessing if Montana had had a death with dignity law or some kind of a court ruling so that Betty could have sought a physician's assistance in hastening her death, rather than having to plead with me, her sister, on an on-going basis, to help her leave her life. Believe me, the strongest temptation to accommodate her wishes was there. In the end, to say that it was an excruciating time would be an understatement."

- "The family members express sadness, anger, and guilt over their loved ones' loss of dignity and loss of control over their own lives, resulting from laws prohibiting aid in dying. Others decry a cruel legal system which legislates against the abstract notion of "homicide" rather than addressing the reality of the pain, suffering, and loss of personal autonomy and dignity of terminally ill, competent patients. This law leaves family members angry and frustrated that they are unable to obtain comfort for their loved ones at their time of greatest need."

## Excerpts from ACLU of Montana Amicus Brief:

- “If there is any time, place or situation in which this right to be let alone must be respected it is when a mentally competent, terminally ill person is enduring unbearable pain and suffering, and must make that most personal of all decisions about when and how to die.”
- “There is little doubt that each person has an expectation of privacy in decisions relating to the time, place and manner of his or her own death, and that this expectation is one which our society would recognize as reasonable. Decisional personal autonomy of the right to die is multi-faceted and implicates numerous aspect of the right of privacy.”
- “Decisions regarding the end of one’s own life necessarily implicate medical decisions in this modern age and to the extent they do so, they are protected (by privacy clause).”
- “the right to death with dignity, is one of those core decisions involving one’s own fate and control over one’s own body that requires preeminent deference to the individual.”
- “each individual has the right to preserve his or her humanity and control over decisions related to pain and suffering, bodily deterioration and integrity.”
- “the right of privacy includes “the right of each individual to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference” This special relationship...allows the physician to enforce the patient’s right through the physician’s own skills and expertise... providing the patient the means to exercise her own decisions through a prescription that would gently allow the patient death with dignity. This special relationship between a patient and physician... allows the physician to be protected under the patient’s constitutional rights when the physician’s actions are the means for enforcing those rights. The motivating force to exercise the constitutional right comes from the patient, not the physician. It is the patient’s intention to hasten impending and certain death and it is the patient’s desire that this be accomplished in a certain, gentle and medically supervised manner. ...the physician is not acting in his individual capacity, but more in a “representational” capacity by effectuating the exercise of the patient’s constitutional rights, and the State must demonstrate a compelling state interest when it interferes with this relationship.”
- “The State’s interest in preservation of life must be measured on a continuum where the right to death with dignity prevails when the competent, terminally ill patient, whose life is being forcefully “preserved” desires to be able to make the choice to end unbearable suffering and die with dignity.”

### **Excerpts from Legal Scholars Amicus Brief:**

*(Professors Larry m. Elison, Thomas P. Huff and Erwin Chemerinsky)*

- "our constitution maximizes individual freedom and minimizes government control of individual choices"
- "Without question this Court has the authority and the responsibility to interpret the Montana Constitution"
- "it is neither the duty nor the privilege of the legislature to determine whether a right exists under the Montana Constitution"
- Re privacy: "To (fail to find a privacy right here) would signify a retreat from Montana's robust privacy jurisprudence."
- "The guarantee of the inviolability of individual dignity thus is sufficient, on its own, as a basis for the right of a competent, terminally ill Montanan to choose to die with dignity."

### **Excerpts from Montana Legislators Amicus Brief:**

*(31 Montana Legislators in Support of Privacy and Dignity - More than 1/5th of Montana Legislators in State)*

- "these Montana Legislators believe that it is appropriate and necessary for the Court to recognize a right to aid in dying, they acknowledge that the Legislature will have a role in providing a structure in which that right can be exercised without abuse."
- "If the Court affirms the fundamental right to aid in dying, and if safeguards against abuse are needed, the Legislature is wholly capable of (enacting) a regulatory scheme that will properly... comport with the constitutional protections of this state, and protect Montanan citizens from potential abuses"
- "The Court has defined the contours of a robust right to privacy that reflects Montana's traditions of individualism and limited government. In keeping with those traditions,... that right must be read to include a fundamental right to aid in dying where necessary to autonomy and a humane death."

### **Excerpts from Montana Bioethicists Amicus Brief:**

*(University of Montana Professors and Montana State University Professors, including: Director of the National Rural Bioethics Project at the University of Montana, director of the University of Montana Rural Institute on Disabilities Aging Project, and program director at Missoula Aging Services(Cook); founding member of the local St. Patrick Hospital Ethics Committee(Townsend))*

- "it is ethical for physicians to aid their mentally competent, terminally ill patients in dying. Fundamental principals of bioethics – namely autonomy, dignity, and compassion – support this view."
- "To distinguish between terminal sedation and physician-assisted dying... is simply unsound... no ethical basis to permit terminal sedation but not physician-assisted dying"
- "many of the State's concerns with physician-assisted dying – such as protecting vulnerable patients – are more present with respect to terminal sedation, where drugs are administered by a physician (not the patient)"
- "the data collected over the last eleven years conclusively establish that none of these specters(e.g. harm to vulnerable populations) has materialized"

### **Excerpts from Women's Rights Groups Amicus Brief:**

- " Just as women's reproductive decisions are frequently subject to attempts to restrict certain choices in favor of others, competent terminally ill individuals face threats to their ability to make decisions that may be politically controversial but are too personal for government interference."
- "protection of the vulnerable has been used as justification for limiting women's civil liberties for centuries and is equally baseless in this (EOL) context."
- "A confirmation that the Montana right to privacy and its corresponding protection of personal autonomy does in fact extend to aid-in-dying would protect the range of interests already recognized as included in constitutional protections of privacy and human dignity, and bring within the broad scope of Montana's right to privacy another deeply personal decision: whether and when to end suffering when in the final ravages of a terminal illness. Excluding such decisions from the protected zone of personal autonomy is illogical, unprincipled, and would erode confidence in existing – and critical - protections of personal autonomy."
- "The State's Asserted Interest in Protecting Vulnerable Persons Does Not Justify Banning the Exercise of a Constitutional Right, and is the Same Argument Historically Used To Exclude Women from the Legal Rights Enjoyed by Men"
- "Imposing an absolute ban on a constitutional right, based on the assertion of vulnerability of some potential patients, risks the autonomy of all patients, and undermines the foundation for self-determination in other life decisions of profound magnitude."

- "women's rights advocates are especially wary of arguments that assert protectionism at the expense of individual autonomy. With good reason – there is long history in this country of rationalizing discrimination against women based on a view that women are the "weaker sex" in need of protection."
- "The litany of discriminatory actions based on women's so-called vulnerability is too long to chronicle here...This so-called protection, "in practical effect, put women not on a pedestal, but in a cage."... Likewise, protectionist arguments would trap terminally ill, competent patients into physical suffering and indignity that the patient finds unbearable. The guise of protection must therefore be viewed with a skeptical eye. Only those who are facing the end stages of a terminal illness can know the implications of their decisions... The terminally ill, by virtue of their illnesses, do not lose their humanity or their civil rights. Decisions about how to retain human dignity in the face of immeasurable suffering are best left to the individual, not the state."

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**Compassion & Choices** is a nonprofit organization working to improve care and expand choice at the end of life. As a national organization with over 30 chapters and 40,000 members, we help patients and their loved ones face the end of life with calming facts and choices of action during a difficult time. The organization is non-judgmental, affirmative and inclusive. Learn more at [www.CompassionAndChoices.org](http://www.CompassionAndChoices.org).