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## Implementing Provider Aid in Dying in Wyoming

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# WYOMING LAW REVIEW

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## IMPLEMENTING PROVIDER AID IN DYING IN WYOMING\*

*John M. Burman<sup>†</sup> and Cameron T. Pestinger<sup>‡</sup>*

I.	INTRODUCTION .....	2
II.	PROFESSOR BURMAN'S EXPERIENCE .....	3
	A. <i>Disabled Persons Need Protection from Those Who Would Deny Them the Right to PAD</i> .....	5
	B. <i>The Term "Health Care Decisions" in the Wyoming Constitution Should be Interpreted to Give Wyomingites Broad Authority to Request and Administer PAD</i> .....	6
	C. <i>Implementing PAD Would Increase Trust between Patients and Providers</i> .....	6
	D. <i>PAD Will Not Prematurely Terminate Life</i> .....	7
III.	WYOMING RESIDENTS HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO PAD .....	7
	A. <i>Choosing PAD is a Health Care Decision</i> .....	8
	1. <i>Application Under the Clear and Unambiguous Standard of Statutory Interpretation</i> .....	9
	2. <i>Application under the Rules of Construction</i> .....	10
	B. <i>Implementing PAD will Benefit Wyoming Residents</i> .....	12
IV.	CONCLUDING REMARKS .....	14
V.	PROPOSED LEGISLATION .....	14

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## I. INTRODUCTION

Wyoming adults have a right to provider aid in dying (PAD).<sup>1</sup> This right is protected by a 2012 amendment (the Amendment) to the State Constitution, which reserves for each adult the right to make their own health care decisions.<sup>2</sup>

PAD is “[t]he intentional act of providing a person with the medical means or medical knowledge to commit suicide.”<sup>3</sup> Where permitted, PAD is restricted to qualified patients.<sup>4</sup> Qualified patients are competent adults with a terminal illness who make an informed, voluntary, and enduring request to die.<sup>5</sup> A qualified patient may be prescribed lethal medication to self-administer at a time of his or her choosing, if at all.<sup>6</sup>

Wyoming has no policy prohibiting PAD.<sup>7</sup> The legal landscape is, however, deceptively permissive. Absent a statute protecting the right to PAD, health care providers and patients are reasonably reluctant to participate. Consequently, suffering patients are left with poor options. A patient may, for instance, refuse food and fluids to end his or her suffering. This process can take up to three weeks.<sup>8</sup> Alternatively, a patient may turn to self-help, ending or attempting to end their life, or petitioning a compassionate person for help. A patient may also move to a jurisdiction where PAD is an open and regulated practice—an unrealistic option because of financial or other such barriers.

PAD offers another option that is supported by an overwhelming majority of Wyoming health care providers.<sup>9</sup> A recent study indicates that 73% of surveyed providers, comprised of physicians, nurses, and social workers, approve of PAD,<sup>10</sup> while 71% are willing to participate.<sup>11</sup>

<sup>1</sup> Also known as *physician-assisted suicide* and *physician aid in dying*. The authors use *provider aid in dying* to account for the broad prescriptive scope of Wyoming health care providers.

<sup>2</sup> WYO. CONST. art. 1, § 38(a) (“Each competent adult shall have the right to make his or her own health care decisions.”).

<sup>3</sup> See *Assisted Suicide*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>4</sup> See, e.g., OR. REV. STAT. § § 127.800–127.897 (2016).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> The Legislature’s awareness of the absence is reflected in the Wyoming Health Care Decisions Act, stating “This act does not authorize . . . assisted suicide . . . to the extent prohibited by other statutes of this state.” This statement only would have been made if there is not a policy to rely on. See WYO. STAT. ANN. § 35-22-414(c) (2015).

<sup>8</sup> Emily B. Rubin and James L. Bernat, *Voluntarily Stopping Eating and Drinking, in PALLIATIVE CARE AND ETHICS* 231, 232–33 (Timothy E. Quill & Franklin G. Miller eds., 2014).

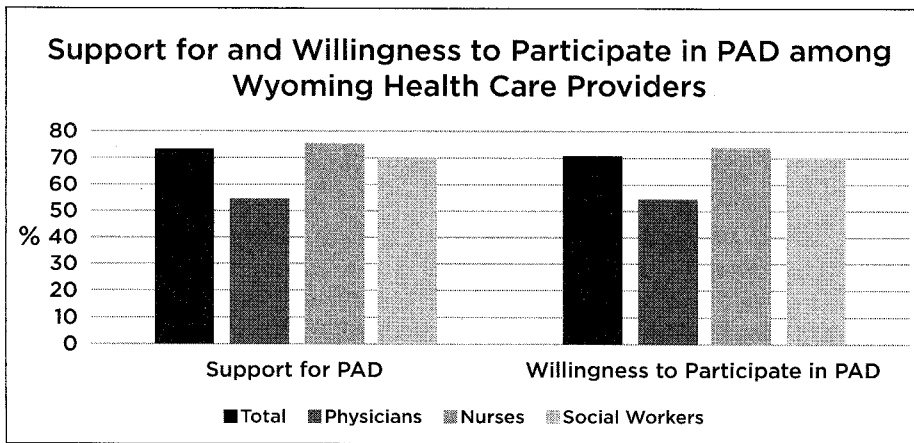
<sup>9</sup> See *infra* Table 1.

<sup>10</sup> Kyle R. Joyner, *Death With Dignity: Assessing the Attitudes of Wyoming Health Care Professionals* 43 (July 2016) (unpublished M.S.W. thesis, University of Wyoming) (on file with author).

<sup>11</sup> *Id.*

Dying patients have asked 16% of Wyoming providers for PAD.<sup>12</sup> We request the Wyoming Legislature to implement a statute that will help similarly-situated persons at the end of their lives. A statute will support and encourage the compassion of our health care providers and enable persons to fully exercise their right to make their own health care decisions.

Part II of this article explains how the personal experience of disability has shaped one of the author's views on PAD.<sup>13</sup> Part III explains why the right to make health care decisions includes the right to choose PAD.<sup>14</sup> Part V proposes a statute to guide the Wyoming Legislature in implementing the practice.<sup>15</sup>



**Table 1.**<sup>16</sup>

## II. PROFESSOR BURMAN'S EXPERIENCE<sup>17</sup>

One of the benefits of my enforced retirement I did not expect, was the chance to think about many things. Among the things about which I think every day, is how my life will end.

<sup>12</sup> *Id.* at 42.

<sup>13</sup> *See infra* Part II.

<sup>14</sup> *See infra* Part III.

<sup>15</sup> *See infra* Part IV.

<sup>16</sup> *Id.* (Data was collected in March 2016. Surveys were administered through an online survey tool that assessed health care provider attitudes concerning PAD. Eight Wyoming medical institutions participated in the study, with a sample population of 395).

<sup>17</sup> Professor Burman is now 61 years old. He retired from the University of Wyoming's College of Law three years ago because he was severely disabled because of an incurable brain disease. The disease, originally known as Olivo Ponto Cerebellar Atrophy and now named Spino-Cerebellar Atrophy (type 7), affects those parts of the brain that control coordination, vision, and speech. As a result of the disease, Professor Burman is now in a wheelchair, is legally blind, and has difficulty speaking. Despite these disabilities, Professor Burman is able to write by dictating to another person, such as the co-author. Currently, Professor Burman has shifted his interest to health care issues, such as PAD.

When I was young and healthy, the concept of dying was nothing more than a theoretical one, something that would not happen for many years. Retiring because of a severe disability has changed the way I view death.

Now, every day is a precious gift, to be enjoyed to its fullest. Part of the reason for that change is the awareness that I do not have a long time to live. One thinks about death very differently when it is staring him or her in the face.

I know that the end is near since the disease I suffer from is a progressive one, meaning that my physical condition will worsen every day.

One of the interesting aspects of being severely disabled is that one consults health care providers regularly. Such frequent interactions change one's view of health care significantly.

Twenty years ago, I consulted a health care provider about once every five or ten years (except for dental hygienists, which I saw every several months). Now, I consult a health care provider every week, at least. I have become, in other words, an "expert" patient.

One of the concepts I now consider every day is how I wish to terminate my existence. The concept which has become central to my thinking is that I have the right to PAD but I am not currently able to exercise it.

Perhaps one of the reasons that I, and many others, want the right to PAD is that we do not live with dignity. On a regular basis a disabled person needs help performing virtually every bodily function, including those we often consider private. This may include, for example, using the toilet.

About twenty-five years ago, Larry McMurtry wrote *Lonesome Dove*. In that novel, two Texans, Augustus McRay and Woodrow Call, drive a herd of cattle from Texas to Montana. After they get to Montana, McRay suffers a serious injury from an arrow. By the time he consults a doctor, gangrene has set in on both legs. The doctor he consults says that he will likely die unless both legs are amputated. The doctor is able to amputate one leg while McRay is unconscious, but McRay refuses, while pointing a gun at the doctor, to agree to the amputation of his second leg. In explaining his decision, McRay says: All my life I have walked the world with my pride. Once that is gone, there is no reason to continue.<sup>18</sup>

When I first read of McRay's decision, I was impressed with his actions. Now, I believe he was a coward. Having now lived several years without my legs, I can say that there is much more to life than being able to walk.

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<sup>18</sup> See LARRY MCMURTRY, *LONESOME DOVE* (1985).

Many disabled or sick persons have, I think, made similar decisions. They have, in other words, decided to live with pain and discomfort that is far beyond what a healthy person expects. Having made that decision, however, they should have the right to PAD, rather than undergoing additional, gratuitous pain.

Even though I think McRay's decision was a cowardly one, that is irrelevant. It was, more importantly, the decision of a competent adult who understood the consequences of his decision. The rest of us, therefore, need to respect that decision, just as we should respect a decision to PAD.

*A. Disabled Persons Need Protection from Those Who Would Deny Them the Right to PAD*

One of the common arguments against a right to PAD for sick or disabled persons is that they will become the victims of involuntary death by others.<sup>19</sup> This argument represents, to me, one more type of discrimination against disabled persons.

One of the disheartening aspects of being disabled is to experience discrimination, which is common against disabled persons. While few persons intentionally treat disabled persons discriminatorily, many do so without thinking.

I have, on many occasions, experienced discrimination by persons who intended to treat me well. The problem is, however, that a healthy person often does not realize that his or her actions are offensive, i.e. discriminatory to disabled persons.

As an example, I was recently in a restaurant with a friend. After he and I ordered our meals, we were informed that we were entitled to have salads as well. The waitress asked my friend what type of dressing he would like. He told her. She then asked him "What kind of dressing would your friend like?" "I have no idea," he said, "why don't you ask him?"

I doubt that the waitress intended to insult me or treat me poorly, but she did. It is, therefore, important for us all to think about how our actions will be perceived by others.

So the argument that disabled persons need protection is, ultimately, premised on the notion that disabled persons cannot think for themselves. Nothing can be further from the truth.

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<sup>19</sup> Diane Coleman, *Assisted Suicide Laws Create Discriminatory Double Standard for Who Gets Suicide Prevention and Who Gets Suicide Assistance: Not Dead Yet Responds to Autonomy, Inc.*, 3 DISABILITY & HEALTH J. 39, 44–46 (2010) (examining the claim that PAD is only for those who are competent and choose it voluntarily).

Disabled persons not only have more time than able bodied persons, regardless of the type of disability, they tend to think about death much more often. Their decisions, therefore, are usually much more carefully thought through than the decisions of able bodied persons.

Ultimately, disabled persons are as competent as able bodied persons to make decisions about PAD. Their decisions should not be disregarded under the pretense of protecting them when they are as qualified, if not more qualified, to make such decisions than able bodied persons.

*B. The Term “Health Care Decisions” in the Wyoming Constitution Should be Interpreted to Give Wyomingites Broad Authority to Request and Administer PAD*

While Wyoming is traditionally a red, Republican state, Wyomingites of every philosophy share one common desire.<sup>20</sup> That is, we do not want politicians making personal decisions for us. Rather, such decisions should be reserved for individuals.

The Amendment protecting the right to make health care decisions reflects that notion.<sup>21</sup> It expressly limits the ability of politicians in either the Federal or the State Governments from making personal decisions.<sup>22</sup> It therefore reflects the prevailing view in Wyoming.

*C. Implementing PAD Would Increase Trust between Patients and Providers*

The key to effective health care is good communication between a patient and his or her provider. Good communication, in turn, depends on a relationship of trust between a patient and the patient’s provider.

The decision to seek PAD is among the most personal decisions a patient could ever make. He or she will not communicate that decision to a provider unless he or she trusts that provider. In this context, trust means an assurance that, among other things, the information will not be repeated or disclosed to another.

As Chief Justice Rehnquist of the U.S. Supreme Court recognized in discussing the analogous<sup>23</sup> provisions of the attorney-client privilege, one reason for having a confidential relationship is to encourage “full and frank” discussions

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<sup>20</sup> One of the authors of this article, and the author of this part, John Burman, was born and reared and has lived in Wyoming for over fifty years.

<sup>21</sup> WYO. CONST. art. 1, § 38(a).

<sup>22</sup> *Id.*

<sup>23</sup> See WYO. STAT. ANN. § 1-12-101(a) (2015) (containing the attorney-client privilege and the doctor-patient privilege in the same statute).

between a client and the client's lawyer so the lawyer can give accurate advice.<sup>24</sup> So, too, having full and frank discussions between a patient and the patient's provider will enable a provider to give accurate advice.

#### *D. PAD Will Not Prematurely Terminate Life*

It has long been accepted that a person's body may be alive after that person is effectively dead. In *Cruzan v. Missouri Department of Health*, for example, Nancy Cruzan had been in a persistent vegetative state for many years.<sup>25</sup> Such a person is not *alive* under any realistic argument.

While *Cruzan* represents one extreme, it shows plainly that *life* is more than being biologically alive. Allowing PAD will transfer the decision on when life ceases to be meaningful to the person whose life is involved.

Any disabled or elderly person knows that at some point life ceases to have meaning. When that realization occurs, the person should be allowed to choose PAD.

Allowing PAD essentially transfers the decision on when life has ceased to have meaning from politicians to the persons involved.

### III. WYOMING RESIDENTS HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO PAD

Wyoming has a strong policy of respecting its citizens' health care decisions. As early as 1932 the Wyoming Supreme Court declared "[i]t is undoubtedly the rule that ordinarily, and in the absence of an emergency, a surgical operation cannot be performed upon a person without his consent . . . ."<sup>26</sup>

Consent logically entails the right to refuse treatment. In 1990, the United States Supreme Court found this right to encompass refusing life-sustaining treatment.<sup>27</sup>

Since 1990, the Wyoming Legislature has acted to ensure that its residents' health care decisions are honored.<sup>28</sup> These laws often require direct participation

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<sup>24</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

<sup>25</sup> *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 266 (1990).

<sup>26</sup> *Higley v. Jeffrey*, 8 P.2d 96, 97 (Wyo. 1932).

<sup>27</sup> *Cruzan*, 497 U.S. at 277 ("[T]he common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.").

<sup>28</sup> See *Cardiopulmonary Resuscitation Directives*, WYO. STAT. ANN. §§ 35-22-201-208 (2015) (requiring health care providers to comply with a cardiopulmonary resuscitation directive executed by any adult with decisional capacity), *repealed by* Provider Orders for Life Sustaining Treatment Act, WYO. STAT. ANN. §§ 35-22-501-509 (2015); Wyoming Health Care Decisions



of health care providers when a patient has requested life-prolonging treatment be removed or withheld. This decision may call for sedation and analgesia to comfort the dying patient.<sup>29</sup> When sedated to unconsciousness, a patient's death is arguably hastened.<sup>30</sup>

The most pronounced effort to protect patient autonomy occurred in 2012 when Wyoming residents voted to amend the Wyoming Constitution, reserving for each adult the right to make their own health care decisions.<sup>31</sup> The Amendment reads "[e]ach competent adult shall have the right to make his or her own health care decisions."<sup>32</sup> One question is whether choosing PAD is a health care decision. Under Wyoming rules of constitutional construction, the right to make one's own health care decisions includes the right to choose PAD.

### A. *Choosing PAD is a Health Care Decision*

In construing constitutional provisions, Wyoming follows the same rules that govern the construction of statutes.<sup>33</sup> The primary consideration in construing statutes is determining the legislative intent, as expressed in the statute's words.<sup>34</sup>

The Amendment does not define health care decision. The Wyoming Health Care Decisions Act (the Act), however, defined the phrase in 2004.<sup>35</sup> As discussed below, this definition should control.

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Act, WYO. STAT. ANN. §§ 35-22-401–416 (2015) (requiring health care providers to comply with an individual's direction concerning his or her health care); Provider Orders for Life Sustaining Treatment Act, WYO. STAT. ANN. §§ 35-22-501–509 (2015) (requiring health care providers to comply with orders contained in a patient's POLST form, which articulates the patient's goals and preferences for care as he or she nears the end of life).

<sup>29</sup> Robert D. Truog, *Withholding and Withdrawing Life-Sustaining Treatments*, in *PALLIATIVE CARE AND ETHICS* 187, 195–96 (Timothy E. Quill & Franklin G. Miller eds., 2014).

<sup>30</sup> David Orentlicher, *The Supreme Court and Terminal Sedation: Rejecting Assisted Suicide, Embracing Euthanasia*, 24 *HASTINGS CONST. L.Q.* 947, 956 (1997) ("In many cases, terminal sedation amounts to euthanasia because the sedated patient often dies from the combination of two intentional acts by the physician—the induction of stupor or unconsciousness and the withholding of food and water. Without these two acts, the patient would live longer before eventually succumbing to illness.").

<sup>31</sup> WYO. CONST. art. 1, § 38.

<sup>32</sup> *Id.*

<sup>33</sup> *Cantrell v. Sweetwater Cty. Sch. Dist. No. 2*, 2006 WY 57, ¶ 6, 133 P.3d 983, 985 (Wyo. 2006).

<sup>34</sup> *Wyo. Cmty. Coll. Com'n v. Casper Cmty. Coll. Dist.*, 31 P.3d 1242, 1249 (Wyo. 2001); see also *Rasmussen v. Baker*, 50 P. 819, 821 (Wyo. 1897) ("The primary principle underlying an interpretation of constitutions or statutes is that the intent is the vital part, and the essence of the law. . . . Such intent, however, is that which is embodied and expressed in the statute or instrument under consideration.").

<sup>35</sup> WYO. STAT. ANN. § 35-22-402(a)(ix) (2015).

The Wyoming Legislature is presumed to act with knowledge of existing law.<sup>36</sup> When it uses a technical word or phrase with a specific meaning, that meaning is to govern absent a contrary indication.<sup>37</sup>

The amendment process requires legislative approval before a proposed amendment is submitted to the electorate.<sup>38</sup> When the Legislature approves an amendment incorporating a technical phrase and offers no indication that it should be understood differently, the phrase ought to be given its technical meaning. The Legislature did not indicate that health care decision should be construed differently. This phrase should be understood in its technical sense as the Act provides.

The Act defines health care decision as “a decision made by an individual . . . regarding the individual’s health care, including . . . directions to provide, withhold or withdraw . . . health care.”<sup>39</sup> The Act also broadly defines health care to mean “any care, treatment, service or procedure to maintain, diagnose or otherwise affect an individual’s physical or mental condition.”<sup>40</sup>

### *1. Application Under the Clear and Unambiguous Standard of Statutory Interpretation*

When a statute is clear and unambiguous, its plain and ordinary meaning is given effect.<sup>41</sup> A statute is unambiguous if reasonable persons are able to consistently and predictably agree as to its meaning.<sup>42</sup> Conversely, a statute is ambiguous if it is uncertain and subject to varying interpretations.<sup>43</sup>

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<sup>36</sup> *Rodriguez v. Casey*, 50 P.3d 323, 326 (Wyo. 2002) (“We presume that statutes are enacted by the legislature with full knowledge of existing law, so we construe statutes in harmony with existing law, particularly other statutes relating to the same subject or having the same purpose.”).

<sup>37</sup> WYO. STAT. ANN. § 8-1-103 (2015) (“Words and phrases shall be taken in their ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law should be understood according to their technical import.”); *see also* *Dorr v. Wyo. Bd. of Certified Pub. Acct.*, 21 P.3d 735, 743 (Wyo. 2001) (“When a term is not defined within a statutory scheme, we look to the ordinary and usual meaning accorded to the word.”).

<sup>38</sup> *See* WYO. CONST. art. 20, § 1 (“Any amendment . . . to this constitution may be proposed in either branch of the legislature, and, if the same shall be agreed by two-thirds of all members of each of the two houses . . . it shall be the duty of the legislature to submit such amendment . . . to the electors of the state . . . and if a majority of the electors shall ratify the same, such amendment . . . shall become part of this constitution.”).

<sup>39</sup> WYO. STAT. ANN. § 35-22-402(a)(ix) (2015) (including the decision to withhold or withdraw artificial nutrition and hydration).

<sup>40</sup> *Id.* § 402(a)(viii).

<sup>41</sup> *E.g., In the Interest of MM v. Dep’t of Family Serv.*, 2009 WY 28, ¶ 11, 202 P.3d 409, 413 (Wyo. 2009).

<sup>42</sup> *Allied-Signal, Inc. v. Wyo. State Bd. of Equalization*, 813 P.2d 214, 220 (Wyo. 1991).

<sup>43</sup> *Id.* at 219–20.

Choosing PAD is clearly and unambiguously a health care decision. Black's Law Dictionary<sup>44</sup> defines PAD as "[t]he intentional act of providing a person with the medical means or medical knowledge to commit suicide."<sup>45</sup> Suicide means "[t]he act of taking one's own life."<sup>46</sup> Health care decisions include decisions for care that "affect an individual's physical or mental condition."<sup>47</sup> Reasonable persons would consistently and predictably agree that choosing PAD is a decision regarding care that affects an individual's physical or mental condition. The statute is unambiguous. Choosing PAD is a health care decision.

Rules of construction are not applied to a clear and unambiguous statute.<sup>48</sup> But even if those rules are applied, the Amendment still encompasses PAD as a health care decision.

## 2. *Application under the Rules of Construction*

Wyoming has long accepted the *ejusdem generis* doctrine.<sup>49</sup> This doctrine, expressed by Justice Scalia, means "[w]here general words follow an enumeration of two or more things, they apply only to . . . things of the same general kind or class specifically mentioned."<sup>50</sup> Black's Law Dictionary provides an example. "[T]he phrase *horses, cattle, sheep, pigs, goats, or any other farm animals*—despite its seeming breadth—would probably be held to include only four-legged, hooved mammals typically found on farms . . . ."<sup>51</sup> The doctrine applies in Wyoming when a statute uses the general phrase "or otherwise."<sup>52</sup>

The definition of health care includes a general phrase following an enumeration of two or more things. The Act states, "any care . . . to *maintain, diagnose, or otherwise* affect an individual's physical or mental condition."<sup>53</sup> *Ejusdem generis* is appropriate in this context.

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<sup>44</sup> The definitive legal dictionary used in the United States.

<sup>45</sup> See *Assisted Suicide*, BLACK'S LAW DICTIONARY (10th ed. 2014); see also *supra* notes 4–7 and accompanying text (explaining why PAD falls under the definition of assisted suicide and why the term PAD is preferred).

<sup>46</sup> *Suicide*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>47</sup> WYO. STAT. ANN. § 402(a)(viii) (2015).

<sup>48</sup> *E.g.*, State Dep't of Revenue and Tax'n v. Pacificcorp, 872 P.2d 1163, 1166 (1994).

<sup>49</sup> *E.g.*, People *ex rel.* Sch. Dist. No. 3 in Laramie Cty. v. Dolan, 39 P. 752, 755 (Wyo. 1895) ("When a specific enumeration concludes with a general term, it is held to be limited to things of the same kind.").

<sup>50</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 199 (2012).

<sup>51</sup> *Ejusdem Generis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>52</sup> *Green River Dev. Co. v. FMC Corp.*, 660 P.2d 339, 353 (Wyo. 1983).

<sup>53</sup> WYO. STAT. ANN. § 35-22-402(a)(viii) (2015) (emphasis added).

“Maintain” and “diagnose” are both ends of health care, and are therefore members of that general class. Under this doctrine, if PAD achieves an end of health care, it is care that Wyomingites have a right to choose.

Relieving pain and suffering is a central end of health care. Others include curing illness and healing injury. The Act includes care to maintain and diagnose, but confining health care to only these unduly narrows what health care providers can offer their patients. In some circumstances, both may be appropriate ends of health care, and in others, maybe only one.

Bioethicists Tom Beauchamp and James Childress, view PAD on a health care continuum.<sup>54</sup> On one end is restoring health and, on the other, relieving pain and suffering.<sup>55</sup> Providers ought to restore health when there is a reasonable prospect for success and the patient agrees to the means.<sup>56</sup> However, the health of the terminally ill is, by definition, beyond restoration. If, in the opinion of a terminally ill patient, the burdens of treatment outweigh the benefits, it is appropriate to redirect the focus of care to relieving pain, suffering, and other symptoms associated with dying.<sup>57</sup>

The American Medical Association adopts this view of end-of-life treatment. It states: “[t]he duty to relieve pain and suffering is central to the physician’s role as healer and is an obligation physicians have to their patients.”<sup>58</sup> The Hastings Center<sup>59</sup> has also adopted this position, including the relief of pain and suffering among the appropriate contemporary goals of modern health care.<sup>60</sup>

Palliation with aggressive analgesia is often sufficient to meet that end, but this is inappropriate for some patients. Most patients who request PAD in permitting jurisdictions, for example, are unconcerned with pain.<sup>61</sup> Rather, their suffering

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<sup>54</sup> TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 184 (7th ed. 2013).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> CODE OF MEDICAL ETHICS § 5.6 (AM. MED. ASS’N 2016).

<sup>59</sup> The Hastings Center is a renowned nonpartisan, nonprofit bioethics institute producing publications on ethical questions in medicine, science, and technology that help inform policy, practice, and public understanding.

<sup>60</sup> THE GOALS OF MEDICINE: THE FORGOTTEN ISSUES IN HEALTH CARE REFORM 23 (Mark J. Hanson & Daniel Callahan eds., 1998).

<sup>61</sup> Oregon Public Health Division, *Oregon Death with Dignity Act: 2015 Data Summary*, <https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year18.pdf> (last visited Nov. 13, 2016) (stating that, from 1998 to 2015, only 25.2% of Oregon patients requesting PAD were concerned with inadequate pain control).

stems from concerns that cannot be addressed by traditional end of life care.<sup>62</sup> The Hastings Center, for instance, has stated:

At times . . . even the most empathetic caring and the most advanced palliative care will reach their limit. Here medicine will have to recognize its own boundaries; not all of life can be controlled or managed by a medicine as finite in its possibilities as those human beings it serves are finite in theirs.<sup>63</sup>

Despite the absence of a statute, dying patients have asked 16% of Wyoming health care providers for PAD.<sup>64</sup> Tragically, for those and other dying patients, relieving pain and suffering comes only with death. PAD achieves that end.

Under the *ejusdem generis* doctrine, health care decisions include decisions for care that achieve an end of health care. Maintaining and diagnosing are both ends of health care. Others include curing and healing. So too is relieving pain and suffering. PAD is care—sometimes the only care that relieves an individual's pain and suffering. Choosing PAD, then, is a decision for care that achieves an end of health care. It is a health care decision.

Under Wyoming rules of constitutional construction, the right to make one's own health care decisions includes the right to choose PAD. Rights, however, are subject to restriction.<sup>65</sup> Some believe the right to make health care decisions ought to be restricted to exclude PAD. This view is considered next.

### *B. Implementing PAD will Benefit Wyoming Residents*

One argument against PAD is that its implementation will cause greater harm than good. This was the position of the New York State Task Force on Life and the Law, which urged against the state changing its prohibitions on PAD.<sup>66</sup> Among its principle reasons were: PAD is subject to error and abuse, which will endanger the lives of many who suffer from treatable pain, depression, or coercion; PAD

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<sup>62</sup> *Id.* (stating that, from 1998 to 2015, 89.7% of patients requesting PAD were concerned with being less able to engage in activities making life enjoyable, 91.6% were concerned with losing autonomy, and 78.7% were concerned with loss of dignity).

<sup>63</sup> THE GOALS OF MEDICINE: THE FORGOTTEN ISSUES IN HEALTH CARE REFORM 25 (Mark J. Hanson & Daniel Callahan eds., 1998).

<sup>64</sup> Joyner, *supra* note 10, at 42.

<sup>65</sup> WYO. CONST. art. 1, § 38(c) (“[t]he legislature may determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare of the people . . .”).

<sup>66</sup> N.Y. TASK FORCE ON LIFE & THE LAW (1994), WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 68–74 (1994).

discourages active treatment of the terminally ill; and PAD will put in peril those who are incompetent and incapable of providing knowing consent.<sup>67</sup>

Supporters of this line of reasoning point out that a patient's decision to die can be respected by another effective but less contentious practice, refusing life-sustaining treatments.<sup>68</sup> Death by treatment refusal can take up to three weeks.<sup>69</sup> The harms this practice avoids are thought to justify the burden of continued life imposed on dying, suffering individuals.

The burden is not justified. Gerald Dworkin has made the point that if the above arguments against PAD are effective against its legalization, they are equally effective against allowing patients to refuse life-sustaining treatments.<sup>70</sup> Some in the disability-rights community, for example, have argued that depression and coercion influence the decisions of disabled persons who consider dying by refusing treatment.<sup>71</sup> Permitting an individual to refuse unwanted treatments also discourages the active treatment of the terminally ill. The decisions of others to discontinue treatment endangers the lives of incompetent individuals whose preferences are unknown. Yet, none of these reasons has proved so compelling as to curtail the right of individuals to refuse treatments that prolong unwanted life, a right strongly endorsed in Wyoming. If these reasons are insufficient to set aside the right to die by refusing treatment, they too are insufficient for avoiding the legalization of PAD. Both practices must stand or fall together.<sup>72</sup>

An implementing statute will not engender harm, but prevent it. Absent statutory immunity, health care providers are reluctant to communicate with patients about their patient's desire for hastened death.<sup>73</sup> Patients are also reluctant to communicate with their provider because they will either be ignored or possibly

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<sup>67</sup> *Id.*

<sup>68</sup> BERNARD GERT ET AL., *BIOETHICS: A RETURN TO FUNDAMENTALS* 299 (1997) ("We believe that the strongest argument against physician-assisted suicide is that, given the alternatives available, it does not provide sufficient benefit to patients to justify the risks that it poses. Patients already have the alternative of refusing treatment and food and fluids . . .").

<sup>69</sup> Rubin & Bernat, *supra* note 8, at 232–33.

<sup>70</sup> GERALD DWORKIN ET AL., *EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE: FOR AND AGAINST* 67 (R.G. Frey ed. 1998).

<sup>71</sup> *E.g.*, Paul K. Longmore, *Policy, Prejudice, and Reality: Two Case Studies of Physician-Assisted Suicide* 16 *J. DISABILITY POL'Y STUD.* 38 (2005) (noting how discrimination and untreated depression contributed to the desires of two ventilator users, David Rivlin and Larry McAfee, to petition the courts to be allowed to die by having their ventilators removed).

<sup>72</sup> *Cf.* JAMES RACHELS, *THE END OF LIFE* 111 (1986) (arguing that those properties that make killing morally objectionable can also be found in cases of letting a person die. Therefore, "if one is permissible (or objectionable), then so is the other, and to the same degree.").

<sup>73</sup> *See supra* notes 9–12 and accompanying text.

reported.<sup>74</sup> This silence increases the likelihood of harm to a patient, suffering from treatable symptoms, who then turns to self-help.

Communication expands the options available to the patient. The proposed statute grants providers immunity and protects the patient from the provider's duty to report.<sup>75</sup> Implementing PAD will encourage communication between patients and providers. Discussion will ensure that patients with treatable symptoms receive treatment. Learning of all available options assures an informed decision. Rather than discouraging treatment, implementing PAD will encourage the use of all forms of care that can benefit Wyoming residents.

#### IV. CONCLUDING REMARKS

Wyoming residents have a constitutionally protected right to PAD. Patients and health care providers wish to take advantage of this right. Implementing PAD will offer patients and providers with important protection and guidance. The result is better care. We ask the Wyoming Legislature to benefit its residents and consider the proposed legislation.

#### V. PROPOSED LEGISLATION

##### **35-22-601. Definitions.**

(a) As used in this act:

- (i) "Adult" means any individual who is eighteen (18) years of age or older;
- (ii) "Attending health care provider" means a health care provider who has primary responsibility for the care of a patient and treatment of the patient's terminal condition;
- (iii) "Competent" means an individual's ability to understand the significant benefits, risks and alternatives to proposed health care and to make and communicate a health care decision, including communication through persons familiar with the patient's manner of communicating if those persons are available;
- (iv) "Consulting health care provider" means a health care provider who is qualified to make a professional diagnosis and prognosis regarding the patient's condition and to make a determination

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<sup>74</sup> WYO. STAT. ANN. § 35-20-103(a) (2015) ("Any person . . . who knows or has reasonable cause to believe that a vulnerable adult is . . . committing self neglect [sic] . . . shall report the information immediately to a law enforcement agency or the department [of family services].").

<sup>75</sup> See *infra* Section V.

that the patient is competent, acting voluntarily and making an informed decision;

(v) “Counseling” means one (1) or more consultations as necessary between a licensed mental health care provider and a patient for the purpose of determining that the patient’s judgment is not impaired by a psychiatric or psychological condition;

(vi) “Department” means the Wyoming Department of Health;

(vii) “Health care institution” means an institution authorized by law to provide health care in the ordinary course of business;

(viii) “Health care provider” means any person licensed under the laws of Wyoming practicing within the scope of that license;

(ix) “Patient” means a person who is under the care of an attending health care provider;

(x) “Resident” means a person physically present in Wyoming for sixty (60) or more days. Other factors demonstrating Wyoming residency include:

(A) Possession of a valid Wyoming driver’s license or valid Wyoming identification card;

(B) Registration to vote in Wyoming;

(C) Evidence that the person owns or leases property in Wyoming;

(D) Possession of a valid Wyoming resident hunting or fishing license; or

(E) Filing a Wyoming tax return for the most recent tax year.

(xi) “Terminal condition” means a condition that will, within reasonable medical judgment, produce death within six (6) months;

(xii) “This act” means W.S. 35-22-601 through 35-22-611.

(xiii) “Voluntarily” means free of undue physical or mental coercion.

### **35-22-602. Rights implemented.**

(a) A patient has the right to be informed of all available options related to his or her terminal condition and the benefits and risks of all available options.



(b) Any patient who qualifies under this act may receive a prescription for medication to end his or her life.

**35-22-603. Qualification.**

(a) A patient is qualified to receive a prescription for medication from his or her attending health care provider if:

- (i) The patient is an adult Wyoming resident;
- (ii) The patient is suffering from a terminal condition;
- (iii) The patient is competent and acting voluntarily;
- (iv) The patient has made an informed decision pursuant to W.S. 6-22-604(a)(ii);
- (v) A licensed mental health care provider has determined the patient's judgment is not impaired by a psychiatric or psychological condition, if applicable;
- (vi) The attending health care provider has confirmed sections (i) through (iv) of this paragraph;
- (vii) A consulting health care provider has confirmed sections (ii) through (iv) of this paragraph in writing; and
- (viii) The request for medication complied with the procedure set forth in W.S. 35-22-605.

(b) No patient shall qualify under this act on the sole basis of age, disability, or other condition.

**35-22-604. Attending health care provider responsibilities.**

(a) The attending health care provider shall:

- (i) Make a determination of whether a patient is an adult Wyoming resident, has a terminal condition, is competent and acting voluntarily;
- (ii) Inform the patient of:
  - (A) The medical diagnosis and prognosis;
  - (B) The risks and probable result of taking the prescribed medication; and

(C) Any feasible alternatives, including treatments, comfort care, hospice care and palliative care.

(iii) Obtain written confirmation from a consulting health care provider that the patient has a terminal condition, has made an informed decision, is competent and acting voluntarily;

(iv) Refer the patient for counseling if appropriate pursuant to W.S. 35-22-606;

(v) Inform the patient that he or she may rescind the request for medication at any time and in any manner;

(vi) Comply with the medical record documentation requirements pursuant to W.S. 35-22-607; and

(vii) Ensure that all steps are carried out in accordance with this act prior to writing a prescription for medication.

**35-22-605. Request procedure.**

(a) To receive medication under this act a patient shall make to the attending health care provider:

(i) An initial request;

(ii) A written request substantially in the form described in W.S. 35-22-611, signed and dated by the patient and witnessed by two (2) persons who, in the presence of the patient, attest that to the best of their knowledge the patient is competent and acting voluntarily; and

(iii) A request made not less than fifteen (15) days after making the initial request.

(b) One of the witnesses required by paragraph (a) of this section shall not be:

(i) A relative of the patient by blood, marriage or adoption;

(ii) A person who at the time the request is signed would be entitled to any portion of the estate upon the death of the patient under any will or by any other operation of law; or

(iii) An owner, operator or employee of a health care institution where the patient is receiving medical treatment.

(c) If the patient is physically unable to make a written request, he or she may direct a competent adult in his or her presence who is not a witness to make the written request.

(d) The patient's attending health care provider at the time the request is signed shall not be a witness.

**35-22-606. Counseling referral.**

If in the opinion of the attending health care provider or consulting health care provider a patient's judgment may be impaired by a psychiatric or psychological condition, the patient shall be referred for counseling. No medication shall be prescribed until the person performing the counseling has determined the patient's judgment is not impaired by a psychiatric or psychological condition.

**35-22-607. Medical record documentation requirements.**

(a) The following shall be documented or filed in the patient's medical record:

(i) Any requests made by a patient pursuant to this act;

(ii) The attending health care provider's diagnosis, prognosis, and determination that the patient is competent, acting voluntarily and has made an informed decision;

(iii) The consulting health care provider's written confirmation of section (ii) of this paragraph;

(iv) A report of the outcome and determinations made during counseling, if performed;

(v) A note by the attending health care provider that all requirements of this act have been met and indicating the steps taken to carry out the patient's request.

**35-22-608. Reporting requirements.**

(a) The department shall annually review a sample of records maintained pursuant to this act.

(b) The department shall require any health care provider upon prescribing medication under this act to file a copy of the record required by W.S. 35-22-607 with the department. Except as otherwise provided by law,

information collected by the department shall not be a public record and shall not be made available for inspection by the public.

(c) The department may make rules to facilitate the collection of information regarding compliance with this act.

(d) The department may generate and make available to the public an annual statistical report of information collected pursuant to this section.

**35-22-609. Immunities; health care provider participation; liabilities.**

(a) No person shall be subject to civil or criminal liability or professional disciplinary action for participating in good faith with this act.

(b) No professional organization or association or health care institution may subject a person to any penalty for participating or refusing to participate under this act.

(c) Actions taken or information received in accordance with this act do not impose a duty to report under W.S. 35-20-103 or any other similar requirement.

(d) No health care provider shall be under any duty to participate in providing a patient with medication in accordance with this act. An attending health care provider who is unable or unwilling to carry out a patient's request must:

(i) Promptly inform the patient;

(ii) Provide continuing care to the patient until a transfer of care can be effected; and

(iii) Immediately make all reasonable efforts to assist in the transfer of care of the patient to another health care provider who is willing and able to carry out a patient's request.

(e) Notwithstanding paragraphs (a) and (b) of this section, any person who violates a policy established by a health care institution may be subject to sanctions otherwise allowable under law or contract.

(f) A person who without authorization of the patient willfully alters or forges a request for medication or conceals or destroys a rescission of that request with the intent or effect of causing the patient's death shall be guilty of a felony punishable by imprisonment for a term not less than twenty (20) years.

(g) A person who coerces or exerts undue influence on a patient to request medication for the purpose of ending the patient's life, or to destroy a rescission of such a request, shall be guilty of a felony punishable by imprisonment for a term not less than twenty (20) years.

(h) A person who without authorization willfully alters, forges, conceals or destroys an instrument or any other evidence reflecting a patient's desires and interests with the intent or effect of affecting any decision under this act shall be guilty of a misdemeanor punishable by imprisonment for a term not more than one (1) year, a fine of not more than two thousand dollars (\$2,000.00) or both.

(i) Nothing in this act shall be construed to limit further criminal or civil liability or professional misconduct resulting from other intentional or negligent conduct by any person.

**35-22-610. Construction of act.**

(a) Nothing in this act shall be construed to authorize any person to end a patient's life by active euthanasia.

(b) Death in accordance with this act shall not constitute suicide for any purpose.

**35-22-611. Forms.**

(a) A written request for medication pursuant to W.S. 35-22-605(a)(ii) shall be in substantially the following form:

**REQUEST FOR MEDICATION**

I, \_\_\_\_\_, am of a sound mind and a resident of the state of Wyoming.

I am suffering from \_\_\_\_\_, which my attending health care provider has determined is in its terminal phase and which has been confirmed by a consulting health care provider.

I have been fully informed of my diagnosis, prognosis, the risks and probable result of taking the prescribed medication, and feasible alternatives, including treatments, comfort care, hospice care, and palliative care.

I request that my attending health care provider prescribe medication that will end my life should I choose to take it.

I understand that I have a right to rescind this request at any time.

I understand the full import of this request and I expect to die when I take the medication prescribed.

I make this request voluntarily and without reservation.

Signed: \_\_\_\_\_

Dated: \_\_\_\_\_

**DECLARATION OF WITNESSES**

We declare that the person signing this request:

- (a) Is personally known to us or has provided proof of identity;
- (b) Signed this request in our presence;
- (c) Appears to be of sound mind and not under duress, fraud or undue influence; and
- (d) Is not a patient for whom either of us is attending health care provider.

\_\_\_\_\_  
Witness 1/Date

\_\_\_\_\_  
Witness 2/Date