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TRANSCRIPT

AID IN DYING IN MONTANA KEYNOTE ADDRESS: SOME PERSONAL PERSPECTIVES ABOUT WHERE WE ARE, WHERE WE ARE GOING, AND WHETHER THE COURTS ARE PART OF THE PROBLEM OR THE SOLUTION*

James C. Nelson**

Thank you Professor Johnstone for your warm introduction. And let me also welcome you all to this symposium and to a very important dialogue.

In my brief remarks here today, I want to offer some personal perspectives about aid in dying in Montana.

Let me start by noting that it has been ten years since the Montana Supreme Court handed down its decision in *Baxter v. State*.¹ I suggest that it is time that we who are passionate about aid in dying in Montana take this opportunity to assess where we are, where we are going, and whether the courts are part of the problem or the solution.

These are important questions that need to be answered thoughtfully and honestly. And it is these matters on which I would like to focus my remarks for the next 20 or so minutes.

As you know, the Montana Supreme Court decided *Baxter* on non-constitutional grounds, notwithstanding the district court's decision. In her

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1. 224 P.3d 1211 (Mont. 2009).

decision, District Court Judge, the Honorable Dorothy McCarter, ruled that Montanans' constitutional rights of individual privacy² and inviolable human dignity³ protected the right of incurably ill patients to end their physical and mental suffering with the medical assistance of their physicians.⁴

The Montana Supreme Court, however, chose a more narrow approach. The Court concluded that, reading various Montana statutes together, persons with incurable illnesses who were going to die within a short period of time, accompanied by great suffering, had a legal avenue to seek and receive their physicians' assistance in dying a dignified death.

Basically, the Court ruled that Montana's criminal consent statute,⁵ read in conjunction with the Montana Rights of the Terminally Ill Act,⁶ provided a consent defense to a charge of homicide filed against the aiding physician.

In other words, Dr. Jones provides a life-ending medication to her terminally ill patient, Smith, at Smith's request. Smith, then, at a time of his choosing, self-administers the medication in order to bring his suffering and life to a close in a dignified manner. Dr. Jones is charged with deliberate homicide for providing the medication to patient Smith and in aiding him in taking his own life. At trial, Dr. Jones can assert her innocence to the crime on the basis that patient Smith consented to being provided with and subsequently taking the medication ending his life. Then, it is up to the jury to determine whether they believe the consent defense or not.

What is wrong with this picture is that the prescribing physician has to effectively roll the dice in providing medical assistance to her patient. She might be found not guilty after a trial, or she might be found guilty of criminal homicide. The physician is only one sectarian, conservative prosecutor, and a similarly oriented jury away from being charged with and convicted of Montana's most serious criminal felony; a career- and liberty-ending decision for the physician.

Moreover, in choosing to decide *Baxter* on statutory grounds, the Court chose a path that would subject its decision to legislative manipulation. The road not taken, the constitutional path, would have solidified aid in dying as a constitutional right and, thus, essentially carved that right in stone. Unless the Constitution itself was amended to repeal or modify the right, it would be nearly impossible for the Legislature to impair the right.

2. MONT. CONST. art. II, § 10.

3. MONT. CONST. art. II, § 4.

4. *Baxter v. State*, No. ADV-2007-787, 2008 WL 6627324 (Mont. Dist. Ct. Dec. 5, 2008).

5. MONT. CODE ANN. § 45-2-211 (2019).

6. MONT. CODE ANN. §§ 50-9-101 to 50-9-505.

And the focus would be shifted from the doctor to the patient, where, of course, the focus belongs.

As most of you probably know, I sat on the case and joined the opinion by way of a lengthy special concurrence grounded in the rights of dignity and privacy. Justice John Warner concurred separately, and Justice Jim Rice dissented, joined by District Court Judge Joe Hegel, sitting for Chief Justice Mike McGrath.

Be aware that not one of the Justices that sat on *Baxter* is still sitting on the Montana Supreme Court, save for Justice Rice.

Also be aware that, in the intervening ten years, not one session of the Legislature has gone by without a challenge to the *Baxter* decision by the conservative, partisan right and by a number of various sectarian organizations. There has been every manner of attempt to legislatively overrule *Baxter*, to penalize assisting physicians, and to criminalize their giving aid in dying to their patients.

But thanks to the exceptionally hard work of the Compassion and Choices organization, along with unfailing, vocal support from numerous physicians, long-suffering patients and their families, members of the public, progressive members of the Legislature, and, on occasion, the media, all of the Legislature's attempts to undo *Baxter* were beaten back.

And despite its detractors, we know that over the intervening ten years since the Court's decision, Montanans suffering those types of horrible and debilitating illnesses have successfully sought and obtained aid in dying from various compassionate physicians in this State.

Indeed, *Baxter* has worked successfully and as intended—and without the parade of horrors predicted by those who would interfere with the patient's most personal end-of-life decision. I tried to get some numbers, but apparently no database has been compiled. I am advised, though, that, anecdotally, Montana's experience has been similar to that of Oregon's.

So the short answer to my first question—where are we—is that *Baxter* has worked well, and it has had strong public support despite legislative attempts to overrule it.

That said, I suggest this good record is in danger. And that brings me to my second assessment: where are we going?

Here, we need a dose of reality. First, we can expect another legislative challenge to *Baxter* in the 2021 legislative session. Unless Montanans, collectively, have some sort of epiphany, I expect the next Legislature will be controlled by a majority of conservative partisans, chomping at the bit, along with their sectarian friends, to rid Montana of *Baxter* once and for all.

Moreover, for most of *Baxter*'s existence, Montana has had a progressive Governor. I think most of us believed that, even if the Legislature suc-

ceeded in statutorily overruling the Court's decision or criminalizing physicians, we could always count on a gubernatorial veto as plan B to save *Baxter*.

I suspect Montana's next Governor, elected in 2020, won't be a progressive. And from the candidates I have seen so far, all those from the pool of likely winners wear their evangelical beliefs on their sleeves. None would likely veto legislation overruling *Baxter*. Indeed, quite to the contrary. And if you think I'm nuts for saying so, be sure to question all the gubernatorial candidates at town halls and forums—and be sure to demand a straight-forward answer to your question—does he or she support *Baxter* or not?

And that brings me to the third question I raised: whether the courts are part of the problem or the solution?

Let's assume for the sake of argument that some sort of legal challenge is brought in court against legislation overruling *Baxter*. The district court is going to be on a short leash. Because *Baxter* was decided on statutory grounds, the law is clear that the Legislature is perfectly within its power to amend or adopt new statutes to undo what the Montana Supreme Court did. So I suggest that the trial courts are going to have a tough time reversing legislative action, short of another constitutional challenge—which route the Montana Supreme Court already declined to address.

Moreover, as I noted before, the only member of the *Baxter* Court still sitting is the Justice who dissented from the Court's decision. And frankly, I wouldn't predict how the other members of the present Court would rule.

That aside, however, the Montana Supreme Court will be bound by the same rules that govern the district court. The Legislature is free to statutorily overrule *Baxter* because the Montana Supreme Court's decision was based on statutes. Thus, with the Montana Supreme Court having put itself in the statutory box, I don't think the courts will likely be part of the solution in the next go-around.

Indeed, when the history of *Baxter* is written, it may well be said that, while the Court gave birth to Montanans' ability to seek and receive aid in dying, the baby was conceived with a genetic flaw assuring its own demise. That being the failure to simply uphold the district court and make aid in dying a constitutional right, grounded in the rights of inviolable human dignity and individual privacy.

So what is the solution? I suggest that, to solve this problem once and for all, a movement must start to amend the Constitution to either create a stand-alone right for aid in dying or, alternatively, to textually include such a right within the right of individual privacy or within the right of inviolable human dignity.

While I think that is where it belongs, grounding the right in human dignity is problematic because the Montana Supreme Court has not recognized inviolable human dignity as a stand-alone right (although I have maintained that it is). Individual privacy, however, is recognized as a fundamental stand-alone right. Accordingly, if aid in dying is not adopted as a stand-alone right, Article II, Section 10 would be the appropriate place to locate it.

I suggest this effort to amend the Constitution be accomplished via a Citizens Initiative placed on the 2020 general election ballot. Furthermore, if this effort is undertaken, it will have to be very well-funded to prevent being overwhelmed by the churches, special interests, and conservative partisan right, all of which are well-funded. This Citizens Initiative would merely create the right of aid in dying as a fundamental constitutional right, not set out any regulatory scheme.

Finally, I want to confess that joining *Baxter* was one of the biggest regrets of my judicial career. I believed at the time that half a loaf was better than none at all, and I was concerned there would not be four votes for a favorable decision on even that.

But I wish I had simply stuck with my categorical belief—that our Montana Supreme Court should have simply upheld Judge McCarter’s decision on the constitutional bases she determined. It was not that the Montana Supreme Court was wrong; it was simply that Judge McCarter was right—indeed, more right!

Men and women who are enduring the maelstrom of a life-ending illness; who are suffering terribly from pain and disability; who are not only losing their bodies to their illness, but—and in many cases, worse—their spirits, their dignity, and their autonomy, cultivated and treasured over a lifetime, do, and let me repeat, *do* have an individual constitutional right to end their lives with the aid from their physicians. That right is protected and guaranteed by Montana’s Constitution. That right is fundamental. It is a natural right grounded in the attributes of humanness with which each of us is born. It is a right grounded in our ability to make and take responsibility for our own moral decisions. It is an elemental part of our individual sentience and consciousness.

In his recent book, *Falter*,⁷ author Bill McKibben states: “[t]he pattern of our lives is set by the span we hope to live . . . and if we’re brave enough to acknowledge it, we can prepare for our approaching death.”

For those suffering from an incurable illness, who expect to die shortly, preparing for approaching death, determining when her or his own

7. BILL MCKIBBEN, *FALTER: HAS THE HUMAN GAME BEGUN TO PLAY ITSELF OUT?* 188 (2019).

mortal existence should come to a dignified and peaceful end, is that person's final, fundamental right to exercise.

It is a right that society must respect and that we must fight to preserve.

Thank you.