

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 09-0051

STATE OF MONTANA, et al.

Appellants,

vs.

ROBERT BAXTER, et al.,

Appellees.

FILED

APR 02 2009

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

On Appeal from the Montana First Judicial
District Court, Lewis and Clark County
The Honorable Dorothy McCarter, Presiding.

MOTION FOR LEAVE TO FILE
BRIEF OF AMICI CURIAE FAMILY RESEARCH COUNCIL,
AMERICAN ASSOCIATION OF PRO LIFE OBSTETRICIANS AND
GYNECOLOGISTS, CATHOLIC MEDICAL ASSOCIATION, DR.
DONALD BERDEAUX, DR. RICHARD D. BLEVINS, DR. PAUL L.
GORUSCH, JR., DR. KIRSTEN L. MORISSETTE, DR. CARLEY C.
ROBERTSON, DR. D. PERRIN ROTEN, JR., DR. RONALD P. SKIPPER,
DR. STEPHEN R. SHAUB, DR. CRAIG TREPTOW, DR. JAMES
THREATT, DR. THOMAS A. WARR, and MS. BROOKE E. CANTU, IN
SUPPORT OF APPELLANTS

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RELIEF REQUESTED

Amici Curiae supporting this brief (collectively, “Concerned Physicians”) respectfully move the Court to grant leave to file an *amici curiae* brief in support of Appellant, the State of Montana, to be filed by the April 30 amicus brief deadline set by the Court.

APPELLANT AND APPELLEES HAVE NOT STATED AN OBJECTION TO THE FILING OF CONCERNED PHYSICIANS’ AMICI CURIAE BRIEF

Concerned Physicians’ counsel have been in contact with counsel for Appellant and for Appellees. The State indicates that it takes no position on Concerned Physicians’ motion for leave, and counsel for Appellees indicates that they have no objection to our motion for leave. (Decl. of Duane T. Schmidt, ¶ 5.) Therefore, no party has stated an objection.

ISSUES TO BE ADDRESSED BY CONCERNED PHYSICIANS

In their brief, Concerned Physicians plan to address the following issue:

Legalizing assisted suicide implicates dramatically negative public policy effects that have been debated and experienced in other jurisdictions for decades. The Montana Constitution’s protections of individual dignity and privacy have never been interpreted to demand legalization of assisted suicide (nor has any other State ruled similarly). Such a judicial mandate threatens rather than protects the individual dignity of vulnerable patients. Therefore, should this Court reverse the district court, and hold instead that the Montana Constitution does not forbid the State from protecting its most vulnerable citizens from the medically questionable practice of assisted suicide?

(*Id.* at ¶ 6.)

HOW THE PROPOSED *AMICI CURIAE* BRIEF WILL ASSIST THE COURT

Concerned Physicians is a coalition of Montana medical doctors, along with some physician groups and a public policy organization, who are concerned that mandating legal assisted suicide would threaten vulnerable patients, and would constitute a violation of physicians' ethical duty to care for suffering rather than intentionally end patients' lives. Concerned Physicians' proposed *amici curiae* brief will address important constitutional issues from this perspective.

Concerned Physicians' brief will demonstrate that constitutionally legalizing assisted suicide would actually jeopardize interests that vulnerable patients have in dignity and privacy under the Montana Constitution. These concerns are central to the Court's decision of whether to become the first state to strike down the long-existing, dignity-protecting laws against assisted suicide.

Concerned Physicians plan to discuss the well-documented abuses of assisted suicide in the Netherlands, a regime that was legislated rather than constitutionalized and where systematic attempts were made to regulate against abuse. Concerned Physicians will explain why the central concepts of patient autonomy and compassion actually rebut the idea that dignity requires legal assisted suicide. Instead, legalizing assisted suicide will almost by definition lead to the termination of psychologically vulnerable patients rather than giving them the effective counseling and pain control.

INTEREST OF *AMICI CURIAE*

Dr. Donald Berdeaux is a medical oncologist in Great Falls, Montana, and has practiced there since 1993. As an oncologist he has many terminally ill patients.

Dr. Richard D. Blevins is a medical doctor who has practiced in Great Falls since 1982. He is board certified in pulmonary disease and internal medicine, and has directed critical services at a hospital for 15 of those years. He has cared for hundreds of patients in the final stages of their lives, and has dealt with many issues of relief of suffering, both physical and emotional, through palliative care or hospice programs.

Dr. Paul L. Gorsuch, Jr., is a neurosurgeon in Great Falls. He has practiced since 1987 and has extensive training and experience in conditions such as stroke, spinal cord injuries, brain tumors with no reasonable expectation of cure, degenerative diseases of the nervous system, brain trauma, and pain. He frequently engages in end-of-life, palliative care, and hospice discussions and decisions with his patients and their whole team of specialists.

Dr. Kirsten L. Morissette is a family physician in Hardin, Montana. She practices the full scope of family medicine, including at the end of patients' lives, and in hospice care and nursing homes. Palliative care was an integral part of her training.

Dr. Carley C. Robertson is a medical doctor in Havre, Montana. She is a general practitioner who has practiced medicine in rural Montana for over 25 years. She

practices in an emergency room in Havre, and she supervises three rural ambulance services in Blaine County as well as three physician assistants in Chouteau County.

Dr. Ronald Patrick Skipper is a general surgeon in Lewistown, Montana. He graduated from medical school in 1986 and from his general surgery residency program in 1991. He is a fellow of the American College of Surgeons and is certified by the American Board of Surgery.

Dr. Stephen R. Shaub, D.O., practices in Billings, Montana. He is a board certified physician with thirty years of experience in family medicine, and has knowledge of pain management, compassionate treatment, and hospice care for those near death.

Dr. Craig Treptow is a family practice physician in Great Falls, treating patients from birth through the natural end of their life. These include patients with heart problems, cancer, disabilities, progressive neurological problems, and depression. He has been asked by a patient's family member about assisted suicide.

Dr. James Threatt is an ophthalmologist in Billings. He received his M.D. from Emory University in 1973, was a flight surgeon for the United States Air Force, did a residency in ophthalmology and has been in private medical practice in Billings since 1980. He sees about 3,500 patient-visits per year, and 75% of his patients receive Medicare. Many of his patients suffer significant medical problems, and often his patients' last office visit is within a few years or months of their death.

Dr. Thomas Warr is a medical doctor in Great Falls who is board certified in medical oncology, hematology, internal medicine, and hospice and palliative medicine. His practice is oncology, and he often cares for patients at the end of life. He was medical director of Peace Hospice of Montana for 15 years, during which time he supervised the deaths of over 3000 patients.

Ms. Brooke E. Cantu is a registered nurse in Kalispell, Montana. As a nurse at a medical center she has encountered multiple opportunities to care for patients in end-of-life and hospice situations.

Catholic Medical Association is a non-profit corporation incorporated in the State of Virginia and comprised of doctors in various fields of medicine from around the country, including from Montana. CMA's members are deeply committed to the ethical principles intrinsic to the medical profession (including those ethical principles expressed in the Hippocratic Oath), and believe that patients are in danger of becoming victims when society begins to define killing as an acceptable legal, and constitutional interest, and attempts to require members of the medical profession to participate in advancing this interest.

The American Association of Pro-Life Obstetricians and Gynecologists is a non-profit organization comprised of obstetricians and gynecologists from around the country, including from Montana. AAPLOG's members are deeply concerned about the

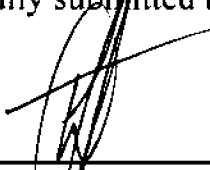
ethics of the medical profession and are opposed to defining acts of killing as medical care. Many of AAPLOG's members encounter terminal illnesses in their patients.

Family Research Council is a non-profit organization located in Washington, D.C. that exists to develop and analyze governmental policies that affect the family. FRC is committed to strengthening traditional families in America and advocates continuously on behalf of policies designed to accomplish that goal.

CONCLUSION

Based on the foregoing and the attached declaration, Concerned Physicians respectfully request the Court to issue an order granting them leave to file an *amici curiae* brief in support of Appellant, the State of Montana.

Respectfully submitted this 1st day of April, 2009,



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**DECLARATION OF DUANE T. SCHMIDT IN SUPPORT OF
MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF**

I, Duane T. Schmidt, do hereby declare as follows:

1. That if called upon, I could and would testify truthfully, as to my own personal knowledge as follows.
2. I am over the age of eighteen years and am competent to testify.
3. I am an active member of the Montana Bar. I have been admitted to practice before the United States District Court for the District of Montana. I am an inactive member, though in good standing, of the State Bar of Maryland.
4. I am counsel of record for *amici curiae* listed in the caption above.
5. Staff working with me at the Alliance Defense Fund have been in contact with Appellant's and Appellees' legal counsel regarding the filing of my clients' brief. Counsel for the State indicate that they do not take a position our motion for leave to file, counsel for Appellees called and indicated that they have no objection to our motion for leave to file.
6. In our brief we plan to address the following issue:

Legalizing assisted suicide implicates dramatically negative public policy effects that have been debated and experienced in other jurisdictions for decades. The Montana Constitution's protections of individual dignity and privacy have never been interpreted to demand legalization of assisted suicide (nor has any other State ruled similarly). Such a judicial mandate threatens rather than protects the individual dignity of vulnerable patients. Therefore, should this Court reverse the district court, and hold instead that the Montana Constitution does not forbid the State from protecting its most

vulnerable citizens from the medically questionable practice of assisted suicide?

7. We do not make this request for purposes of delay or to harass any of the parties or for any other inappropriate purpose.
8. I certify that the content of this motion for leave is less than 1250 words as measured by the word count of the word processing system used to prepare the motion, and it is printed in proportionally spaced, 14-point Times New Roman typeface.

The foregoing is true and correct and is of my own personal knowledge, and I indicate such below by my signature executed on this 1st day of April, 2009, in Scottsdale, Arizona.

A handwritten signature in black ink, appearing to be 'Duane T. Schmidt', written over a horizontal line.

Duane T. Schmidt, Esq.

CERTIFICATE OF SERVICE

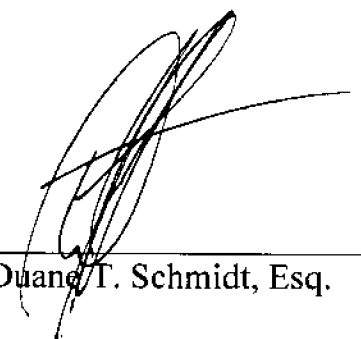
I certify that on the 1st day of April, 2009, a copy of the foregoing motion, declaration, and Proposed Order was sent via U.S. Mail to:

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Jennifer Anders
Anthony Johnstone
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Date: April 1, 2009.



Duane T. Schmidt, Esq.