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THE CALIFORNIA END OF LIFE OPTION ACT:
To Participate Or Not To Participate

by Larry T. Pleiss and Kimberli Poppe-Smart, JD, RN, BSN, CPHRM, CHC

Among the rapidly evolving areas of health law are the legal, medical, and ethical issues relating to death and dying. California is now the fifth state to authorize medical aid-in-dying. This raises the thorny and inevitable question as to whether your institution, facility or agency will participate or not participate in the activities authorized under the End of Life Option Act [the "Act"] signed by Governor Jerry Brown, on October 5, 2015. (Cal. Health & Safety Code, § 443, et seq.)

The Act permits a competent, qualified individual who is an adult with a terminal disease to receive a prescription for an aid-in-dying drug if certain conditions are met. These conditions include two oral requests, a minimum of 15 days apart, and a written request signed by two witnesses. These requests must be provided to his or her attending physician who then refers the patient to a consulting physician to confirm diagnosis and capacity to make medical decisions. The attending physicians refers the patient to mental health specialists, if indicated.

Because the Act was sanctioned during a special session of the California Legislature and not during the regular 2015 legislative session, the usual rules regarding its effective date do not apply. Instead, it will become effective 90 days after the special session ends. As of this writing, legislative leaders have not yet decided exactly when that will occur, but it will be soon. The Act's sunset date is January 1, 2026.

The purpose of this article is to provide a modicum of guidance on what to be done at this juncture by acute care hospitals, skilled nursing and long term nursing facilities ["Institutions"], as well as hospice and home health agencies ["Agencies"]. It must be stressed that the Act is not an institutions-focused law; rather, it is focused on the individual who is making the request and physicians involved in the process. It is anticipated that most of the activities authorized under this law will occur in a doctor's office and at home – not in an institution. It is also anticipated that hospice and home health providers will be involved with the patient at the time the prescription is requested or consumed. Institutions and agencies alike should be aware of the law, understand how it may impact them, and develop appropriate policies.

An institution or agency should first decide whether it wishes to permit its employees, medical staff and others to participate in the activities authorized by the Act. Such activities include writing a prescription for an aid-in-dying drug, filling such a prescription, allowing a patient to self-administer the drug on its premises, or allowing a home health or hospice employee to prepare the drug.

If an institution or agency chooses to prohibit participation in such activities, it may do so. It must however adopt appropriate policies and notify employees, medical staff, and contractors of such policies. The requirements for an institution or agency that chooses to prohibit participation is described below. The institution or agency also may wish to address how to inform patients/residents who inquire about the facility's policy on this issue.

Long term care institutions and agencies face a unique set of circumstances. Where a non-participating institution or agency has a long term resident or patient who requests aid-in-dying, the provider will need a plan that fulfills its state and federal licensing regulations and allows the patient to exercise their right to pursue assisted death.

If an institution or agency elects to allow participation in some or all of the activities authorized by the Act, it should adopt policies addressing the various steps outlined in the law. The institution or agency may desire to include a requirement that administration be notified if a patient/resident plans to take an aid-in-dying drug in the facility.

The issue to participate or not participate on the part of an institution is a profound one with manifold implications. The decision needs to be explored internally through committee processes as well as by its governing board. Wroten & Associates is prepared to assist you in this process. We will provide you with detailed help with the evaluation process relative to participation and non-participation and preparation of appropriate policies to meet the Act's requirements.

The Act was sponsored by numerous groups but principally Compassionate Choices California which wrote the law – AB X2 -15 End of Life. According to the later, less than 1% of dying Californians will take the lethal medication and many others will benefit from the peace of mind provided by having access to aid-in-dying in the defined circumstance, if they need and want it. Simply knowing the option is available can provide a palliative effect for dying people. The AIDS Healthcare Foundation wrote that the Act contains explicit protections against manipulation of the law for inappropriate purposes. These provisions ensure a balance between meeting the critical goal of the Act and protecting against acts by people who do not have the patient's best interests in mind. The Conference of California Bar Associations indicated that the Act included numerous safeguards to ensure that the medication was provided only to terminally ill individuals according to their own choice and a knowing, well considered decision, made only after consideration of feasible alternatives and additional treatment opportunities. Proponents indicated that the 20 years of data collected in Oregon demonstrates that the Act would work as intended, with no substantial reports of abuse or coercion and it resulted in improved end of life pain management and increased use of hospice for all dying patients.

The opponents of the Act included the Coalition of Physicians & Other Healthcare Providers and organizations dedicated to the rights of people with disabilities. Faith-based organizations advocate that while protections for healthcare providers are present, it is the patient who remains without adequate protections. The Coalition wrote that the Act does not require a psychiatrist to evaluate a patient before he or she decides to end their life; does not require anyone to be present when the patient takes his/or her lethal prescription; and allows the patient, or designated agent, to pick up their lethal prescription at the local pharmacy. In addition, the opponents assert that the Act will have a devastating impact on the treatment of terminally ill and disabled patients because it will quickly become another treatment option, always being the cheapest. The Medical Oncologist Association of Southern California, Inc. believes that no matter how many parameters are placed around the practice, legalizing a form of suicide will have spill over effects in society at large.

As can be discerned from the foregoing, the implementation of and compliance with the Act will become onerous and perhaps itself beget litigation. Again, Wroten & Associates is ready and willing to provide input so that these uncharted seas can be less treacherous for all concerned.

About the Authors:

Larry T. Pleiss

A Shareholder at Wroten & Associates, Larry T. Pleiss previously served as the Managing Partner at Madory, Zell, Pleiss, McGrath, APC. Mr. Pleiss has almost 37 years of experience defending healthcare professionals and governmental entities and has argued cases before the United States and California Supreme Courts. He has achieved the rank of Diplomat, the highest ranking of the American Board of Trial Advocates, which he has been a member of since 1987 and has tried and arbitrated disputes as lead counsel in over 130 cases.

Mr. Pleiss has been called on to speak on such topics as trial skill and defense strategies with the California Continuing Education of the Bar, University of California, Orange County Bar Association, Orange County College of Trial Advocacy, American Board of Trial Advocates, and The Rutter Group. Mr. Pleiss also serves on numerous hospital ethics and quality of care improvement committees in the Southern California community. In 2004 he received the National Business Advisory Council's Ronald Reagan Gold Medal and National Leadership Awards. For over 20 years he has held AV rating of preeminent AV® in Martindale-Hubbell, which ranks him at the highest level of legal ability and ethical standards.

He was admitted to the California State Bar in 1979, United States District Court for the Central District of California and United States Court of Appeals for the Ninth Circuit in 1980, United States Supreme Court in 1985, United States District Court of Appeals for the Southern District of California in 1988, the United States District Court of Appeals for the Northern District of California in 1989, and the United States District Court for the Eastern and Southern Districts of California in 2013.

Mr. Pleiss concentrated his undergraduate and graduate studies in economics and marketing, and was a member of Alpha Gamma Sigma and Beta Gamma Sigma Honor Societies. At Pepperdine University School of Law, Mr. Pleiss was a member of Law Review and Moot Court Honor Board. He received American Jurisprudence awards in Torts, Evidence, and Civil Procedure. He was published in Law Review ["Deceptive Advertising and the FTC: A Perspective," Pepperdine Law Review (1979); "Beyond Kent and Gault: Consensual Searches and Juveniles," Pepperdine Law Review (1979)] and taught legal research and writing. Mr. Pleiss participated in both the prestigious Roger J. Traynor California State Moot Court competition in 1978 and 1979 and the Vincent S. Dalsimer Pepperdine University School of Law Moot Court competitions, winning best appellate brief awards in each competition and best advocate in the latter competition. He was also a member of Phi Alpha Delta Law Fraternity.

In addition to the professional memberships mentioned above Mr. Pleiss is affiliated with the following: American Bar Association; State Bar of California; Orange County Bar Association; Orange County Trial Lawyers Association; Association of Trial Lawyers of America; Cambridge Who's Who in America; Who's Who in American Law; Who's Who in Practicing Attorneys; Southern California Defense Counsel; Southern California Association for Healthcare Risk Management; American Society for HealthCare Risk Management; Phi Alpha Delta Law Fraternity; American Hospital Association; California Association for Health Care Attorneys; Board of Trustees, and Business Advisory Council.

Kimberli Poppe-Smart

A Senior Attorney at Wroten & Associates, Kimberli M. Poppe-Smart has united her 30-year nursing career with over a decade of legal experience into a healthcare risk management and compliance specialist. Ms. Poppe-Smart served as an appointed leader in Alaska State government. Her role as the Deputy Commissioner for Health and Social Services overseeing Medicaid, Senior and Disability Services, Behavioral Health Services, long term care and psychiatric facilities, survey, certification and a myriad of additional state-administered program add a depth of knowledge and experience rarely seen in the litigation arena.

Ms. Poppe-Smart is a Wroten & Associates litigation team member as well as an expert in identifying and managing risks and implementing enterprise risk management plans and strategies. She has spoken nationally on healthcare topics including quality assurance, risk management and compliance. Her most recent presentation was titled Proactive Measures to Mitigate Risks From Surveys Gone Bad…and Other Tips. Ms. Poppe-Smart has written a number of articles as well, her most recent titled "The Ins and Outs of Resident Transfer & Discharge".

Ms. Poppe-Smart earned a diploma in registered nursing in 1983, a Bachelor of Science in Nursing in 1992 and graduated cum laude from Thomas Jefferson School of Law in San Diego, California in 2002. She is a member of the Health Care Compliance Association (HCCA) and is a professional Certified in Healthcare Compliance and a Certified Professional in Healthcare Risk Management (CPHRM).