New York Court Of Appeals Roundup

A Review of '*Myers v. Schneiderman*'

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New York has a 189-year-old history of prohibiting conduct that assists a person in committing suicide, and the Court of Appeals' recent decision in *Myers v. Schneiderman* reinforces that tradition. The court addressed claims brought by three terminally ill individuals, several medical providers, and a non-profit entity seeking a declaration that New York's "assisted suicide" statutes do not prohibit physicians from prescribing a lethal dose of drugs to terminally ill, mentally competent patients. The court's per curiam opinion unequivocally rejected such claims and affirmed that a physician who "assists a suicide" by prescribing lethal doses of drugs is subject to criminal prosecution for second degree manslaughter. Interestingly, there are three concurring opinions, authored by Judges Jenny Rivera, Eugene Fahey, and Michael Garcia, that explore additional facets of the case and stake out differing viewpoints for a subgroup of patients who are in the final stage of dying.

The court's per curiam opinion is joined by Judges Rowan Wilson, Rivera, Fahey, Garcia and Leslie Stein. Chief Judge Janet DFiore and Judge Paul Feinman did not participate in the appeal. The court noted that Penal Law §120.30 provides that a person is guilty of assisting a suicide if he intentionally causes or aids another person to attempt suicide, and that Penal Law §125.15 provides that conduct that intentionally aids another in committing suicide constitutes manslaughter in the second degree. Plaintiffs challenged the statutes on the basis that they unconstitutionally deter physicians from providing aid-in-dying to terminally ill, mentally competent persons. Plaintiffs initially named the attorney general and various district attorneys as defendants, later discontinuing the case against the district attorneys upon the district attorneys' stipulation to be bound be the results. The trial court granted the attorney general's motion to dismiss for failure to state a cause of action or present a justiciable controversy. The Appellate Division, First Department affirmed, finding that the criminal statutes are valid and do not violate the State Constitution. Plaintiffs appealed as of right under CPLR 5601(b) on the basis that the case directly involves an issue of constitutional construction. The Court of Appeals held that the Penal Laws plainly apply to a physician who intentionally prescribes a lethal dosage of a drug because such act constitutes "aid[ing] another person to commit suicide," giving no safe harbor to physicians who act out of sympathetic concerns to help terminally ill persons through a painful end-of-life experience.

The court also rejected plaintiffs' constitutional challenges. Dismissing the plaintiffs' Equal Protection claim, the court found that the statutes treat everyone the same: All persons are allowed to refuse unwanted lifesaving medical treatment, and no one is allowed to assist a suicide. On the Due Process challenge, the court found that plaintiffs' asserted right to self-determination and to control the course of one's medical treatment is not a fundamental right, and therefore New York's statutes restricting its exercise need only have a rational relationship to a legitimate government interest. The court found that the state has multiple interests in

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prohibiting assisted suicide: prohibiting the intentional taking of life; preventing suicide in general; guarding against the risks of mistake and abuse in prescribing lethal drugs; maintaining physicians' role as healers; protecting vulnerable people from pressure to end their lives; and avoiding a slide into euthanasia. The court concluded that these important state interests satisfy the rational relationship requirement.

The court noted that New York enacted the first statute in the country outlawing assisted suicide, in 1828, and that New York's Task Force on Life and the Law unanimously concluded in the 1980s that legalizing assisted suicide and euthanasia would pose a profound risk to sick and vulnerable individuals. New York's legislature has revisited this issue several times but repeatedly rejected efforts to legalize physician-assisted suicide. The court observed that legislatures (as opposed to courts) in Oregon, Washington, Vermont, California, Colorado and D.C. have permitted aid-in-dying by physicians, and concluded that New York's absolute ban is a permissible approach for protecting against its dangers.

Judge Rivera wrote a lengthy concurring opinion that makes the case for a different standard for terminally ill, mentally competent individuals who are near the end of life and in significant pain. She focuses on the fact that physicians across the country are allowed to withdraw life-sustaining treatment (such as ventilators, breathing tubes, and feeding tubes) and can provide palliative sedation (meaning intravenous sedatives and pain medication that often induce unconsciousness). She reasons that there is no practical difference between allowing physicians to perform these acts of compassion near the end of life and allowing a physician to prescribe a lethal dose of medicine. For her, the inquiry should focus not on the physician's mindset (of providing comfort versus bringing on death) but rather on the individual's right to exercise control over how the individual wants to face death and whether the individual should be given the means to eliminate a slow, painful, "undignified" process of succumbing to death. Judge Rivera notes that the individual's only other choice at that point is to refuse food and water, which can be a drawn-out excruciating process. Thus, while Judge Rivera agrees with the per curiam opinion on the statutory interpretation point and the Equal Protection argument, she would find under the Due Process Clause that individuals attain a heightened right to receive the means to take their own lives when death is imminent and pain management is inadequate.

Judge Fahey wrote a concurring opinion focused on the risks of legalizing physician-assisted suicide. He discusses the experiences of the Netherlands, which allows both physician-assisted suicide and euthanasia (which he defines as the intentional killing of a patient by a doctor administering a lethal dose of medicine, and can be voluntary or non-voluntary, where the patient is not capable of giving consent). Judge Fahey cites that in 2015, 4 percent (or 5,516) of all deaths in the Netherlands were the result of euthanasia or physician-assisted suicide, a percentage that had doubled over 10 years. He further notes that in 2005, 0.4 percent of all deaths (or 560 people) were due to *non-voluntary* euthanasia. Judge Fahey observes that euthanasia is not allowed anywhere in the United States, but expresses concern about the slippery slope effect and the potential dangers for those who are poor, uninsured, mentally incompetent, or suffering from dementia. While he allows for palliative sedation, he takes issue with Judge Rivera's contention that there is no difference between that and physician-assisted suicide. He points to the difference in the physician's intentions and relies on the U.S. Supreme Court's distinction in *Vacco v. Quill*, 521 U.S. 793, 803 (1997), that "[t]he law has long used actors' intent or purpose to distinguish between two acts that may have the same result."

Judge Garcia wrote the last concurrence, in which Judge Stein joined (rendering Judge Wilson the only judge to the per curiam opinion without additional comment). Judge Garcia agrees with the per curiam's analysis upholding New York's categorical ban on assisted suicides, but states that he writes additionally to address plaintiffs' "more particularized" as-applied challenge to the penal statutes. In essence, Judge Garcia disagrees with Judge Rivera on the question of whether terminally ill, mentally competent individuals "in the final stage of life" attain a heightened personal interest over their medical treatment to override the state's interest in

prohibiting assisted suicides. Judge Garcia rejects a weighing of interests as antithetical to the “rational relationship” test and concludes that the state’s legitimate interests in outlawing physician-assisted suicides subsists regardless of the patient’s condition, pain, or proximity to death. Judge Garcia notes that mistakes in medical prognoses and opportunities for abuse can arise even at late stages of terminal illness. (In fact, while two of the three plaintiffs died during the case, the third, who had been treated for cancer, entered into remission.) Ultimately, he rejects as unworkable Judge Rivera’s creation of a permitted class of late-stage suicide-seekers given the medical differences that could arise over what qualifies as “terminally ill,” “mentally competent,” “imminent death,” “intractable pain,” and “inadequate” pain treatment.

The constellation of opinions in *Myers* reinforces historical statutes, cases, a State Task Force, and legislative activity that all come out in support of imposing criminal penalties in New York on individuals, including physicians, who intentionally act to aid a person in committing suicide. While Judge Rivera would open the door for a sub-group of patients experiencing debilitating pain near the end of life, the other Court of Appeals judges who participated in this appeal are not receptive to such an exception, and some are vigorously opposed. Given New York’s firm views against physician-assisted suicide, it is interesting that five other states and the District of Columbia have allowed for it. One can speculate whether the more permissive states will become destinations for those facing end-of-life sicknesses, at least for individuals who want to preserve their options.

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