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New Jersey Supreme Court Plows the Field for Implementation of the Medical Aid in Dying for the Terminally Ill Act

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This article is intended to update our prior article printed in the summer edition of *Garden State Focus*, where we wrote about the newly enacted Medical Aid in Dying for the Terminally Ill Act (the "Act").

The Act "permits qualified terminally ill patient[s] to self-administer medication to end [their] live[s] in [a] humane and dignified manner." Under the Act, "terminally ill" is defined as a patient who "is in the terminal stage of an irreversibly fatal illness, disease, or condition with a prognosis, based upon reasonable medical certainty," with a life expectancy of six months of less. Qualified patients choosing to exercise their rights under the Act will be required to submit their request in writing, stating, among other things, that they have been fully informed of any available alternatives. Two individuals, one who must not be a relative, entitled to any portion of the patient's estate, or the patient's doctor, must witness and attest to the voluntariness of the patient's request. With the passage of the Act, New Jersey became the eighth state in the country to allow competent, terminally-ill adults to exercise their "right to die."

The Act was set to go into effect on August 1, 2019 when Yosef Glassman, a medical doctor, filed an order to show cause and verified complaint seeking to enjoin the implementation of the Act. Dr. Glassman's eleven-count verified complaint alleged that the Act violated: (1) "the fundamental right to defend life"; (2) the equal protection clauses of the state and federal constitutions and the Fifth Amendment's right to due process; (3) religious physicians' and religious pharmacists' First Amendment rights under the United States Constitution; (4) the "canon of common law" which prohibits killing oneself and aiding and abetting another's death; (5) state and federal law prohibiting the felonious possession of narcotics; (6) a physician's right to practice medicine and a pharmacist's right to practice pharmacy by involving unwilling participants "to be involved in the machinery of death"; (7) the duty to warn; (8) the Administrative Procedure Act by failing to promulgate rulemaking, "thereby rendering its entire process of death wholly and dangerously unregulated, leaving ambiguities and contradiction in statutory language"; (9) Article Ten of the United States Constitution forbidding the institution of state action that impairs existing contracts between physicians and their patients; and (10) a physician's obligation not to falsify records. Finally, Dr. Glassman sought declaratory relief deeming the Act unconstitutional and invalid.

On August 14, 2019, the Chancery Court entered an order preliminarily enjoining the enforcement of the Act, concluding that the failure to promulgate regulations would cause Dr. Glassman "immediate and irreparable injury" based on the significant change in the law when "dealing with individuals who are terminally ill." That preliminary injunction held in abeyance the effective date of the Act.

At the behest of the State Attorney General to dissolve the preliminary injunction, the Appellate Division ordered expedited briefing, to be completed by August 23rd, but declined to dissolve the injunction. On August 20th, the New Jersey Supreme Court entered an order denying the Attorney General's request to dissolve the preliminary injunction and declined to

take any further action concerning "an issue of this magnitude" until the Appellate Division addressed the issue with "thoughtful consideration." The Supreme Court also requested the Appellate Division to "resolve the matter expeditiously."

Dr. Glassman raised a number of hard-hitting arguments attacking the lack of standards in the Act and potential disparate impacts on terminally ill patients. He argued that the Act:

- Sets forth no age or literacy qualifications for witnesses of a request for medication;
- Permits witnesses to make viatical agreements or will provisions immediately after witnessing a terminally ill patient's request;
- Sets forth no due diligence requirements for attending physicians to verify witness signatures;
- Does not disqualify physicians who determine terminally ill patient's capacity by virtue of being a blood relative or beneficiary in a will;
- Permits an employee or director of a facility in which patient resides to witness a request;
- Does not require that a check be made of the Prescription Monitoring Program before writing a prescription for a lethal drug;
- Permits life or medical insurance agents, or insurance beneficiaries to be a witness to the terminally ill patient's request;
- Does not recognize the lack of uniformity in lethal medications which may involve varying degrees of pain and suffering;
- Does not recognize that non-specialist healthcare professionals might apply different standards for decision-making capacity;
- Does not recognize the potential disparate treatment of patients based on economic status and ability to pay for costly lethal pharmaceuticals;
- Does not recognize that some medications are faster-acting than others; and
- Does not recognize that terminally ill patients may be of sound mind when they make the request for medication, but may later become incompetent at the time of administration.

Finding that the Chancery Court "abused its discretion in awarding preliminary injunctive relief," on August 23rd, the Appellate Division dissolved the restraints imposed in the Chancery Court's August 14th order. In doing so, the Appellate Division applied the well-settled standards for injunctive relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). First, the Court found that Dr. Glassman failed to establish that injunctive relief was necessary to prevent irreparable harm. The only harm identified, said the Court, was the Executive Branch's failure to adopt enabling regulations but, there was no showing that the absence of such regulations harmed Dr. Glassman. At that point, no party had sought medical advice or assistance from Dr. Glassman to implement any provision in the Act. Other than a blanked assertion that there was a "material change in the law," regarding terminally ill patients, neither Dr. Glassman nor the Chancery Court identified a single provision of the Act that lacked the clarity necessary for a patient or any affected individual or entity to effectuate the Act's purpose. Moreover, the Act makes participation by physicians like Dr. Glassman entirely voluntary. "The only requirement the Act imposes on health care providers who, based upon religious or other moral bases, voluntarily decide not to treat a fully-informed, terminally-ill patient interested in ending their lives, is to transfer any medical records to the new provider selected by the patient." Characterizing the transfer of medical records from one physician to another as a purely "administrative function," the Appellate Division found that function to have no constitutional import, nor did it run contrary to a physician's professional obligations.

Second, Dr. Glassman failed to demonstrate that he had a likelihood of succeeding on the merits of the claims he asserted in his complaint. The Appellate Division disagreed with the Chancery Judge's conclusion that an injunction was necessary because the Executive Branch failed to implement enabling regulations prior to the Act's effective date, finding that ruling to be contrary to the clear, plain and unambiguous language of the Act. Pointing out that the Act permitted but did not require the relevant administrative agencies with a vested interest in the Act's implementation to adopt regulations, the Appellate Division stated, "[h]ad the Legislature intended the Act to remain in a period of perpetual quiescence, thereby keeping all interested parties in limbo until a half-dozen administrative bodies decided to engage in their rule-making functions, it could have clearly said so." In fact, the "absence of agency action here," said the Court, "may imply . . . that regulations were not necessary to implement the Act." Further, the Court found that Dr. Glassman did not have standing to assert claims on behalf of other physicians, patients or interested family members. In addition, his claims ignore the voluntary nature of his participation under the Act and his "already existing obligation under relevant regulations to provide a patient with his or her medical records."

Finally, the Appellate Division weighed the relative hardships that granting injunctive relief would have on the parties and concluded that the Chancery Court failed to adequately consider "the interests of qualified terminally-ill patients, who

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the Legislature determined have clearly prescribed rights to end their lives consistent with the Act." Consequently, the Appellate Division dissolved the preliminary injunction.

By Order entered on August 27th, The New Jersey Supreme Court likewise found that Dr. Glassman failed to satisfy the *Crowe v. DeGioia* standards for emergent injunctive relief and determined that the Act could be implemented without further delay. By doing so, the New Jersey Supreme Court has averted a head-on collision between the Medical Aid in Dying for the Terminally Ill Act and the State and Federal Constitutions – at least for the moment…

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