HB 15-1135
"Death with Dignity"
Physician Assisted Suicide

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ISSUE ONE: **Creating the new legal standard of "capable" when Colorado has already established the "capacity" standard.**

- HB 15-1135 requires an individual to be "capable" in order to make a request for life-ending medication.[1] The Bill as introduced defines "capable" as, in the opinion of a "court, attending physician or consulting physician, psychiatrist, or psychologist," having "the ability to make and communicate health care decisions to health care providers, *including communication through persons familiar with the individual's manner of communicating if those persons are available.*"[2]
    - It is worth noting that the Bill essentially allows someone else to speak on the patient's behalf.
    - Perhaps even more problematic is that the "capable" standard creates a brand new legal standard in Colorado.
- To execute a Will, an Advance Healthcare Directive, or a Power of Attorney in Colorado, an individual must have testamentary capacity.
    - Courts apply the test outlined in the *Cunningham* case to determine whether an individual had testamentary capacity at the time that a will was executed. Under *Cunningham*, "it must be shown that:
        - The testator understood the nature of his act;
        - That he knew the extent of his property;
        - That he understood the proposed testamentary disposition;
        - That he knew the natural objects of his bounty; and
        - That the will represented his wishes.[3]
- *Cunningham* was decided in 1953 and still stands over 60 years later. This test is also applied to contractual capacity.[4] Even this well-established standard is not always easily applied, and attorneys often need special training in discerning whether clients have testamentary capacity. (I think of the example of client "Nina" who had a progressive brain tumor which could quickly change her testamentary capacity.)

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[1] HB 15-1135, 25-47-103(1)(b)
[2] HB 15-1135, 25-407-102 (3)
[3] *Cunningham v. Stender*, 127 Colo. 293 (1953).
[4] *Matter of the Estate of Breeden*, 992 P.2d 1167 (Colo. 2000) *citing Hanks v. McNeil Coal Corp.*, 114 Colo. 578, 168 P.2d 256 (1946).

- Conclusion: **Any Death with Dignity statute adopted in Colorado should use the longstanding "capacity" standard to determine whether a person is qualified to make a request for life-ending medication instead of the new "capable" standard.**

ISSUE TWO: **It should not be easier to end one's life than it is to execute a Will.**

- Standards for using HB 15-1135 to end one's life. An individual must:
  (1) Be an adult (Eighteen years or older);
  (2) Be capable (see above);
  (3) Be a Colorado resident;
  (4) Be suffering from a terminal illness;
  (5) Voluntarily express his/her wish to die;
  (6) Submit two oral requests (15 days between) and one written request, which must be
    a. signed and dated by the "qualified individual" and
    b. witnessed by at least two individuals (only one of which must be uninterested) who in the presence of the qualified individual attest to the best of their knowledge and belief that the qualified individual is capable, is acting voluntarily, and is not being coerced to sign the request.
- By way of comparison, the following are the standards as outlined in the Colorado Revised Statutes 15-11-501 and 502 for execution of a Will in Colorado. An individual must be:
  (1) Eighteen years or older;[5]
  (2) "Of sound mind" (see capacity discussion, above);[6]

  The Will itself must be:

  (3) In writing;[7]
  (4) Signed by the Testator;[8]
  (5) Either signed by two witnesses OR acknowledged by a notary OR meet the requirements for holographic will.[9]
    a. Witnesses CAN be interested witnesses in Colorado as long as they are competent, however, from the perspective of an estate planning attorney, having interested witnesses is not best practices and may give rise to a presumption of undue influence.
- While on first appearance it may seem that the requirements to qualify for life-ending medications are somehow similar to the requirements to execute a Will, it is problematic that the HB 15-1135 requirements apply only to procuring the medication to end one's life, and do not apply to the actual act of ending one's life. For example, the person

[5] C.R.S. 15-11-501 (2014)
[6] C.R.S. 15-11-501(2014)
[7] C.R.S. 15-11-502(1)(a) (2014)
[8] C.R.S. 15-11-502(1)(b) (2014)
[9] C.R.S. 15-11-502(1)(c) (2014)

ending his/her life need not be "capable" at the time the medication is administered, and (while physicians should advise patients to have witnesses), patients are not required to have witnesses to their death.[10] The Bill also never defines "self-administer," nor does it require the patient's consent at the time of administration.

- This lack of safeguards at the time of (self) administration has the potential to lead to egregious abuses, particularly in situations where a terminally ill individual has few heirs and those beneficiaries also provide their care. (I think of the example of client "Muriel", who had one beneficiary – her son – who also acted as her Agent on Powers of Attorney, and could certainly have been subject to involuntary action at some points in her illness).
- Conclusion: **Unlike Wills which can be changed in the future, the decision to end one's life is irreversible. Accordingly, the requirements for obtaining a prescription for life-ending medications should be *much more stringent* than the prerequisites to executing a Will.**

ISSUE THREE: **HB 15-1135 does not protect patients from Undue Influence by friends and/or family who could benefit from their death.**

- Undue influence in probate situations: In probate cases, circumstances that strongly support a finding of Undue Influence include: (1) a confidential relationship; (2) preparation of the Will under the direction of one enjoying confidence with the Testator; (3) the fact that the *Testator was fatally ill at the time the document was executed*; and (4) secrecy from other family members.[11]
- Undue Influence and HB 15-1135: One of the circumstances which courts have looked to determine Undue Influence is whether the testator was fatally ill. Under the proposed legislation, "terminal illness" is a prerequisite to procuring life-ending drugs from a physician. It would seem that the case law on undue influence suggests that being terminally ill in and of itself makes an individual more susceptible to Undue Influence, and hence greater safeguards than those offered are needed.
- There may also be enforcement concerns, since undue influence is traditionally a civil concept.[12]

I join others who have or will testify about multiple concerns with this Bill, including lack of proper elder and civil rights protections, in respectfully requesting this Committee to oppose the passage of HB 15-1135. Thank you.

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[10] *See* http://www.margaretdore.com/pdf/Recipe%20for%20Elder%20Abuse.pdf.

[11] *Ofstad v. Sarconi*, 252 P.2d 94, 95-97 (Colo. 1952).

[12] "[The Oregon Act] impose[s] criminal but not civil liability for undue influence in connection with the lethal dose request. Undue influence is a civil concept, which is not capable of being criminally enforced." *See* http://www.margaretdore.com/pdf/Recipe%20for%20Elder%20Abuse.pdf.