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People v. Kevorkian: Michigan's Supreme Court Leads the Way in Declaring No Fundamental Right to Assist Another in Suicide

In *People v. Kevorkian*,¹ the Michigan Supreme Court addressed the constitutionality of Michigan's statute, 1992 Public Act 270,² which imposed criminal penalties on a person who assists another in suicide.³ After the enactment of the statute, Dr. Jack Kevorkian allegedly assisted a terminally ill person in committing suicide.⁴ Charges were filed against Dr. Kevorkian in the Circuit Court of Wayne County alleging that Dr. Kevorkian violated the assisted suicide statute.⁵ Dr. Kevorkian moved to dismiss the charges.⁶ In finding that the statute violated the United States Constitution, the circuit court held that a person has a due process right to commit suicide, and the assisted suicide statute unduly burdens that right.⁷ The prosecution appealed.⁸ Another action was brought in the Circuit Court of Wayne County after the enactment of the Michigan statute; Teresa Hobbins, a terminally ill person, and a group of other plaintiffs, sought a declaration that the assisted suicide statute was unconstitutional.⁹ The circuit court found a due process right to commit suicide, but did not make a determination as to whether the statute places an undue burden on the right to commit suicide.¹⁰ The court invalidated the statute by holding that it violated the Michigan Constitution.¹¹ The attorney general filed an appeal.¹² On

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1. 527 N.W.2d 714 (Mich. 1994) (mem.), *cert. denied*, 115 S. Ct. 1795 (1995).
 2. MICH. COMP. LAWS § 752.1027 (Supp. 1996).
 3. *Id.*
 4. 527 N.W.2d at 717.
 5. *People v. Kevorkian*, No. 93-11482, 1993 WL 603212, at *1 (Mich. Cir. Ct. Dec. 13, 1993).
 6. *Id.*
 7. *Id.* at *19.
 8. *Hobbins v. Attorney General*, 518 N.W.2d 487, 489 (Mich. App. 1994).
 9. *Id.* at 489.
 10. *Id.*
 11. *Id.*

appeal, the case of *Hobbins* was consolidated with the *Kevorkian* appeal.¹³ The Michigan Court of Appeals held that the assisted suicide statute violated the Michigan Constitution and was, therefore, unenforceable.¹⁴ The court also found that there is no constitutional right to commit suicide, and held that a state may make assisted suicide a criminal offense.¹⁵ The prosecuting authorities filed an appeal contending that the assisted suicide statute does not violate the Michigan Constitution, and Dr. Kevorkian filed an appeal alleging that the statute violates the United States Constitution.¹⁶ The Michigan Supreme Court held that the assisted suicide statute does not violate the Michigan Constitution¹⁷ and that the United States Constitution does not prohibit a state from imposing criminal penalties on one who assists another in suicide.¹⁸

The Due Process Clause of the Fourteenth Amendment of the United States Constitution declares, "nor shall any State deprive a person of life, liberty, or property, without due process of the law."¹⁹ The United States Supreme Court has found a right of personal privacy implied in this amendment.²⁰ *Union Pacific Railway v. Botsford*²¹ was one of the earliest cases suggesting an implied right of privacy.²² In *Union*, the Supreme Court stated, "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person."²³ In *Roe v. Wade*,²⁴ the Court reinforced the right of personal privacy.²⁵ In *Roe*, the plaintiffs brought a declaratory action challenging the constitutionality of a Texas statute that proscribed all abortions except those performed to save the mother's life.²⁶ The Supreme Court found the statute was unconstitutional and held the following: 1) Prior to the end of the first trimester the decision to abort rests solely on the woman and her attending physician; 2) Subsequent to the first trimester, the state may

12. *Id.*

13. *Id.*

14. *Id.* at 492.

15. *Id.* at 494.

16. 527 N.W.2d at 718.

17. *Id.* at 724.

18. *Id.* at 733.

19. U.S. CONST. amend. XIV.

20. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

21. 141 U.S. 250 (1891).

22. *Id.* at 251.

23. *Id.*

24. 410 U.S. 113 (1973).

25. *Id.* at 153.

26. *Id.* at 113.

regulate abortions in a manner reasonably related to maternal health; and 3) Once the fetus has reached viability, the state may regulate and even proscribe abortions, except in instances where the abortion is necessary to save the mother's life.²⁷ The Court held that the Texas statute was unconstitutional because it violated women's right of personal privacy.²⁸ The Court recognized that this long-standing right is founded in the Fourteenth Amendment.²⁹ The right of privacy is limited to personal rights that can be deemed fundamental.³⁰ A right is fundamental if it is implicit in the concept of ordered liberty or deeply rooted in history and traditions.³¹ The Court further stated that in determining a statute's constitutionality where a fundamental right is established, the state's interest must be weighed against the interest of the person seeking the right of privacy.³² In *Roe*, the Court found that a woman's personal right of privacy in the first trimester is stronger than the interest of the state in proscribing abortions.³³ The Court then analyzed both the mother's and state's interest at different stages of the pregnancy to determine the constitutionality of state abortion regulations.³⁴ The Supreme Court, in *Carey v. Population Services International*,³⁵ analyzed a statute regulating the sale of nonprescriptive contraceptives.³⁶ The statute only allowed licensed pharmacists to sell nonprescriptive contraceptives to persons over the age of sixteen.³⁷ Finding the statute violated the privacy right protected by the Constitution,³⁸ the Court noted that the right of personal privacy includes the interest in making certain kinds of personal decisions free from state interference.³⁹ The Court recognized that limitations have not been established in determining specific areas covered by the right of personal privacy.⁴⁰ The Court, however, referenced past decisions that identified areas subject to the right of personal privacy.⁴¹ The Court stated a person's right to privacy encompasses personal decisions relating to

27. *Id.* at 164.

28. *Id.*

29. *Id.* at 153.

30. *Id.* at 152.

31. *Id.* (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

32. *Id.* at 154.

33. *Id.* at 163.

34. *Id.* at 163-64.

35. 431 U.S. 678 (1977).

36. *Id.* at 678.

37. *Id.*

38. *Id.* at 697.

39. *Id.* at 684.

40. *Id.*

41. *Id.* at 685.

marriage, procreation, contraception, family relationships, and child rearing and education.⁴² The Court's dicta explained that the right of privacy deals with the most intimate of human activities and relationships.⁴³ In *Planned Parenthood v. Casey*,⁴⁴ the Supreme Court was confronted with determining the constitutionality of two amendments to a Pennsylvania abortion statute.⁴⁵ The statute's amendments provided that a woman seeking an abortion must be given information concerning the abortion at least twenty-four hours prior to the operation and must give her informed consent to the procedure; a married woman must sign a statement declaring that she has notified her husband, except in certain situations; and a minor must have parental consent or proceed through a judicial bypass.⁴⁶ The Court held unconstitutional the provision stating that a married woman must sign a statement declaring that she has notified her husband.⁴⁷ The Court found that the right of a pregnant woman to terminate her pregnancy was fundamental, and that the Pennsylvania statute placed an undue burden on this right.⁴⁸ In *Casey*, the Court summarized the interests protected under the Fourteenth Amendment stating, "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence."⁴⁹ This holding emphasized the right of bodily integrity.⁵⁰ The right of bodily integrity is most pervasive in the right to die cases. In *Cruzan v. Director, Missouri Department of Health*,⁵¹ the Court expanded the right of bodily integrity. In *Cruzan*, the guardians of a patient brought a declaratory judgment action seeking the right to terminate artificial hydration and nutrition of the patient.⁵² The patient had sustained severe injuries in an automobile accident, and she remained in a persistent vegetative state.⁵³ The termination of the artificial hydration and nutrition would result in the death of the patient.⁵⁴ Referring to a prior New Jersey Supreme Court

42. *Id.*

43. *Id.*

44. 505 U.S. 833 (1992).

45. *Id.* at 844.

46. *Id.*

47. *Id.* at 895.

48. *Id.*

49. *Id.* at 851.

50. *Id.* at 849.

51. 497 U.S. 261 (1990).

52. *Id.* at 268.

53. *Id.* at 266.

54. *Id.* at 268.

holding in *In re Quinlan*,⁵⁵ the Court stated that a competent person has a constitutionally protected liberty interest in refusing unwanted medical care.⁵⁶ The Court further held that in the case of an incompetent person, a surrogate decisionmaker may have the right to refuse medical care for that incompetent person if it can be shown by clear and convincing evidence that the incompetent person would have made the same decision.⁵⁷ Finding the right to refuse unwanted medical treatment in the Due Process Clause,⁵⁸ the Court concluded that even when a liberty interest is found, it must undergo a balancing test.⁵⁹ Therefore, a state statute in conflict with a liberty interest may still be constitutional if the state's interest is greater than the liberty interest.⁶⁰

In *People v. Kevorkian*,⁶¹ the Michigan Supreme Court upheld the constitutionality of Michigan's assisted suicide statute⁶² which imposes criminal penalties on one who assists another in suicide.⁶³ The court found that three requirements must be met to declare the statute unconstitutional.⁶⁴ First, there must be a fundamental right to commit suicide.⁶⁵ Second, there must also be a fundamental right to assistance in committing suicide.⁶⁶ Third, the interest of those seeking the right of assisted suicide must outweigh the interest of the state in proscribing assisted suicide.⁶⁷ The proponents of assisted suicide base their contention that a fundamental right to assisted suicide exists on many theories, at least with respect to the terminally ill.⁶⁸ One theory relies on the holdings in *Roe* and *Casey*.⁶⁹ The proponents of assisted suicide argue that these cases develop liberty interests concerning a person's right to personal autonomy.⁷⁰ They further contend that the right to assisted suicide is covered by this realm of personal autonomy just as marriage, procreation, family relationships, and education are covered

55. 355 A.2d 647 (N.J. 1976).

56. 497 U.S. at 270.

57. *Id.*

58. *Id.* at 278.

59. *Id.* at 279.

60. *Id.*

61. 527 N.W.2d 714 (Mich. 1994).

62. *Id.* at 733.

63. MICH. COMP. LAWS § 752.1027 (Supp. 1996).

64. 527 N.W.2d at 724-25.

65. *Id.* at 724.

66. *Id.*

67. *Id.* at 725.

68. *Id.* at 726.

69. *Id.* at 724-25.

70. *Id.* at 725.

because all of these areas deal with subjects that are very personal by their nature.⁷¹ Finally, the proponents focus on a section of the opinion in *Casey* that states, "there is a realm of personal liberty which the government may not enter."⁷² Another theory that the proponents of assisted suicide advance is that assisted suicide is analogous to terminating life-sustaining treatment or refusing unwanted medical care.⁷³ The proponents claim that these subjects are similar because they all result in death.⁷⁴ In analyzing the constitutionality of the assisted suicide statute, the Michigan Supreme Court began and ended its inquiry with the issue of whether there is a fundamental right to commit suicide.⁷⁵ The court found that there is no such right.⁷⁶ In reaching this conclusion, the court began its analysis by distinguishing both the termination of life-sustaining treatment and the refusal of unwanted medical care from suicide.⁷⁷ The court found a substantial distinction in the fact that suicide deals with "acts that artificially curtail life,"⁷⁸ whereas the termination of life-sustaining treatment and the refusal of unwanted medical care deal with "acts that artificially sustain life."⁷⁹ The court further found that this distinction was similar to the distinction between misfeasance and nonfeasance found in tort law.⁸⁰ The court also drew a distinction in that "whereas suicide involves an affirmative act to end a life, the refusal or cessation of life-sustaining medical treatment simply permits life to run its course, unencumbered by contrived intervention."⁸¹ The Michigan Supreme Court then referenced *McKay v. Bergstedt*⁸² and *Guardianship of Jane Doe*⁸³ which also held that there is a difference between suicide and terminating life-sustaining medical care and refusing unwanted medical treatment.⁸⁴ With these distinctions, the court found that there was no fundamental right to commit suicide inherent in the holding of cases which grant persons the right to terminate life-sustaining treatment or

71. *Id.* at 727.

72. *Id.* at 726.

73. *Id.* at 727.

74. *Id.*

75. *Id.* at 733.

76. *Id.*

77. *Id.* at 728-29.

78. *Id.* at 728.

79. *Id.*

80. *Id.*

81. *Id.*

82. 801 P.2d 617 (Nev. 1990).

83. 583 N.E.2d 1263 (Mass. 1992).

84. 527 N.W.2d at 729.

refuse unwanted medical care.⁸⁵ The court then addressed the issue of whether there is a liberty interest in suicide that is found under the tests developed in *Palko* and *Casey*.⁸⁶ In *Palko*, the United States Supreme Court stated that a right is fundamental if it is implicit in the concept of ordered liberty or deeply rooted in history and traditions.⁸⁷ The proponents of assisted suicide argue that this test was expanded in *Casey* when the Court, in determining whether a fundamental right existed, stated that a court must determine whether an "asserted right to commit suicide arises from a rational evolution of tradition, or whether recognition of such a right would be a radical departure from historical precepts."⁸⁸ In examining whether there is a fundamental right to suicide, the Michigan Supreme Court examined how society and courts have dealt with the issue of suicide and assisted suicide.⁸⁹ The court found that at common law in England, one who committed suicide was punished by forfeiture of property and an ignominious burial.⁹⁰ The court also recognized that at the time the Fourteenth Amendment was ratified, at least twenty-one of the thirty-seven states proscribed assisted suicide.⁹¹ Assisted suicide has also been thought of as being a breach of the Hippocratic Oath, which states that no one shall prescribe a deadly drug or give advice that will produce death.⁹² The court then looked at present day statutes to determine how states today deal with the area of suicide.⁹³ The court found that a "substantial number of jurisdictions have specific statutes that criminalize assisted suicide."⁹⁴ The court also recognized that a number of states allow the use of nondeadly force to keep one from committing suicide.⁹⁵ Moreover, the court looked to the opinion in *Cruzan* which read in part, "the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death."⁹⁶ The Michigan Supreme Court then went on to hold that the right to commit suicide is

85. *Id.*

86. *Id.* at 730.

87. *Id.*

88. *Id.*

89. *Id.* at 730-32.

90. *Id.* at 731.

91. *Id.*

92. *Id.*

93. *Id.* at 731-32.

94. *Id.* at 731.

95. *Id.* at 732.

96. *Id.* at 732-33.

neither implicit in the concept of ordered liberty nor deeply rooted in this nation's history and tradition.⁹⁷ The court found that to declare a fundamental right to commit suicide would be a radical departure from existing tradition.⁹⁸

Since the Michigan Supreme Court upheld the constitutionality of a statute criminalizing assisted suicide in *People v. Kevorkian*,⁹⁹ other courts have addressed the issue of assisted suicide. Two days after *Kevorkian* was decided, *Quill v. Kopell*¹⁰⁰ was decided by the United States District Court in New York. The court upheld a statute that made it a crime to assist another in committing suicide.¹⁰¹ The court reasoned that there is no fundamental right to commit suicide under prior holdings of the United States Supreme Court, nor can a fundamental right to commit suicide be found within the test described in *Palko*.¹⁰² The United States Court of Appeals for the Ninth Circuit is the highest federal court that has ruled on whether it is constitutional to impose criminal penalties on one who assists another in suicide.¹⁰³ In *Compassion in Dying v. State of Washington*,¹⁰⁴ the court of appeals held that a statute criminalizing assisted suicide is constitutional.¹⁰⁵ The court noted that no court of final jurisdiction has ever upheld a right to assisted suicide.¹⁰⁶ This statement indicates that it is unlikely that a court of another jurisdiction would find a right to assisted suicide. Some states have recognized the courts refusal to grant a right to assisted suicide and have chosen to circumvent the courts by using the ballot box. In Oregon, Measure 16, The Death With Dignity Act, was passed by voters on November 8, 1994 and legalized physician-assisted suicide in some instances.¹⁰⁷ The Act allows capable adult residents to make a written request for medication to end their lives.¹⁰⁸ The written request is granted if either the attending and consulting physicians or a court determine that the patient is terminally ill and has

97. *Id.* at 733.

98. *Id.*

99. 527 N.W.2d 714 (Mich. 1994).

100. 870 F. Supp. 78 (S.D.N.Y. 1994), *cert. granted*, *Vacco v. Quill*, No. 95-1858 (U.S. Oct. 1, 1996).

101. 870 F. Supp. at 79.

102. *Id.* at 84.

103. *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1995), *cert. granted*, *Washington v. Blucksberg*, No. 95-110 (U.S. Oct. 1, 1996).

104. 49 F.3d at 588.

105. *Id.* at 590.

106. *Id.* at 591.

107. Death With Dignity Act, 1995 Or. Laws Ch. 3 (codified at OR. REV. STAT. § 127.800 (Supp. 1996)).

108. *Id.* § 127.840, § 3.06.

voluntarily expressed a wish to die.¹⁰⁹ Once the Act was passed, however, the United States District Court for the State of Oregon, in *Lee v. Oregon*,¹¹⁰ granted an injunction enjoining Oregon from enforcing the Act.¹¹¹ The court held that there were serious equal protection and due process liberty interests to be addressed before the state would be allowed to enforce the Act.¹¹² The voters of California and Washington have voted on legislation aimed at legalizing assisted suicide, and in both states the legislation was defeated.¹¹³ Recognizing that Oregon was successful in legalizing assisted suicide through the voters, Michigan Senate Bill No. 640 was introduced on September 12, 1995.¹¹⁴ The bill sets forth many criteria that must be met in allowing assisted suicide in cases where a person makes a written request for medication to his or her attending physician.¹¹⁵ If the bill is passed by the voters, it is subject to take effect January 1, 1997.¹¹⁶

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109. *Id.* § 127.820, § 3.02.

110. 869 F. Supp. 1491 (D. Oregon 1994).

111. *Id.* at 1503.

112. *Id.* at 1498.

113. Proposition 161, defeated in 1992, proposed an amendment to CAL. PENAL CODE § 401 (1988); Initiative 119, defeated in 1991, proposed an amendment to WASH. REV. CODE § 9A.36.060 (1988).

114. MICH. S. 640, 88th Leg. (1995).

115. *Id.*

116. *Id.*

