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MEMORANDUM

TO: Lance Wright and Mercedes Aponte
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: September 11, 2015
SUBJECT: Proposed initiative measure 2015-2016 #39, concerning Medical Aid in Dying

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

An earlier version of this proposed initiative, proposed initiative 2015-2016 #34, was the subject of a memorandum dated August 17, 2015. Proposed initiative 2015-2016 #34 was discussed at a public meeting on August 20, 2015. The comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment to the Colorado constitution appear to be:

1. To add to Article III of the state constitution, which pertains to the distribution of the powers of the state government among the three branches of government, a provision proclaiming that mentally competent adult residents of Colorado:
 - a. Are responsible for managing their personal medical decisions and, as such, have "citizen-sovereign" status;
 - b. Have the liberty at life's end to set the time and tone of their own deaths; and
 - c. Are not required to obtain permission from any person or organization.
2. To declare that any person or group that assists a citizen-sovereign in obtaining medical aid in dying is immune from criminal prosecution and civil liability upon presenting documentation to show the voluntary nature of the action.
3. To declare that a citizen-sovereign's right to obtain medical aid in dying is not limited to periods when the citizen-sovereign is mentally competent if the citizen-sovereign desires and documents his or her desire that the right be durable into incompetency.
4. To specify the manner by which a citizen-sovereign may pre-arrange with a medical professional to obtain "conditional" medical aid in dying at a future time under conditions specified in a contract, regardless of whether the citizen-sovereign is mentally competent at the time the conditions are met.
5. To specify that conditional medical aid in dying is only available for an individual who is no longer a mentally competent citizen-sovereign.
6. To specify that participation in medical aid in dying and conditional medical aid in dying is voluntary and can be rescinded by the citizen-sovereign at any time.
7. To declare that conditional medical aid in dying is subject to the same documentation requirements as are determined by the General Assembly for medical aid in dying, and that both types of assisted dying are to have the same

provisions for dealing with the death of any or all witnesses in such a manner as to not interfere with fulfillment of the citizen-sovereign's wishes.

8. To declare that legislation may be enacted to facilitate the operation of the article but that the legislation cannot limit or restrict the provisions of the article or the rights and powers declared in the article.
9. To define the terms "medical professional", "medical aid in dying", "citizen-sovereign", "mental competency", "voluntary", "acceptable documentation", and "immunity".
10. To state the effective date of the measure as March 1, 2016, and to require the General Assembly to complete its work to allow the measure to take effect by that date.
11. To declare that while some Coloradans wish to shorten their dying period by obtaining medical aid in dying, Coloradans currently do not have the liberty to obtain assistance from a medical professional in achieving a peaceful death through the administration of oral or intravenous drugs.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. The measure is placed in the Distribution of Powers article of the state constitution. What is the rationale for the placement of this measure in Article III, since it does not appear to be giving a power to one of the three branches of government?
3. The numbering of the sections of the measure appears to be incorrect and inconsistent. Currently, several different styles are used in what are ostensibly section headings: "SECTION 1."; "Section 2."; "Section 3"; "Section (4)"; and "(6)".
 - a. There are two different types of section numbers needed in an amendment to the constitution:
 - b. The first type of section number subdivides the initiative into different parts, similar to the chapters in a book. Those section numbers are shown in all capital letters followed by a number. The amending clause

is the first section and thus has the designation "SECTION 1." If the initiative also amends a different section of the constitution, a second amending clause would be numbered as "SECTION 2." and if the initiative also contains other clauses that are not intended to appear in the constitution itself, such as an effective date clause, that clause would be numbered "SECTION 3." Given that the current proposal only amends one portion of the constitution, the proposal should only have one of this type: "SECTION 1." which is the amending clause.

- c. The second type of section number designates the number of the constitutional section. That number is shown in bold, lowercase type followed by a number. For example, section 6 of article XVIII of the Colorado constitution appears as follows:

Section 6. Preservation of forests. The general assembly shall enact laws in order to prevent the destruction of, and to keep in good preservation, the forests upon the lands of the state, or upon lands of the public domain, the control of which shall be conferred by congress upon the state.

- d. Currently, the amending clause number and the numbers within the constitutional section are successive. The numbers in the constitutional section should begin with the next available number in the article to which the section is being added.
- 4. The state constitution consists of numerous articles covering a broad topic, and most of the broad articles contain one or more sections that address more specific topics within the broader article topic. For example, article X addresses the broad topic of "Revenue". Within article X, there are 21 different sections addressing more specific revenue-related topics, e.g., Section 1 declares the fiscal year; Section 2 authorizes the enactment of taxes to defray government expenses, Section 3 establishes property taxes, etc.
 - a. If the proponents intend to add a new section to an existing article in the constitution, the entire measure should be designated as a specific numbered section followed by a headnote, then each of the portions of the proposed measure should be redesignated as subsections (1), (2), (3), etc. For example, if the proposed initiative were added to Article II of the Colorado constitution:

Section 32. Medical Aid in Dying. (1) Findings. (a)
Recent scientific advanced in medical science . . .

(b) Despite the fact that . . .

(2) **Declarations.** (a) The people of Colorado hereby proclaim that mentally competent adult residents . . .

(b) The people of Colorado hereby further declare . . .

(c) (I) The citizen-sovereign's right . . .

(II) While mentally competent a citizen-sovereign can arrange . . .

(III) Conditional Medical Aid in Dying can only be provided . . .

(3) **Legislation.** Legislation may be enacted . . .

(4) **Definitions.** As used in this [section]:

(a) "Medical professional" means . . .

(b) "Medical aid in dying" means . . .

* * * * *

(5) **Effective date.** The general assembly shall . . .

or, if the proponents do not intend for the effective date language to actually appear in the Colorado constitution:

SECTION 2. Effective date. The general assembly shall . . .

b. If the proponents prefer to add an entirely new article to the constitution, consider adding a new article XXX, and then use the structure of the current proposal, but renumber "Findings" as Section 1, and renumber the succeeding sections in numerical order.

5. The measure uses the acronym "MAID" but never defines that abbreviation. It appears that "MAID" stands for "medical aid in dying", but absent a specific definition, the meaning of the abbreviation is unclear. Would the proponents consider defining "MAID"? The proponents could modify the definition of "Medical aid in dying" in section 5. (2) as follows: "Medical aid in dying" or "MAID" means . . .

6. With regard to Section 3 of the measure:

a. The measure purports to grant rights to "mentally competent adult residents of Colorado" but does not specify the age at which an

individual is considered an adult for purposes of availing himself or herself of the rights specified in the measure. Would the proponents consider clarifying the age at which a person is an adult for purposes of the measure?

- b. How does a person establish that he or she is a "resident" of Colorado? Is there a required period of time a person must live in Colorado to be considered a "resident" and be entitled to avail oneself of rights under the measure? Could the General Assembly specify in implementing legislation the requirements for establishing residency in Colorado?
- c. The measure appears to allow any mentally competent adult resident to obtain medical aid in dying, regardless of whether the individual is close to death or is suffering from a terminal or debilitating illness. Given the breadth of the measure, is it possible that a healthy 30-year-old person, who would otherwise be expected to live to age 90, could decide that she is at her "life's end" and could obtain medical assistance in dying? How does the measure prevent or protect against assisted suicide by a person who simply decides she wants to die and wants to set the time and tone of her death?
- d. Section 3.a. appears to grant immunity to a person who assists another in dying if the person presents documentation of "the voluntary nature of the action". Given the placement of that phrase in the sentence, it is unclear whether the phrase applies to the "voluntary" action of the person providing assistance, or to the "voluntary" decision of the person seeking aid in dying. Would the proponents consider clarifying whose action must be documented as voluntarily taken?
- e. Section 3.b.(II) states that "Conditional Medical Aid in Dying can only be provided to an individual who is no longer a mentally competent citizen-sovereign." In section 5.(4), "Mental competency" is defined to apply to "any adult resident of Colorado who possess[es] the necessary and sufficient decisional ability to be responsible for [his or her] own decisions and actions." While "conditional medical aid in dying" is not defined, it appears to permit a person to establish a written agreement with a medical professional to set forth conditions that, if and when met, would trigger medical aid in dying for the person, but only if the person becomes mentally incompetent.
 - i. What happens if a person executes a conditional medical aid in dying agreement while mentally competent and while able to

communicate, but then loses his or her ability to communicate but is not mentally incompetent. If the conditions in the agreement are met, would the person be precluded from obtaining medical assistance in dying because he is not "mentally incompetent"?

- ii. What is a "well-documented agreement"? Is it different from "acceptable documentation"?
 - iii. If the agreement is with a medical professional, would the medical professional actually have to administer the life-ending medication for the person? If another, non-medical professional person is to provide assistance in administering medication, would that person also have to enter into a "well-documented agreement" with the citizen-sovereign? If not, what would protect that person from criminal prosecution or other liability for administering medication pursuant to a conditional medical aid in dying agreement to which the person is not a party?
- f. In section 3.b.(II), the measure states that "Participation in MAID and Conditional MAID is always voluntary and can be rescinded by the citizen-sovereign involved at any time." Would this provision allow a mentally competent adult who enters into a contract for conditional MAID and then later becomes incompetent to rescind the contract for conditional MAID?
- g. The meaning of the last sentence of section 3.b.(II) is unclear. How would the death of a witness interfere with the citizen-sovereign's wishes? What is meant by the phrase "dealing with the death of any or all witnesses"? Would the proponents consider clarifying the meaning and intent of this sentence?

7. With regard to section 4:

- a. Do the proponents intend the General Assembly to enact legislation, or could legislation to facilitate the measure be enacted via another citizen-initiated measure?
- b. Reference is made to "this article". However, given that the measure purports to add a section or sections to Article III of the state constitution, references to "this article" would be interpreted to mean all of Article III. Is it the proponents' intent that legislation be enacted to facilitate the operation of the entire article dealing with the distribution

of government powers, as well as medical aid in dying? By specifying authority to enact legislation regarding Article III, distribution of powers, does the measure contain multiple subjects? If the proponents do not intend for legislation regarding the distribution of government powers, references to "this article" should be changed to refer specifically to the provisions being enacted by the measure. (See question 3, above, regarding the appropriate delineation for the contents of the measure).

- c. What would be an example of legislation that would limit or restrict the rights and powers granted by the measure?

8. With regard to section 5:

- a. Reference is again made to "article", but presumably, the reference should be changed, depending on the structure the proponents choose for the measure (as outlined in question 3, above).
- b. In the definition of "citizen-sovereign," what is meant by the term "near ultimate authority" over personal life decisions? If a person does not have "near ultimate authority" over personal life decisions, is the person not a "citizen-sovereign"?
- c. Section 1-40-105, Colorado Revised Statutes, requires laws to be "written in plain, nontechnical language and in a clear and coherent manner using words with common and everyday meaning which are understandable to the average reader." This requirement, commonly referred to as the "plain language" requirement, is intended to ensure laws are clear, concise, easy to understand, and do not contain superfluous or unnecessary words. The second sentence in the definition of "citizen-sovereign" does not appear to define the term and appears to be unnecessary. Would the proponents consider rewriting the sentence or simply striking it?
- d. The terms "acceptable documentation" and "immunity" are defined in section 5 of the measure; however, those terms are not otherwise used in the measure, so it is unclear why the terms are included in the definitions section.
 - i. Did proponents intend to use the term "acceptable documentation" instead of "documentation" in section 3.a.?
 - ii. The term "immune" is used in section 3.a., so would the proponents consider defining "immune" instead of "immunity"?

- e. In the definition of "acceptable documentation", what is meant by the term "artifact"? According to Merriam-Webster Dictionary, the common definition of "artifact" is "a simple object (such as a tool or weapon) that was made by people in the past." It appears that "artifact" is not the appropriate term to use in defining what type of documents are required. You may wish to use the word "document" instead.
- f. Generally, it is a preferred drafting practice to exclude substantive law requirements from a definition. Definition sections should simply define the terms that are used in the substantive law provisions. Would the proponents consider striking substantive law from the following definitions?
 - i. The definition of "acceptable documentation" contains the following substantive-law clause: "but in no way shall such legislation limit or restrict the provisions of this [s]ection or the inalienable rights of the citizen-sovereign of liberty and self-determination herein declared." This concept is generally covered in section 4.
 - ii. The definition of "immunity" contains the following substantive-law clause: "because, under the provisions of this [s]ection, MAID is not suicide or assisting suicide." The proponents might consider adding a provision, possibly in the "declarations" section, stating that medical aid in dying is not suicide or assisted suicide.

9. With regard to section 6:

- a. The measure specifies that the effective date is March 1, 2016. However, the measure cannot be on the ballot until the November, 2016 general election. How can the measure become effective before it has been approved by the voters?
- b. The effective date seems to be contingent on the General Assembly completing "its work". What "work" would the General Assembly need to complete? Do the proponents intend the General Assembly to "complete its work" before the General Assembly knows whether the measure is approved by the voters?
- c. Do the proponents intend to tie the effective date of the measure to when the General Assembly enacts implementing legislation? If yes, the proponents might want to consider allowing the measure to become

effective upon proclamation of the governor, as provided in section 1 (4) of article V of the constitution, and adding an "applicability" clause that specifies that the measure applies to conduct occurring on or after a date certain or on or after an event occurs. For example, "This measure is effective upon official declaration of the vote by proclamation of the governor pursuant to section 1 (4) of article V of the state constitution and applies to conduct occurring on or after the general assembly enacts legislation to implement the measure, but no later than [insert specific date after the 2016 general election]."

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. The correct format and wording for an amending clause adding a new **section** to an existing article is:

SECTION 1. In the constitution of the state of Colorado, **add** section __ [insert the next available section number in the article being amended] to article __ [insert the number of the article being amended] as follows:

The correct format and wording for an amending clause adding a new **article** to the constitution is:

SECTION 1. In the constitution of the state of Colorado, **add** article __ [insert the number of the article being added] as follows:

2. Headnotes are traditionally shown in boldfaced type, followed by a period. The text should immediately follow the headnote instead of appearing on the next line.
3. The first comma in the second sentence in (1) of Section 2 should be removed so as not to interrupt the verb phrase "are...making."

4. It is standard drafting practice to write words other than proper nouns such as the names of towns, cities, states, and countries, and certain defined terms, in lowercase. As such, capitalized phrases and titles, such as “Article,” “Medical Aid In Dying,” “Declaration of Independence,” “medical professional,” and “mental competency” should be lowercased.
5. Typically, Colorado residents are referred to as "Coloradans" not "Coloradoans".
6. Use a comma to offset an introductory phrase. For example, the first sentence in Section 3 (b) (I) should read: “While mentally competent, a citizen-sovereign... .”
7. A space interrupts the word “limit” in Section 4.
8. A colon should follow the introductory portions. For example, section 5 should begin: “As used in this article:”.
9. Definitions should be in alphabetical order.
10. Insert the word “the” between the words “in” and “ordinary” in the definition for medical professional.
11. In section 5 (3), when using a singular pronoun, use “he or she” or “his or her” instead of the plural pronoun “their”.
12. The word “possess” in the definition of mental competency should be “possesses”.
13. No comma should appear after “proceeding” in the definition for voluntary.
14. There is a block of text at the end of the document after the proponents' names. Its purpose is unclear.