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MEMORANDUM

August 17, 2015

TO: Lance Wright and Mercedes Aponte

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2015-2016 #34, 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 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.

Purposes

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

1. To add a new article to the Colorado constitution declaring that mentally competent adult residents of Colorado are sovereign in the matter of personal medical decisions, have the liberty at life's end to set the time and

tone of their own deaths, and are not required to obtain permission from any person or organization.

2. To shield from prosecution any person or group assisting a "sovereign" to obtain "Medical Aid in Dying" if the person or group presents acceptable documentation of the voluntary nature of the action.
3. To declare that a sovereign's right to obtain "Medical Aid in Dying" is not limited to periods when the sovereign is mentally competent if the sovereign desires and documents his or her desire that the right be durable into incompetency.
4. To declare that some Coloradans desire to shorten their dying period by obtaining "Medical Aid in Dying" and that despite constitutional rights to life, liberty, and the pursuit of happiness, under current law Coloradans do not have the liberty to pursue happiness by obtaining assistance from a medical professional to peacefully die 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 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, the phrase at the beginning of the proposal should be amended to mirror this language.
2. 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?
3. Given that the measure appears to address personal rights and liberties of individuals, it seems that the proposed language may be better situated in the Bill of Rights portion of the Colorado constitution. Would the proponents consider locating the proposed language as a new section 32 to be added to article II of the state constitution, which is the Bill of Rights?
4. Currently, the states of Oregon, Washington, and Vermont have laws, either citizen-initiated or legislatively enacted, that authorize aid in dying. Additionally, New Mexico and Montana, pursuant to court decisions, also

- permit aid in dying. Is the proposed measure modeled after the laws or decisions in any of these states? Is it modeled after another country's law?
5. The measure uses several undefined terms and does not contain details about the process of and requirements for obtaining assistance in dying, such as who can obtain medical aid in dying, whether a person must have a terminal illness to obtain medical aid in dying, who can provide the aid, what type of aid is available, whether the person seeking aid must administer medications himself or herself or whether another person can administer lethal medication to the person, what documentation is required to demonstrate that the individual seeking aid in dying did so voluntarily and while competent, et cetera. Without further clarification and definitions of terms, it is possible that the measure would lead to abuse of vulnerable populations, litigation to clarify the meaning of the measure, and delays in implementing the measure.
 - a. Would the proponents consider adding more specificity to the measure to avoid ambiguity in the law?
 - b. Do the proponents anticipate the need for implementing legislation to be enacted by the General Assembly to more clearly specify the scope and requirements of the measure? If so, could a directive be added to authorize implementing legislation?
 - c. Would the proponents consider adding a section of defined terms to add clarity to the intent and meaning of phrases like "medical aid in dying", "sovereign", "medical professional", "fatal condition", "administration", "oral or intravenous drugs", "mentally competent" or "mental competency", "incompetency", "personal medical decisions", "adult", "resident", "tone", "liberty", "life's end", "acceptable documentation", and any other terms for which the meaning is unclear, ambiguous, or subject to different interpretations? For an example of a "definitions" section, see section 16 (2) of article XVIII of the state constitution.
 6. The measure does not specify an effective date or applicability date. Absent clear language stating a different effective or applicability date, the measure will take effect upon the governor's proclamation pursuant to article V, section 1 (4) of the state constitution. Is that your intent? Is a delay in the applicability of the measure necessary to allow the enactment of implementing legislation?
 7. The measure does not specify whether it applies only to a Coloradan who has a terminal illness, or to any "mentally competent adult resident [] of

- Colorado." Is the measure intended to be limited to Coloradans with terminal illnesses? If the measure is intended to restrict assistance in dying to persons with a terminal illness, the measure should clearly state that restriction. As written, it appears that any person who desires assistance in dying can do so, regardless of whether the person is suffering from a terminal illness.
8. Section 1 of the measure is labeled "Purpose and findings." However, the measure itself not only makes findings, but it also proclaims rights of mentally competent adult residents of Colorado and provides criminal immunity to persons who assist residents in obtaining medical aid in dying. Thus, Section 1 is not limited to "purposes and findings".
 - a. Would the proponents consider relabeling Section 1 to better reflect the substantive contents of the section?
 - b. Alternatively, it appears that paragraphs (1) and (2) set forth "purposes and findings", while paragraph (3) sets forth rights and protections. Would the proponents consider making paragraph (3) a separate Section 2 with a label that reflects the contents of paragraph (3)?
 9. With regard to paragraph (1) of the measure:
 - a. What is the factual basis for or source of information in the declarations contained in the paragraph?
 - b. What is meant by the phrase "yielding little in other cases"? To what does "other cases" refer? Would the proponents consider clarifying the meaning of this provision?
 - c. The term "Medical Aid in Dying" appears to have a specific meaning, but that term is not defined in section 1 or elsewhere in the measure. What do the proponents intend this term to mean? How would a person obtain medical aid in dying? Does "medical aid" require assistance from a health care provider? Can any health care provider assist a person in dying? Would the proponents consider defining the phrase "Medical Aid in Dying"?
 10. With regard to paragraph (2):
 - a. The measure states that the Colorado constitution proclaims "that certain natural rights--such as life, liberty and the pursuit of happiness--are so fundamental as to be self-evidently inalienable. . ." Where in the Colorado constitution are these rights proclaimed to be

"self-evidently inalienable"? Are the proponents referring to Section 3 of Article II of the state constitution?

- b. Reference is made to obtaining assistance from a "medical professional" to achieve a "peaceful death [through] the administration of oral or intravenous drugs." Is the measure intended to require a medical professional to assist a person in dying? Who is included in the term "medical professional"? Would the term include, for example, a pharmacist, dentist, or acupuncturist? Does the medical professional have to be authorized to prescribe or administer drugs? Would the proponents consider defining the term "medical professional"?
- c. Is the intent that a person may obtain medical assistance in dying only through the administration of oral or intravenous drugs? Would the person have to self-administer the drugs, or does the term "assistance" include the direct administration of drugs by someone else?
- d. What types of "oral or intravenous drugs" would a person use for aid in dying? Are the drugs ones that would be commonly prescribed for any illness? Are the drugs lethal, or do they become lethal based on the dosage?
- e. What protections are there to ensure that any person, other than the person who desires to use the drugs for aid in dying, cannot obtain the drugs, use them, or administer them to anyone else? Would the drugs have to be labeled in some manner to clearly identify them as lethal? Would a physician or other authorized prescriber have to prescribe the drugs?

11. With regard to the first portion under paragraph (3):

- a. The measure declares mentally competent adult residents of Colorado to be "Sovereign". According to *The American Heritage Dictionary*, 2nd College Edition, the term "sovereign" (when applied to a person) means "the chief of state in a monarchy." The term is generally used in the context of a person who possesses or holds supreme political power, like a king or queen. The meaning of the term, in the context of an individual Colorado resident, is unclear. Do the proponents intend to say that each mentally competent resident adult is the "king" or "queen" of his or her personal medical decisions? If the intent is to specify that each mentally competent adult resident has the power to make his or her own medical

decisions, would the proponents consider plainly stating that in clear, understandable terms, with or without using the word "sovereign"?

- b. Paragraph (3) appears to contain the substantive law of the measure, but it is unclear what the substantive law requirements are. The measure proclaims that mentally competent adult Colorado residents "have the liberty at life's end to set the time and tone of their own deaths." Is this phrase intended to mean that a mentally competent adult Colorado resident can obtain assistance in dying? It is not clear that setting "the time and tone" of one's death means that a person may obtain medical assistance in dying.
- c. What constitutes "mental competency" and who determines if a person is "mentally competent"?
- d. Does the term "adult" refer to a person who is at least eighteen years of age or a person who is at least twenty-one years of age? Under Colorado law, the age of adulthood depends on the particular law, e.g., a person who is at least eighteen has the right to vote but cannot legally buy or consume alcohol. Would the proponents clarify the age at which a person is an adult for purposes of the measure?
- e. 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?
- f. What constitutes "life's end"? Does a person have to be near death to exercise the rights under the measure? If a person is diagnosed with a terminal illness with a prognosis of six months to live, would the person have to wait six months, or is the person, at the time of diagnosis, at "life's end"?
- g. What is meant by the phrase "asking permission of no person or organization"? Does "person or organization" include a public body, like the state or a local government? Could this phrase be construed to conflict with the requirement for a prescription to obtain a particular drug?
- h. Could the General Assembly enact legislation that would establish any restrictions on a person seeking aid in dying, such as requiring that the person have a diagnosed terminal illness, requiring the person to complete a written document stating his or her intent to obtain assistance in dying, or requiring the person to affirmatively

state that the decision to hasten death is being made voluntarily? Could these requirements be considered restrictions on a person that equate to requiring "permission" from the state? Could these requirements be considered infringements on a person's sovereignty over his or her personal medical decisions or infringements on a person's "liberty to set the time and tone" of his or her death?

- i. Paragraph (3) a. appears to require that a person who obtains aid in dying must do so voluntarily, but that requirement is only specified in the context of a person seeking immunity for assisting a person in dying. Nothing in the first portion of paragraph (3), which appears to address the rights and qualifications of a person seeking aid in dying, requires that the person do so voluntarily. If the intent is that a person obtaining assistance in dying must be acting voluntarily, would the proponents consider adding language to clearly state that requirement?
- j. The declaration of the right to set the "time and tone" of one's death is broadly stated. In the context of references to drugs and medical professionals, "time and tone" may implicitly be limited to the use of drugs, but there is no explicit limitation. Do you wish to add an explicit limitation on the "time and tone" that a sovereign may choose?

12. With regard to paragraph (3) a.:

- a. This provision appears to protect from prosecution "any person or group" that assists a person in obtaining medical assistance in dying. This language is broad and does not appear to be restricted to medical professionals, as referred to in paragraph (2). Is the measure intended to protect only medical professionals who provide assistance to the dying person, or does it allow any person to provide assistance and then protect any person who actually provides assistance and can present the requisite documentation?
- b. Could this language protect a husband who obtains and administers to his disabled but not terminally ill wife a lethal dose of intravenous drugs without her knowledge? What safeguards are in the measure to protect a person who has no desire to die but is under the care of another who could administer a lethal dose of medication to the person and then present documentation that purports to show that the person wanted to die?

- c. Does the immunity only apply to criminal liability? The term "prosecution" is generally used to refer to prosecuting a person for a criminal offense. Would a person who provides assistance in dying be shielded from liability in a civil lawsuit? If the proponents intend to include protections from both civil and criminal liability, the proponents should consider clearly stating that the immunity applies in both the civil and criminal contexts.
- d. In what manner would a person "present" acceptable documentation demonstrating that a dying person he or she assisted voluntarily obtained the person's assistance? Would the documentation need to be formally filed with a government entity, like a court or other record-keeping body? Would the person who provided assistance just "present" the documentation to any authorities who arrive on the scene after the death of the person he or she assisted?
- e. What constitutes "acceptable documentation of the voluntary nature of the action"? Would a hand-written note on a scrap of paper qualify? Would the documentation need to be completed and signed by the person seeking aid in dying or could another person create the document for the person? Would any witnesses to the document be required? Would the document need to be notarized? How would the document be authenticated to ensure that it truly represents the "voluntary nature of the action" of the dying person? Who determines what is "acceptable" documentation?
- f. When a term is defined in the law, it is usually set off in quotation marks followed by language to clearly state the meaning of the term. The measure refers to "Sovereign as defined in Section 3 above". The term "Sovereign" is not actually defined; rather it is used in the sentence stating that all mentally competent adult Colorado residents are "Sovereign in the matter of personal medical decisions". Would the proponents consider clearly defining what is meant by the term "Sovereign" as used in the measure? Alternatively, the term "sovereign", as used in (3) a. and (3) b. could be replaced with "individual".

13. With regard to paragraph (3) b.:

- a. What is meant by "incompetency"? Does it only refer to mental capacity? Would the proponents consider clarifying the scope of the term?

- b. Would the proponents explain this provision? Is it intended to allow a person, while mentally competent, to execute a document declaring that even if he or she becomes incompetent, the person desires assistance in dying? Would the document have to specify when and how the assistance occurs? What type of document is required? Does the person have to complete and sign the document himself or herself, or can another person complete the document? Must the document be witnessed or notarized? Must the document be formally filed with a government entity, like a court or other record-keeping body?
- c. If a person executes the required document and becomes incompetent, could the person revoke the document?

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. In the amending clause, the instruction word "add" should be in boldface type.
2. New language to be added to the state constitution by the proposed initiative should be indicated in small capital letters. THIS IS AN EXAMPLE OF SMALL CAPITAL LETTERS.
3. The Colorado constitution is divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs. If a section contains more than one paragraph, each paragraph should be numbered as follows:

Section 1. Purpose and findings. (1) THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE THAT:

- (a) RECENT SCIENTIFIC ADVANCES ...
- (b) DESPITE THE FACT THAT ...
- (2) THE PEOPLE OF COLORADO HEREBY PROCLAIM ...

4. If a paragraph is a complete sentence, it should not be followed by paragraphs with smaller designations. Rather, the subsequent paragraphs should have equal designations. Subsection (3) of the proposed initiative is a complete sentence, as are the subsequent paragraphs, so paragraphs a. and b. should be renumbered as subsections (4) and (5) as follows:

(3) THE PEOPLE OF COLORADO HEREBY PROCLAIM THAT MENTALLY COMPETENT ... ASKING PERMISSION OF NO PERSON OR ORGANIZATION.

(4) THE PEOPLE OF COLORADO HEREBY FURTHER...THE VOLUNTARY NATURE OF THE ACTION.

(5) THE SOVEREIGN'S RIGHT TO OBTAIN [M]EDICAL [A]ID IN [D]YING...BE DURABLE INTO INCOMPETENCY IF DESIRED AND DOCUMENTED.

5. It is standard drafting practice to use the designated names of internal references, i.e. "subsection (1)," "paragraph (a)," etc. In paragraph a. of the proposed initiative, the reference to "Section 3 above" should be "subsection (3) of this section" since (3) is actually a subsection, not a section, and the section is Section 1.
6. The words "herby" and "thru" are misspelled.
7. In paragraph (1) of the proposed initiative, consider rewriting the beginning of the second sentence so that it begins with "These advances are producing".
8. Grammatical changes:
 - a. In paragraph (3) a., before the word "obtain", insert the word "to".
 - b. In paragraph (3) b., consider adding the word "also" after "but can".
9. Although the text of the proposed initiative should be in small capital letters, an uppercase letter should be used, where appropriate, to indicate capitalization. The following should be large-capitalized:
 - a. The first letter of the first word of each sentence;
 - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon;

- c. Proper nouns, such as "Colorado" or "South Platte river." "State" and "Medical aid in dying" are not proper nouns and should not be capitalized.