WBASNY

The Women's Bar Association of the State of New York

presents

Convention 2023
Continuing Legal Education Series

I Said It. I Mean It. So Honor It.

June 2, 2023
3:45 pm - 4:45 pm

Presenter: Peter J. Strauss, Esq.

‘I SAID IT. I MEANT IT. SO HONOR IT.’

- Honoring Patient Choice
- The Supplemental Advance Directive for Oral Feeding for Dementia Patients
- Thoughts on Dobbs v. Jackson Women’s Health Organization
- Medical Aid in Dying

Women’s Bar Association of the State of New York

Convention 2023

PRESENTED BY: PETER J. STRAUSS, SENIOR PARTNER

PIERRO, CONNOR & STRAUSS, LLC
Trusted Counsel

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The U.S. - More Older Persons & Persons With Disabilities

	2010	2020	2030	2050
Total Population (In Millions)	310	333	373	439
OVER 65				
Percent	13%	16%	19%	20%
Number	40	54.8	72	88.5
OVER 85				
Percent	1.8%	1.9%	2.0%	4.4%
Number	5.7	6.6	8.7	19

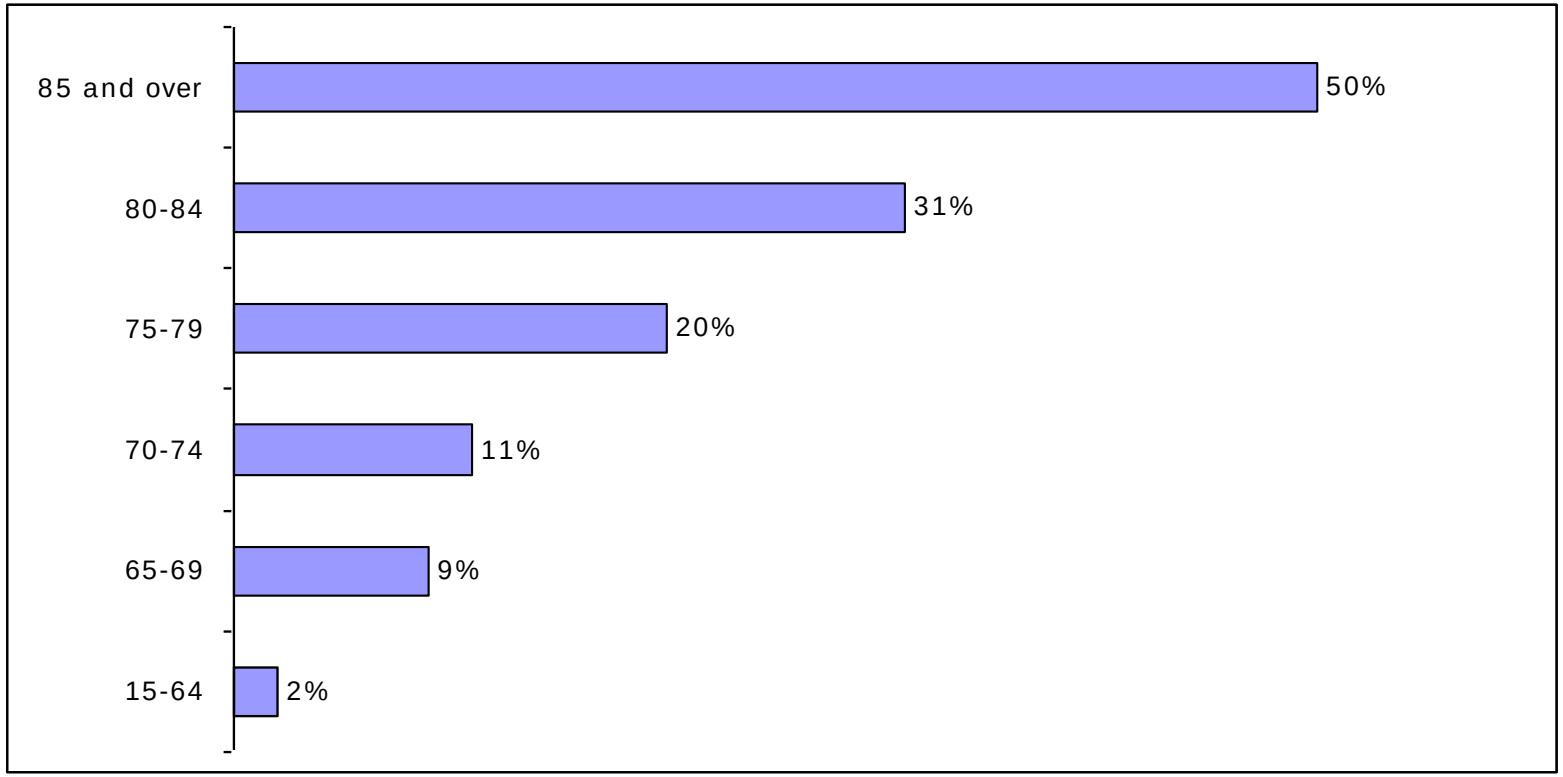
This slide and the following slide are based on the 2010 Census and are still valid for general observations about the older population. Numbers will be updated shortly according to the final reports from Census Bureau.

Good News, Bad News

While this increase in life expectancy and the growth of our older population is positive, there is a **negative side**. 50% of persons over age 85 need significant assistance in daily functioning.

Chronic disease such as arthritis, hearing impairment, hypertension, heart disease and stroke become more prevalent as persons age.The **increasing prevalence of dementia** among older Americans is a major factor; it is estimated that Alzheimer's disease is the cause of 70% of all dementia.

The Need for Help With Everyday Activities Increases with Age (Primarily Because Of Cognitive Issues)



The Failure of Medicare

MEDICARE is America's health care program for persons over 65 younger persons with disabilities who are not covered by an employer health insurance plan.

When Medicare was enacted in 1965, President Lyndon B. Johnson stated the following prediction of Medicare's benefits for the elderly:

"Every citizen will be able, in his productive years when he is earning, to insure himself against the ravages of illness in his old age. No longer will illness crush and destroy the savings that they have so carefully put away over a lifetime so that they might enjoy dignity in their later years."

Planning Ahead: Take Control

THE FAILURE TO EXECUTE ADVANCE DIRECTIVES FOR *HEALTH CARE DECISION-MAKING* AND *PROPERTY MANAGEMENT* WILL RESULT IN LOSS OF INDIVIDUAL CONTROL AND AUTONOMY

- Persons with little knowledge of a patient's wishes may become the decision maker
- A court appointed guardian may obtain the right to make end of life decisions
- The person who may be appointed guardian or be recognized as the "surrogate" may not be the person the incapacitated person would choose
- A partner in a non-traditional, loving relationship may have no authority to make health decisions
- These concerns apply for both health care decisions and financial affairs

Making Decisions at the End of Life

- The **doctrine of informed consent** was established by the case of *Schloendorff v. Society of New York Hospital*, 211 N.Y. 1 25 (1914) where Justice Benjamin Cardozo, then on the New York Court of appeals, wrote:

"Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."

Does the Right to Refuse Extend to Incapacitated Persons?

- In general, yes. *Matter of Quinlan*, 70 N.J. 10 (1976)
- Where a patient did not have advance directives and/or her or his wishes were not known most states have allowed a "surrogate" to make medical decisions, including end of life decisions, based on the theory of either **substituted judgment** or **best interests**
- Historically, New York applied a conservative approach to the right to refuse by requiring *clear and convincing evidence* of the patient's wishes before life-sustaining treatment can be withheld or withdrawn. *Matter of Storar*, 52 N.Y.2d 363 (1980); *Eichner v. Dillon*, 73 A.D.2d 431 (1980), *modified sub. nom. Matter of Storar*, 52 N.Y.2d 363 (1980); *Matter of Westchester County Medical Center (O'Connor)*, 72 N.Y.2d 517 (1988)

"Informed Consent" Includes The Right To Refuse Treatment"

See *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990)

- "The common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment"
- "...the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be viewed from our prior decisions"
- This right exists even where the decision to decline treatment will result in death.

New York's Historical Clear And Convincing Evidence Requirement

- The clear and convincing evidence test can be met by oral testimony but the best evidence is a written document. *Matter of Westchester County Medical Center (O 'Connor), supra; Delia v., Westchester County Medical Center*, 120 A.D.2d 1 (1987)
- Where the clear and convincing evidence test is not met health care providers were required to use all available medical treatment and procedures
- As a result of the "clear and convincing evidence" rule, in New York *the "never competent" or the "formerly competent" person whose wishes could not be proved by clear and convincing evidence did not have the same constitutional right as other residents of the other states to refuse life-sustaining treatment*
- Storar: the tragedy of the clear and convincing evidence rule's application

New York Finally Adopts Substituted Judgment

On March 16, 2010, Governor Paterson signed Chapter 8 of the Laws of 2010 which was passed by the legislature after 17 years of debate. Public Health Law Article 29-C C (Family Health Care Decisions Act)

The Governor said, *"After nearly twenty years of negotiations, New Yorkers now have the right to make health care decisions on behalf of family members who cannot direct their own care."*

Advance Directives: Health Care Proxy

- Appoints a person – the health care agent – to make health care decisions
- Presumption of capacity
- The health care agent's authority to act begins when a physician determines that the patient lacks capacity to make health care decisions (ability to give informed consent)

Advance Directives:The Living Will

At Pierro,Connor & Strauss,we refer to this as a“Health Care Declaration.”

- Expresses a person’s wishes about the type of care and treatment she or he would want or refuse
- Guides the Health CareAgent
- The Health Care Declaration must be honored by physicians and other health care providers, **but compliance is spotty**
- PCS has designed language for its Declaration to deal with the compliance issue

Drafting Suggestion

"In the event I suffer from an injury, disease or illness which renders me unable to make health care decisions on my own behalf, which leaves me unable to communicate with others meaningfully, and from which there is no reasonable prospect of recovery to a cognitive and sentient life (even if my condition or illness is not deemed to be "terminal" and even if my death is not imminent), I direct that no medical treatments or procedures (except as provided in paragraph 4 below) be utilized in my care or, if begun, that they be discontinued"

Avoid using terms such as "terminal condition," terminal illness," "death is imminent" or "heroic measures."

When is the Health Care Proxy effective?

When Living Will Is Operative

PA Statute, Title 20 Ch. 54, Health Care Section 5443

(a) When operative. A living will become operative when:

(1) a copy is provided to the attending physician; and

(2) the principal is determined by the attending physician to be incompetent and to have an end-stage medical condition or to be permanently unconscious.

(b)Compliance. When a living will becomes operative, the attending physician and other health care providers shall act in accordance with its provisions or comply with the transfer provisions of section 5424 (relating to compliance).

- New York has no "living will" statute
- Do not create this problem by adding limiting language in the document you draft

Can a Person with Diminished Capacity Engage in Advance Planning?

- Traditionally, physicians have tended to construe capacity as either present or absent
- Today, physicians use a decision-specific approach, whereby the measure of capacity is a person's understanding of a specific decision or task
- The level of capacity needed to perform a task or make a decision will vary depending on its complexity

Evaluating Capacity

- Consider having a physician or psychologist do a capacity test since there is some doubt about whether a client can engage in advance planning

- Consider the following guidelines developed by Peter J. Strauss based on current thinking, the rules of professional conduct for attorneys promulgated by the American Bar Association and several states

Guidelines to Determine Whether a Client Can Execute Advance Directives

A client can be determined to have sufficient capacity to engage in advance planning if:

- She's aware that she has difficulty with decision making for health care or managing day-to-day decisions at the present time or in the future
- Her choice of a fiduciary to assist is reasonable
- Her choice is consistent with the history of prior choices and lifetime decisions
- She can articulate the reason underlying the need to establish a particular legal document
- She can appreciate the consequences of the execution of the legal document

Memory vs. Judgment

Honoring Patient Choice

Expectation: Health Care Providers would follow Schloendorff, Quinlan and Cruzan, but a review of U.S. Case Law shows that is not often the case - patient rights are being denied.

Until recently, courts have not allowed lawsuits for provider failure to follow patient's rights

Cronin v. Jamaica Hospital Medical Center 60 A.D.21 803 (2009)
is typical:

There is no right of action for "wrongful living"

A New Direction at Last

Dr. Gerald Greenberg completed a living will and health care proxy in 2011 stating that in the event of irreversible brain damage *he did not want medical treatment except comfort care*. Dr. Greenberg subsequently developed advanced Alzheimer's and in November 2016 was admitted to Montefiore Hospital with severe sepsis.

Despite the wife's instructions the hospital proceeded to treat Dr. Greenberg's sepsis, administering antibiotics and other curative treatments on multiple occasions. As a result of this unwanted treatment, Dr. Greenberg lived an additional 30 days in immense pain and suffering.

The trial court dismissed the case, stating that Dr. Greenberg did not suffer any damages by being kept alive against his explicit wishes, following the Cronin decision.

On March 31, 2022, the Supreme Court of the State of New York, Appellate Division, First Judicial Department reversed the lower court's decision. Greenberg v. Montefiore New Rochelle Hospital, 205 A.D.3d 47 (1st Dept. 2022). As a result, Plaintiffs could now hold the hospital accountable for Dr. Greenberg's pain and suffering because of the unwanted medical treatment in violation of its required standard of care.

The Pierro, Connor & Strauss
Sue The Non-complying Physician Clause
For The Health Care Declaration

Enforcement of My Directives:

It is my intention that my wishes, as evidenced by this document and my agent's instructions, be honored by everyone, including my family, friends, courts, physicians and all others concerned with my care. I expect all such persons to be legally and morally bound to act in accord with my wishes, as expressed on my behalf by my agent. If any hospital or other institution or any physician, nurse or other health care personnel refuses to obey my wishes as set forth herein, I hereby direct my agent to take one or more of the following actions: (1) commence suit against such institution and/or personnel for all hospital costs, drugs, medical expenses and all other damages flowing from such refusal, including my pain and suffering, (2) not to pay bills for unwanted services from any such health care provider, (3) file objections with Medicare, Medicaid and any private insurance company for payment of such charges and (4) file complaints against such providers with appropriate state regulatory agencies and licensing and professional associations. Assault and battery charges should also be seriously considered. I request, but do not direct, my agent acting from time to time to consult with the persons I have nominated as successor agents to advise and support the acting agent in his or her responsibilities and decision making.

New Provision in PCS Power of Attorney Form

In the Pierro, Connor & Strauss Power of Attorney form, we authorize the agent:

"…to provide funds for actions of the health care agent."

The New Issue: Supplemental Advance Directive for Oral Feeding for Dementia Patients

- Legal in all states to withhold or withdraw artificial feeding

  (NG tubes, stomach tubes (PEG), and IV feeding)
- But can an individual with capacity refuse natural feeding in advance of losing capacity?
- VSED is legal
- Terminal sedation is legal
- If a health care agent can implement a patient's spoken choice expressed in an advance directive, and take the above actions, why not this choice?

The New Dementia Advance Directive

The Pierro, Connor & Strauss, LLC Health Care Declaration provides:

In the event I suffer from an injury, disease or illness which renders me unable to make health care decisions on my own behalf, which leaves me unable to communicate with others meaningfully, and from which there is no reasonable prospect of recovery to a cognitive and sentient life (even if my condition or illness is not deemed to be "terminal" and even if my death is not imminent), **I direct that no medical treatments or procedures (except as provided in paragraph C below) be utilized in my care or, if begun, that they be discontinued.**

- Typical – deals only with medical treatments
- The law is clear that nutrition and hydration by mechanical means is a medical treatment
- There is growing interest in allowing rejection or stopping of ***natural feeding*** by health care agents directed to do so in a **DEMENTIA ADVANCE DIRECTIVE**

Barbara's Story

Barbara is 82, has moderate to advanced Senile Dementia of the Alzheimer's type, a history of coronary artery disease, congestive heart failure and hypertension. She has had many falls recently, lost 14% of her weight in six months, her short-term memory is gone and she does not recognize her children. She has not reached the stage of oropharyngeal apraxia (inability to swallow or process food). When offered food by spoon she will open her mouth and accept the food but shows no indication of pleasure or enjoyment.

Barbara executed a health care proxy naming one of her 3 children as agent and a health care declaration prepared by Pierro, Connor & Strauss 12 years ago when she had full capacity.
You are Barbara's primary physician. Yesterday you met with her 3 children and was directed by the son who is the health care agent to discontinue the oral feeding based on his understanding of his mother's verbal instructions before the start of her dementia. The other children support the request.

AS THE TREATING PHYSICIAN, WHAT WILL YOU OR CAN YOU DO?

SUPPOSE BARBARA HAS SIGNED A SUPPLEMENTAL ADVANCE DIRECTIVE FOR DEMENTIA PATIENTS?

Supplemental Advance Directive for Oral Feeding for Dementia Patients

The Ulysses Contract

In the Odyssey, Ulysses has his crew tie him to the mast so that when he hears the songs of the sirens he will not be able go to them no matter how strongly he demands to be untied. This has historically been referred to as the Ulysses Contract.

Physicians have analogized the Ulysses Contract to their own dilemma in cases where they have agreed with a patient to honor the patient's wishes as described in an advance directive but later do not agree that the patient's best interests are served by compliance.

Critical Issues

- Can the physician comply with the request if the agent has only the basic HCP/HCD?
- If not, would the Supplemental Advance Directive enable a decision to stop the natural feeding?
- Suppose Barbara evidenced pleasure when being fed? She smiles when brought to the lounge to listen to music in her Assisted Living Facility?
- Does behavior evidencing that Barbara is not presently unhappy demonstrate a NEW SELF that means the wishes of the OLD SELF should not be honored?
- Is there a presumption that the values and wishes of an older person will change over time thus freeing the agent/child from earlier promises?

Critical Issues

- Must respect for the autonomy of the old self prevail even if it appears not to be in Barbara's best interest?
  - Is the agent legally bound by a contract? Ethically bound?
  - Can the agent now make a best interests decision?
  - Does there ever come a time when strict adherence to the primacy of autonomy becomes
  - immoral?

- Or must respect for autonomy prevail?
- Does there ever come a time when strict adherence to the primacy of autonomy becomes immoral?
- Or, as the dementia increases and the person's condition declines, does the sanctity of the advance directive increase?

DO WE UNTIE ULYSSES?

Nevada Law – Dementia Advanced Directive

Nevada revised Statutes Section 162A.870 (2021) now includes the following paragraph 2

The form for end-of-life decisions of a power of attorney for health care **for an adult with any form of dementia** may be substantially in the following form, and must be witnessed or executed in the same manner as the following form:

END-OF-LIFE DECISIONS ADDENDUM STATEMENT OF DESIRES

(You can, but are not required to, state what you want to happen if you get very sick and are not likely to get well. You do not have to complete this form, but if you do, your agent must do as you ask if you cannot speak for yourself.)

..... (Insert name of agent) might have to decide, if you get very sick, whether to continue with your medicine or to stop your medicine, even if it means you might not live, ... (Insert name of agent) will talk to you to find out what you want to do, and will follow your wishes.

If you are not able to talk to..... (insert name of agent), you can help him or her make these decisions for you by letting your agent know what you want.

(cont.)

Nevada Law – Dementia Advanced Directive

(cont.)

Here are your choices. Please circle yes or no to each of the following statements and sign your name below:

1. I want to take all the medicine and receive any treatment I can to keep me alive regardless of how the medicine or treatment makes me feel. YES NO

2.I do not want to take medicine or receive treatment if my doctors think that the medicine or treatment will not help me. YES NO

3.I do not want to take medicine or receive treatment if I am very sick and suffering and the medicine or treatment will not help me get better. YES NO

4.I want to get food and water even if I do not want to take medicine or receive treatment. YES NO

(YOU MUST DATE AND SIGN THIS END-OF-LIFE DECISIONS ADDENDUM)

I sign my name to this End-of-Life Decisions Addendum on …… (date)

at …… (city), …… (state)

Excerpts from the Pierro, Connor & Strauss Supplemental Health Care Directive for Receiving Oral Foods and Fluids in the Event of Dementia

Option A: **The provisions of this option are selected. _____(initial)**

Assisted Hand Feeding

If my appointed health care agent concludes, after consultation with my primary health care provider, that I am suffering from advanced dementia and the conditions mentioned above are met, I want all provision of oral feeding by hand or by assisted oral feeding to be withheld or, if already begun, to be withdrawn.

If I appear willing to accept food or fluid offered by assisted or hand feeding, my instructions are that I do NOT want to be fed by hand even if I appear to cooperate in being fed by opening my mouth.

Excerpts from the Pierro, Connor & Strauss Supplemental Health Care Directive for Receiving Oral Foods and Fluids in the Event of Dementia

Option B: **The provisions of this option are selected. _____(initial)**

Assisted Hand Feeding

If my appointed health care agent concludes, after consultation with my primary health care provider, that I am suffering from advanced dementia and the conditions mentioned above are met, I would want to receive oral feeding by hand or by assisted oral feeding *only under the following circumstances:*

1.So long as I appear receptive and cooperate in eating and drinking by showing signs of enjoyment or positive anticipation of eating and drinking, I want to receive oral feeding by hand or by assisted oral feeding.

2. I would want to be fed only those foods I appear to enjoy, in any texture I prefer, and in whatever amount I readily accept.

3.I would want all attempts to provide assisted oral feedings stopped when I no longer seem to enjoy or appear willing to eat or drink, or if I begin to cough, choke or aspirate oral feedings into my lungs.

4.I do not wish to receive assisted feedings once I no longer willingly open my mouth or I appear indifferent to being fed, or spit out food or fluids.

5. I do not wish to be coerced, cajoled or in any way forced to eat or drink.

Does Dobbs V. Jackson Women's Health Org Present Issues For End Of Life Choice Advocates?

Justice Alito wrote:

- "The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions."
- "The dissent is very candid that it cannot show a constitutional right to abortion has any foundation, let alone a "deeply rooted one." *Glucksberg, 521 U.S, at 721"*
- "The exercise of the rights at issue in *Griswold, Eisenstadt, Lawrence and Obergefell* does not destroy a "potential life," but an abortion has that effect."
- Note: Washington v. Glucksberg and Vaco v Quill are not on the above list
- "Finally, the dissent suggests that our decision calls into question *Griswold, Eisenstadt, Lawrence and Obergefell*. But we have stated unequivocally that "nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion…. Rights regarding contraception and same-sex termed relationships are inherently different from the right to abortion because the latter…uniquely involves what *Roe* and *Casey* termed "potential life."

From the Concurring Opinion of Justice Thomas

Courtesy: wsj.com

"For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including Griswold, Lawrence, and Obergefell. Because any substantive due process decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents…"

"The harm caused by this Court's forays into substantive due process remains immeasurable."


CHOOSE
LIFE
LIFE
is beautiful
Life!

Medical Aid in Dying

In 11 states, dying patients with mental capacity have the right under state law to end their lives by ingesting terminal medication prescribed by a licensed physician.

- Medical Aid in Dying is not assisted suicide
- State laws permitting Medical Aid in Dying have not been abused, have worked as intended
- There is no “slippery slope”

STATES WHERE MAID IS AUTHORIZED

By effective date and how adopted

Oregon	11/8/1994	Ballot
Washington	11/4/2008	Ballot
Montana	12/31/2009	Courts
Vermont	5/20/2013	Legislature
California	6/9/2016	Legislature
Colorado	11/8/2016	Ballot
Washington, D.C.	12/20/2016	Legislature
Hawai‘i	4/15/2018	Legislature
New Jersey	4/12/2019	Legislature
Maine	6/12/2019	Legislature
New Mexico	4/8/2021	Legislature

Opposition to Medical Aid in Dying (MAID)

There is strong opposition to MAID, primarily from

- Disability Rights Organizations
- Conservative Religious Groups
- The Conservative "Right"

Here is a sample of what is in the news around the US every week, (courtesy of Compassion and Choices):

Death Activists Oppose Limits on Virtual Access to Assisted Suicide

By Wesley Smith
NRL News Today | 5,995 unique visitors per month
Assisted-suicide advocates say they believe in "strict guidelines to guard against abuse." They don't. They write bills as broadly as they deem to guard against abuse." They don't. They write bills as broadly as they deem politically expedient and then expand access as people become accustomed to doctors prescribing overdoses to ill, suicidal patients. And they take advantage of any exigency to expand access to lethal prescriptions.
3/23/2023 | Tweet Share on LinkedIn

Legalized assisted suicide push in U.S. alarms doctors, disability advocates: 'Where do you draw the line?'

By Kristine Parks
Fox News | 64,173,075 unique visitors per month
Physician-assisted suicide has been a hotly debated topic across the United States for decades but a push to legalize the controversial practice in more states is picking up steam this year. Starting with Oregon in 1997, ten other states and the District of Columbia have made it legal for a terminally ill patient to ask their doctor for a lethal cocktail of drugs they ingest to die. They include California, Montana, Vermont, Washington, New Jersey and Hawaii.
3/23/2023 | Tweet Share on LinkedIn
Thanks for reading the Daily Clips! Please let me know if you have questions or feedback.

Mary's Story

Mary, 103, advanced dementia, could not perform any activities of daily living, could not speak. She was a retired university professor of music history. I was her court appointed guardian.

I gave her a birthday party and her aides, the care manager and a distant cousin attended. I engaged a Julliard violin student and a flautist to play for her.

The violin student leaned in and, not knowing the extent of her disability, asked Mary who her favorite composer was.

"Mozart" Mary smilingly said and smiled for an hour.

Courtesy: calmradio.com

BIOGRAPHY OF PETER J.STRAUSS

- Peter Strauss has practiced trusts and estate law since 1961 and has special expertise in the legal problems of aging and persons with disabilities, end of life issues and the capacity of persons with disabilities to execute legal documents with respect to health care. He is a founding member of the National Academy of Elder Law Attorneys, a Fellow of the American Academy of Trust and Estate Counsel (ACTEC) and Distinguished Adjunct Professor of Law at the New York Law School, where he teaches Elder Law and is director of the guardianship clinic.
- Peter is the recipient of the New York State Bar Association "2019 Attorney Professionalism Award," given to one attorney in the State each year. He has been honored from 2007 to 2019 as one of the New York Metropolitan area's "Best Lawyers," and "Super Lawyer" from 2007 to 2016.
- In May 2022, Peter received the Theresa Award from the National Academy of Elder Law Attorneys for his contribution to the profession and the community

- Peter is a prolific author and has written articles for various publications including the New York Law Journal and Bottom Line Personal and has addressed many national professional and consumer organizations. He is the author of the consumer book, "The Complete Retirement Survival Guide: Everything You Need to Know to Safeguard Your Money, Your Health and Your Independence," (Facts-on-File, Inc. 2003).
- He presently serves on the Executive Committee of the Elder Law & Special Needs Section of the New York State Bar Association, the Board of Directors of End of Life Choices New York and JALBCA (Judges & Lawyers Breast Cancer Alert) and the Steering Committee of the Louis Armstrong Center for Music and Medicine.
- Peter is a Graduate of Bowdoin College with BA in Government Studies, 1957
- J.D. from New York University School of Law, 1961

THANK YOU! QUESTIONS?

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