Hastening Death by Voluntarily Stopping Eating and Drinking: Legal Perspective

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Disclosures

I have no conflicts of interest or relevant financial interests.
25 min

Learning Objectives
Describe four legal foundations of a patient’s right to contemporaneous VSED

Understand the challenges and risks for families and clinicians in implementing an advance VSED decision for a now incapacitated patient

Compare legal distinctions between VSED, on the one hand, and medical aid in dying and withholding or withdrawing life-sustaining treatments, on the other hand

**Definition**

**VSED**
3

Physiologically able to take food & fluid by mouth
Voluntary, deliberate decision to stop

**Intent:** death from dehydration
>50% at 8d
>80% at 14d

Legal concerns

Legal analysis
Legal concerns

Uncertainty & reluctance among providers
Almost never: express prohibition
RCWA specifically & expressly prohibits lots of things

**Not** VSED

**BUT**

Absence of a red light **not** good enough
Clinicians want *express* permission

No green light from Olympia
No green light anywhere
Little precedent & not supportive

No red lights
No green lights
Lack of clarity & guidance
neglected in academic & policy circles
Providers still ask

Is VSED legal?
Is VSED illegal?

Wrong questions
Law is rarely binary

Risk assessment
2 case types

1
VSED now with capacity

Ability to understand significant benefits, risks & alternatives

Ability to make & communicate decision
Advance directive for VSED later (when lack capacity)
Patient with capacity requests VSED now

Extremely low risk of sanctions – criminal, civil, regulatory
Right to refuse medical interventions
Right to refuse non-medical interventions

Not assisted suicide
Not elder neglect
Right to refuse medical interventions

Well established > 3 decades
“A competent patient **may refuse** treatment . . .”

99 Wash.2d 114
In the Matter of the WELFARE OF Bertha COLYER.
No. 48521–6.
Supreme Court of Washington, En Banc.
March 10, 1983.

**Right to refuse medical**
Vent
Dialysis
CPR
Antibiotics
Feed tube

VSED
Vent
Dialysis
CPR
Antibiotics
Feed tube

ICD
Hastening Death by VSED - 10-14-2016

Vent
Dialysis
CPR
Antibiotics
Feed tube

VSED

Not DTC
Not DIY
Contrast

VSED
Part of a broader treatment plan

Supervised by licensed healthcare professionals
“the number of cases will increase. Since the concept of fasting is not taught in medical schools, we will produce a guide to support doctors.”

Harvard CEC
PAVSED

“Palliated and Assisted Voluntarily Stopping Eating and Drinking”

PAVSED

Highlights **medical role** in palliating symptoms

Highlights the **direct care staff** role in providing assistance
Medical b/c not “typical human”
2

treatment
Does **not** matter whether food & fluid are “medical treatment”
“The common law right to be free from *bodily invasion* is an alternative basis ...”

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99 Wash.2d 114
In the Matter of the WELFARE OF Bertha COLYER.
No. 48521-6.
Supreme Court of Washington.
En Banc.
March 10, 1985.

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Battery
Unwanted contact

Even if clinically beneficial
“Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . . ”

Mohr v. Williams (Minn. 1905)
Force feeding is a battery

“It seems odd that your bodily integrity is [not] violated . . . by sticking a spoon in your mouth.”
Move now from legal bases, grounds for right

Responding to main objections
VSED is\textbf{ not} assisted suicide
Alleged risk

RCWA 9A.36.060
(1) A person is guilty of promoting a suicide attempt when he or she knowingly causes or aids another person to attempt suicide.
(2) Promoting a suicide attempt is a class C felony.
BUT

Active Passive
VSED is not abuse or neglect

Alleged risk
“The facility must provide each resident with **sufficient fluid intake** to maintain proper hydration and health.”

42 C.F.R. 483.25(j)

Tag F0327

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<th>Date</th>
<th>Nursing Home</th>
<th>City</th>
<th>State</th>
<th>Def.</th>
<th>Severity</th>
<th>Range</th>
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<td>The Woodlands</td>
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The number and severity of deficiencies shown below relate only to the search terms, not necessarily all deficiencies against the home. **Important:** If you searched for a city or home name, results for that home may be spread over several pages. To improve results, select a state and sort by city.
BUT

I agree

I disagree
Over-treatment just as risky as under-treatment
SUPREME COURT OF GEORGIA

Bucilla Stephenson

Now leave contemporaneous VSED
Advance directive for VSED later

Trickier & more controversial
1 What is this

Complete AD, today
VSED in future when reach point you define as intolerable

But lack capacity at future time
Can you leave VSED instructions in an AD?

Yes
Glendower:
I can call spirits from the vasty deep.

Hotspur:
Why, so can I, or so can any man;
But will they come when you do call for them?

You can **write** anything you want in an AD

But will it be **honored**
No express permission
• Oregon legislation planned

Sometimes prohibited
Legal & ethical expert support nearly universal

Autonomy
Wis. Stat. 155.20

“A health care agent may not consent to the withholding or withdrawal of orally ingested nutrition or hydration . . .”
“Health care directive may include . . . health care instructions . . . appoint . . . agent to make health care decisions.”

Minn. Stat. 145C.02

“Health care means any care, treatment, service, or procedure to maintain . . . or otherwise affect . . . physical . . . condition.”

Minn. Stat. 145C.01(4)
4 “Soft” hurdles
Be very specific on the when
Be very specific on the what

Margot Bentley
TO MY FAMILY, MY PHYSICIAN, MY LAWYER & ALL OTHERS WHOM IT MAY CONCERN

I, Margaret P. Sweeney, residing at 302 E. 5th St., hereby declare that if the time comes when I can no longer take part in decisions for my future, I wish this statement to stand as an expression of my wishes.

IF AT SUCH A TIME THE SITUATION SHOULD ARISE THAT THERE IS NO REASONABLE EXPECTATION OF MY RECOVERY FROM EXTREME PHYSICAL OR MENTAL DISABILITY, I DIRECT THAT I BE ALLOWED TO DIE AND NOT BE KEPT ALIVE BY ARTIFICIAL MEANS OR "HEROIC MEASURES".

I DO ASK THAT MEDICATION BE MERCIFULLY ADMINISTERED TO ME TO ALLEVIATE SUFFERING EVEN THOUGH THIS MAY SHORTEN MY REMAINING LIFE.

I MAKE THIS STATEMENT AFTER CAREFUL CONSIDERATION AND IS IN ACCORDANCE WITH MY CONVICTIONS AND BELIEFS.

I HEREBY ABSOLVE ALL WHO FOLLOW THESE INSTRUCTIONS TO BE FREE OF ANY LEGAL LIABILITY. IN PARTICULAR, I WOULD REQUEST THE FOLLOWING INSTRUCTIONS TO BE CARRIED OUT:

A. NO ELECTRICAL OR MECHANICAL RESUSCITATION OF MY HEART WHEN IT HAS STOPPED BEATING.
B. NO NOURISHMENT OR LIQUIDS.
C. NO MECHANICAL RESPIRATION WHEN I AM NO LONGER ABLE TO SUSTAIN MY OWN BREATHING.
D. NO SURGERY.
E. OTHERS TO DECIDE THAT OTHER INTERVENTIONS ARE USEFUL.

I HEREBY DESIGNATE THE REV. John V. McDonough, OF THE PARISH, A CATHOLIC PRIEST, TO SERVE AS MY PROXY FOR THE PURPOSE OF MAKING MEDICAL DECISIONS ON MY BEHALF IN THE EVENT THAT I BECOME INCAPABLE OR UNABLE TO MAKE SUCH DECISIONS FOR MYSELF.

I HEREBY APPOINT TURKEY C. JOHNSON, ESQ., AS AN ALTERNATE PROXY.

WITNESSES SIGNATURES:

[Signature]

[Signature]

DATE: Nov. 24, 1971

FROM EXTREME PHYSICAL OR MENTAL DISABILITY, I DIRECT THAT I BE ALLOWED TO DIE AND NOT BE KEPT ALIVE BY ARTIFICIAL MEANS OR "HEROIC MEASURES".

A. HEART WHEN IT HAS STOPPED BEATING;
B. NO NOURISHMENT OR LIQUIDS.
PART I: POWER OF ATTORNEY FOR HEALTH CARE

I revoke all prior advance health care directives and durable powers of attorney for health care signed by me. This document shall not be affected by my subsequent incapacity. I am not a patient in a skilled nursing facility, and I am not a conservatee.

1.1 NAME AND ADDRESS OF PRINCIPAL. My name and address are:

Nora R. Harris, 83 Arnold Drive, Novato, CA 94949

PART 2: INSTRUCTIONS FOR HEALTH CARE

2.1 END-OF-LIFE DECISIONS. I direct that my health care providers and others involved in my care provide, withhold, or withdraw treatment in accordance with the choice I have marked below:

a. I Choose NOT To Prolong Life. If I initial this line, I do not want my life to be prolonged and I do not want life-sustaining treatment to be provided or continued if any of the following conditions apply:

...
In re Article 81, 132 A.D.3d 1344 (2015)

132 A.D.3d 1344
Supreme Court, Appellate Division,
Fourth Department, New York.

In the Matter of the Proceedings Under ARTICLE 81, Mental Hygiene Law, for the Appointment of a Guardian for Regina L.F., Incapacitated Person.
Lisa R., Stephen D.R. and John R.F., Petitioners–Respondents,
Regina L.F., by and Through Her Guardian Catholic Family Center,
Respondent–Appellant. (Appeal No. 1.).

Oct. 9, 2015.
Trial court

“comfort care shall always be provided, and shall always include food and hydration, whether orally or artificially . . .

Appellate Division

Vacates that part of the order
“incurable or irreversible condition . . . no artificial administered nourishment or liquids”

“state of permanent unconsciousness or profound dementia, all nourishment or liquids”

5

Capacity
Do later requests for water **revoke** the AD?

Maybe
All patients **presumed** to have capacity

**Until** rebutted

**Decision** specific
Patient might have capacity to make some decisions but not others
Phyllis Shacter <pshacter@comcast.net>  Fri, Apr 3, 2015 at 8:42 PM
To: "Pope, Thaddeus M." <tpope01@hamline.edu>
Cc: Erin Crisman Glass <ecrisanglass@barronsmithlaw.com>

Dear Thad:

19 months ago

This is a summary of a recent meeting between Erin Crisman Glass and me. We discussed initial steps to take to move toward the realization of the VSED conference.
Questions

Selected References
Medical Futility Blog

Since 2007, I have been blogging, almost daily, to medicalfutility.blogspot.com. This blog focuses on reporting and discussing legislative, judicial, regulatory, medical, and other developments concerning end-of-life medical treatment conflicts. The blog has received over 2 million direct visits. Plus, it is redistributed through WestlawNext, Bioethics.net, and others.


T.M. Pope, *Voluntarily Stopping Eating and Drinking: A Legal Treatment Option at the End of Life*, 17(2) WIDENER LAW REVIEW 363-428 (2011) (with Lindsey Anderson).
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