76yr old patient . . .
recently applied for
hospice and rejected . . .
not meet imminent-death criterion based on
projection of 2-4 years)

42 CFR § 418.20(b)
“to be eligible to elect
hospice care under
Medicare, an individual
must be . . . certified as
being terminally ill”

42 CFR § 418.22(b)(1)
“individual's
prognosis is for a
life expectancy of
6 months or less”

14 days  <  6 months
“clinical findings” that support prognosis can cite VSED

But many clinicians wait until day 3

Case 3

“89yr old patient . . . no longer mentally competent”

Now leave contemporaneous VSED

Advance directive for VSED later

Trickier & more controversial

Roadmap

Complexities of Choosing an End Game for Dementia

The New York Times

Meadow Brook

4/6/2017
1. What is it
2. Why do it
3. Legality
4. Practical tips
5. Challenges

This morning: both VSED & capacity at same time

Now, VSED when lack capacity

4 conditions

1

Complete AD, today

2

Direct VSED in future

future
When reach point you define as intolerable

You lack capacity at that time

Why do it

Benefits Burdens

Future Benefits Future Burdens

Advanced dementia

My Way Cards for Natural Dying™

Sort them now to obtain your personal NATURAL Dying—living will...to let others know EXACTLY what you will want. If the time comes when you are too sick to speak for yourself.
3 Legality

Can you leave VSED instructions in an AD?

Yes

Definitely acceptable
Definitely NOT acceptable
Unacceptable when combined with others

I cannot remember the important events of my life. If reminded, I don’t know why they are important. [1.2]

I have severe pain. But I cannot say what bothers me. Doctors don’t see my pain. They do not treat my pain. [2.6]

When I see people in my close family or see my best friends, I do not know who they are. [3.1]

Macbeth pic

Call ghosts from the deep

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 call for them?”

Henry IV Part I

Wordsworth Classics

William Shakespeare

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

But . . . will it be **honored**

65-76% of physicians whose patients **have** advance directives do not know they **exist**

Assume AD

Completed

Available

Prohibited

Unsure

Permitted

No specific permission for VSED

Sometimes, advance VSED is **prohibited**
Wis. Stat. 155.20
“A health care agent **may not consent** to the withholding or withdrawal of **orally** ingested nutrition or hydration . . .”

“Providing nutrition or hydration **orally** . . . is **not** health care”

NY Pub Health Code 2994-a

**Autonomy**

**Prospective autonomy**

No green (yet)

Some red

Legality in NC

Living will

HCPOA

Living will
HCPOA

No legal obstacle to NC agent authorizing VSED
Still “soft” obstacles
Be very specific on the when

Lessons from 2 recent cases

1

Margot Bentley

DIRECT THAT I BE ALLOWED TO DIE AND NOT BE KEPT ALIVE BY ARTIFICIAL MEANS OR “HEROIC MEASURES”.

B. NO NOURISHMENT OR LIQUIDS.

Probably meant this
Challenges

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.

Legal status of incapacitated objection?

Conclusion

NC may authorize later VSED when lack capacity.

But may “unintentionally” revoke.

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 2.5 million direct visits. Plus, it is redistributed through WestlawNext, Bioethics.net, and others.

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