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 withdrawing or withholding life-sustaining treatments, on the other hand

Definition
VSED

Physiologically able to take food & fluid by mouth
Voluntary, deliberate decision to stop
**Intent:** death from dehydration

**Legal concerns**

**Legal analysis**

**Uncertainty & reluctance among providers**

**Prohibited**

**Unsure**

**Permitted**

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

Providers still ask

neglected in academic & policy circles
Is VSED legal?  Is VSED illegal?  Wrong questions

Law is rarely binary  Risk assessment  Measure Mitigate

Legal analysis  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 . . .”

Right to refuse medical

Vent

Dialysis

CPR

Antibiotics

Feed tube

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."
PAVSED
“Palliated and Assisted Voluntarily Stopping Eating and Drinking”

Highlights medical role in palliating symptoms
Highlights the direct care staff role in providing assistance

Medical b/c not “typical human”

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

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 . . . .”

Move now from legal bases, grounds for right

Force feeding is a battery

“It seems odd that your bodily integrity is [not] violated . . . by sticking a spoon in your mouth.”

Mohr v. Williams (Minn. 1905)
Responding to main objections

VSED is 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

4
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

**BUT**

Tag 242

Over-treatment just as risky as under-treatment
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?

2 No express permission

3 Sometimes prohibited

Autonomy

Autonomy

Prospective autonomy
Wis. Stat. 155.20
“A health care agent may not consent to the withholding or withdrawal of orally ingested nutrition or hydration . . .”

Minn. Stat. 145C.02
“Health care directive may include . . . health care instructions . . . appoint . . . agent to make health care decisions.”

Minn. Stat. 145C.01(4)
“Health care means any care, treatment, service, or procedure to maintain . . . or otherwise affect . . . physical . . . condition.”

4 “Soft” hurdles

Be very specific on the when

Evidence
Unusual
Be very **specific** on the what

**Margot Bentley**

- DIRECT THAT I BE ALLOWED TO DIE AND NOT BE KEPT ALIVE BY ARTIFICIAL MEANS OR "HEARTIC MEASURES".
- DIRECT WHEN IT HAS STOPPED BEATING.
- NO NOURISHMENT OR LIQUIDS.

**PART 2: INSTRUCTIONS FOR HEALTH CARE**

2. 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 choices I have made herein:

1. I choose NOT to Forcing LIFE. IF I initil this line, I do not want my LD to be prolonged and I do not want life-sustaining treatment to be provided or continued if any of the following conditions apply:

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

**PART 2: POWER OF ATTORNEY FOR HEALTH CARE**

I revoke all prior advance health care directives and durable power 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.

My name and address are:

Mary B. Hart, 31 Arnold Drive, Reno, CA 96165.
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

Margot Bentley
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.

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Fri, Apr 3, 2015 at 8:42 PM

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.


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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