

**Top 10 Legal Developments in Law and Public Health**

**Withholding/Withdrawing Life Sustaining Medical Treatment, Aid-In-Dying**

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**No Conflicts**

- No financial conflicts to disclose

**Topics**

- **Withholding & Withdrawal of Life-Sustaining Medical Treatment**
  - Decision making for incapacitated
  - Resuscitation, DNR, POLST
- **(Medical) Aid in Dying/Physician Assisted Suicide**

**Dying in America: IOM Report 2014**

- **We still don't do end-of-life well**
- **We need:**
  - Palliative care
  - Better communication
  - Better education
  - Better advance care planning
  - Better alignment of financial incentives
  - Greater transparency and accountability
  - Better public engagement
  - **[not necessarily better laws]**
    - advance directives, pre-hosp. DNR, POLST have shout-outs;
    - **futility & PAS noted as issues**

– Institute of Medicine. Dying in America: Improving Quality and Honoring Individual Preferences Near the End of Life. 2014  
<http://www.iom.edu/Reports/2014/Dying-in-America-Improving-Quality-and-Honoring-Individual-Preferences-Near-the-End-of-Life.aspx>

**Limitation of Treatment:  
The Consensus**

- **Right to refuse any intervention**
  - Ventilators, feeding tubes, blood products
    - Bartling (Cal.App. 1984), Bouvia (Cal.App. 1986)
    - Wons (Fla. 1989), Fosmire (N.Y.1990)
- **All patients have right, even incapacitated**
  - Quinlan (N.J. 1976), Cruzan (U.S. 1990)
- **Withholding / withdrawing**
  - **not homicide or suicide**
    - Barber (Cal.App. 1983), Cruzan (U.S. 1990)
  - **orders to do so are valid**
    - Dinnerstein (Mass. 1978)
  - **Courts need not be involved**

– [Barber A. The consensus about ordering life-sustaining treatment: its status and prospects. Kennedy Institute of Ethics Journal. 1997;7:309-324.](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3557094/)

**Greater % of patients dying  
Out of Hospital**

- Lower likelihood of dying in an acute care hospital, an increase and then stabilization of intensive care unit use during the last month of life, and an increase and then decline in health care transitions during the last 3 days of life
- 2015 compared with 2000
- **Among Medicare fee-for-service beneficiaries who died**
  - Teno JM, Gozalo P, Trivedi AN, Bunker J, Lima J, Ogarek J, Mor V. Site of Death, Place of Care, and Health Care Transitions Among US Medicare Beneficiaries, 2000-2015. JAMA 2016;320(3):264-271.

## Advance Directives – Now

Outcomes of Surrogate Decision Making before Death

- Patients who had prepared advance directives received care that was strongly associated with their preferences
  - 3746 subjects who died from Health and Retirement Study adults<sub>≥60</sub> yo
  - 42.5% required decision making
    - 70.3% lacked decision making capacity
      - 67.6% had advance directives
  - 83.2% of subjects who requested limited care and
  - 97.1% who requested comfort care received care consistent with their preferences
    - 5/10 (50%) of subjects who requested all care possible received it, but the group was far more likely to receive aggressive care
      - Silveira MJ, Kim SYH, Langa KM. N Engl J Med 2010;362:1211-1218.

## Advance Directives ~ 1/3 of US Adults

- 36.7% had completed an advance directive,
  - including 29.3% with living wills.
  - Proportions were similar across the years reviewed.
  - Review of studies published in the period 2011–16
    - proportion of US adults with a completed living will, health care power of attorney, or both.
  - 795,909 people in 150 studies analyzed
    - Similar proportions - chronic illnesses (38.2%) and healthy adults (32.7%) had completed ADs.
      - Yadav KN, Gabler NB, Cooney E, Kent S, Kim J, Herbst N, Mante A, Halpern SD, Courtwright KR. Approximately One In Three US Adults Completes Any Type Of Advance Directive For End-Of-Life Care Health Aff July 2017 vol. 36 no. 7 1244-1251.

## Advance Directives 2018

- Oregon – values section added; notary can take place of 2 witnesses
  - [https://healthcare.oregon.gov/shiba/Documents/advance\\_directive\\_form.pdf](https://healthcare.oregon.gov/shiba/Documents/advance_directive_form.pdf)
- Washington – notary option

## California ADs & Organ Donation

- California advance directive form amendment for organ donation
- “I authorize my agent to consent to any temporary medical procedure necessary solely to evaluate and/or maintain my organs, tissues, and/or parts for purposes of donation.”
- [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180AB3211](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB3211)
  - Cal. AB-3211 Advance health care directives

## Nora Harris - VSED

- Nora Harris, Ashland OR woman with Alzheimer's x 10 yrs.
  - not taking food, spoon feeding started
  - Husband said wife's advance directive stated didn't want life prolonged
  - filed suit to stop spoon-feeding
- State ombudsman's office
  - not assisting by spoon feeding would be a violation of state law
- Judge refused to order spoon-feeding stopped
  - Facilities must provide "assistance with eating (e.g., supervision of eating, cueing, or the use of special utensils)," according to Oregon Administrative Rules
  - Jackson County, OR, July 13, 2016.
    - <http://www.milltribune.com/news/20160918/ashland-woman-didnt-want-life-prolonged-but-state-says-she-must-be-spoon-fed/>
- Patient died Oct. 11, 2017
  - Alaccia J. Dementia Patient At Center of Spoon-Feeding Controversy Dies. Kaiser Health News. Oct 12, 2017.
  - <https://khn.org/news/dementia-patient-at-center-of-spoon-feeding-controversy-dies>

## Cardiopulmonary Resuscitation

- Indication: Reversible arrhythmia from cardiac or other cause
- Everyone (with few exceptions) assumed to be “full code” unless ordered otherwise.
- Some rhythms better than others: VF vs. PEA
- The sooner the response the better (EMS, Bystander CPR, AEDs)
  - BUT
- Not indicated for everyone in cardiac arrest
- Not wanted by everyone in cardiac arrest
- Overall CPR survival rates are WAY lower than most people think
  - Survival to discharge thought >75%
    - vs. actual 10.6%
  - Quatletto L, Puro A, Weatherhead J, Shaheen M, Chasse T, Whalen D, Jones J. Public knowledge and perceptions about cardiopulmonary resuscitation (CPR): Results of a multicenter survey. Am J Emerg Med. 2018. Online February 3, 2018. DOI: <https://doi.org/10.1016/j.ajem.2018.01.103>
  - Crist C. CPR survival rates are lower than most people think. Reuters Feb. 23, 2018
    - <https://www.reuters.com/article/health-cpr-survival-rates-are-lower-than-most-people-think/idUSKBN1U3Z66/>
- Solution in-hospital = DNR orders

## Resuscitation Duration Proposal

- Proposal to extend all out-of-hospital resuscitation to 35 minutes
- Each minute without CPR decreases survival
- Despite low success rates
  - 99.1% of all survivors achieved ROSC within 35 minutes
    - (99.2% of those with favorable neuro outcome)
      - Goto Y. Presentation, European Society of Cardiology Congress. Aug 30, 2015.
      - Eurekalert.org/pub\_releases/2015-08/esoc-cfo082815.php

## Emergency Physicians Err on the Side of Treatment (Even if Non-Beneficial)

- Hypothetical case of an end-stage lung cancer patient in pending respiratory failure
  - 94% = concluded intubation would not provide an overall survival benefit
- 68% = a discussion about goals of care is more time consuming than intubation (true, but...)
- 26% would intubate the patient even with a do-not-intubate (DNI) status if the family insisted,
  - (13%) of EPs if self-perceived adequate palliative care training
- 53 emergency physicians; 100% response rate
- To Intubate or Not to Intubate: Emergency Medicine Physicians' Perspective on Intubating Critically Ill, Terminal Cancer Patients. Kim K, Chakravarthy B, Anderson C, Liao S. *J Pain Symptom Manage.* 2017 Nov;54(5):654-660.

## POLST Paradigm

- Physician Orders on Life-sustaining Treatment
- Translation of patient wishes into portable pre-hospital physician orders
  - Resuscitation, Intubation, Artificial nutrition and hydration, Antibiotics, Dialysis
- Widespread adoption
  - Also known by different acronyms depending upon the state in which it has been adopted. New York Medical Orders for Life Sustaining Treatment (MOLST), North Carolina Medical Orders for Scope of Treatment (MOST), West Virginia and Idaho Physicians Orders for Scope of Treatment (POST), and Vermont Clinician Orders for Life-Sustaining Treatment (COLST).
    - Schmidt TA, Hickman SE, Tolle SW, Brooks HS. The physician orders for life-sustaining treatment (POLST) program: Oregon emergency medical technicians' practical experiences and attitudes. *J Am Geriatrics Soc.* 2004; 52:1430-1434.

## POLST & Outpatient EOL wishes

- Out-of-hospital & ED care generally concordant with patient wishes
  - 94% POLST DNR orders honored
  - 84% POLST Resuscitate orders honored
    - Vs. 60% if no POLST
      - Richardson DK, Fromme E, Zive D, Fu R, Newgard CD. Concordance of out-of-hospital and emergency department cardiac arrest resuscitation with documented end-of-life choices in Oregon. *Ann. Emerg. Med.* 2014;63:375-383.

## POLST & Out of Hospital Cardiac Arrest (OHCA)

- Oregon (= "Mature" POLST State)
- Oregon has 50% better survival rates of OHCA with CPR vs. national
  - (15.4% vs 10.6% survival to hospital discharge) with better cognitive outcomes
- Oregon has lower rate attempted resuscitation in nursing homes (6.2% vs. 10.6%)
- Note: Correlations, not proven cause and effect
  - CARES Summary Report. Demographics and Survival Characteristics of OHCA. April 14, 2016.

## POLST developments 2018

- VT COLST statute amended to permit out-of-state clinicians to complete and sign POLST forms for VT residents/patients
- Indiana POST Out of State recognized forms recognized
- Non-physician clinicians may complete/sign
  - IN POST- PAs, APNs
  - NY MOLST - NPs
- ACEP Endorsement of POLST 2018
  - AMENDED RESOLUTION 32(18): POLST Forms; ACEP

## Pediatric Palliative and End of Life Care Order

- Alabama statute authorizing portable DNR order for terminally ill minors
  - Pediatric Palliative and End of Life Care Order (PPEL)
  - Ala. HB194 (2018)

## Unwanted Treatment with Pacemaker

- 78 yo man with arrhythmias, confused; agent refused pacer
  - Health care power of attorney document stated “all measures were to be taken to preserve [patient’s] life.”
  - Ethics committee and physician agreed agent not acting in accord with patient’s instructions & pacer should be placed despite refusal
- Pacer implanted despite refusal
- Patient had cardiac arrest despite pacer; anoxic brain injury
- Pacer removed 2 days later;
  - Pt. transferred to LTC, died ~6 wks later
- Suit claims elder abuse, battery, fraudulent concealment
  - Trial Ct. – summary judgment for defendants
  - App. Ct. reverses; jury question
- Stewart v. Superior Court (San Bernadino Cty.), 224 Ca. Rptr. 3d 219 (Ct. App. 2017)

## Allegation: Failure to do CPR

- Patricia Smithmyer, RN charged in NY with misdemeanor willful violation of health laws and felony falsifying business records
  - Possible 4 year imprisonment
- Resident w/ COPD, Alzheimer’s, full code
- Alleged: Patient has resp. arrest while defendant (supervising RN) in room, did not provide or direct others to provide; patient died
- Alleged: false written statement that did not witness resp. arrest
  - Kingston Nurse Charged With Failure To Give Life-saving Care To Nursing Home Resident; Patricia Smithmyer Charged With Falsifying Records; Faces Jail Time. NY Atty. Gen. Press Release. <http://www.ag.ny.gov/press-release/kingston-nurse-charged-failure-give-life-saving-care-nursing-home-resident>

## Aid in Dying/ Physician Assisted Suicide [AID/PAS]

- Physician Assisted Death
- Physician Assisted Aid-in-Dying [AID]
- Medical Assistance in Dying [MAID]
- Death with Dignity [DWD] Acts

## Professional Stances

- AAN (American Academy of Neurology)
  - Now neutral; Had opposed since 1998
    - Russell JA, Epstein LG, Bonnie RJ, Conwit R, Graf WD, Kirschen K, Kurek JA, Larriviere DG, Pascuzzi RM, Rizzo M, Sattin JA, Simmons Z, Taylor L, Tsou A, Williams MA. Lawful physician-hastened death. Neurology Feb 2018, 90 (9) 420-422
- AMA
  - Recommendation that the American Medical Association continue its long-standing opposition to the practice was met by the majority of delegates rejecting the recommendation and sending it back to the Council for Ethical and Judicial Affairs for further discussion
    - Bever L. American Medical Association to keep reviewing its opposition to assisted death. Washington Post. June 11, 2018. Accessed July 16, 2018.
    - <https://www.washingtonpost.com/news/to-your-health/wp/2018/06/11/american-medical-association-to-keep-reviewing-its-opposition-to-assisted-death/?hpid=hp-top-stories%3Ahomepage%2Fstory&hpid=hp-top-stories%3Ahomepage%2Fstory>

## Oregon et al statutory provisions

- Terminal condition
- Adults
  - With decision making capacity
  - Able to take medication
- Resident of State
- Waiting periods for request & Rx & fill
- Reporting requirements

## Physician Assisted Death: Oregon DWDA Experience

- 20 year experience (1998-2017)
  - 1,275 deaths (#0.3% of deaths)
- Top reasons
  - Loss of autonomy (91%)
  - Loss of activities enjoyed (90%)
  - Loss of dignity (76%)
  - Loss of bodily functions (46%)
  - Burden for family, friends, caregivers (44%)
  - Pain (26%), finances (4%), not out of state
    - Oregon Death with Dignity Act. Data Summary 2017. Oregon DHS. February 9, 2018
      - <https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathWithDignityAct/Documents/year20.pdf>

## Washington DWDA Experience

- 9 year experience (2009-2017)
  - 1,350 deaths after ingestion
- Top reasons (2009-2016)
  - Loss of autonomy (90/100/87/91/91/89/84/87/90%)
  - Loss of activities enjoyed (87/91/89/89/94/84/84/87%)
  - Loss of dignity (64/82/79/79/79/67/65/73%)
  - Loss of bodily functions (52/41/-/-/52/51/46/43/51%)
  - Burden for family, friends, caregivers (28/23/-/-/61/59/58/51/56%)
  - Inadequate pain control or concern (36/25/-/-/36/41/35/40/38%)
  - Not finances (-/-/-/13/8/10/8/12%)
    - Characteristics and end-of-life care of DWDA patients who died after ingesting a lethal dose of medication by year, Washington, 2009-2017. Washington DOH 2018.
      - <https://www.doh.wa.gov/Portals/1/Documents/Pubs/422-109-DeathWithDignityAct2017.pdf>

## Vermont reporting biennially started in 2018

- The Vermont Statutes Online Title 18 : Health Chapter 113 : Patient Choice At End Of Life § 5293. Reporting requirements
- (a) ... Except as otherwise required by law, information regarding compliance shall be confidential and shall be exempt from public inspection and copying under the Public Records Act.
- (b) Beginning in 2018, the Department of Health shall generate and make available to the public a biennial statistical report of the information collected pursuant to subsection (a) of this section, as long as releasing the information complies with the federal Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191. (Added 2015, No. 27, § 2, eff. May 20, 2015.)

## Calif. Physicians sue to prevent Calif. EOLOA

- Doctors in Riverside CA challenged EOLOA
  - Violates DP & EP by arbitrarily labeling patients as terminally ill.
    - "It is nearly impossible for doctors to accurately predict how long a seriously ill person may live..."
  - Also, motion for preliminary injunction to suspend [Calif DWDA] while the lawsuit proceeds
  - Ottolia, J. denied request b/c harm to terminally ill patients
  - But also dismissed challenge to plaintiff's standing, allowing suit to proceed to trial
    - Ahn et al (incl. American Academy of Medical Ethics [AAME]) v. Hestrin, Calif. Superior Ct. (Riverside) Case No. RIC 1607135
    - [http://www.nytimes.com/2018/08/28/us/california-judge-rejects-request-to-suspend-assisted-suicide-law.html?ref=collection/%2Fsection/collection/%2Fhealth&action=click&openCollection=health&region=stream&modulestream\\_unit=story&site=localtop&partner=4&type=section&id=4](http://www.nytimes.com/2018/08/28/us/california-judge-rejects-request-to-suspend-assisted-suicide-law.html?ref=collection/%2Fsection/collection/%2Fhealth&action=click&openCollection=health&region=stream&modulestream_unit=story&site=localtop&partner=4&type=section&id=4)
    - <http://www.dailymail.co.uk/wires/reuters/article-3760451/Judge-refuses-suspend-Calif-law-allowing-physician-assisted-suicide.html>

## California EOLOA Temporary Reinstatement

- May 24, 2018 ruled legislation unconstitutional on procedural issue invalidating the EOLOA
- Calif. App. Ct. suspended & stayed this judgment, reinstated EOLOA
- Ahn et al (incl. American Academy of Medical Ethics [AAME]) v. Hestrin, Calif. Superior Ct. (Riverside) Case No. RIC 1607135
- Cal. Ct. App. (4<sup>th</sup> Dist. 2<sup>nd</sup> Div.) 2018
  - <https://www.compassionandchoices.org/wp-content/uploads/2018/06/Order-Slay-GRANT-Ed-11-1.pdf>

## District of Columbia

- District of Columbia
  - B21-0038 Death with Dignity Act 2015 passed DC Council 11-2
  - U.S. House Resolution to overturn, H.J. Res. 2, passed out of House Oversight and Government Reform (OGR),
    - but failed to be voted upon by full House
  - Law was passed Subject to Appropriations
    - H.R. 3354 budget bill passed with an amendment by U.S. Rep. Andy Harris to repeal D.C.'s Death with Dignity Act
    - Also H.Con.Res.80 – Expressing the sense of the Congress that assisted suicide (sometimes referred to as death with dignity, end-of-life options, aid-in-dying, or similar phrases) puts everyone, including those most vulnerable, at risk of deadly harm and undermines the integrity of the health care system.
      - Introduced by Rep. Brad Wenstrup (Ohio) and cosponsored by Reps. Luis Correa (Calif.) and Juan Vargas (Calif.); House - 09/29/2017 Referred to the Subcommittee on Health
  - Senate passed its version Oct. 19, 2017; reconciled
    - Compassion and Choices Newsletter, Washington DC Death with Dignity Act Takes Effect. <https://www.compassionandchoices.org/dc-festivals/>
    - D.C. Act 21-577, D.C Law L21-0182, 64 D.C. Reg 2691 (Mar. 17, 2017)

## Failed attempt to overturn DC

- (H.R. 3354)
- amendment by U.S. Rep. Andy Harris (MD) to repeal the D.C. Death with Dignity Act
- Excluded from final bill

## Hawai'i

- Our Care, Our Choice Act
- Enacted April 5, 2018; effective Jan. 1, 2019
- Like Oregon and others, except:
  - Waiting period between the first request and the prescription = 22 days
  - Required mental health screening before receiving a lethal prescription (may be by telemedicine evaluation)
- HB2739 HD1
- [https://www.capitol.hawaii.gov/measure\\_indiv.aspx?billtype=HB&billnumber=2739&year=2018](https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=2739&year=2018)

## Call for Uniform Reporting

Abbott JT, Glover JJ, Wynia MK. Accepting Professional Accountability: A Call For Uniform National Data Collection On Medical Aid-In-Dying. Health Affairs. Nov. 20, 2017 10.1377/hblog20171109.33370

## Aid-in-Dying Legislative Bills

- New York
  - A2383-A, New York Medical Aid in Dying Act
- Maine - ballot petition 2019
- Unsuccessful:
  - AK, AZ, CT, DE, IN, KS, MA, MI, MN, MO, NB, NJ, OK, PA, RI, TN, UT, WI

## New Statutory Prohibition 2018

- Utah – H.B. 86 (2018) manslaughter includes assisted suicide (and includes “practitioners”)
  - Amendment Utah Code Ann §76-5-20
  - [now 38 states with statutory prohibitions]

## Ohio

- No constitutional right to physician assisted suicide
  - *Distasio v. Mohr*, 2018 WL 827888, 208 U.S. Dist. LEXIS 2218 (S.D. Ohio Fe 12, 2018)
    - <https://www.casemine.com/judgement/us/5afaac404e1adc5433ab8813>
- Ohio Statute § 3795.04 Assisted suicide.
  - (A) Except as provided in section 3795.03 of the Revised Code [treatment re: palliative care, medical standards, health care agent] no person shall knowingly cause another person to commit or attempt to commit suicide...
  - (B) Whoever violates division (A) of this section is guilty of assisting suicide, a felony of the third degree.
  - Added by 131st General Assembly File No. TBD, HB 470, § 1, eff. 3/21/2017.

## **Final Exit Network v. Swanson 2018**

- **Federal 1st Amendment federal suit**
  - 18-cv-01025 D. Minn.
  - FEN “seeks a declaratory judgment that Minn. Stat. 609.215, subd. 1, ...violates its First Amendment protected rights ...”
    - prohibits FEN to “assist” another in suicide, when the critical element of “assistance” is met solely by ...First Amendment protected speech.