

# VSED Legal Issues

Thaddeus Mason Pope, JD, PhD, HEC-C  
Completed Life Initiative • Oct 21, 2021

1

VSED is  
legal

2

Sizable, settled,  
and stable  
**consensus**

3

**5** minutes  
to expand

4

**Roadmap**

5

**5** parts

6

On point  
precedent

1

7

Right refuse  
**medical**  
treatment

2

8

Right refuse  
**any** unwanted  
intervention

3

9

Medical  
profession  
**accepts** VSED

4

10

No sanctions  
imposed

5

11

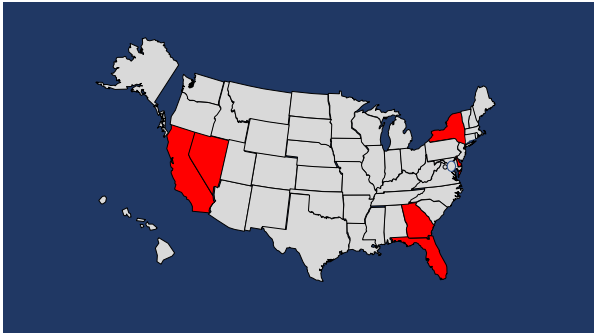
On-point  
precedent

1

12

**Multiple**  
appellate  
court decisions

13



14

**Same** in other  
common law  
countries

15

**SUPREME COURT OF SOUTH AUSTRALIA**  
(Applications Under Various Acts or Rules: Application)

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment. The onus remains on any person using material in the judgment to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court in which it was generated.

**H LTD v J & ANOR**

[2010] SASC 176

Judgment of The Honourable Justice Kourakis

15 June 2010

16

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Citation: *Bentley v. Maplewood Seniors Care Society*,  
2014 BCSC 165

Date: 20140203  
Docket: S135854  
Registry: Vancouver

Between: **Margaret Anne Bentley,  
by her Litigation Guardian Katherine Hammond,  
John Bentley and Katherine Hammod**  
Petitioners

17

Is VSED legal?  
**Asked &  
answered**

18

Right to refuse  
medical  
treatment

2

19

**No need** for  
direct, explicit  
authority

20

**already** legal  
**existing** rules

21

Right to  
refuse  
treatment

22

Ventilator  
Dialysis  
CPR  
Antibiotics  
Feed tube

23

Right to  
refuse  
treatment

VSED

24

Not DIY

25

Part of a broader  
**treatment** plan

26

**Supervised** by  
licensed healthcare  
professionals

27

**Recognized** as  
healthcare by  
medical profession

28

**More** position  
statements

29

**More** clinical  
practice  
guidelines

30

**BUT**

31

**Right to  
refuse  
treatment** **VSED**

32

Oral N&H =  
“treatment”

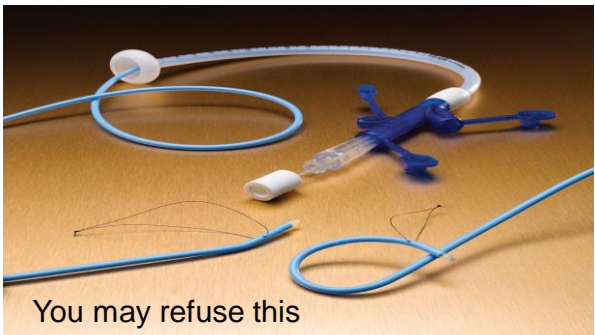
33

Oral N&H  $\neq$   
“treatment”

34

**Basic  
care**

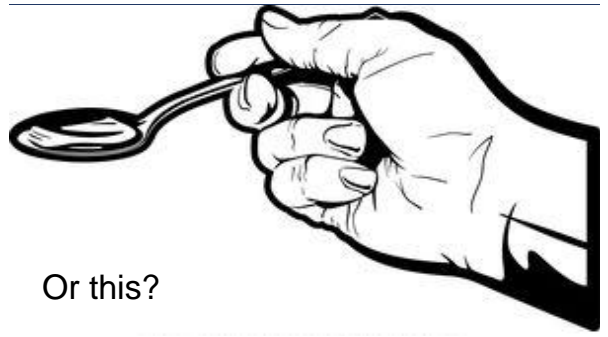
35



36



37



38

Yes

39

Right to refuse ANY intervention 3

40

Does **not** matter whether food & fluid by mouth is “**medical treatment**”

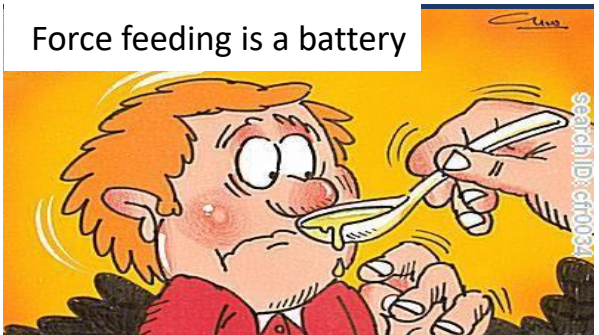
41

Right to refuse **any** intervention (medical **or not**)

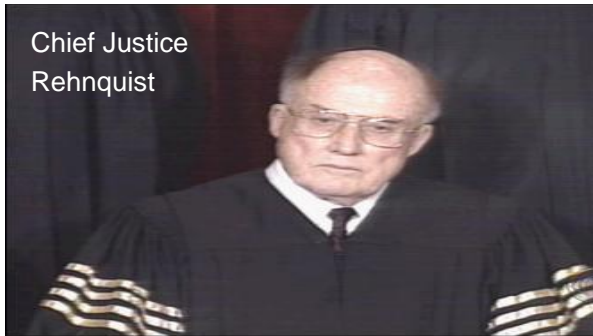
42

Right to refuse  
**any**  
**unwanted** contact

43



44



45

“bodily integrity is violated . . . by sticking a **spoon in your mouth** . . . sticking a needle in your arm”

46

Medical profession accepts VSED 4

47

Law **delegates & defers** to healthcare professionals

48



When medical profession says it is appropriate → law often **follows**

49

POSITION STATEMENT



Nutrition and Hydration at the End of Life

Effective Date: 2017  
Status: Revised Position Statement  
Written by: ANA Center for Ethics and Human Rights  
Adopted by: ANA Board of Directors

50



51



52

Position Paper



Ethical Aspects of Artificially Administered Nutrition and Hydration: An ASPEN Position Paper

Denise Baird Schwartz, MS, RD<sup>1</sup>; Albert Barrocas, MD<sup>2</sup>

Nutrition in Clinical Practice  
Volume 0 Number 0  
January 2021 1-14  
© 2021 American Society for Parenteral and Enteral Nutrition  
DOI: 10.1002/ncp.10633  
wileyonlinelibrary.com



53

No sanctions

5

54

### Appendix E Personal Narratives

Earlier in this book, we presented nine original, never-before-published cases. We included four VSED cases in Chapter 1 and one more in Chapter 2. We included four SED by AD cases in Chapter 7. But we are not alone. Many individuals have written about their experience or their family member's experience with either VSED or SED by AD. This Appendix includes citations and links to these personal narratives. These are grouped into four sections: (1) books, (2) articles, (3) video and audio recordings, and (4) collections of cases.

#### I. Books

Brewer, Colin O. 2019. *Let Me Not Get Alzheimer's, Sweet Heaven: Why Many People*

55

Used &  
reported

56

No liability  
No HC licensing  
board discipline

57

Recap

58

VSED is  
legal

59

Sizable, settled,  
and stable  
**consensus**

60

**SED by AD**

61

In contrast to VSED  
variability &  
uncertainty

62

**7** minutes  
to expand

63

**Roadmap**

64

**4** parts

65

**Growth**  
dementia  
directives

1

66

**(3) types  
AD laws**

2

67

**Alternative  
options**

3

68

**Tips for  
Success**

4

69

**Growth  
dementia  
directives**

1

70



**Complete AD, today**

71



72

At **point**  
Pt specifies

73



74

**A Piece of My Mind** [REDACTED]

**My Living Will**

**588** JAMA, February 28, 1996—Vol 275, No. 8

*I, William Arthur Hensel, being of sound mind, desire that my life not be prolonged by extraordinary means if my condition is determined to be terminal and incurable. I am aware and understand that this writing authorizes a physician to withhold or discontinue extraordinary means.*

basic of comfort and nutritional care. Even a detailed living will that includes the refusal of all active treatments such as cardiopulmonary resuscitation, antibiotics, artificial nutrition, and hydration may be inadequate in such a situation. I do not want to become a vacant-looking body, reflexively swallowing food and water placed in my mouth, my soul frozen inside while my life

75

Last 4 years

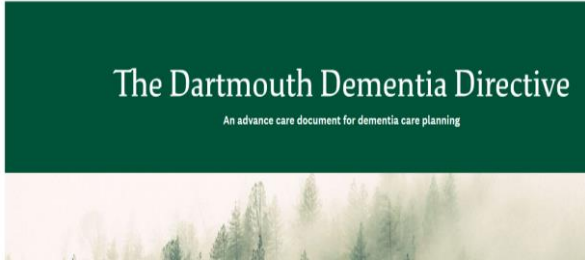
76

**ABOUT THE ADVANCE DIRECTIVE FOR RECEIVING ORAL FOOD AND FLUIDS IN DEMENTIA**

77

Your life. Your death. Your choice.


78



79

**Dementia Provision  
Advance Directive Addendum**



 The following document can be added to any advance directive to provide guidance regarding consent to or refusal of certain therapies. Once completed, signed and witnessed, it should be kept with the advance directive.

80



81



**Introduction to our Supplemental  
Advance Directive  
For Dementia**

82

NEVADA ADVANCE DIRECTIVE FOR ADULTS WITH DEMENTIA  
PAGE 7 OF 10

**PART 2. END-OF-LIFE DECISIONS ADDENDUM STATEMENT OF DESIRES.**

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

83



84



NEVADA ADVANCE DIRECTIVE FOR ADULTS WITH DEMENTIA  
PAGE 7 OF 10

PART 2. END-OF-LIFE DECISIONS ADDENDUM STATEMENT OF DESIRES.

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

91



92

“health care”  
“personal  
circumstances”

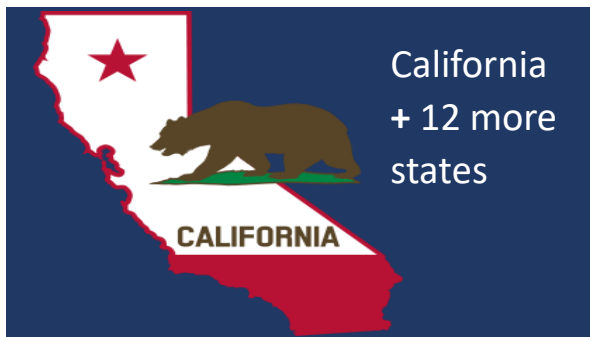
Vermont § 9702(a)(12)

93

“services to assist  
in activities of  
daily living”

Vermont §§ 9702(a)(5), 9701(12)

94



95



96





97



98

“living will ... control ... **health care** treatment decisions”  
 36-3201(10) 36-3261

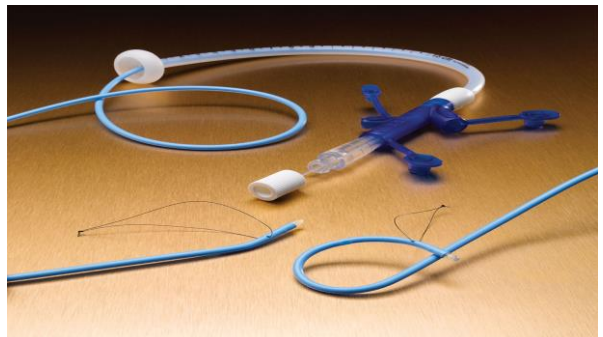
99

“agent entitled ... make **health care** decisions”  
 36-3223

100

What is health care?

101



102



103



104



105



106



107



108

# Out-of-state AD for SED

109



110

NEVADA ADVANCE DIRECTIVE FOR ADULTS WITH DEMENTIA  
PAGE 7 OF 10

PART 2. END-OF-LIFE DECISIONS ADDENDUM STATEMENT OF  
DESIRES.

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

111



112

**“valid in this state**  
if ... valid in the place  
where ... adopted ...”  
36-3208

113

universal

114

One more  
option

115

Your  
AD law

SED  
by AD

?

116

That's  
okay

117

Following AD  
law **optional**

118

**Non**-statutory  
AD for SED

119

**4** sources  
of rights

120

~~State statute~~

Federal constitution

State constitution

Common law

121

In re GUARDIANSHIP OF Estelle  
M. BROWNING.

STATE of Florida, Petitioner,  
v.  
Doris F. HERBERT, etc., Respondent.  
No. 74174.  
Supreme Court of Florida.  
Sept. 13, 1990.

Luz E. LOZADA TIRADO, Andrea  
Hernández Lozada et al., Respondents  
v.  
Roberto Tirado FLECHA and the  
Christian Congregation of Jehovah's  
Witnesses of Puerto Rico, Inc., Petitioners.

En El Tribunal Supremo De Puerto Rico.  
No. CC-2006-94.  
Jan. 27, 2010.

122

BUT

123

Providers **prefer**  
ADs that comply  
with AD law

124

Recap

125



126

SED by AD

New

127

Little guidance  
courts, regulators

128

Few institutional  
policies &  
procedures

129



130

1 “regular”  
AD

131

2 show  
capacity  
at sign

132

# 3 clear on what

133

# Be specific

134

- Oral food & fluids
- Nutrition & hydration by mouth
- Hand- feeding
- Spoon- feeding
- Normal feeding

135

# Be clear on what you want

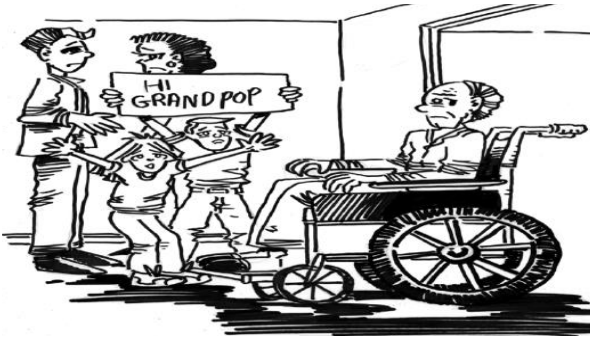
136

# 4 clear on when

137



138



139



140

5 how  
**measure**  
when

141

6 clear on  
where

142

7 clear on  
why

143

8 show  
understand

144



9 Ulysses clause

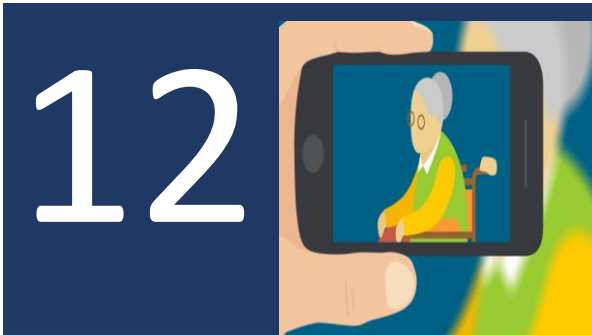
145

10 discuss agent

146

11 copies & registry

147



148

Thank you  
@ThaddeusPope  
www.thaddeuspope.com

149

**Thaddeus Mason Pope, JD, PhD, HEC-C**  
Mitchell Hamline School of Law  
875 Summit Avenue  
Saint Paul, Minnesota 55105  
T 651-695-7661  
C 310-270-3618  
E Thaddeus.Pope@mitchellhamline.edu  
W www.thaddeuspope.com  
B medicalfutility.blogspot.com

150