

## 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

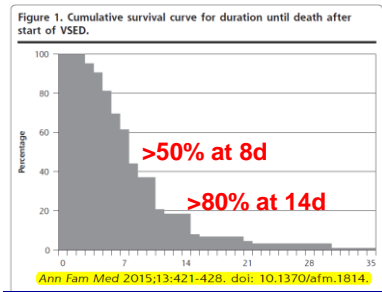
## Definition VSED

# 3

Physiologically  
**able** to take food  
& fluid by mouth

Voluntary,  
**deliberate**  
decision to stop

**Intent:** death from dehydration



Legal concerns  
Legal analysis

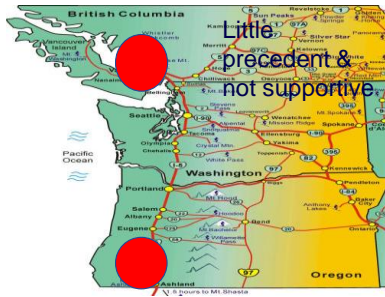
Legal concerns

Uncertainty & reluctance among providers



RCWA specifically & expressly prohibits lots of things  
**Not** VSED

**BUT**  
Absence of a red light **not** good enough



No red lights  
No green lights  
**Lack** of clarity & guidance



Providers still ask

Is VSED  
legal?

Is VSED  
illegal?

Wrong  
questions



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

2

Advance  
directive for  
VSED **later**  
(when lack capacity)

Patient with  
capacity  
requests  
VSED **now**

Extremely  
**low** risk

of sanctions – criminal, civil, regulatory

4

Right to refuse  
**medical**  
interventions

Right to refuse  
**non**-medical  
interventions

**Not** assisted  
suicide

**Not** elder  
neglect

1

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, 1988.

Right to  
refuse  
medical

Vent  
Dialysis  
CPR  
Antibiotics  
Feed tube

Vent  
Dialysis  
CPR  
Antibiotics  
Feed tube

VSED



Vent  
Dialysis  
CPR  
Antibiotics  
Feed tube

ICD

Vent  
Dialysis  
CPR  
Antibiotics  
Feed tube

VSED

Not DTC  
Not DIY



Contrast  
VSED

Part of a broader  
**treatment** plan  
  
**Supervised** by  
licensed healthcare  
professionals

vavv kumg

Caring for people who consciously choose not to eat and drink so as to hasten the end of life

How To Make Your Own Inert Gas Hood Kit

2014

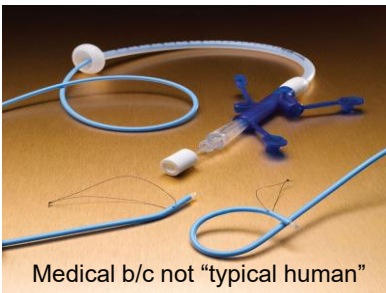
"the number of cases will increase. Since the concept of fasting is not taught in medical schools, we will produce a guide to support doctors."

COLLÈGE DES MÉDECINS  
DU QUÉBEC



**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



**2**

**treatment**

**unwanted**

Does **not** matter  
 whether food &  
 fluid are “medical  
 treatment”



“The common law right to be free from **bodily invasion** is an alternative basis ...”

89 Wash.2d 114  
 In the Matter of the WELFARE OF  
 Bertha COLYER,  
 No. 48521-6,  
 Supreme Court of Washington,  
 ED. BARR,  
 March 10, 1983.

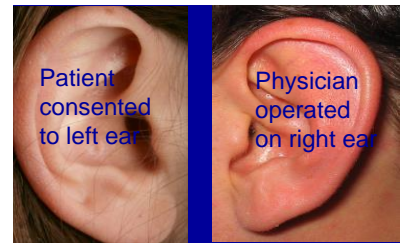
# Battery

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

3

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

527 results  
073 Deficiencies

Page 1 2 3 4 5 6 7 8 9 ... 15 16 Next

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.

Date	Ranking	Name	City	State	Def.	Severity Range	Deficiencies With "Dehydrate"
Sept 22, 2015	THE BRIGADIER AT CRENSHAW PARK (REPORT)	The Woodlands	Tex.	2	1-2	1	1
April 20, 2015	BRANGLIFF HEALTH CENTER (REPORT)	Tar	Tex.	2	1-2	1	1
Aug 1, 2013	KINGSD TRANSITIONAL CARE AND REHABILITATION ROOM (REPORT)	East Waltham	Tex.	4	1-2	1	1
Mar 10, 2015	DAY HILL SENIOR RESIDENTS	Waltham	Tex.	6	1-2	1	1

BUT



**Tag 242**

DEPARTMENT OF HEALTH & HUMAN SERVICES  
Centers for Medicare & Medicaid Services  
7500 Security Boulevard, Mail Stop S2-12-25  
Baltimore, Maryland 21244-1850

Center for Medicaid and State Operations/Survey and Certification Group

**Over-treatment** just as risky as under-treatment

SUPREME COURT OF GEORGIA

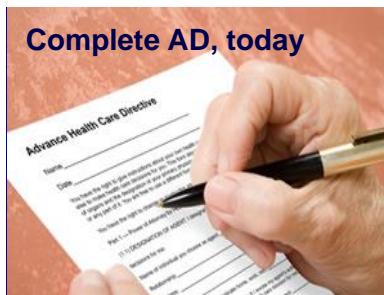
Bucilla Stephenson

Now leave  
contemporaneous  
VSED

Advance  
directive for  
VSED later

Trickier & more  
controversial

1 What  
is this



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



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

But will it be **honored**

**2** No express permission



**3** Sometimes prohibited

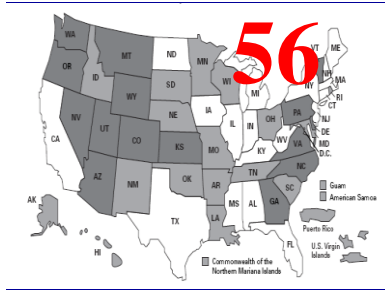


**Autonomy**



**Wis. Stat. 155.20**

“A health care agent **may not consent** to the withholding or withdrawal of **orally** ingested nutrition or hydration . . .”



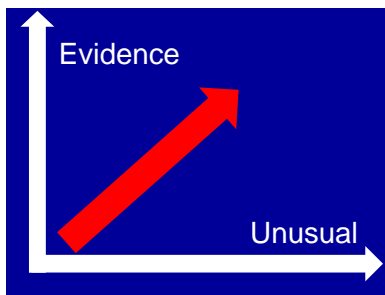
“Health care directive may include . . . **health care instructions** . . . appoint . . . agent to make **health care decisions**.”

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

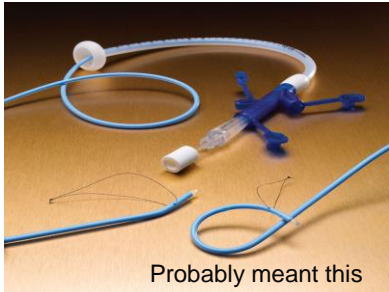


TO MY FAMILY, BY PHYSICIAN, BY LAWYER & ALL OTHERS WHOM I MAY CONSULT... I, Margot Bentley, do hereby certify that I am of sound mind and memory and I am not under any legal disability... IF AT SUCH A TIME THE SITUATION SHOULD ARISE THAT I AM NOT ABLE TO MAKE MY OWN DECISIONS... I DO AND THEY MEDICATION BE Meticulously ADMINISTERED TO ME TO ALLEVIATE SUFFERING EVEN THROUGH THEIR OWN SUFFERING BY SUFFERING LIFE... I MAKE THIS STATEMENT WITH CAREFUL CONSIDERATION BELIEVE... I HEREBY REQUEST ALL WHO FOLLOW THESE INSTRUCTIONS TO BE PROUD OF MY LOCAL LAWYERS IN PARTICULAR, I COMPLETELY OBTAIN THE FOLLOWING PROTECTIONS TO BE... READ ELECTRICAL OR MECHANICAL REBURSTATION OF MY... NO HUMAN INTERVENTION BEING... IN PARTICULAR, I HEREBY REQUEST THAT I AM NO LONGER... BE BURIED IN MY HOME... WITNESSES: John Bentley DATE: 10/14/15 SIGNED: Margot Bentley DATE: 10/14/15 WITNESS: John Bentley DATE: 10/14/15

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



PART 1: 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:  
Not 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)  
18 N.Y.S.3d 487, 2015 N.Y. Slip Op. 07359  
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



Margot  
Bentley



Risk ~ 0

~~Risk = 0~~



Phyllis Shacter <psshacter@comcast.net> Fri, Apr 3, 2016 at 8:42 PM  
 To: "Pope, Thaddeus M." <ppope1@hamline.edu>  
 Cc: Erin Crisman Glass <ecrisman@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.



Selected  
References

**Medical Futility Blog**

Since 2007, I have been blogging, almost daily, to [medicalfutility.blogspot.com](http://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, *Narrative Symposium: Patient, Family, and Clinician Experiences with Voluntarily Stopping Eating and Drinking (VSED)*, 6(2) NARRATIVE INQUIRY IN BIOETHICS 75-126 (2016).

T.M. Pope, *Prospective Autonomy and Dementia: Ulysses Contracts for VSED*, 12(3) JOURNAL OF BIOETHICAL INQUIRY 389-94 (2015).

T.M. Pope, *Legal Briefing: Voluntarily Stopping Eating and Drinking*, 25(1) JOURNAL OF CLINICAL ETHICS 68-80 (2014) (with Amanda West).

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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B medicalfutility.blogspot.com

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