Under-examined End-of-Life Option: Hastening Death by Voluntarily Stopping Eating and Drinking (VSED)

ICEL2 (Halifax NS), Sept. 15, 2017

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Mitchell Hamline Health Law Institute
More & more jurisdictions expanding EOL liberty
Most VISIBLE exit option

Medical aid in dying
MAID legal in 7 US states
MAID illegal in 49
BUT
Other exit options
VSED
Voluntarily Stopping Eating & Drinking
Define VSED
Physiologically able to take food & fluid by mouth
Voluntary, deliberate decision to stop
Intent: death from dehydration
Bad rap
Peaceful
Comfortable
Nurses’ Experiences with Hospice Patients Who Refuse Food and Fluids to Hasten Death

>100 Oregon nurses cared for VSED patient
Most deaths:
“peaceful, with little suffering”
“opportunity for reflection, family interaction, and mourning”
Not for everyone
On My Own

Diane Rehm

“Clear, moving and completely honest, ... Diane Rehm has again found her voice, and, as she has always done, she speaks passionately and courageously about issues that concern us all.”

—The Washington Post
Preferred by many
Even though MAID available, “almost twice” chose VSED
Good
option
International Association for Hospice and Palliative Care Position Statement: Euthanasia and Physician-Assisted Suicide
Legal concerns
Clinician involvement is very important.
Uncertainty & reluctance
Prohibited
Unsure
Permitted
Almost never: express prohibition
No U.S. jurisdiction expressly prohibits VSED.
BUT

Absence of a red light

not good enough
Clinicians want express permission
No statutory permission
No judicial precedent
No red lights
No green lights

Lack of clarity &
guidance
neglected in academic & policy circles
Providers ask
Is VSED legal?
Is VSED illegal?
Wrong questions
Law is rarely binary
Risk assessment
Measure
Mitigate
2 case types
VSED now by patient with capacity
Advance directive for VSED later (when Pt lacks capacity)
VSED now, patient with capacity
Extremely low risk of sanctions – criminal, civil, regulatory
4 Arguments
1 Right to refuse medical measures
Well established

> 4 decades
Right to refuse medical
Unclear
Vent
Dialysis
CPR
Antibiotics
Feed tube
Not DIY
How To Make Your Own Inert Gas Hood Kit

By Derek Humphry

Contrast
VSED
Part of a broader treatment plan

Supervised by licensed healthcare professionals
PAVSED
Palliated & Assisted Voluntarily Stopping Eating and Drinking
Highlights medical role in palliating symptoms

Highlights the direct care staff role in providing assistance
Recognized as healthcare by medical profession
More position statements (e.g. ANA, IAHPC)
More clinical practice guidelines
Caring for people who consciously choose not to eat and drink so as to hasten the end of life
COLLÈGE DES MÉDECINS DU QUÉBEC
BUT
Barely established
ANH = medical treatment
Medical b/c not “typical human”
Implies
ONH is not medical
ONH = “treatment”
Right to refuse medical VSED
2 Right to refuse unwanted measures
Does not matter whether food & fluid is “medical treatment”
Right to refuse any intervention (medical or not)
Unwanted contact

Even if clinically beneficial
Battery
Patient consented to left ear

Physician operated on right ear

Mohr v. Williams (Minn. 1905)
Force feeding is a battery
“bodily integrity is violated . . . by sticking a spoon in your mouth . . . sticking a needle in your arm”
Move from legal bases, grounds for right
Respond to 2 main legal concerns
VSED is not assisted suicide
49 US jurisdictions

“Every person . . . aids, or advises, or encourages another to commit suicide, is guilty of a felony.”
Clinicians worry participation with VSED = assisting suicide
Prevalence of Formal Accusations of Murder and Euthanasia against Physicians

> 600 palliative care physicians
<table>
<thead>
<tr>
<th>Action that might be misperceived</th>
<th>Mean rating of risk</th>
<th>SD</th>
<th>Actual number of physicians who were accused based on this action</th>
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</thead>
<tbody>
<tr>
<td>Total sedation (the application of pharmacotherapy to induce a state of decreased or absent awareness [unconsciousness] in order to reduce the burden of otherwise intractable suffering)</td>
<td>4.1</td>
<td>1.1</td>
<td>2</td>
</tr>
<tr>
<td>Stopping artificially delivered nutrition/hydration</td>
<td>3.6</td>
<td>1.1</td>
<td>0</td>
</tr>
<tr>
<td>Stopping oral nutrition/hydration in a patient who can eat/drink when requested by the patient</td>
<td><strong>3.3</strong></td>
<td>1.2</td>
<td>0</td>
</tr>
<tr>
<td>Use of palliative and sedative medications in the process of discontinuing mechanical ventilation</td>
<td>3.2</td>
<td>1.3</td>
<td>6</td>
</tr>
<tr>
<td>Stopping dialysis</td>
<td>3.1</td>
<td>1.2</td>
<td>0</td>
</tr>
<tr>
<td>Use of barbiturates for symptom treatment</td>
<td>2.9</td>
<td>1.1</td>
<td>2</td>
</tr>
<tr>
<td>Use of opiates for symptom treatment</td>
<td>2.8</td>
<td>1.2</td>
<td>13</td>
</tr>
<tr>
<td>Use of benzodiazepines for symptom treatment</td>
<td>2.3</td>
<td>1.0</td>
<td>1</td>
</tr>
<tr>
<td>Other</td>
<td>N/A</td>
<td>N/A</td>
<td>6</td>
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BUT
VSED ≠ AS
Active  Passive
AS statutes
target active
conduct
Normally:

“Providing the physical means by which the other person commits . . . suicide”
VSED entails only passive conduct
Plus
Even if otherwise within scope

Exception
“Nothing . . . prohibit or preclude . . . prescribing . . . administering, . . . purpose of diminishing . . . pain or discomfort”
Everything clinician does in VSED expressly exempted from AS statute
0 cases
VSED is not abuse / 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
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.

<table>
<thead>
<tr>
<th>Date</th>
<th>Nursing Home</th>
<th>City</th>
<th>State</th>
<th>Def.</th>
<th>Severity Range</th>
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<tbody>
<tr>
<td>Sept. 22, 2015</td>
<td><strong>THE BROADMOOR AT CREEKSIDE PARK (REPORT)</strong></td>
<td>The Woodlands</td>
<td>Tex.</td>
<td>2</td>
<td>K to L</td>
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<td>April 28, 2015</td>
<td><strong>BRIARCLIFF HEALTH CENTER (REPORT)</strong></td>
<td>Tyler</td>
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<td><strong>KINDRED TRANSITIONAL CARE AND REHABILITATION-RIDGM (REPORT)</strong></td>
<td>Fort Worth</td>
<td>Tex.</td>
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<td>L</td>
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<tr>
<td>May 29, 2013</td>
<td><strong>PALMA REAL (REPORT)</strong></td>
<td>Methis</td>
<td>Tex.</td>
<td>3</td>
<td></td>
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</table>
BUT
I agree

I disagree
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
Conclusion
Risk ~ 0
Risk ≠ 0
Selected References
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 nearly 3 million direct visits. Plus, it is redistributed through WestlawNext, Bioethics.net, and others.

TM 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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