

No. 77359-9

MADSEN, J. (concurring)—I concur in the result reached by the lead opinion. However, I do not believe that the *Turner*¹ balancing test is necessary or appropriate in this case. Prisoners who are otherwise healthy have no right to refuse artificial means of nutrition and hydration in an effort to end their lives. Contrary to the inference of the dissent, Charles McNabb is not conducting a hunger strike—he is attempting to commit suicide. The extraordinary intervention in this case was initiated only when medical staff issued a written determination that McNabb’s health was threatened. McNabb has no right to starve himself to death by refusing sustenance while in the custody of the State—this is not a privacy right that citizens of the state hold or expect to hold.

I write separately to express my disagreement with the lead opinion’s premise that there is a right to refuse artificial means of nutrition and hydration on the part of individuals who do not suffer from a terminal or incurable illness or a severe and permanent mental and physical deterioration. Our precedent expressly states that “in the absence of countervailing state interests, a person has the right to

¹ *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

have life-sustaining treatment withheld where he or she (1) is in an advanced stage of a terminal and incurable illness, and (2) is suffering severe and permanent mental and physical deterioration.” *In re Guardianship of Grant*, 109 Wn.2d 545, 556, 747 P.2d 445 (1987).

Mr. McNabb’s privacy rights are not violated by the force-feeding at issue because he is not in an advanced stage of a terminal or incurable illness, nor does he suffer from a severe and permanent mental and physical deterioration. He therefore has no right to refuse life-sustaining treatment.

The State’s Natural Death Act, chapter 70.122 RCW, carries out the constitutional right. It provides that “adult persons have the fundamental right to control the decisions relating to the rendering of their own health care, including the decision to have life-sustaining treatment withheld or withdrawn *in instances of a terminal condition or permanent unconscious condition.*” RCW 70.122.010 (emphasis added). “Life-sustaining treatment” includes “artificially provided nutrition and hydration, to sustain . . . a vital function, which, when applied to a qualified patient, would serve only to prolong the process of dying.” RCW 70.122.020(5). “Terminal condition” means “an incurable and irreversible condition . . . that, within reasonable medical judgment, will cause death within a reasonable period of time . . . and where the application of life-sustaining treatment serves only to prolong the process of dying.” RCW 70.122.020(9). Like this court’s cases addressing the constitutional right, the state statutes recognize

that the right to refuse nutrition and hydration exists only in the case of a terminal illness.

The lead opinion, however, expands the constitutional privacy right by granting to an otherwise healthy and competent individual the right to refuse nutrition and hydration, subject only to compelling state interests that might outweigh the right. Our cases hold that only when an individual is in an advanced stage of a terminable or incurable disease or is suffering from severe and permanent mental and physical deterioration does the individual have the constitutional right to refuse nutrition and hydration.

As explained, the Natural Death Act is to the same effect. RCW 70.122.010 addresses health care decisions, first stating the broad proposition that adults have the right to make decisions relating to their health care. It then identifies a subset of this category of decisions, i.e., decisions pertaining to life-sustaining treatment. The statute limits the decision-making right with respect to this subset of decisions because it expressly states that an adult has the right to make decisions relating to life-sustaining treatment “in instances of a terminal condition or permanent unconscious condition.” RCW 70.122.010. Not only does the statute fail to state or imply that healthy adults have the right to make decisions relating to termination of life-sustaining treatment, it affirmatively provides that only terminally ill or permanently unconscious adults have this right.

The lead opinion’s analysis conflicts with both the constitutional right as

this court has explained it and with the Natural Death Act, which implements the constitutional right.

Because it is clear that McNabb has no right to refuse force-feeding through involuntary nasogastric intubation, I concur with the lead opinion in result only.

AUTHOR:

Justice Barbara A. Madsen

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Charles W. Johnson

Justice Tom Chambers
