End of Life Options in Ohio: Legality of Hastening Death by Voluntarily Stopping Eating & Drinking (VSED)

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Objectives
While other states are expanding patient liberty at the end of life, Ohio recently strengthened its prohibition of assisted suicide. Nevertheless, Ohioans still have other options to hasten death when they find their lives intolerable. This presentation assesses the legality of one exit strategy: voluntarily stopping eating and drinking (VSED).

(131st General Assembly)
(Substitute House Bill Number 470)
effective March 21, 2017
AN ACT

“no person shall knowingly cause another person to commit or attempt to commit suicide”

“Whoever violates . . . is guilty of . . . felony of the third degree”

Medical aid in dying

Other states are expanding EOL liberty

Ohio is restricting end-of-life liberty
BUT Other exit options

Stop LSMT
Accelerate opioids
VSED / VRFF
Palliative sedation
PAD / MAID

Roadmap
Why hasten death
Other options
VSED

Why?

Physical or existential suffering

Physical suffering

Pain
Nausea
Dyspnea
Paralysis
Foul-smelling wounds
Existential suffering

- Psychic pain
- Loss of control
- Anxiety
- Delirium
- Hopelessness

Self-defined quality of life

Benefits

Burdens

Pt own assessment
Pt own values
Pt own preferences

Stop LSMT

Mostly well settled patient with capacity may refuse life-saving treatment contemporaneously

Mostly well settled patient without capacity may refuse life-saving treatment through advance instructions
Mostly well settled patient without capacity may refuse life-saving treatment through decision of authorized SDM.

ORC Chapter 2133
Modified Uniform Rights of the Terminally Ill Act

“the patient generally possesses the right not to consent, that is, to refuse treatment.”
Cruzan v. Missouri DOH (1990)

“Turning off”
Ventilator
CANH
Antibiotics

Nothing to “turn off”

Stop LSMT → legal option
But not practical

Definition
VSED

Physiologically able to take food & fluid by mouth
Voluntary, deliberate decision to stop

**Intent:** death from dehydration

**Peaceful Comfortable**

One third of 300 responding OR nurses cared for VSED patient

Even though MAID available, “almost twice” chose VSED

“opportunity for reflection, family interaction, and mourning”

Most deaths: “peaceful, with little suffering”
Legal concerns

Legal analysis

Legal concerns

Uncertainty & reluctance among providers

Prohibited

Unsure

Permitted

Almost never: express prohibition

ORCA specifically & expressly prohibits lots of things

Not VSED

BUT

Absence of a red light not good enough

Clinicians want express permission
No green light from Columbus

No green light anywhere

Ohio Mechanics Institute
1956-1962

Years later, fasting in a Syracuse nursing home to hasten death.

Nursing home sought a declaration of its rights and responsibilities.


Unpublished

Trial court opinion

>30 years old

No red lights

No green lights

Lack of clarity & guidance

neglected in academic & policy circles.
Providers still ask: Is VSED legal?

Is VSED illegal?
Wrong questions

Law is rarely binary

Health lawyer’s job
Risk assessment
Measure Mitigate
There are 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

3. Other considerations:
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 > 4 decades

Right to refuse medical

Vent
Dialysis
CPR
Antibiotics
Feed tube
Vent
Dialysis
CPR
Antibiotics
Feed tube

Unclear

Vent
Dialysis
CPR
Antibiotics
Feed tube

Not DTC
Not DIY

Contrast
VSED
Part of a broader treatment plan

Supervised by licensed healthcare professionals

"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."

Harvard CEC

"Palliated and Assisted Voluntarily Stopping Eating and Drinking"

Highlights medical role in palliating symptoms

Highlights the direct care staff role in providing assistance

Barely established ANH = medical treatment
Medical b/c not “typical human”

2 treatment

unwanted

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

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)

Patient consented to left ear.
Physician operated on right ear.

"It seems odd that your bodily integrity is [not] violated . . . by sticking a spoon in your mouth."

"Force feeding is a battery."

Move now from legal bases, grounds for right

Responding to main objections

3

VSED is not assisted suicide

Alleged risk
ORC 3795.04
“no person shall . . . cause another . . . commit suicide”

BUT

Active / Passive

“knowingly cause another person . . . to commit suicide by doing either of the following:"

“(1) Providing the physical means by which the other person commits . . . suicide”

“(2) Participating in a physical act by which the other person commits . . . suicide.”

“Except as provided in . . . 3795.03”

“Nothing in 3795.04 . . . shall prohibit or preclude a physician, . . . prescribing, dispensing, administering, . . . for the purpose of diminishing the patient's pain or discomfort . . .”

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

**BUT**

Over-treatment just as risky as under-treatment

**Tag 242**

**SUPREME COURT OF GEORGIA**

Bucilla Stephenson
Now leave contemporaneous VSED

Advance directive for VSED later

Trickier & more controversial

What is this

Complete AD, today

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
Glendower:
I can call spirits from the vasty deep.

Hotspur:
Why, so can I, or so can any man; But will they come when thou do call for them?

You can write anything you want in an AD
But will it be honored

2 No express permission

Wis. Stat. 155.20
“A health care agent may not consent to the withholding or withdrawal of orally ingested nutrition or hydration . . .”

3 Sometimes prohibited

Autonomy
Autonomy

Prospective autonomy

56

"Hydration" means fluids that are artificially or technologically administered.

"Nutrition" means sustenance that is artificially or technologically administered.

ORC 2133.01

State of Ohio
Health Care Power of Attorney

For: ____________________________

May refuse N&H – under some conditions

BUT

If no legal obstacle to Ohio agent authorizing VSED

Still “soft” obstacles
Evidence

Unusual

**Be very specific** on the **when**

**Be very specific** on the **what**

Margot Bentley

Probably meant this

Unusual
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

Legal status of incapacitated objection? 3
Risk ~ 0

Risk = 0

Ohioan with capacity may VSED today

Less clear if Ohioan may authorize later VSED when lack capacity

Selected References
Medical Futility Blog
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 over 2 million direct visits. Plus, it is redistributed through WestlawNext, Bioethics.net, and others.


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