

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

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of Law • March 21, 2017

Thaddeus Mason Pope, JD, PhD  
Mitchell Hamline School of Law

# Disclosures

I have **no conflicts**  
of interest or relevant  
financial interests.

# Objectives

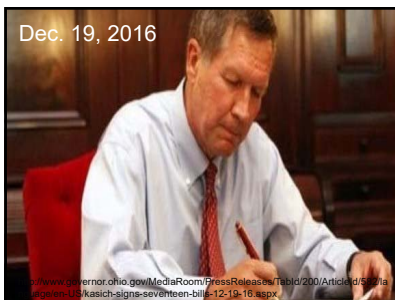
While other states are expanding patient liberty at the end of life, Ohio recently strengthened its prohibition of assisted suicide. Nevertheless, Ohioans still have other options to hasten death when they find their lives intolerable. This presentation assesses the legality of one exit strategy: voluntarily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

(131st General Assembly)  
(Substitute House Bill Number 470)

**effective March 21, 2017**

# AN ACT

Dec. 19, 2016



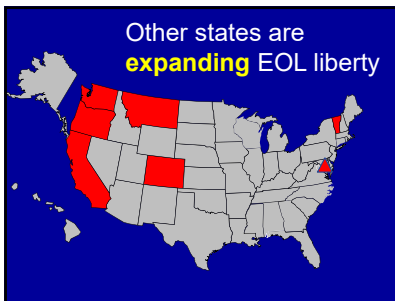
<http://www.governor.ohio.gov/MediaRoom/PressReleases/TabId/200/ArticleId/5701a/Itemid/110/kasich-signs-seventeen-bills-12-19-16.aspx>

“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**

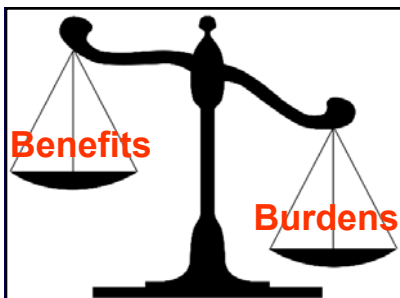
Pain  
Nausea  
Dyspnea  
Paralysis  
Foul-smelling wounds

# Existential suffering

Psychic pain  
Loss of control  
Anxiety  
Delirium  
Hopelessness



Advanced dementia



# Self-defined quality of life

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**

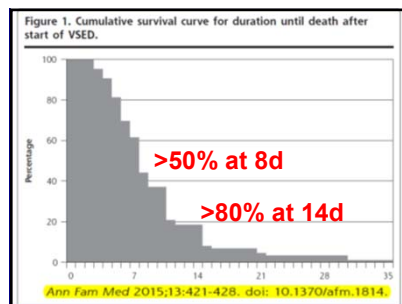
**Definition  
VSED**

**3**

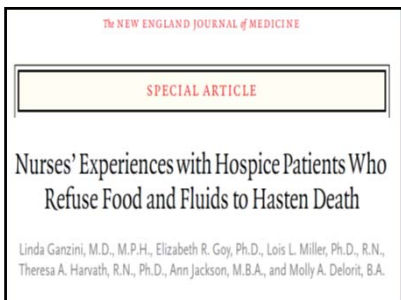
Physiologically  
**able** to take food  
& fluid by mouth

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

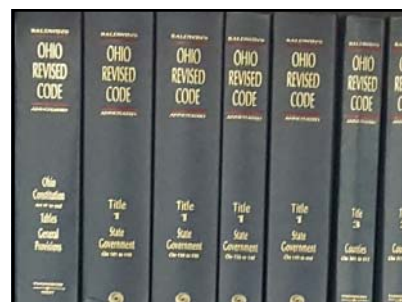
"opportunity for  
reflection, family  
interaction, and  
mourning"

Most deaths:  
"peaceful, with  
little suffering"

Legal concerns  
Legal analysis

Legal concerns

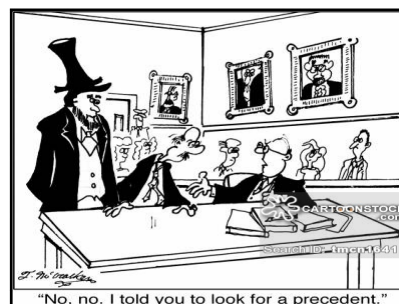
Uncertainty & reluctance among providers



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

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





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

Nursing home sought a declaration of its rights and responsibilities.

*Plaza Health and Rehabilitation Center v. Henninger* (N.Y. Sup. Ct., Syracuse Feb. 2, 1984).

Unpublished  
Trial court opinion  
>30 years old

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





Providers  
still ask

Is VSED  
legal?

Is VSED  
illegal?

Wrong  
questions



Health  
lawyer's  
job

Risk  
assessment

Measure  
Mitigate



**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  
> 4 decades

Right to  
refuse  
medical

Vent  
Dialysis  
CPR  
Antibiotics  
Feed tube

Vent  
Dialysis  
CPR  
Antibiotics  
Feed tube

VSED

Unclear



Vent  
Dialysis  
CPR  
Antibiotics  
Feed tube

ICD

Vent  
Dialysis  
CPR  
Antibiotics  
Feed tube

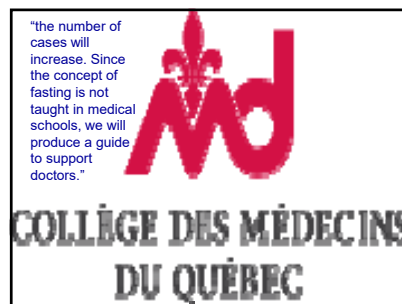
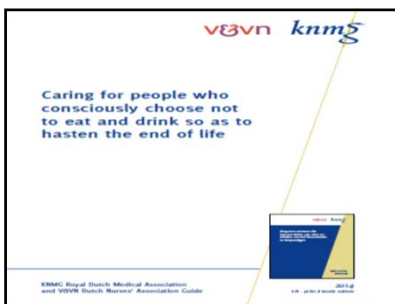
VSED

Not DTC  
Not DIY



Contrast  
VSED

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

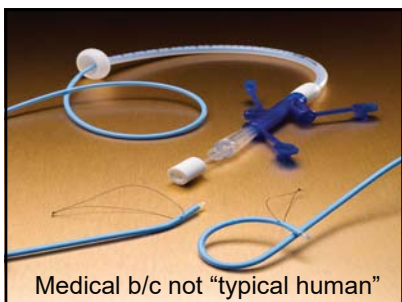


**PAVSED**  
"Palliated and Assisted Voluntarily Stopping Eating and Drinking"

**PAVSED**  
Highlights **medical role** in palliating symptoms  
Highlights the **direct care staff** role in providing assistance

**BUT**





2

treatment

unwanted

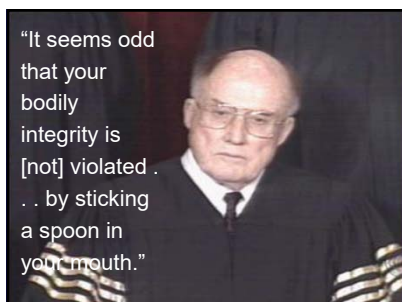
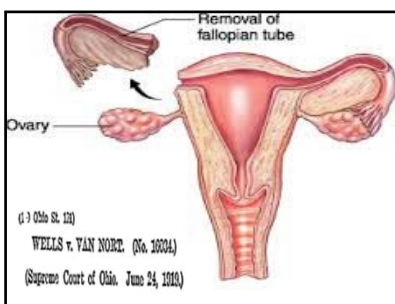
Does **not** matter whether food & fluid are "medical treatment"

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 . . . ."



**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

357 results  
1779 Deficiencies

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	Nursing Home	City	State	Def.	Severity Range	Deficiencies With "Dehydrate"
Sept 22, 2015	THE BROADHOOR AT CREEKVIEW PARK (REPORT)	The Woodlands	Tex.	2	1-2	0
April 26, 2015	BRIARCLIFF HEALTH CENTER (REPORT)	Tulsa	Tex.	2	1-2	0
Aug 7, 2015	KINDRED TRANSITIONAL CARE AND REHABILITATION-ROOM (REPORT)	Fair Work	Tex.	4	1-2	0

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

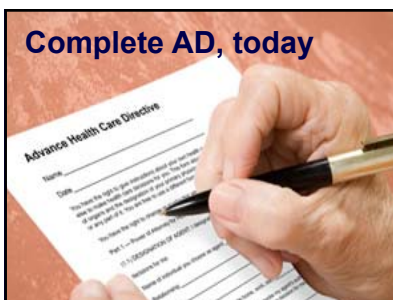


Now leave  
contemporaneous  
VSED

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

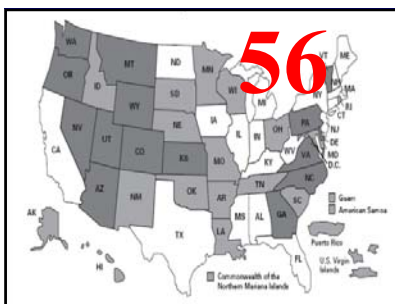


**3** Sometimes prohibited



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

**Autonomy**



State of Ohio  
 Health Care Power of Attorney  
 For: \_\_\_\_\_

May refuse  
 N&H –  
 under some  
 conditions

The seal of the Probate Court for Franklin County, Ohio, is located at the bottom right of the form. It features a circular design with a landscape scene and the text "PROBATE COURT" and "FRANKLIN COUNTY, OHIO".

**BUT**

“Hydration” means fluids that are **artificially or technologically** administered.”

“Nutrition” means sustenance that is **artificially or technologically** administered.

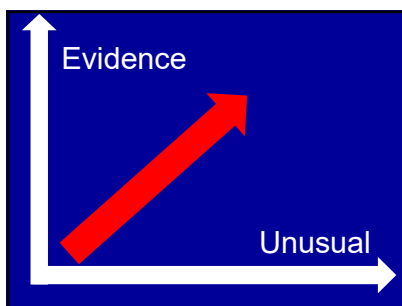
ORC 2133.01

If no legal obstacle to Ohio agent authorizing VSED

Still “soft” obstacles

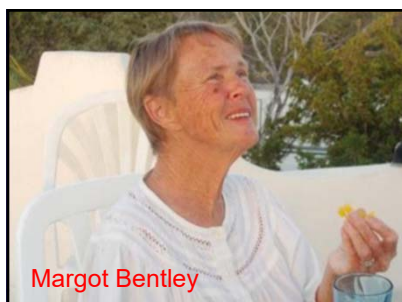
**1**





Be very **specific** on the when

Be very **specific** on the what



DIRECT THAT I BE ALLOWED TO DIE AND NOT BE KEPT ALIVE BY ARTIFICIAL MEANS OR "HEROIC MEASURES",  
 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.

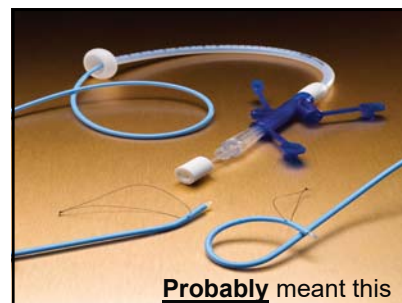
1.1 NAME AND ADDRESS OF PRINCIPAL. My name and address are:  
 \_\_\_\_\_  
 Nora R. Harris, 83 Arnold Drive, Novato, CA 94949

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**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:

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:



2

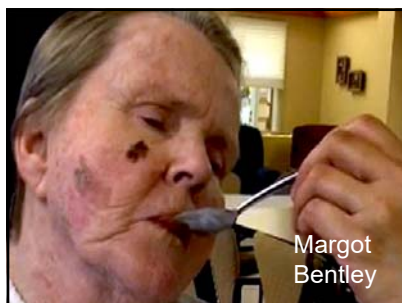
Do later requests for water **revoke** the AD?

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](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.

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### Thaddeus Mason Pope, JD, PhD

Director, Health Law Institute  
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](mailto:Thaddeus.Pope@mitchellhamline.edu)  
W [www.thaddeuspope.com](http://www.thaddeuspope.com)  
B [medicalfutility.blogspot.com](http://medicalfutility.blogspot.com)

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