

Legal Mechanisms to Resolve Futility Disputes

Thaddeus Mason Pope, J.D., Ph.D.

American Thoracic Society Conference
San Francisco May 23, 2012

1

Last resort

2

Consensus

Intractable

3

5%

of futility conflicts are intractable

4

Transfer

5

**Surrogate
Selection**

Concept

6



1. Follow directions
2. Substituted judgment
3. Best interests

Surrogate Selection

Cases

9

Surrogate	Advance directive
Go	Stop

10

Minnesota

2011

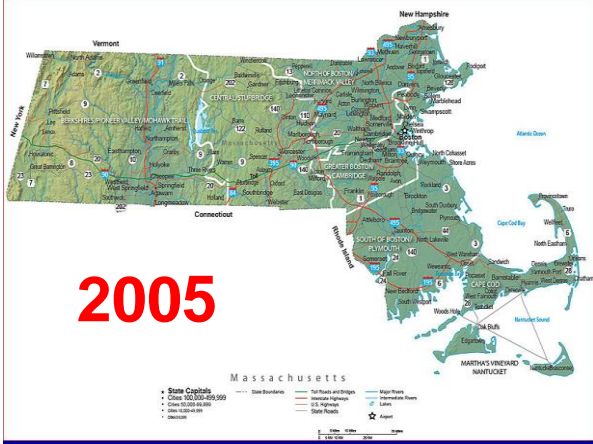
11

Albert Barnes













“Your own personal issues are impacting your decisions”

“Refocus your assessment”

19

Surrogate Selection

3 comments

20





Not just an
option
But a **duty**

USC
UNIVERSITY
HOSPITAL

USC University Hospital

More than a hospital. An academic medical center.

Cardoza v. USC
(Cal. App. 2008)

A collage of medical professionals in a clinical setting, including a surgeon in a mask and cap, a doctor with a stethoscope, and a woman smiling. The background features a computer monitor and a chest X-ray.

Surrogate Selection

Limitations

25

Good

??

Bad



Hassan Rasouli



Consent and Capacity Board

28





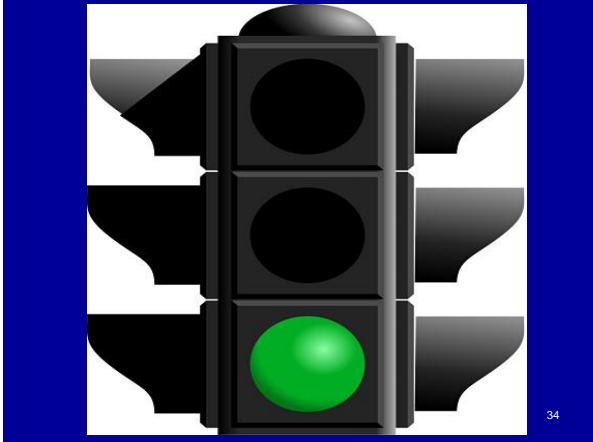
**Withhold or
withdraw
without
consent**

31



32

**Green
light**





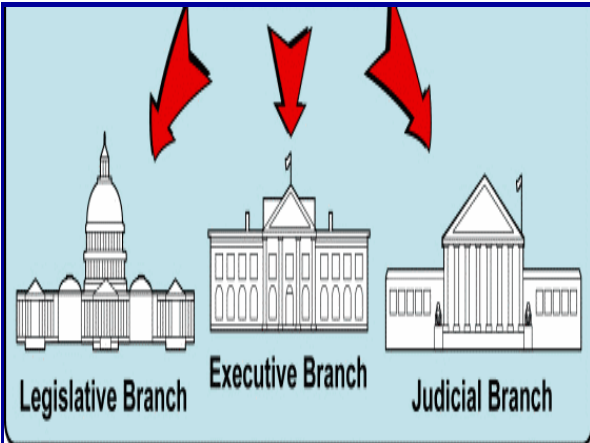
The Lone Star State

You may stop LSMT
for **any reason**

- with immunity
- if your HEC agrees

Tex. H&S 166.046





Resolution 505-08

TITLE: LEGAL SUPPORT FOR NONBENEFICIAL
TREATMENT DECISIONS

Author: H Hugh Vincent, MD;
William Andreck, MD

Introduced by: District 8 Delegation

Endorsed by: District 8 Delegation

CA

E

Reference Committee

October 4-6, 2008

WASHINGTON STATE MEDICAL ASSOCIATION
HOUSE OF DELEGATES

WA

Resolution: C-5
(A-09)

Subject: Legal Protection for Physicians When
Treatment is Considered Futile

Introduced by: King County Medical Society Delegation

Referred to: Reference Committee C

RESOLUTION 1 - 2004

[\(read about the action taken on this resolution\)](#)

WI

Subject: Futility of Care

Introduced by: Michael Katzoff, MD and the Medical Society of Milwaukee County

RESOLVED, That the Wisconsin Medical Society, concurrent with a recommendation of the American Medical Association, Medical Futility in End-of-Life Care policy E-2.037, supports the passage of state legislation which establishes a legally sanctioned extra-judicial process for resolving disputes regarding futile care, modeled after the Texas Advanced Directives Act of 1999.



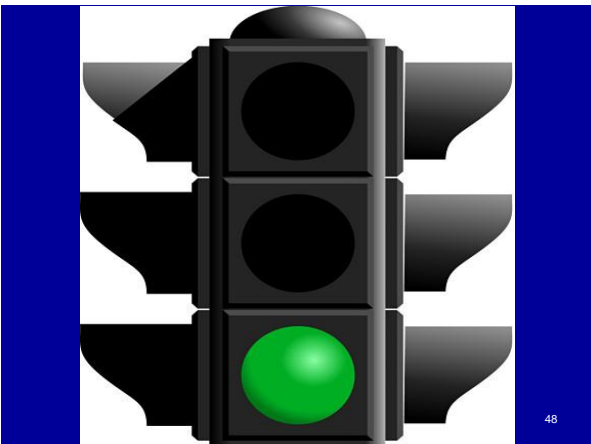








Conscience clauses



Traditional limitation

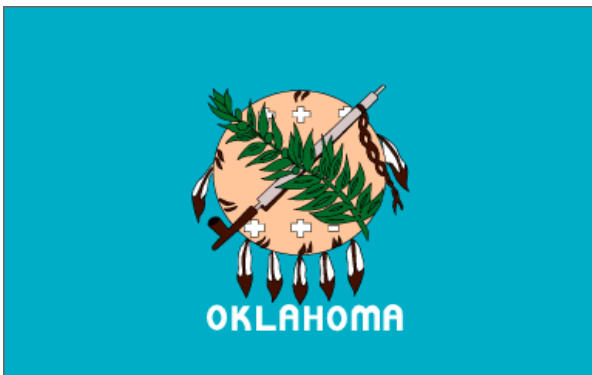
Treat until
transfer

49



Miss. Code § 41-107-3

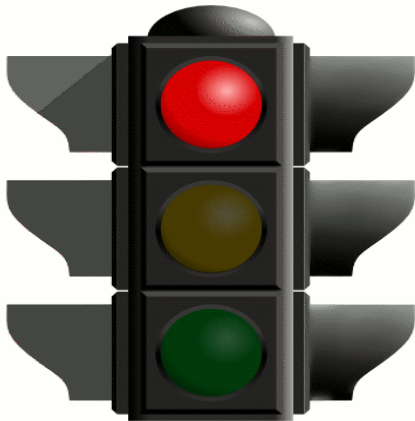
50



Okla. H.B. 2460

51

Red lights



53



SB 1348

effective
July 2012

54

Discrimination in Denial of Life-Preserving Treatment Act

55

“Health care . . . **may not be withdrawn or denied** if its provision is directed by . . . patient . . . directive . . ., or . . . surrogate”

56

“Futile care” exception

57

“ . . . death is **imminent** within hours or at most a few days whether or not . . . treatment is provided . . . ”

OR

“denial . . . will **not result** in or hasten . . . death.”

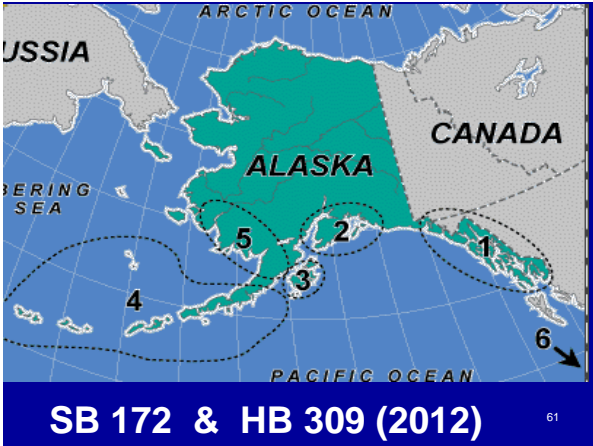
58

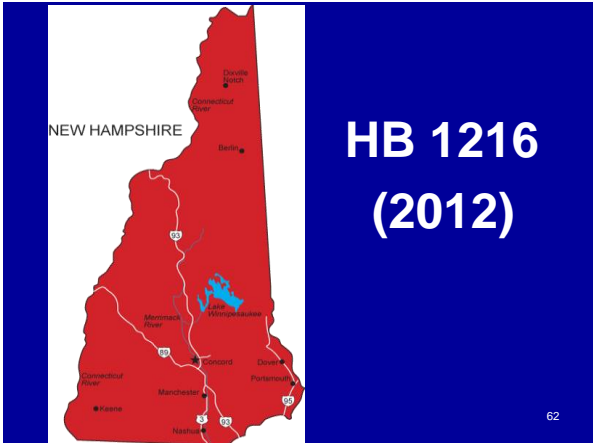




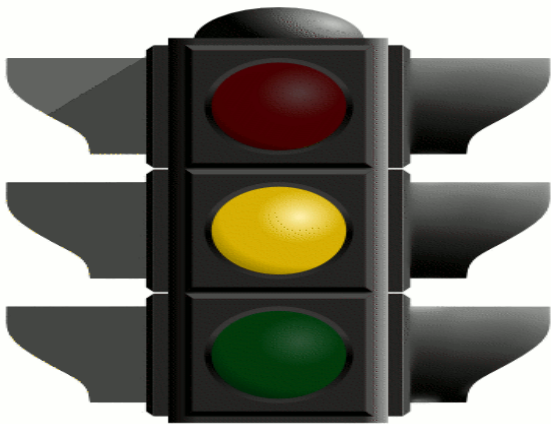
S.B. 1695 (2012)

60

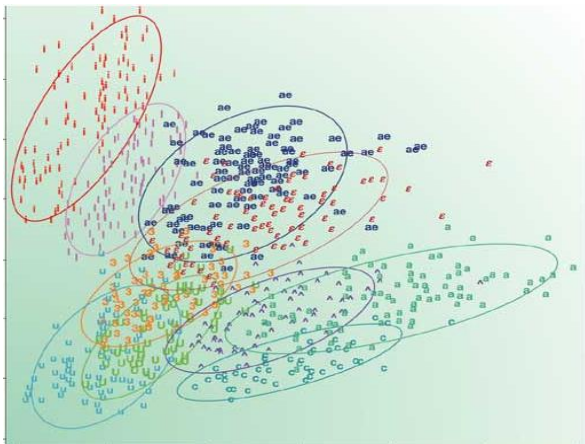




**Yellow
lights**



“**may decline** to comply . . .
medically inappropriate
health care . . .
contrary to generally
accepted health care
standards”



Providers **won**
almost every
ex post case

67

Risk > 0

68

Perceptions of “futile care” among caregivers in intensive care units

Robert Sibbald MSc, James Downar MD, Laura Hawryluck MD MSc

CMAJ 2007;177(10):1201-8

“ . . . follow the . . . SDMs
instead of doing what
they feel is appropriate, .
. . . **lack legal support.**”

69





Thaddeus Mason Pope
Associate Professor of Law
Hamline University School of Law
1536 Hewitt Avenue
Saint Paul, Minnesota 55104
T 651-523-2519
F 901-202-7549
E tpope01@hamline.edu
W www.thaddeuspope.com
B medicalfutility.blogspot.com

References

White DB & Pope TM, *The Courts, Futility, and the Ends of Medicine*, 307(2) JAMA 151-52 (2012).

Pope TM, *Physicians and Safe Harbor Legal Immunity*, 21(2) ANNALS HEALTH L. 121-35 (2012).

Pope TM, *Medical Futility*, in GUIDANCE FOR HEALTHCARE ETHICS COMMITTEES ch.13 (MD Hester & T Schonfeld eds., Cambridge University Press 2012).

73

Pope TM, *Review of LJ Schneiderman & NS Jecker, Wrong Medicine: Doctors, Patients, and Futile Treatment*, 12(1) AM. J. BIOETHICS 49-51 (2012).

Pope TM, *Responding to Requests for Non-Beneficial Treatment*, 5(1) MD-ADVISOR: A J FOR THE NJ MED COMMUNITY (Winter 2012) at 12-17.

Pope TM, *Legal Fundamentals of Surrogate Decision Making*, 141(4) CHEST 1074-81 (2012).

74

Pope TM, *Legal Briefing: Medically Futile and Non-Beneficial Treatment*, 22(3) J. CLINICAL ETHICS 277-96 (Fall 2011).

Pope TM, *Surrogate Selection: An Increasingly Viable, but Limited, Solution to Intractable Futility Disputes*, 3 ST. LOUIS U. J. HEALTH L. & POL'Y 183-252 (2010).

Pope TM, *Legal Briefing: Conscience Clauses and Conscientious Refusal*, 21(2) J. CLINICAL ETHICS 163-180 (2010).

75

Pope TM, *The Case of Samuel Golubchuk: The Dangers of Judicial Deference and Medical Self-Regulation*, 10(3) AM. J. BIOETHICS 59-61 (Mar. 2010).

Pope TM, *Restricting CPR to Patients Who Provide Informed Consent Will Not Permit Physicians to Unilaterally Refuse Requested CPR*, 10(1) AM. J. BIOETHICS 82-83 (Jan. 2010).

Pope TM, *Legal Briefing: Medical Futility and Assisted Suicide*, 20(3) J. CLINICAL ETHICS 274-86 (2009).

76

Pope TM, *Involuntary Passive Euthanasia in U.S. Courts: Reassessing the Judicial Treatment of Medical Futility Cases*, 9 MARQUETTE ELDER'S ADVISOR 229-68 (2008).

Pope TM, *Medical Futility Statutes: No Safe Harbor to Unilaterally Stop Life-Sustaining Treatment*, 75 TENN. L. REV. 1-81 (2007).

Pope TM, *Mediation at the End-of-Life: Getting Beyond the Limits of the Talking Cure*, 23 OHIO ST. J. ON DISP. RESOL. 143-94 (2007).

77
