



## CHAPTER 6: MENTAL HEALTH ADVANCE DIRECTIVES

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People with mental illness have the same rights as people without mental illness. This includes the right to consent to or refuse health care treatment, including mental health treatment. Mental illness may render people incapable of making mental health treatment decisions at some point in their lives. At these times of crisis, in particular, mental health treatment decisions -- such as the choice of hospital and types of medications -- are critical, but the individual is unable to make his wishes known.

Since 2005, Pennsylvania has authorized individuals to make mental health advance directives. Mental health advance directives are documents that allow people with mental illness to make mental health treatment choices in advance and to have those decisions implemented in the event they later lose capacity to make treatment decisions. Mental health advance directives allow individuals to take responsibility for their treatment and to assure that their treatment decisions will be respected, thus encouraging individuals to seek treatment.

Mental health advance directives do not affect the provisions of Pennsylvania's Mental Health Procedures Act (MHPA) relating to voluntary and involuntary commitment. Thus, an individual who has a mental health advance directive is subject to involuntary commitment if he meets the standards of the MHPA. Mental health advance directives, however, will affect how the individual can be treated after he or she is committed and at other times when the individual lacks capacity to make mental health treatment decisions.

## **I. TYPES OF MENTAL HEALTH ADVANCE DIRECTIVES**

Pennsylvania law recognizes two types of mental health advance directives: (1) a declaration, and (2) a power of attorney. Pennsylvania also allows individuals to make a combined mental health declaration and power of attorney. This allows the individual to make definitive decisions about some treatment issues, while leaving other issues to the discretion of his or her appointed agent.

### **A. Declarations**

A mental health declaration delineates the person's preferences with respect to specific types of treatment. For instance, the declaration can state:

- The name of the facility or facilities where the individual would prefer to be treated in the event involuntary commitment is necessary and the names of any facilities where he or she prefers not to receive treatment. This decision cannot be legally binding because it is possible that there will not be an open bed at the preferred facility, because insurance will not cover the preferred facility, or because the individual is not near the preferred facility at the time of crisis. The individual's physician thus has the authority to place the individual in a facility that is contrary to his or her stated preference.
- Whether the individual consents to the administration of any medications. The declaration can identify any specific medications to which the individual does not consent. In doing so, the individual should explain in the declaration why the medication is refused, such

as due to particular side effects, health risks, or because it has been tried and was not effective. It is important to explain the reasons for the refusal of particular medications so that the physician can select appropriate alternative medications that do not risk those side effects. The declaration also can identify which, if any, medications the individual specifically consents to receive and any limitations on that consent. Just because an individual consents to a specific medication, however, does not mean that it will be prescribed. The treating physician or psychiatrist will prescribe the medication only if it is clinically appropriate.

- Whether the individual authorizes electroconvulsive therapy.
- Whether the individual authorizes participation in experimental studies, including drug trials.
- Types of interventions that the individual prefers in the event of a crisis.
- Limitations on the release or disclosures of mental health records.

In the declaration, it is important for the individual to identify treatment that is effective. Mental health declarations also can include information about the individual's mental health history and describe activities that help or worsen symptoms. Declarations also can identify the person nominated by the individual to serve as his or her guardian should guardianship be pursued and determined by a court to be appropriate.

Beyond mental health issues, mental health declarations can also include instructions about dietary requirements, religious preferences, who should have temporary custody of children or care for pets, and who should be notified. These preferences, though, are not generally legally binding. Dietary requirements based on medical conditions or religious beliefs may be binding. Individuals cannot authorize psychosurgery or termination of parental rights through their mental health advance directives.

Since a declaration delineates precise instructions about treatment choices, it does not afford much flexibility. If an individual wants to make precise decisions about some but not all treatment choices, he or she can use a combined declaration and power of attorney that designates another individual to make those mental health treatment decisions for the individual if he or she is unable to do so and the matter is not covered by the declaration.

## **B. Powers of Attorney**

A mental health power of attorney, in contrast to a mental health declaration, requires the individual to appoint an agent who will make mental health treatment decisions in the event the person becomes incapacitated. The agent is authorized to make mental health treatment decisions for the individual once the power of attorney becomes effective. Although the power of attorney can, and usually should, provide guidance to the agent about the individual's preferences and may even impose limitations on the authority of the agent, it allows more flexibility in the decision-making process than a declaration.

In selecting an agent, the individual should make sure that it is someone he or she can trust to make the same mental health treatment decisions the individual would make for himself or herself. However, the individual's mental health treatment providers, such as doctors or their employees; certified peer specialists; ACT team members; case managers; or the owner, operator, or employee of a residential facility where the individual lives cannot be designated as the individual's agent. Before naming an agent, the individual should discuss with the proposed agent whether he or she is comfortable acting as the agent. The proposed agent should be aware that he or she is not liable for the costs of the individual's care and treatment. If the person agrees to be the agent, the individual and the agent should discuss the individual's feelings about different treatment options that the agent may be required to make. This will help to assure that the agent's decisions are the ones that will be most like those the individual would have made for himself or herself if he or she had capacity.

The mental health power of attorney can also identify one or more successor agents. These are individuals who will have authority to act as the agent in the event the initial agent is unable to act, withdraws, or is removed by a court. An agent may be removed by a court due to death, incapacity, failure to comply with the mental health power of attorney, physical assaults, threats of harm, coercion, or divorce (if the agent is the individual's spouse). If the spouse is the designated agent and either spouse files for divorce, the designation of the spouse as the agent will be considered to be revoked as of the time the action is filed unless the power of attorney makes clear that the designation was intended to continue notwithstanding a divorce action.

Beyond selecting an agent to make mental health treatment decisions, the mental health power of attorney can state:

- The name of the facility or facilities where the individual would prefer to be treated in the event involuntary commitment is necessary and the names of any facilities where he or she prefers not to receive treatment. Just as with a declaration, this decision cannot be legally binding because it is possible that there will not be an open bed at the preferred facility, because insurance will not cover the preferred facility, or because the individual is not near the preferred facility at the time of crisis. The individual's physician thus has the authority to place the individual in a facility that is contrary to his or her stated preference.
- Whether the individual authorizes the agent to consent to the administration of any medications. Even if medication is authorized, the individual can still identify specific medications for which the agent has no authority to consent. A statement that the individual consents to a particular medication does not mean that the medication will be administered. Medication will be prescribed by a physician only if it is clinically appropriate.
- Whether the agent is authorized to consent to electroconvulsive therapy.
- Whether the agent is authorized to consent to participation in experimental studies, including drug trials.

- Types of interventions that the individual prefers in the event of a crisis.
- Any limitations on the agent's authority to release or disclose the individual's mental health record.

In the absence of specific instructions, the agent will make mental health care decisions after consultation with the individual's treatment professionals and after consideration of the diagnosis, prognosis, acceptable treatment alternatives, and possible side effects of those various alternatives. The mental health agent has the right to request and examine the individual's mental health care information so that the agent can make informed decisions.

Like a declaration, a mental health power of attorney can also include a description of the individual's mental health history and activities that may help or worsen symptoms. The power of attorney also can identify the person who the individual nominates to act as his or her guardian in the event that guardianship is sought and determined by a court to be appropriate. Mental health powers of attorney cannot authorize an agent to consent to psychosurgery or to termination of the individual's parental rights.

Mental health powers of attorney can include instructions relating to dietary requirements, religious preferences, temporary custody of children or pets, and who the individual would like to be notified about his or her condition, although these preferences are generally not binding. Dietary requirements based on medical conditions or religious beliefs may be binding.



## **II. PREREQUISITES FOR MENTAL HEALTH ADVANCE DIRECTIVES**

To make a mental health advance directive, a person must: (1) be at least 18 years old or an emancipated minor; (2) not subject to a guardianship order; and (3) not currently subject to involuntary commitment under the MHPA. Unless the individual has a guardian or is under an involuntary commitment order, he or she is presumed to have capacity to make a mental health advance directive. It is, however, possible for someone else to challenge the person's capacity to make the advance directive at a later time. To prevent this from happening, the individual might include with the mental health advance directive a letter from his or her treating physician to confirm that the individual had capacity at the time he or she made the advance directive.

In addition, the mental health advance directive must be signed and dated by the individual and at least two witnesses. Notarization is not required. If the individual cannot physically sign the document, another person may sign (though the signer cannot also serve as a witness and cannot be one of the individual's mental health care providers). Witnesses must be at least 18 years old. Witnesses are only responsible to attest that the person signed the document. The witness is not responsible to determine whether the person had capacity to make a mental health advance directive.

## **III. WHEN MENTAL HEALTH ADVANCE DIRECTIVES TAKE EFFECT**

An individual can state in his mental health advance directive when he or she wants it to take effect. For instance, the directive can state that it will

take effect only if and when the person has been involuntarily committed. Alternatively, and more commonly, mental health advance directives are drafted to take effect when it is determined that the individual does not have capacity to make mental health treatment decisions. Lack of capacity is determined by the evaluation of the individual by two mental health care professionals, at least one of whom is a psychiatrist.

Mental health advance directives cannot take effect if people do not know that they exist. Thus, it is important for the individual to give copies of the directive to the person who would be called in an emergency, his or her mental health providers, treating physicians, the designated mental health agent, and family members or other people he or she would want to be notified. The individual should maintain the original in a safe place, but should tell other trusted people where it is located so that it can be retrieved in the event of a crisis and given to the attending physician.

Individuals can also carry cards in their wallets that state they have a mental health advance directive and that provide contact information for people to call in the event the individual becomes incapacitated to make mental health treatment decisions.

#### **IV. COMPLIANCE WITH MENTAL HEALTH ADVANCE DIRECTIVES**

Once a mental health advance directive becomes effective, a provider must follow the instructions in the declaration or the directions of the appointed agent. The only exceptions are: (1) if the provider cannot comply with the instructions in good conscience because they are contrary to accepted clinical or medical practice; (2) if the provider's policies do not allow

compliance (e.g., because the treatment is not covered by the individual's insurance); or (3) if the treatment is physically unavailable.

If a provider cannot comply with the mental health directive for one of the reasons stated above, the provider must notify the individual if he or she is competent, his or her designated mental health agent, and any court-appointed guardian. In addition, the provider must make every reasonable effort to transfer the individual to another provider who can comply with his or her wishes stated in the mental health advance directive. While a transfer is pending, the provider must treat the individual in accordance with his or her mental health advance directive to the extent possible. If reasonable efforts to transfer fail, the provider can discharge the individual.

## **V. DURATION OF MENTAL HEALTH ADVANCE DIRECTIVES**

A mental health advance directive is valid for two years from the date the individual signs it. If the individual does not have capacity to make treatment decisions at the time his or her mental health advance directive would terminate, the directive will remain valid until the individual is able to make treatment decisions.

The mental health advance directive can terminate before the two-year period ends if: (1) the individual revokes the document; or (2) the individual makes a new mental health advance directive. The individual can revoke the mental health advance directive, in whole or in part, unless he has been determined to lack capacity to make mental health decisions or he has been involuntarily committed under the MHPA. Even when an individual has

been involuntarily committed, however, he or she still may revoke the advance directive if a psychiatrist and another physician or mental health treatment professional examine him or her and determine that he or she is capable of making mental health treatment decisions. A revocation can be made orally or in writing, though it is preferable to do so in writing. It is effective as soon as the individual tells his or her physician or other mental health care provider.

An individual can also make changes to a mental health advance directive, without revoking it, at any time as long as he or she has capacity to do so. Any changes to the document must be signed, dated, and witnessed in the same way as the original document. Rather than amending the original document, it is preferable to create a new mental health directive (and revoke the prior one) to assure that the changes are clearly understood.

## **VI. IMPACT OF GUARDIANSHIP**

In some circumstances, guardianship may be sought for an individual whose mental illness makes him incapable to make decisions. An individual can help to assure that a guardian acts in his or her best interests by identifying in his or her mental health advance directive the person who he or she would like to act as his or her guardian if guardianship is necessary. The court will generally appoint the person nominated by the individual to act as his or her guardian unless there is a good reason not to do so.

The individual should consider nominating his or her mental health agent as the potential guardian so that one person makes all important decisions. If a

person other than the individual's mental health agent is appointed as his or her guardian, the court should still allow the agent to make mental health treatment decisions. If, however, the court authorizes the guardian to make mental health treatment decisions rather than the agent named in the individual's mental health advance directive, the guardian is still bound to make decisions in accordance with the instructions in the individual's mental health advance directive.

## **Contact Information**

If you need more information or need help, please contact Disability Rights Pennsylvania (DRP) at 800-692-7443 (voice) or 877-375-7139 (TDD). The email address is: [intake@disabilityrightspa.org](mailto:intake@disabilityrightspa.org).

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**PLEASE NOTE: For information in alternative formats or a language other than English, contact Disability Rights Pennsylvania at 800-692-7443, Ext. 400, TDD: 877-375-7139, or [intake@disabilityrightspa.org](mailto:intake@disabilityrightspa.org)**

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