

Guide for Agents

MENTAL HEALTH ADVANCE DIRECTIVES

INSTRUCTIONS AND RESPONSIBILITIES

I. INTRODUCTION

On January 29, 2005, Act 194 became effective. This new law promotes the creation of a Mental Health Advance Directive -- a tool for mental health consumers that focuses on wellness and recovery planning. Essentially it allows planning ahead for mental health services and supports needed in a crisis before an actual crisis.

The passage of this legislation is largely the result of collaboration between advocacy organizations, county governments, professional associations and the state government. Pennsylvania is pleased to join the national trend of promoting the use of this tool as a mental health policy.

An Advance Directive can include a Power of Attorney where an individual authorizes a designated mental health care agent to make treatment decisions on his/her behalf in the event of a mental health crisis. This guide, which outlines an agent's responsibilities, has been developed to assist you in serving as an individual's mental health care agent.

If you have additional questions, contact any one of the following organizations:

- Pennsylvania Mental Health Consumers' Association
1-800-88PMHCA
pmhca@pmhca.org
- Pennsylvania Protection & Advocacy / Disabilities Law Project
1-800-692-7443
717-236-8110
1-877-375-7139 (TDD/TTY)
- Mental Health Association in Pennsylvania
1-866-578-3659
717-346-0549
info@mhapa.org

II. FREQUENTLY ASKED QUESTIONS

What is a Mental Health Advance Directive?

A Mental Health Advance Directive is a document that allows a person to make preferences regarding mental health treatment in the event that the person is incapacitated by his/her mental illness. In effect, the person is giving or withholding consent to treatment in advance of when treatment is needed. This allows a person to make more informed decisions and to communicate his/her wishes more clearly. A new law was passed in Pennsylvania, effective January 28, 2005, that makes it possible for a person to make and enforce a Mental Health Care Advance Directive. Pennsylvania law allows for three types of Advance Directive: a Declaration, a Power of Attorney, or a combination of both. If a person chooses a Power of Attorney or a combination directive, the person must appoint an agent to act on their behalf.

What is a Declaration?

A Declaration, like the directive that forms the basis for a living will contains instructions to health care providers about the details of treatment in the event that an individual becomes incompetent or unable to communicate his/her wishes. They usually deal with specific situations and do not allow much flexibility for changes that come up after the document is written, such as a new type of medical crisis, new kinds of medication, or different treatment options.

What is a Mental Health Power of Attorney?

A directive that is a Mental Health Power of Attorney allows a person to designate someone else, called an agent, to make treatment decisions on his/her behalf in the event of a mental health crisis. The advantage of this type of directive is that it provides flexibility to deal with the situation as it occurs rather than attempting to anticipate every possible scenario. When using this type of directive it is very important to choose someone the person trusts as an agent. An attending doctor, his/her employee, an owner, operator, or employee of a residential facility where the person is receiving care may not serve as an agent.

What is a Combined Mental Health Declaration and Power of Attorney?

Pennsylvania's statute also allows a person to make a combined Mental Health Declaration and Power of Attorney. This Advance Directive option allows a person to make definite decisions about some things, but also allows the person to give certain powers to an agent. The person designates the decisions that he/she wants the agent to be able to make, and can limit the agent's power as little or as much as the person is comfortable with. This makes an Advance Directive more flexible in dealing with future situations, such as new treatment options, that the person would have no way of knowing about now.

What makes a Mental Health Care Advance Directive valid?

There is no specific form that must be used, but the document must meet the following requirements:

1. The person making the Advance Directive must be at least 18 years of age or an emancipated minor;
2. The person must not have been deemed incapacitated, such as by a guardianship proceeding or an involuntary commitment;
3. The document must be signed, witnessed and dated. Witnesses must be at least 18 years old. If the person cannot physically sign the document themselves, another person may sign on behalf of the person, but the person signing may not also be a witness;
4. Neither a provider nor an employee of the provider may be named as the agent unless they are also a blood relative;
5. And, the document must express preferences regarding the initiation, continuation, or refusal of mental health treatment. Other instructions may include, but are not limited to, designating an agent, nominating a guardian, temporary custody of children or pets, family notification, or dietary or religious preferences.

The Advance Directive is valid for two years from the date of execution unless one of the following happens first:

- a. The person revokes the entire Advance Directive, or
- b. The person makes a new Advance Directive.

If the person does not have capacity to make mental health care decisions at the time the Advance Directive will expire, the Advance Directive remains in force until the person regains capacity.

What is Capacity?

In this context, capacity is the basic ability to understand a diagnosis and to understand the significant risks, benefits, and alternative treatments of mental health care. It also includes the ability to understand the consequences of not receiving treatment.

Does the person have to provide proof of capacity?

No. Unless the person was adjudicated, incapacitated, had a guardian or was under an involuntary commitment at the time of the writing, the person is presumed to have had capacity when the Advance Directive was created.

Who will determine capacity to make mental health care decisions?

Incapacity will be determined by examination by a psychiatrist and one of the following: another psychiatrist, psychologist, family physician, attending physician, or mental health treatment professional. Whenever possible, one of the decision makers will be one of the person's actual treating professionals.

Can a person amend their Mental Health Care Advance Directive?

Yes. A person may make changes to a Mental Health Care Advance Directive in writing at any time, as long as he/she has capacity to make mental health care decisions. Changes must be executed and witnessed in the same way as the original document.

If a person is currently under an involuntary commitment and wishes to make changes, the person must have an evaluation for capacity to make mental health care decisions. The determination of capacity must be made by examination by a psychiatrist and one of the following: another psychiatrist, psychologist, family physician, attending physician, or mental health treatment professional. Whenever possible, one of the decision makers will be one of the person's actual treating professionals. If the person is found to have capacity, the person may make changes that are executed and witnessed in the same way the original document was.

Can a person cancel his/her Mental Health Advance Directive?

Yes. A person may revoke (or cancel) one or more instructions or the whole directive at any time, as long as he/she has capacity to make mental health care decisions. The revocation may be made either orally or in writing. It is effective as soon as the provider is notified. An Advance Directive will automatically terminate after two years from the date of execution unless the person does not have capacity to make mental health care decisions at the time it would expire. If the person does not have capacity to make mental health care decisions at the time it would expire, it will stay in force until he/she regains capacity.

If a person is currently under an involuntary commitment and wishes to revoke the Advance Directive, the person must have an evaluation for capacity to make mental health care decisions. The determination of capacity must be made by examination by a psychiatrist and one of the following: another psychiatrist, psychologist, family physician, attending physician, or mental health treatment professional. Whenever possible, one of the decision makers will be one of the person's actual treating professionals. If the person is found to have capacity, the person may revoke all or some of the provisions of the Advance Directive.

What are my responsibilities as an agent?

1. Understand the preferences of the person you represent. Take the time to discuss treatment history and experiences, side effects of medications, and the person's ideas with regard to ECT, lab trials, and drug trials. If the person has made a combination Declaration and Power of Attorney, you should also discuss any decisions the person has made in the Declaration section of the Mental Health Advance Directive. Remember to get contact information of anyone named to take care of children or pets, or someone who should act as a guardian in the event one is appointed.
2. Make decisions on the basis of "substituted judgment." That means that you make the decision for the person that you believe the person would have made for themselves if they had capacity.

3. Accurately represent any preferences and make every effort to comply with the person's written instructions (Declaration), even if you do not agree with the person's choices.

4. Decline to be someone's agent if you are unable to accurately represent a person's choices.

5. Understand the provider responsibilities so that you can help treatment go as smoothly as possible.

6. Keep any copies of the Advance Directive that the person gives to you. As well, keep any amendments that the person makes to his/her Advance Directive. Advise the person to make any changes in writing. Remember that any amendments must be signed, dated and witnessed. In order to avoid confusion, you may wish to advise the person to make a whole new document.

7. Upon notification that the person has been hospitalized or otherwise found not to have capacity to make mental health care decisions, you must give a copy of the Directive and any amendments to the person's provider. You may need to give out more than one copy – e.g., to the treating psychiatrist, therapist, and hospital.

8. If you are notified that there will be a guardianship proceeding in court you must come forward and let the court know that you are the person's appointed agent for mental health care decisions and give the court a copy of the Mental Health Care Advance Directive.

9. If the person revokes their Advance Directive, destroy any copies that you have, and make a note of the date on which the person cancelled the Directive.

10. The Mental Health Advance Directive expires after two years from the date it is signed. Remind the person that it is time to review his/her preferences and make a new document when the time is up.

11. A mental health care agent has the same rights and limitations as the person to request, examine, copy, and consent or refuse to consent to the disclosure of mental health care information unless the person specifies other-

wise in the Directive. Therefore request whatever information you need in order to make your decisions, and release only appropriate information to providers and others.

What decisions will I have the power to make?

A mental health care agent may make any mental health care decision and exercise any right and power regarding the person's care, custody, and mental health treatment that the person could have made with the following exceptions:

1. If the person wants to limit any specific decisions you are allowed to make and notes them in the Advance Directive.
2. You can only make decisions related to electroconvulsive therapy, experimental procedures and research studies if the person specifically states that you may make those decisions in his/her Advance Directive.
3. An Agent does not have the power to relinquish parental rights or consent to psychosurgery, no matter what the instructions in the Advance Directive contain.

After consulting with mental health care providers and consideration of the prognosis, person's diagnosis, alternative treatments and side effects, you must make decisions in accordance with your understanding and interpretation of any written and/or verbal instructions that cover the situation presented.

You have the power to release mental health records unless the person specifies otherwise. This means that you may have to make decisions about what records should be released, and to whom. You may not disclose information except as is reasonably necessary to perform your obligations.

Will I be subject to criminal or civil liability because I am an agent?

As long as you act in good faith to comply with the person's instructions, you will not be subject to liability. An agent who willfully fails to comply with a Mental Health Power of Attorney may be removed and sued for actual damages. You are not personally liable for any of the costs of care or treatment of the person.

What if I cannot serve as an agent any longer?

You may withdraw from acting as a person's agent. If you choose to withdraw, you must inform the person immediately. If the person is incapacitated

at the time you withdraw you must also inform the person's providers and any alternative agent named in the Advance Directive. If the Mental Health Advance Directive does not provide for an alternative agent, the provider must still follow any specific instructions in the Advance Directive. It is a very serious step to withdraw as a person's agent when the person is incapacitated because the person may be left with no one to make decisions on their behalf. You should consider a decision to withdraw very carefully.

Is it possible for an agent to be removed by the Court?

Yes. A mental health care agent may be removed for any of the following reasons:

1. Death or incapacity.
2. Non-compliance with the Mental Health Care Advance Directive.
3. Physical assault or threats of harm.
4. Coercion.
5. Divorce – unless the Directive specifically allows for a spouse to continue after a divorce proceeding is filed.

What if the provider can't comply with the instructions in the Mental Health Care Advance Directive?

As soon as the possibility of non-compliance becomes apparent, the provider must inform the person. If the person is incapacitated at the time the provider determines he/she cannot comply, he/she must also inform any agent, guardian, and/or other legal representative. It may be possible to discuss and resolve the issue, and as the person's agent, you should make every effort to do so. If compliance is still not possible, the provider must make every reasonable effort to transfer the person to another mental health care provider who will comply with the instructions. While the transfer is pending, the provider must treat the patient in a way consistent with his/her Advance Directive. If all efforts to transfer fail, the provider may discharge the patient.

Remember that just because consent is provided in advance to a particular medication or treatment, the provider will not prescribe that treatment or drug unless it is appropriate treatment at the time of the person's illness. Consent only means that consent is given to treatment if it is a suitable choice *at that time* within the standards of medical care. The

provider will also have to consider if a particular treatment option is covered by the person's insurance. If, for example, the HMO does not cover a certain drug on its formulary, the provider may prescribe a drug that is similar, but is on the HMO formulary (unless the person has specifically withheld consent to that drug.)

What if compliance with the instructions could cause irreparable harm or death?

You, or another interested party, may file a petition with the court seeking a determination that following the instructions may cause irreparable harm or death. The court may invalidate some or all of the provisions of the Advance Directive and will issue an appropriate order within 72 hours from the filing of the petition. Even if the court invalidates some of the provisions of the Directive, the remaining provisions will remain in effect.

What if there is a conflict with instructions in another Power of Attorney or Declaration?

If there is a conflict, the provisions of the document latest in date of execution must be followed.

How does a Mental Health Advance Directive affect commitment under the Mental Health Procedures Act?

The voluntary and involuntary commitment provisions of the Mental Health Procedures Act are not affected by having a Mental Health Care Advance Directive. What is affected is the provision of treatment after a person is committed.

What if someone else has applied to the court to become the person's guardian?

If another person applies to become the person's guardian there will be a court proceeding. The person and/or the provider should notify you of the proceedings. You must inform the court of your status as the person's agent and give the court a copy of the Advance Directive. The court will give preference to allowing you to continue making mental health treatment decisions unless the person specifies otherwise or there are extenuating circumstances. If the court decides to allow the guardian to make mental health decisions, the guardian is still bound by any instructions in the Advance Directive.