NC STATE UNIVERSITY The Forum for Family and Consumer Issues (FFCI)

The Forum for Family and Consumer Issues (FFCI)
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TheForumJournal.org | ISSN 1540-5273 | info@theforumjournal.org

A Critical Analysis of North Carolina's Advance Instruction for Mental Health Treatment

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Introduction

You have the right to control the decisions about your medical care. To make these decisions, you must be competent and able to communicate. If you are not competent or able to communicate, someone else must make these decisions for you. Advance directives allow you to have some control if you should become incompetent.

North Carolina statutorily recognizes three forms of advance directives which allow you to make certain medical decisions in advance. First, you may have a living will that allows you to authorize the withholding or withdrawal of extraordinary medical treatment and feeding tubes under specified conditions. Second, you may have a general health care power of attorney that allows you to appoint a health care agent to make your health care decisions when you cannot make them yourself. Third, you may have an advance instruction that covers only mental health care. This article explains an **advance instruction for mental health treatment** (AIMHT).

The advance instruction for mental health treatment is new in North Carolina; it became effective on January 1, 1998. The legislation creating this new document is already subject to criticism, and efforts will likely be made in 1999 to amend or repeal this law. Many lawyers are expressing a reluctance to use the new AIMHT because of the potential problems created by the legislation. They suggest incorporating mental health treatment powers in a health care power of attorney to minimize the concerns now being raised.

What is an advance instruction for mental health treatment?

An advance instruction for mental health treatment allows you to give instructions and preferences regarding mental health treatment. It also allows you to appoint an agent to make these decisions for you when you are incapable of making them yourself. You must sign the

document in the presence of two qualified witnesses. Unlike the living will and health care power of attorney, the document need not be notarized. The form provided by §122C-77 of the North Carolina General Statutes is duplicated at the end of this article. Other forms may be used as long as they comply with the requirements of the statute. If you use a form, read and understand all provisions before signing. Your lawyer can explain and, if necessary, modify the available forms. You should also discuss this form with your doctor.

Who may make an advance instruction for mental health?

Any person of sound mind who is age 18 or over may make an advance instruction regarding mental health treatment. This person is called the "principal."

When is it effective?

An advance instruction becomes effective when it is delivered to your doctor or other mental health treatment provider. It remains valid until revoked or expired. It automatically expires in two years.

Several questions are raised by these rules. First, unless good records are kept as to the date of delivery, it may be unclear as to when the two-year expiration period is up. The document's validity may be challenged prematurely. Health care providers need to adopt a procedure that would clearly reflect the date when an AIMHT is received.

Second, timing the delivery is important. For example, if you deliver your AIMHT to your doctor on January 20, 1998, and you do not need it until April 1, 2000, it has expired automatically unless you renewed it. You cannot renew it after you become incapable. The most logical solution would be to deliver it to your mental health care provider upon admission to the facility or when the need for mental health treatment arises.

Third, if the same document is delivered to several different providers at different times, which delivery marks the effective date? Is the effective date the date it was delivered to the first provider? If so, how do other providers know when the effective date begins? Or, does each delivery begin a new two-year period for each provider? If so, your AIMHT can be invalid for one or more providers and valid for others. The legislation does not answer these questions.

Fourth, if you become incapable and are undergoing treatment when your AIMHT expires, your treatment may be affected. The statutory form attempts to resolve this issue with the first sentence under "Additional Instructions." It reads: "These instructions shall apply during the entire length of my incapacity." However, the statute itself does not suspend the two-year expiration date in the case of incapacity. It is doubtful whether the statement included in the

statutory form (which is nonexclusive) is sufficient by itself to suspend the two-year expiration period.

A health care power of attorney does not automatically expire, and lawyers recommend using it for mental health treatment decisions rather than an AIMHT. If the health care power of attorney is used instead of the AIMHT, the drafter must take care to preserve the principal's right to consent to and refuse certain mental health treatments which are provided for in the statutory form for an AIMHT, but not in the statutory form for a health care power of attorney. The most logical solution is to incorporate by reference in the health care power of attorney a separate advance directive on mental health treatment (using the AIMHT as a guide).

How can it be revoked?

If the you are capable, you may revoke your AIMHT at any time in whole or in part. The revocation is effective when you notify your doctor or other provider that it is revoked. The attending physician or other provider must note the revocation in your medical record.

There is a substantial difference between revoking an AIMHT and revoking a health care power of attorney. You may revoke an AIMHT *in whole or in part*. A health care power of attorney is revoked *in its entirety*. Communicating and documenting a partial revocation of an AIMHT will increase the difficulty in determining what mental health treatment you have authorized, and what authority you have given to your agent.

What is the doctor's duty?

The doctor must make the advance instruction part of the patient's medical record. The doctor "shall" comply with it to the fullest extent possible, unless compliance is not consistent with

- Best medical practice to benefit the principal
- Availability of the mental health treatments requested
- Applicable law

These terms are not defined in the statute, and they are ambiguous enough to fuel lawsuits for years to come. For example, does "best medical practice to benefit the principal" mean the best in the world? Will a small rural facility be held to the same standards as Duke Medical Center? Does "availability of the mental health treatments requested" mean those that are available anywhere? Or, does it mean those available at the treatment facility?

If the doctor is unwilling to comply with part or all of the advance instruction for one or more of the reasons stated above, he or she must notify the principal or agent and must record the reason in the patient's medical record. Also, a doctor need not honor the advance instruction in cases of emergencies or involuntarily committed patients.

Although the language in the statute appears to require mandatory compliance by the use of the word "shall," the exceptions are so broad that it is unlikely a physician or other mental health care provider will feel compelled to honor it if he or she is unwilling to do so. Moreover, the statute does not provide for sanctions against a physician or other provider for failing to honor a patient's AIMHT. This is consistent with legislation for the living will and health care power of attorney, neither of which compels the doctor to ignore his or her best medical judgment, or ethical and moral standards.

The statute also requires the physician to obtain the principal's informed consent to all mental health treatment decisions as required by law. However, the statute does not define "informed consent." The statutory form allows the principal to consent to a number of mental health decisions, such as administration of certain medications and the admission to a mental health care facility. But circumstances change, and informed consent given a year ago may not be informed consent today. Physicians may be reluctant to rely upon "informed consent" given by the principal months or years earlier. In which case, the physician should seek the current informed consent of the principal if he or she is capable, or of the agent if the principal is not capable.

One potential solution would be to statutorily recognize the AIMHT as sufficient "informed consent" that a doctor may rely upon in the treatment process, regardless of when the AIMHT was executed. However, lawyers should advise clients of the risks of blindly giving informed consent to medical treatment years in advance. An informed client would likely be discouraged from executing an AIMHT under these conditions.

How is an agent appointed?

An advance instruction may designate a competent adult to act as an agent to make decisions about mental health treatment. An alternate agent may also be named to act as agent if the first choice is unable or unwilling to act. An agent must accept the appointment in writing. In the statute, the "agent" is referred to as the "attorney-in-fact."

The following people may not serve as the agent:

- The principal's doctor or mental heath service provider or an employee of the doctor or provider, if that person is unrelated to the principal by blood, marriage, or adoption.

- An owner, operator, or employee of a health care facility, if that person is unrelated to the principal by blood, marriage, or adoption.

What is the agent's authority?

The agent may make decisions about mental health treatment on behalf of the principal only when the principal is incapable. The principal is incapable when the doctor or psychologist determines that the principal currently lacks the capacity to make and communicate mental health treatment decisions.

The decisions of the agent must be consistent with the desires the principal has stated in the advance instruction. If the principal's desires are not stated in the advance instruction, the agent must act in good faith in the manner in which the agent believes the principal would act if he or she were capable.

What are the agent's rights?

The agent has the same rights as the principal to receive information about the proposed mental health treatment, and to receive, review, and consent to disclosure of medical records relating to that treatment.

The agent may withdraw by giving notice to the principal. If the principal is incapable, the agent may withdraw by giving notice to the attending physician or provider. The physician or provider must note the withdrawal in the principal's medical record. Notice of withdrawal may be oral, but it is preferable to put it in writing. The agent may reverse the withdrawal by executing a written acceptance after the date of withdrawal. The agent must give notice of the acceptance to the principal if the principal is capable, or to the principal's health care provider if the principal is incapable.

This procedure will make it difficult for a provider to know whether the agent has authority under the AIMHT. How does the provider know whether the agent has given oral notice of withdrawal to a capable principal? If the provider is informed of the withdrawal, how does the provider know whether the agent reversed the withdrawal while the principal was capable?

How does the agent's authority affect the authority of other fiduciaries?

Appointment of Health Care Agent

The appointment of an agent for mental health care treatment does not affect the nonmental health treatment powers granted by the principal to a health care agent under a health care power of attorney or to an attorney-in-fact under a general durable power of attorney. Mental health treatment powers granted under an AIMHT, however, are superior to similar powers granted under a health care power of attorney or under a general durable power of attorney.

This separation of powers assumes that mental health treatment never overlaps with the principal's other health care. Imagine this scenario. The principal executes both an AIMHT and a health care power of attorney, naming different agents. The principal becomes incapable as a result of a mental health condition. The agent under the AIMHT consents to the most effective medication for that particular problem. The medication has side effects that cause kidney problems, a nonmental health problem. Who decides?

An AIMHT may be combined with or incorporated into either a health care power of attorney or a general durable power of attorney. The problems presented in the legislation creating the AIMHT provide strong inducement to grant mental health treatment powers in a health care power of attorney. Incorporating mental health treatment powers into a general durable power of attorney, although allowed by statute, is not recommended because of confidentiality problems. To be valid after the principal becomes incapable, a general durable power of attorney must be registered with the Register of Deeds office, making it a public document.

Appointment of Guardian

If a court appoints a guardian with powers over the person of the principal (a guardian of the person or a general guardian), the AIMHT remains in effect and is superior to the powers and duties of the guardian with respect to mental health treatment decisions that are covered under the AIMHT. Clearly, the mental health treatment preferences stated in the AIMHT govern the court-appointed guardian. But, does an agent designated in the AIMHT have superior powers to the court-appointed guardian with regard to mental health treatment? The statute is not clear on this point.

If the answer is "yes," it is a departure from the legislation creating the health care power of attorney which revokes a health care power of attorney when a court appoints a guardian of the person. It is also a departure from the legislation governing the general durable power of attorney which makes the power of the guardian superior to the power of the attorney-in-fact.

What is the agent's potential liability?

The agent is not personally liable, as a result of acting as an agent, for the cost of treatment provided to the principal. The agent is not subject to criminal prosecution, civil liability, or professional disciplinary action for any action taken in good faith pursuant to an advance instruction.

What is the health care provider's potential liability?

Questions are being raised about the potential liability of the health care provider who relies upon an AIMHT. A literal interpretation of the statute gives more protection to the agent than to the health care provider. The statute provides that a physician or provider who administers or does not administer mental health treatment according to and in good faith reliance upon the validity of an advance instruction is not subject to criminal prosecution, civil liability, or professional disciplinary action *resulting from a subsequent finding that the advance instruction was invalid*. The statute offers no specific protection for when the advance instruction is valid. A health care provider has broader protection under a health care power of attorney, which is another reason why lawyers are recommending using it instead of an AIMHT.

Who may witness it?

An advance instruction for mental health treatment must be witnessed by two people who personally know the principal. Neither may be

1. A person appointed as the agent;
2. The principal's doctor or mental health service provider or a relative of the doctor or provider;
3. The owner, operator, or relative of an owner or operator of a facility in which the principal is a patient or resident; or
4. A person related to the principal by blood, marriage, or adoption.

A careful reading of the statute is required to answer the question "Who may witness it?" The statute defines a qualified witness as someone who is not in the second and third categories, omitting any mention of the first and fourth categories. The first and fourth categories are added in the affirmation of the witnesses on the statutory form. Is the omission of the first and fourth categories in the statutory definition significant? Probably not, but it does create some confusion.

Another issue raised is the requirement that the witnesses must personally know the principal. There is no similar requirement in the execution of a living will or health care power of attorney, which can be, and often are, witnessed by complete strangers to the principal. What is the legal

implication if a stranger witnesses the AIMHT? Does it invalidate the document? Once again, the statute does not address this issue.

Conclusion

Did North Carolina need a separate power of attorney for mental health treatment? Many lawyers say no. The General Assembly could have addressed this need simply by amending the health care power of attorney legislation to include an advance directive for mental health treatment that could either stand alone or be incorporated into a health care power of attorney. Instead, the legislators created a new power of attorney with different rules that, in some cases, are inconsistent with the rules governing the health care power of attorney and general durable power of attorney.

The resulting confusion and uncertainty will motivate many lawyers to ignore this new document. Unfortunately, medical facilities that accept Medicare or Medicaid patients must distribute information about the AIMHT under the Patient Self-Determination Act. So ready or not, medical facilities may soon be faced with implementing a patient's AIMHT under legislation that raises as many questions as it answers.

Author's Note: As this article went to press, the Governor's Advocacy Council for Persons with Disabilities convened a meeting with representatives from hospitals, other health care facilities, and government agencies to discuss the problems raised about the AIMHT. Actions are being taken to amend the legislation, either in 1998 or 1999, to resolve many of the issues raised in this article.

References

Article 3, Part 2 of Chapter 122C of the North Carolina General Statutes, Sections 122C-71, *et seq.*

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Cite this article:

Schwab, Carol. "A Critical Analysis of North Carolina's Advance Instruction for Mental Health Treatment." *The Forum for Family and Consumer Issues* 3.1 (1998): 39 pars. 7 March 1998.