

Mental Health ACHDs and Powers of Attorney: Contents, Applications, and Obstacles

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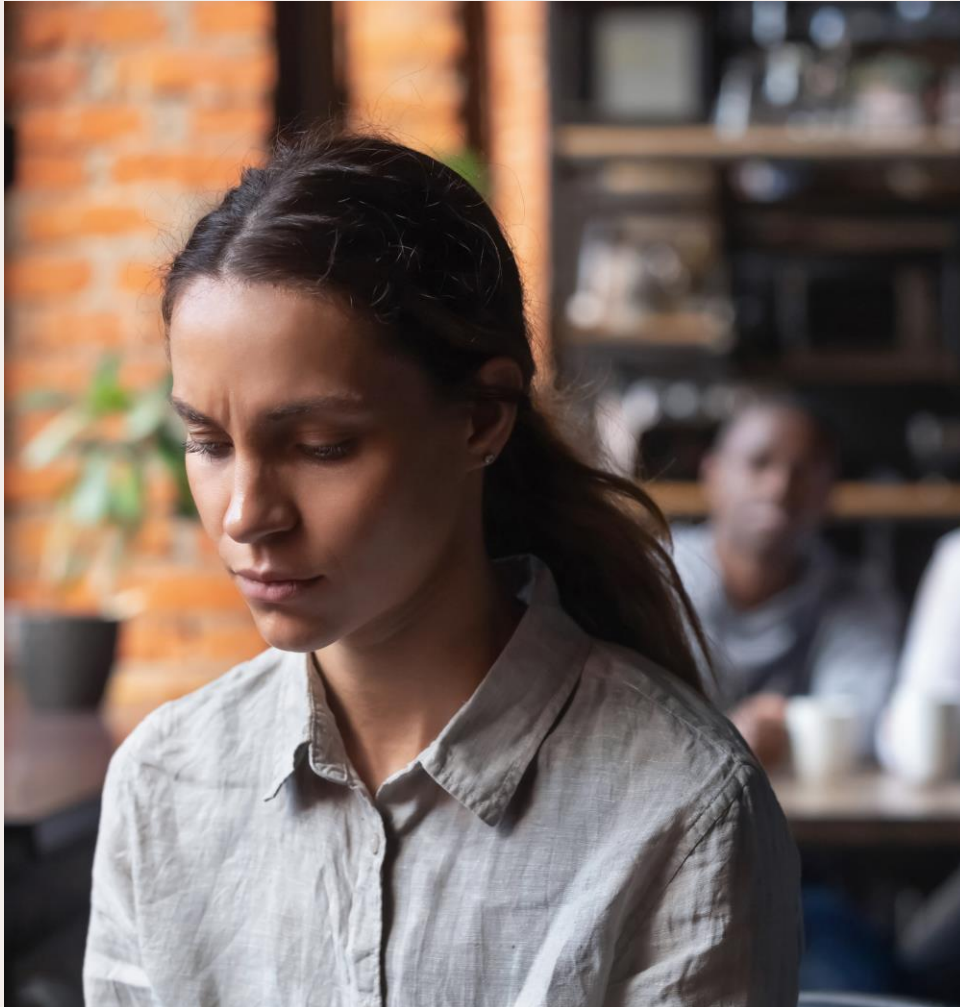
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Agenda

- Providing Context: Incidence of Mental Illness and Treatment
- Behavioral Health Services Under Medicaid
- Overview of 20 Pa.C.S. Ch 58
- Overcoming Reluctance
- Conclusion
- Discussion/Questions

Providing Context: Incidence of Mental Illness and Treatment

Incidence of Mental Illness and Treatment in U.S.



About 59.3 MM people (23.1 % of the U.S. adult population) live with some sort of mental illness

- About half of these received some form of mental health treatment during the year
- Youngest groups had highest prevalence

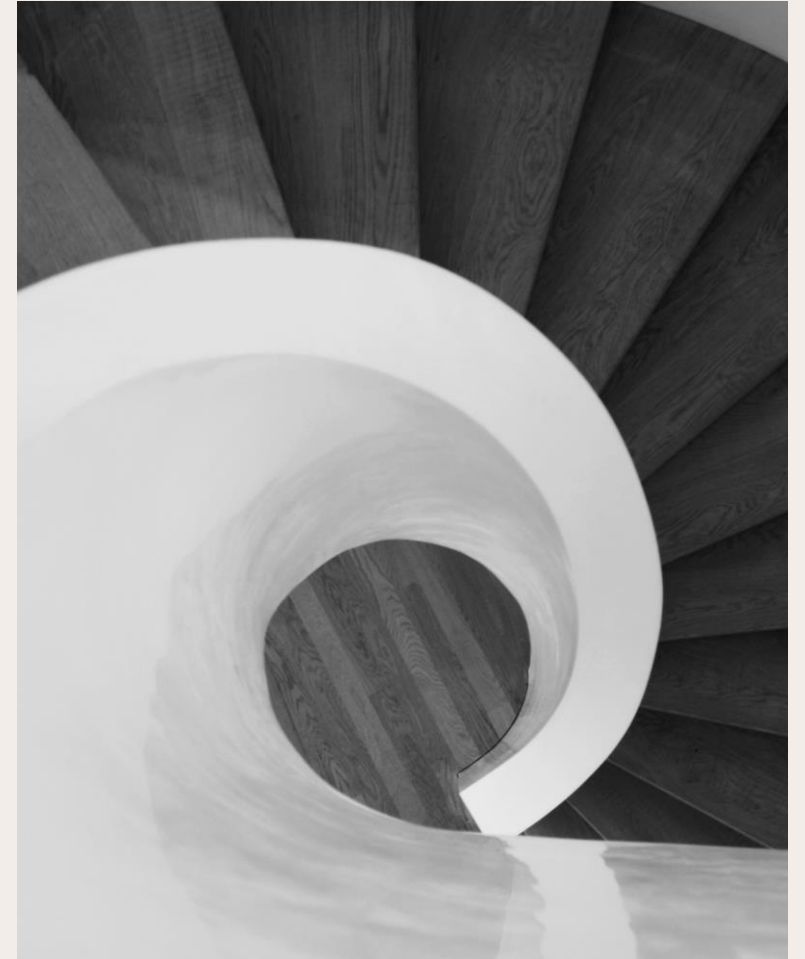
About 15.4 MM people (6% of U.S. adults) have serious mental illness (SMI)

- 66.7% of these received some form of mental health treatment during the year
- A higher percentage of older adults received treatment than adults in younger groups

Source:

<https://www.nimh.nih.gov/health/statistics/mental-illness>

Based on data from 2022



Information Helpful in Mental Health Treatment

- What are the person's diagnoses?
- What medications and/or other drugs are being taken?
- Who provides treatment?

Information Helpful in Mental Health Treatment

- What is the person's mental health treatment history?
 - What's been tried?
 - What's worked well?
 - What hasn't worked well?
- Who are the interested parties and supports?

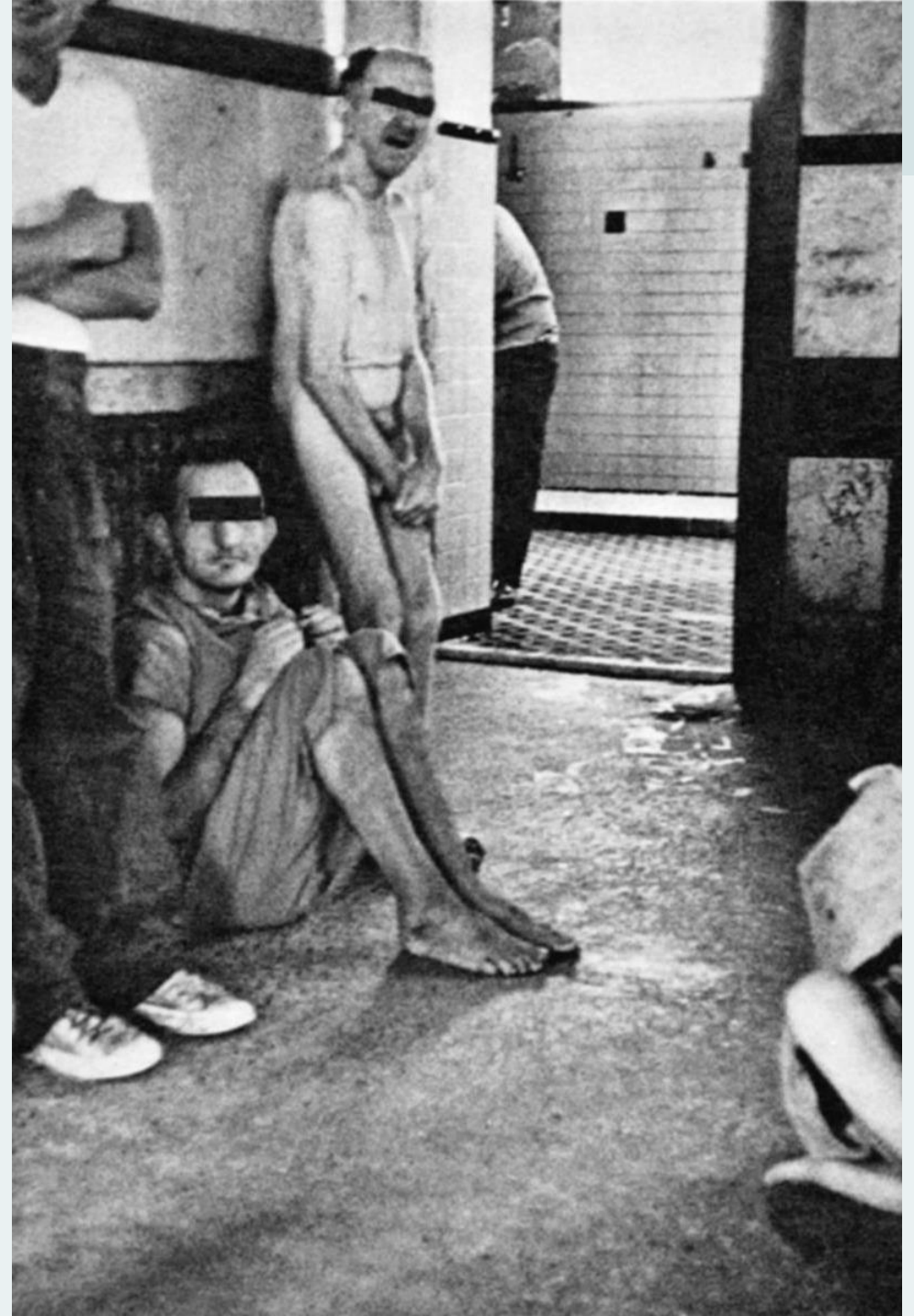
Information Helpful in Mental Health Treatment

- How will finances be managed?
- What information can be provided about person's condition and treatment?
 - Discharge planning
 - Aftercare
 - Symptoms indicating onset of episode

Behavioral Health Services Under Medicaid

In 1968 Bill Baldini's five-part exposé revealed an overcrowded, abusive and neglect-filled environment for the mentally disabled children and adults who lived at Pennhurst near Spring City, Pennsylvania.

Photo: Burton Blatt & Fred Kaplan,
Christmas in Purgatory, 1966.



In response to these conditions at Pennhurst and elsewhere, The ICF/ID benefit was added to the Medicaid program under the 1971 Amendments to the Social Security Act, with two major objectives.

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graph TD; A["In response to these conditions at Pennhurst and elsewhere, The ICF/ID benefit was added to the Medicaid program under the 1971 Amendments to the Social Security Act, with two major objectives."] --> B["Improve the quality of care provided in state institutions to persons with ID"]; A --> C["Establish new MA benefit for persons with ID"];
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Improve the quality of care provided in state institutions to persons with ID

Establish new MA benefit for persons with ID

To receive Federal matching funds for services in ICF/IDs, States were required to bring their State institutions into compliance with federally established facility and treatment standards.



Advocacy groups were concerned that the terms and conditions for qualifying long-term care facilities as SNF's were inappropriate to the service needs of the developmentally disabled.



By the early 1980s, states and advocacy groups pushed the federal government to expand Medicaid matching funds to include community group homes and programs.



Adult Autism Waiver

Provides day and residential habilitation, respite, supported employment, supports coordination, therapies, assistive technology, family support, home modifications, and other services to individuals with autism ages 21 or older who meet an ICF/IID level of care.

PA Community HealthChoices Waiver

Provides adult daily living, employment skills development, job coaching, residential and day habilitation, respite, home health aide, nursing services, occupational therapy, physical therapy, specialized medical equipment and supplies, speech and language therapy, assistive technology, behavior therapy, community integration, home adaptations, non-medical transportation to individuals ages 65 or older and individuals with physical disabilities ages 21-64 years who meet a nursing facility level of care.

PA Community Living Waiver

Provides community participation support, homemaker/chore, in-home and community support, life sharing, respite, supported employment, unlicensed residential habilitation, behavioral support, companion, family/caregiver training and support, home accessibility adaptations, transportation, and vehicle accessibility adaptation services to individuals with autism ages 0 or older, individuals with intellectual disabilities ages 0 or older, and individuals with developmental disabilities ages 0 to 21 years who meet an ICF/IID level of care.

PA Consolidated Waiver

Provides residential habilitation, respite, supported employment, supports coordination, therapy services, behavioral support, transportation, to individuals with autism ages 0 or older, individuals with developmental disabilities ages 0-21 years, and individuals with intellectual disabilities ages 0 or older who meet an ICF/IID level of care.

PA Medicaid Waiver for Infants, Toddlers and Families

Provides special instruction to individuals with intellectual disabilities or developmental disabilities ages 0-2 years who meet an ICF/IID level of care.

PA OBRA Waiver

Provides adult daily living, residential habilitation, respite, service coordination, structured day habilitation, behavior therapy, nursing services, occupational/physical/speech-language therapies, assistive technology, community integration, home adaptations, non-medical transportation, to individuals with developmental disabilities ages 18-59 years who meet an ICF/IID level of care.

PA Person/Family Directed Support (P/FDS) Waiver

Provides community participation support, education support services, homemaker/chore, respite, supported employment, supports coordination, therapy services, assistive technology, behavioral support, home accessibility adaptations, transportation, and vehicle accessibility adaptation services to individuals with autism ages 0 or older, individuals with developmental disabilities ages 0-21 years, and individuals with intellectual disabilities ages 0 or older who meet an ICF/IID level of care.

Overview of PEF Code Chapter 58: Mental Health Care

Mental Health Declarations and POAs in PA

Definition of mental health care § 5802

“Any care, treatment, service, or procedure to maintain, diagnose, treat or provide for mental health, including any medication program and therapeutical treatment.”

Who can make §§ 5822(a), 5832(a)

Legal adults or emancipated minors who have not been adjudicated IP or determined to be severely mentally disabled under the Mental Health Procedures Act (50 P.S. § 7301(a))

Mental Health Declarations and POAs in PA

Signing requirements §§ 5822(b)-(c), 5832(b)-(c)

- Must be “dated and signed by the declarant by signature or mark” or by another individual on behalf of/at the direction of the declarant
- Witnessed by two individuals at least 18 years of age
- Requirements for persons signing on behalf of/at declarant’s direction
 - Signer cannot be MH provider serving the declarant, or the provider’s agent;
 - A person signing on behalf of declarant cannot also witness

Notice page and agent acknowledgments applicable to financial POAs not required. § 5843(c).

Mental Health Declarations and POAs in PA

Required Contents

Declaration: “[A]ny ... written form that expresses the wishes of a declarant regarding the initiation, continuation or refusal of mental health treatment and may include other specific directions[.]” § 5823.

POA: “[A]ny ... written form identifying the principal, appointing a mental health care agent and declaring that the principal authorizes the mental health care agent to make mental health care decisions on behalf of the principal[.]” § 5833(a), (c).

Statutory form: “I hereby grant to my agent full power and authority to make mental health care decision for me consistent with the instructions and limitations set forth in this power of attorney. If I have not expressed a choice in this power of attorney, I authorize my agent to make the decision that my agent determines is the decision I would make if I were competent to do so.”

Mental Health Declarations and POAs in PA

Limits on Who Can Serve as MH Agent § 5835(b)

Unless related to the principal by blood, marriage or adoption, the principal may not appoint any of the following parties:

- Principal's attending physician or other mental health care provider, or an employee thereof
- Owner, operator, or employee of a residential facility in which the principal receives care

Limits on Authority of MH Agent

Prohibited Powers: "A [MHPOA] may not convey the power to relinquish parental rights or consent to psychosurgery." § 5836(b)

Hot Powers (must be specifically included to be conveyed) § 5836(c)

- To consent to ECT
- To consent to experimental procedures or research

Mental Health Declarations and POAs in PA

When Operative §§ 5824(a), 5834(a)

A declaration or POA is operative when:

- 1) A copy is provided to the attending physician; and
- 2) “The conditions stated in the declaration are met.”

Statutory form: “My incapacity shall 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 my treating professionals.”



Comments regarding conditions precedent?

Mental Health Declarations and POAs in PA

Automatic Expiration §§ 5824(e), 5834(c)

Both MHDs and POAs expire two years from the date of execution; provided, that if declarant then is incapacitated, the declaration or power shall continue until the declarant regains capacity.



Any affirmative duty to notify clients/agents as expiration nears?

Revocation §§ 5825, 5839

May be revoked at any time, in whole or part, either orally or in writing, unless the declarant has been found incapable of making MH decisions or “has been” involuntarily committed.

- Subsection (b) of the cited statutes allow declarant/principal to revoke while involuntarily committed if, after examination, 2 psychiatrists, or a psychiatrist and a psychologist, family physician, attending physician or a MH treatment professional find the declarant/principal capable of making MH decisions
- Revocation is effective upon communication to attending physician or other mental health care provider by the declarant/principal “or a witness to the revocation of the intent to revoke” 5825(c), 5839(c)

Drafting Tips: Mental Health Declarations

Treatment preferences See statutory form at § 5823

- Choice of inpatient treatment facility (where to go, where to avoid)
- Preferences regarding psychiatric medications (or statement of nonconsent)
- **Consent to ECT (or statement of nonconsent)**
- **Consent to experimental studies or drug trials (or statement of nonconsent)**
- Additional instructions: activities that help or worsen symptoms; type of intervention preferred in event of crisis; health history; dietary requirements; religious preferences; temporary custody of children; family notification; limitations on release or disclosure of mental health records.

Note: Bolded powers are “hot” powers

Drafting Tips: Mental Health POAs

Optional Provisions See statutory form at § 5833(c)

- Describe any limitations on the agent's authority
- Indicate the intent of the principal regarding the initiation, continuation or refusal of mental health treatment (i.e., mental health declaration)
- Nominate a guardian of the person of the principal
- Contain other provisions as the principal may specify regarding the implementation of mental health care decisions.

Drafting Tips: Generally

- Expiration date – conspicuous at top of document?
- Conditions precedent for power to be effective
- Statutory definition of mental health care
- Language regarding prohibitions and limits in documents

“Electroconvulsive therapy may be administered only if I have specifically consented to it in this document. I will be the subject of laboratory trials or research only if specifically provided for in this document. Mental health care does not include psychosurgery or termination of parental rights.”

- Rubric for agent’s decision-making (substituted judgment rather than best interest)

“I hereby designate and appoint the following person as my agent to make mental health care decisions for me as authorized in this document. This authorization applies only to mental health decisions that are not addressed in [this document, my MHC dated _____, etc.]. If I have not expressed a choice in [this document or in the accompanying declaration], I authorize my agent to make the decision that **my agent determines is the decision I would make if I were competent to do so.**” (my emphasis)

- Revocation authority

Protections for Declarants/Principals

- Already discussed: revocation; expiration
- Criminal liability for concealing, altering, or destroying MHD/POA: § 5806(a)
- MH provider has duty to promptly notify declarant/principal or agent if provider cannot in good conscience comply with declaration or POA: § 5804(a)
- Requirement that MH provider who refuses to comply with directive/POA make “every reasonable effort” to transfer declarant/principal to a provider who will comply § 5804(b)
 - While transfer pending, patient “shall be treated consistent with” declaration or agent’s decisions
 - If efforts fail, patient “may” be discharged
- Agent’s removal: § 5837
- Civil liability for actual damages caused by agent who willfully fails to comply § 5806(b)

Overcoming Reluctance to Mental Health Planning



Information Helpful in Mental Health Treatment

Diagnoses

Medications

Substance use

Primary care

Treatment history

Interested parties

Surrogate
decisionmakers

Surrogate caregivers

Aftercare

Tips for Client Interview

- Assess what supports are known/available
- Discuss declarant/principal's worries and concerns – tailor your strategy to those
- Ask interested party or declarant/principal to troubleshoot issues with your strategy

Strategy:

Primary MH provider has MHD on file

- Declarant chooses what is shared (while competent)
- Written record captures treatment preferences and legally must be followed (with some exceptions). § 5804
- Relies upon communication between emergency personnel and primary provider

Strategy: (Minimal) Disclosure to External Support

- Limited MH agent serves for purposes of
 - Providing information regarding the principal's diagnoses and outpatient treatment providers
 - Receiving notification of principal's discharge
- Primary MH provider has MHD on file and can provide to inpatient providers as needed
- External support is aware of crises and can point emergency treatment staff to primary care providers and their information

Strategy: (More) Disclosure to External Support/Advocate

- Limited MH agent also has ability to make inquiries receive PHI from providers re treatment
 - May also have MHD
- External support can ensure continuity between providers, advocate during periods of incapacity, and provide accountability if needed

Strategy: Most Agent Involvement

- MH agent has ability to make decisions in accordance with what they believe the principal would want if competent
 - With/without MHD
- Continuous treatment may be more effective
- Principal may receive treatment they don't want when provided, and would not have received absent the power
- Obstacles to revoking power during period of incapacity

Conclusion

- Many people in the U.S. have mental health conditions, including serious mental health conditions
- Behavioral health services are a component of Medicaid
- MHD and MH POAs can provide providers with information relevant to treatment, provide consent (or nonconsent) to specific forms of treatment, and appoint a surrogate to make mental health decisions if the principal is unable
- Additional provider education, including from attorneys, can help make use of MHDs and MH POAs more widespread

Discussion & Questions

Thank you

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