

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE BILL 749

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005

AN ACT

RELATING TO HEALTH CARE; ENACTING THE MENTAL HEALTH CARE
TREATMENT DECISIONS ACT TO PROVIDE FOR MENTAL HEALTH TREATMENT
ADVANCE DIRECTIVES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Mental Health Care Treatment Decisions Act".

Section 2. DEFINITIONS.--As used in the Mental Health
Care Treatment Decisions Act:

A. "advance directive for mental health treatment"
means an individual instruction or power of attorney for mental
health treatment made pursuant to the Mental Health Care
Treatment Decisions Act;

B. "agent" means an individual designated in a
power of attorney for mental health treatment to make a mental

1 health treatment decision for the individual granting the
2 power;

3 C. "capacity" means an individual's ability to
4 understand and appreciate the nature and consequences of
5 proposed mental health treatment, including significant
6 benefits and risks and alternatives to the proposed mental
7 health treatment, and to make and communicate an informed
8 mental health treatment decision. A written determination or
9 certification of lack of capacity shall be made only according
10 to the provisions of the Mental Health Care Treatment Decisions
11 Act;

12 D. "emancipated minor" means a person between the
13 ages of sixteen and eighteen who has been married, who is on
14 active duty in the armed forces or who has been declared by
15 court order to be emancipated;

16 E. "guardian" means a judicially appointed guardian
17 having authority to make a mental health decision for an
18 individual;

19 F. "health care decision" means a decision made by
20 an individual or the individual's agent or guardian regarding
21 the individual's mental health treatment, including:

22 (1) selection and discharge of health care or
23 mental health treatment providers and institutions;

24 (2) approval or disapproval of diagnostic
25 tests, programs of medication and mental health treatment; and

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1 (3) directions relating to mental health
2 treatment;

3 G. "health care institution" means an institution,
4 facility or agency licensed, certified or otherwise authorized
5 or permitted by law to provide mental health treatment in the
6 ordinary course of business;

7 H. "individual instruction" means an individual's
8 direction concerning a mental health treatment decision for the
9 individual, made while the individual has capacity;

10 I. "mental health treatment" means services
11 provided for the prevention of, amelioration of symptoms of or
12 recovery from mental illness or emotional disturbance,
13 including electroconvulsive treatment, treatment with
14 medication, counseling, rehabilitation services or evaluation
15 for admission to a facility for care or treatment of persons
16 with mental illness, if required;

17 J. "mental health treatment provider" or "health
18 care provider" means an individual licensed, certified or
19 otherwise authorized or permitted by law to provide mental
20 health treatment in the ordinary course of business or practice
21 of a profession;

22 K. "mental illness" means a substantial disorder of
23 a person's emotional process, thoughts or cognition that
24 grossly impairs judgment, behavior or capacity to recognize
25 reality, but "mental illness" does not mean a developmental

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1 disability;

2 L. "physician" means an individual authorized to
3 practice medicine, including psychiatry or osteopathy;

4 M. "power of attorney for mental health treatment"
5 means the designation of an agent to make mental health
6 treatment decisions for the individual granting the power, made
7 while the individual has capacity;

8 N. "primary physician" means a physician designated
9 by an individual or the individual's agent or guardian to have
10 primary responsibility for the individual's health care or, in
11 the absence of a designation or if the designated physician is
12 not reasonably available, a physician who undertakes that
13 responsibility;

14 O. "primary psychologist" means a psychologist
15 designated by an individual or the individual's agent or
16 guardian to have primary responsibility for the individual's
17 mental health treatment or, in the absence of a designation or
18 if the designated psychologist is not reasonably available, a
19 physician or psychologist who undertakes that responsibility;

20 P. "principal" means an adult or emancipated minor
21 who, while having capacity, has made a power of attorney for
22 mental health treatment by which he delegates his right to make
23 mental health treatment decisions for himself to an agent;

24 Q. "qualified health care professional" means a
25 health care provider who is a physician, physician assistant,

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1 nurse practitioner, nurse, psychologist or social worker;

2 R. "reasonably available" means able to be
3 contacted without undue effort and willing and able to act in a
4 timely manner considering the urgency of the patient's mental
5 health treatment needs;

6 S. "supervising health care provider" means the
7 primary physician or psychologist or, if there is no primary
8 physician or psychologist or the primary physician or
9 psychologist is not reasonably available, the health care
10 provider who has undertaken primary responsibility for an
11 individual's health care; and

12 T. "ward" means an adult or emancipated minor for
13 whom a guardian has been appointed.

14 Section 3. ADVANCE DIRECTIVE FOR MENTAL HEALTH
15 TREATMENT.--

16 A. An adult or emancipated minor, while having
17 capacity, has the right to make his own mental health treatment
18 decisions and may give an individual instruction. The
19 individual instruction may be oral or written; if oral, it
20 shall be made by personally informing a health care provider.
21 The individual instruction may be limited to take effect only
22 if a specified condition arises.

23 B. An adult or emancipated minor, while having
24 capacity, may execute a power of attorney for mental health
25 treatment that may authorize the agent to make any mental

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1 health treatment decision the principal could have made while
2 having capacity. The power shall be in writing signed by the
3 principal and witnessed pursuant to Subsections I and J of this
4 section. The power shall remain in effect notwithstanding the
5 principal's later incapacity under the Mental Health Care
6 Treatment Decisions Act or Article 5 of the Uniform Probate
7 Code. The power may include individual instructions. Unless
8 related to the principal by blood, marriage or adoption, an
9 agent may not be an attending physician or psychologist or an
10 employee of the physician or psychologist or an owner, operator
11 or employee of a health care institution at which the principal
12 is receiving care.

13 C. Unless otherwise specified in a power of
14 attorney for mental health treatment, the authority of an agent
15 becomes effective only upon a determination or certification
16 that the principal lacks capacity and ceases to be effective
17 upon a determination that the principal has recovered capacity.

18 D. Unless otherwise specified in a written advance
19 directive for mental health treatment, a written determination
20 or certification that an individual lacks or has recovered
21 capacity or that another condition exists that affects an
22 individual instruction or the authority of an agent shall be
23 made according to the provisions of the Mental Health Care
24 Treatment Decisions Act.

25 E. An agent shall make a mental health treatment

1 decision in accordance with the principal's individual
2 instructions, if any, and other wishes to the extent known to
3 the agent. Otherwise, the agent shall make the decision in
4 accordance with the agent's determination of the principal's
5 best interest. In determining the principal's best interest,
6 the agent shall consider the principal's personal values to the
7 extent known to the agent.

8 F. A mental health treatment decision made by an
9 agent for a principal is effective without judicial approval.

10 G. A written advance directive for mental health
11 treatment may include the individual's nomination of a guardian
12 of the individual.

13 H. The fact that an individual has executed an
14 advance directive for mental health treatment shall not
15 constitute an indication of mental illness.

16 I. A written advance directive for mental health
17 treatment is valid only if it is signed by the principal and
18 two witnesses who are at least eighteen years of age and who
19 attest that the principal:

- 20 (1) is known to them;
21 (2) signed the advance directive for mental
22 health treatment in their presence;
23 (3) appears to have capacity; and
24 (4) is not acting under duress, fraud or undue
25 influence.

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1 J. For purposes of the advance directive for mental
2 health treatment, at least one witness shall not be:

- 3 (1) an agent of the principal;
4 (2) related to the principal by blood or
5 marriage;
6 (3) entitled to any part of the principal's
7 estate or have a claim against the principal's estate;
8 (4) the attending physician or psychologist;
9 or
10 (5) an owner, operator or employee of a health
11 care institution at which the principal is receiving care or of
12 any parent organization of the health care institution.

13 Section 4. PROHIBITED PRACTICE.--

14 A. No insurer or other provider of benefits
15 regulated by the New Mexico Insurance Code or a state agency
16 shall require a person to execute or revoke an advance
17 directive for mental health treatment as a condition for
18 membership in, being insured for or receiving coverage or
19 benefits under an insurance contract or plan.

20 B. No insurer may condition the sale, procurement
21 or issuance of a policy, plan, contract, certificate or other
22 evidence of coverage, or entry into a pension, profit-sharing,
23 retirement, employment or similar benefit plan, upon the
24 execution or revocation of an advance directive for mental
25 health treatment; nor shall the existence of an advance

1 directive for mental health treatment modify the terms of an
2 existing policy, plan, contract, certificate or other evidence
3 of coverage of insurance.

4 C. The provisions of this section shall be enforced
5 by the superintendent of insurance under the New Mexico
6 Insurance Code.

7 Section 5. REVOCATION OF ADVANCE DIRECTIVE FOR MENTAL
8 HEALTH TREATMENT.--

9 A. An individual, while having capacity, may revoke
10 the designation of an agent either by a signed writing or by
11 personally informing the supervising health care provider. If
12 the individual cannot sign, a written revocation shall be
13 signed for the individual and be witnessed by two witnesses
14 pursuant to Subsections I and J of Section 3 of the Mental
15 Health Care Treatment Decisions Act, each of whom has signed at
16 the direction of the individual and in the presence of the
17 individual and each other.

18 B. An individual, while having capacity, may revoke
19 all or part of an advance directive for mental health
20 treatment, other than the designation of an agent, at any time
21 and in any manner that communicates an intent to revoke.

22 C. A mental health treatment provider, agent or
23 guardian who is informed of a revocation shall promptly
24 communicate the fact of the revocation to the supervising
25 health care provider and to any health care institution at

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1 which the patient is receiving care.

2 D. The filing of a petition for or a decree of
3 annulment, divorce, dissolution of marriage or legal separation
4 revokes a previous designation of a spouse as agent, unless
5 otherwise specified in the decree or in a power of attorney for
6 mental health treatment. A designation revoked solely by this
7 subsection is revived by the individual's remarriage to the
8 former spouse, by a nullification of the divorce, annulment or
9 legal separation or by the dismissal or withdrawal, with the
10 individual's consent, of a petition seeking annulment, divorce,
11 dissolution of marriage or legal separation.

12 E. An advance directive for mental health treatment
13 that conflicts with an earlier advance directive for mental
14 health treatment revokes the earlier directive to the extent of
15 the conflict.

16 F. Unless otherwise specified in the power of
17 attorney for mental health treatment, an advance health-care
18 directive pursuant to the Uniform Health-Care Decisions Act and
19 an advance directive for mental health treatment shall be
20 treated separately. A revocation of a power of attorney for
21 mental health treatment shall not affect the validity of a
22 power of attorney.

23 Section 6. OPTIONAL FORM FOR ADVANCE DIRECTIVE FOR MENTAL
24 HEALTH TREATMENT.--

25 A. The form provided in Subsection E of this

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1 section may be used to create an individual instruction
2 regarding mental health treatment. An individual may complete
3 or modify all or any part of the form. The Mental Health Care
4 Treatment Decisions Act governs the effect of this or any other
5 writing used to create an advance directive for mental health
6 treatment.

7 B. A principal may designate a capable person
8 eighteen years of age or older to act as agent to make mental
9 health treatment decisions. An alternative agent may also be
10 designated to act as agent if the original agent is unable or
11 unwilling to act at any time. An appointment of an agent may
12 be accomplished by using the form provided by Subsection E of
13 this section.

14 C. An agent who has accepted the appointment in
15 writing shall have authority to make decisions, in consultation
16 with the primary physician or psychologist, about mental health
17 treatment on behalf of the principal only when the principal is
18 certified to lack capacity and to require mental health
19 treatment as provided by the Mental Health Care Treatment
20 Decisions Act. These decisions shall be consistent with any
21 wishes or instructions the principal has expressed in the
22 instruction. If the wishes or instructions of the principal
23 are not expressed, the agent shall act in what the agent
24 believes to be the best interest of the principal. The agent
25 may consent to evaluation for admission to inpatient mental

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1 health treatment on behalf of the principal if so authorized in
2 the advance directive for mental health treatment.

3 D. An agent may renounce his authority by giving
4 notice to the principal. If a principal lacks capacity, the
5 agent may renounce his authority by giving notice to the named
6 alternative agent, if any, or, if none, to the attending
7 physician or health care provider. The primary physician or
8 health care provider shall note the withdrawal of the last
9 named agent as part of the principal's medical record.

10 E. An advance directive for mental health treatment
11 may be executed by using the following optional form, completed
12 or modified to the extent desired by the individual, and the
13 form may be notarized:

14 "ADVANCE DIRECTIVE FOR MENTAL HEALTH TREATMENT

15 I, _____, being a person with capacity,
16 willfully and voluntarily make known my wishes about mental
17 health treatment, by my instructions to others through my
18 advance directive for mental health treatment, or by my
19 appointment of an agent, or both. If a guardian or an agent is
20 appointed to make mental health decisions for me, I intend this
21 document to take precedence over other means of ascertaining my
22 wishes and interests.

23 The fact that I may have left blanks in this directive
24 does not affect its validity in any way. I intend that all
25 completed sections be followed. I intend this directive to

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1 take precedence over any other mental health directives I have
2 previously executed, to the extent that they are inconsistent
3 with this document, or unless I expressly state otherwise in
4 either document.

5 I understand that I may revoke this directive in whole or
6 in part if I am a person with capacity. I understand that I
7 cannot revoke this directive if one health care provider and
8 one mental health professional find that I am an incapacitated
9 person and successfully challenged the determination of
10 incapacity.

11 I understand there are some circumstances where my
12 provider may not have to follow my directive, specifically, if
13 the treatment requested in this directive is infeasible or
14 unavailable, the facility or provider is not licensed or
15 authorized to provide the treatment requested or the directive
16 conflicts with other applicable law.

17 I thus do hereby declare:

18 I. DECLARATION FOR MENTAL HEALTH TREATMENT

19 If my primary physician and a licensed mental health
20 professional who is a qualified health care professional, one
21 of whom is my primary physician or psychologist, if readily
22 available, determine that my ability to receive and evaluate
23 information effectively or communicate decisions is impaired to
24 such an extent that I lack the capacity to refuse or consent to
25 mental health treatment and that mental health treatment is

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1 necessary, I direct my primary physician and a licensed mental
2 health professional who is a qualified health care
3 professional, pursuant to the Mental Health Care Treatment
4 Decisions Act, to provide the mental health treatment I have
5 indicated below by my signature.

6 I understand that "mental health treatment" means services
7 provided for the prevention of, amelioration of symptoms of, or
8 recovery from mental illness or emotional disturbance,
9 including but not limited to electroconvulsive treatment,
10 treatment with medication, counseling, rehabilitation services
11 or evaluation for admission to a facility for care or treatment
12 of persons with mental illness, if required.

13 1. Preferences and Instructions About Treatment, Facilities
14 and Physicians

15 I would like the physician(s) named below to be involved in my
16 treatment decisions:

17 Dr. _____ Contact information _____

18 Dr. _____ Contact information _____

19 I do not wish to be treated by Dr. _____

20 Other Preferences: _____

21 Preferences and Instructions About Other Providers

22 I am receiving other treatment or care from providers who I
23 feel have an impact on my mental health care. I would like the
24 following treatment provider(s) to be contacted when this
25 directive is effective:

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underscored material = new
[bracketed material] = delete

1 Name: _____ Profession _____

2 Contact Information _____

3 Name: _____ Profession _____

4 Contact Information _____

5 Preferences and Instructions About Medications for Mental
6 Health Treatment (*initial and complete all that apply*)

7 ___ I consent, and authorize my agent to consent, to the
8 following medications: _____

9 ___ I do not consent, and I do not authorize my agent to
10 consent, to the administration of the following medications:

11 _____

12 ___ I am willing to take the medications excluded above if my
13 only reason for excluding them is the side effects, which
14 include _____, and these side
15 effects can be eliminated by dosage adjustment or other means.

16 ___ I am willing to try any other medication the hospital
17 doctor recommends.

18 ___ I am willing to try any other medications my outpatient
19 doctor recommends.

20 ___ I do not want to try any other medications.

21 Medication Allergies

22 I have allergies to, or severe side effects from, the
23 following:

24 _____

25 I have the following other preferences or instructions about

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underscored material = new
[bracketed material] = delete

1 medications:

2 _____
3 Preferences and Instructions About Hospitalization and
4 Alternatives

5 *(initial all that apply and, if desired, rank "1" for first*
6 *choice, "2" for second choice, and so on)*

7 _____ In the event my psychiatric condition is serious enough
8 to require 24-hour care and I have no physical conditions that
9 require immediate access to emergency medical care, I prefer to
10 receive this care in programs/facilities designed as
11 alternatives to psychiatric hospitalization.

12 _____ I would also like the interventions below to be tried
13 before hospitalization is considered:

14 _____ Calling someone or having someone call me when needed.

15 Name: _____ Telephone: _____

16 ___ Having a mental health service provider come to see me

17 ___ Going to a crisis triage center or emergency room

18 ___ Staying overnight at a crisis respite (temporary) bed

19 ___ Seeing a provider for help with psychiatric medications

20 ___ Other, specify: _____

21 Authority to Consent to Inpatient Treatment

22 I consent, and authorize my agent to consent, to evaluation for
23 admission to inpatient mental health treatment.

24 (Sign one)

25 _____ If deemed appropriate by my agent and treating physician

underscored material = new
[bracketed material] = delete

1 _____ (Signature)

2 or

3 ___ Under the following circumstances (specify symptoms,
4 behaviors or circumstances that indicate the need for
5 hospitalization) _____

6 _____ (Signature)

7 ___ I do not consent, or authorize my agent to consent, to
8 evaluation for admission to inpatient treatment

9 _____ (Signature)

10 Preferences and Instructions About Use of Seclusion or
11 Restraint

12 I would like the interventions below to be tried before use of
13 seclusion or restraint is considered (*initial all that apply*)

14 ___ "Talk me down": one-on-one

15 ___ More medication

16 ___ Time out/privacy

17 ___ Show of authority/force

18 ___ Shift my attention to something else

19 ___ Set firm limits on my behavior

20 ___ Help me to discuss/vent feelings

21 ___ Decrease stimulation

22 ___ Offer to have neutral person settle dispute

23 ___ Other, specify _____

24 If it is determined that I am engaging in behavior that
25 requires seclusion, physical restraint and/or emergency use of

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underscoring material = new
[bracketed material] = delete

1 medication, I prefer these interventions in the order I have
2 chosen (*choose "1" for first choice, "2" for second choice, and*
3 *so on*):

4 Seclusion

5 Seclusion and physical restraint (combined)

6 Medication by injection

7 Medication in pill or liquid form

8 In the event my physician decides to use medication in response
9 to an emergency situation after due consideration of my
10 preferences and instructions for emergency treatments stated
11 above, I expect the choice of medication to reflect any
12 preferences and instructions I have expressed in this
13 directive. The preferences and instructions I express in this
14 section regarding medication in emergency situations do not
15 constitute consent to use of the medication for nonemergency
16 treatment.

17 Preferences and Instructions About Electroconvulsive Therapy

18 My wishes regarding electroconvulsive therapy are (*sign one*):

19 I do not consent, nor authorize my agent to consent, to the
20 administration of electroconvulsive therapy.

21 _____(Signature)

22 I consent, and authorize my agent to consent, to the
23 administration of electroconvulsive therapy.

24 _____(Signature)

25 I consent, and authorize my agent to consent, to the

1 administration of electroconvulsive therapy, but only under the
2 following conditions:

3 _____

4 _____ (Signature)

5 Preferences and Instructions About Who Is Permitted to Visit

6 If I have been admitted to a mental health treatment facility,
7 the following people are not permitted to visit me there:

8 Name: _____

9 Name: _____

10 Name: _____

11 I understand that persons not listed above may be permitted to
12 visit me.

13 Additional Instructions About My Mental Health Care

14 Other instructions about my mental health care:

15 In case of emergency, please contact:

16 Name: _____ Address: _____

17 Work Telephone: _____ Home telephone: _____

18 Physician: _____ Address: _____

19 Telephone: _____

20 The following may help me to avoid a hospitalization:

21 I generally react to being hospitalized as follows:

22 Staff of the hospital or crisis unit can help me by doing the
23 following:

24 Refusal of Treatment

25 I do not consent to any mental health treatment.

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(Signature)

I further state that this document and the information contained in it may be released to any requesting licensed mental health professional.

signature of principal/date

signature of witness 1/date

signature of witness 2/date

II. APPOINTMENT OF AGENT

If my primary physician and a licensed mental health professional who is a qualified health-care professional determine that my ability to receive and evaluate information effectively or communicate decisions is impaired to such an extent that I lack the capacity to refuse or consent to mental health treatment and that mental health treatment is necessary, I direct my primary physician and other health care providers, pursuant to the Mental Health Care Treatment Decisions Act, to follow the instructions of my agent.

I hereby appoint:

NAME _____

ADDRESS _____

TELEPHONE # _____ to act as my

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underscoring material = new
[bracketed material] = delete

1 agent to make decisions regarding my mental health treatment if
2 I become incapable of giving or withholding informed consent
3 for that treatment.

4 If the person named above refuses or is unable to act on my
5 behalf, or if I revoke that person's authority to act as my
6 agent, I authorize the following person to act as my agent:

7 NAME _____

8 ADDRESS _____

9 TELEPHONE # _____

10 My agent is authorized to make decisions that are consistent
11 with the wishes I have expressed in my declaration. If my
12 wishes are not expressed, my agent is to act in what he or she
13 believes to be my best interest.

14 _____

15 (signature of principal/date)

16 III. CONFLICTING PROVISION

17 I understand that if I have completed both a declaration and
18 have appointed an agent and if there is a conflict between my
19 agent's decision and my declaration, my declaration shall take
20 precedence unless I indicate otherwise.

21 _____ (signature)

22 I understand that if I have completed both an advance health
23 care directive and an advance directive for mental health
24 treatment, that those directives should be executed as separate
25 instructions.

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underscoring material = new
[bracketed material] = delete

1 _____ (signature)

2 IV. OTHER PROVISIONS

3 a. In the absence of my ability to give directions regarding
4 my mental health treatment, it is my intention that this
5 advance directive for mental health treatment shall be honored
6 by my family and physicians or psychologists as the expression
7 of my legal right to consent or to refuse to consent to mental
8 health treatment.

9 b. I direct the following concerning the care of my minor
10 children:

11 _____
12 c. This advance directive for mental health treatment shall be
13 in effect until it is revoked.

14 d. I understand that I may revoke this advance directive for
15 mental health treatment at any time.

16 e. I understand and agree that if I have any prior advance
17 directives for mental health treatment, and if I sign this
18 advance directive for mental health treatment, my prior advance
19 directives for mental health treatment are revoked.

20 f. I understand the full importance of this advance directive
21 for mental health treatment and I am emotionally and mentally
22 competent to make this advance directive for mental health
23 treatment.

24 Signed this _____ day of _____, 20__

25 _____

underscored material = new
[bracketed material] = delete

1 (signature)

2 _____

3 (city, county and state of residence)

4 This advance directive was signed in my presence.

5 _____

6 (signature of witness)

7 _____

8 (address)

9 _____

10 (signature of witness)

11 _____

12 (address)

13 _____".

14 Section 7. DECISIONS BY GUARDIAN.--

15 A. A guardian shall comply with the ward's
16 individual instructions and may not revoke the ward's advance
17 directive for mental health treatment unless the appointing
18 court expressly so authorizes after notice to the agent and the
19 ward.

20 B. A mental health treatment decision of an agent
21 appointed by an individual having capacity takes precedence
22 over that of a guardian, unless the appointing court expressly
23 directs otherwise after notice to the agent and the ward.

24 C. Subject to the provisions of Subsections A and B
25 of this section, a mental health treatment decision made by a

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underscored material = new
[bracketed material] = delete

1 guardian for the ward is effective without judicial approval,
2 if the appointing court has expressly authorized the guardian
3 to make mental health treatment decisions for the ward, in
4 accordance with the provisions of Section 45-5-312 NMSA 1978,
5 after notice to the ward and any agent.

6 Section 8. OBLIGATIONS OF MENTAL HEALTH TREATMENT
7 PROVIDER.--

8 A. Before implementing a mental health treatment
9 decision made for a patient, a supervising health care provider
10 shall promptly communicate to the patient the decision made and
11 the identity of the person making the decision.

12 B. A supervising health care provider who knows of
13 the existence of an advance directive for mental health
14 treatment, a revocation of an advance directive for mental
15 health treatment or a challenge to a determination or
16 certification of lack of capacity shall promptly record its
17 existence in the patient's health care record and, if it is in
18 writing, shall request a copy and, if one is furnished, shall
19 arrange for its maintenance in the health care record.

20 C. A qualified health care professional may
21 disclose an advance directive for mental health treatment to
22 other qualified health care professionals only when it is
23 determined that disclosure is necessary to give effect to or
24 provide treatment in accordance with an individual instruction.

25 D. A supervising health care provider who makes or

1 is informed of a written determination or certification
2 pursuant to Section 12 of the Mental Health Care Treatment
3 Decisions Act that a patient lacks or has recovered capacity or
4 that another condition exists that affects an individual
5 instruction or the authority of an agent or guardian shall
6 promptly record the determination in the patient's health care
7 record and communicate the determination or certification to
8 the patient and to any person then authorized to make mental
9 health treatment decisions for the patient.

10 E. Except as provided in Subsections F and G of
11 this section, a health care provider or health care institution
12 providing care to a patient shall comply:

13 (1) before and after the patient is determined
14 to lack capacity, with an individual instruction of the patient
15 made while the patient had capacity;

16 (2) with a reasonable interpretation of the
17 individual instruction made by a person then authorized to make
18 mental health treatment decisions for the patient; and

19 (3) with a mental health treatment decision
20 for the patient that is not contrary to an individual
21 instruction of the patient and is made by a person then
22 authorized to make mental health treatment decisions for the
23 patient, to the same extent as if the decision had been made by
24 the patient while having capacity.

25 F. A mental health care provider may only decline

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1 to comply with an individual instruction or mental health
2 treatment decision for any of the following reasons:

3 (1) the treatment requested is infeasible or
4 unavailable;

5 (2) the facility or provider is not licensed
6 or authorized to provide the treatment requested; or

7 (3) the treatment requested conflicts with
8 other applicable law.

9 G. A mental health care provider or mental health
10 care institution may decline to comply with an individual
11 instruction or mental health treatment decision that requires
12 medically ineffective health care or health care contrary to
13 generally accepted health care standards applicable to the
14 mental health care provider or mental health care institution.
15 "Medically ineffective health care" means treatment that would
16 not offer the patient any significant benefit, as determined by
17 a physician chosen by the principal or agent.

18 H. A health care provider or health care
19 institution that declines to comply with an individual
20 instruction or mental health care decision shall:

21 (1) promptly so inform the patient, if
22 possible, and any person then authorized to make mental health
23 care decisions for the patient;

24 (2) provide continuing care to the patient
25 until a transfer can be effected; and

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1 (3) unless the patient or person then
 2 authorized to make mental health treatment decisions for the
 3 patient refuses assistance, immediately make all reasonable
 4 efforts to assist in the transfer of the patient to another
 5 health care provider or health care institution that is willing
 6 to comply with the individual instruction or decision.

7 I. A health care provider or health care
 8 institution shall not require or prohibit the execution or
 9 revocation of an advance directive for mental health treatment
 10 as a condition for providing health care.

11 J. The Mental Health Care Treatment Decisions Act
 12 does not require or permit a health care institution or health
 13 care provider to provide any type of mental health treatment
 14 for which the health care institution or health care provider
 15 is not licensed, certified or otherwise authorized or permitted
 16 by law to provide.

17 Section 9. HEALTH CARE INFORMATION.--Unless otherwise
 18 specified in an advance directive for mental health treatment,
 19 a person then authorized to make mental health treatment
 20 decisions for a patient has the same rights as the patient to
 21 request, receive, examine, copy and consent to the disclosure
 22 of medical or any other health care information.

23 Section 10. IMMUNITIES.--

24 A. A health care provider or health care
 25 institution acting in good faith and in accordance with

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1 generally accepted health care standards applicable to the
2 health care provider or health care institution is not subject
3 to civil or criminal liability or to discipline for
4 unprofessional conduct for:

5 (1) complying or attempting to comply with a
6 mental health treatment decision of a person apparently having
7 authority to make a mental health treatment decision for a
8 patient;

9 (2) declining to comply with a mental health
10 treatment decision of a person based on a belief that the
11 person then lacked authority;

12 (3) complying or attempting to comply with an
13 advance directive for mental health treatment and assuming that
14 the directive was valid when made and has not been revoked or
15 terminated;

16 (4) declining to comply with a mental health
17 treatment directive as permitted; or

18 (5) complying or attempting to comply with any
19 other provision of the Mental Health Care Treatment Decisions
20 Act.

21 B. An individual acting as agent or guardian under
22 the Mental Health Care Treatment Decisions Act is not subject
23 to civil or criminal liability or to discipline for
24 unprofessional conduct for mental health treatment decisions
25 made in good faith.

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1 Section 11. STATUTORY DAMAGES.--

2 A. A health care provider or health care
3 institution that intentionally violates the Mental Health Care
4 Treatment Decisions Act is subject to liability to the
5 aggrieved individual for damages of five thousand dollars
6 (\$5,000) or actual damages resulting from the violation,
7 whichever is greater, plus reasonable attorney fees.

8 B. A person who intentionally falsifies, forges,
9 conceals, defaces or obliterates an individual's advance
10 directive for mental health treatment or a revocation of an
11 advance directive for mental health treatment without the
12 individual's consent or a person who coerces or fraudulently
13 induces an individual to give, revoke or not give or revoke an
14 advance directive for mental health treatment is subject to
15 liability to that individual for damages of five thousand
16 dollars (\$5,000) or actual damages resulting from the action,
17 whichever is greater, plus reasonable attorney fees.

18 C. The damages provided in this section are in
19 addition to other types of relief available under other law,
20 including civil and criminal law and law providing for
21 disciplinary procedures.

22 Section 12. CAPACITY.--

23 A. The Mental Health Care Treatment Decisions Act
24 does not affect the right of an individual to make mental
25 health treatment decisions while having the capacity to do so.

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1 B. An individual is presumed to have capacity to
2 make a mental health treatment decision, to give or revoke an
3 advance directive for mental health treatment.

4 C. An individual shall not be determined to lack
5 capacity solely on the basis that the individual chooses not to
6 accept the treatment recommended by a health care provider.

7 D. An individual, at any time, may challenge a
8 determination that the individual lacks capacity by a signed
9 writing or by personally informing a health care provider of
10 the challenge. A health care provider who is informed by the
11 individual of a challenge shall promptly communicate the fact
12 of the challenge to the supervising health care provider and to
13 any health care institution at which the individual is
14 receiving care. Such a challenge shall prevail unless
15 otherwise ordered by the court in a proceeding brought pursuant
16 to the provisions of Section 24-7A-14 NMSA 1978.

17 E. A determination of lack of capacity under the
18 Mental Health Care Treatment Decisions Act shall not be
19 evidence of incapacity under the provisions of Article 5 of the
20 Uniform Probate Code.

21 F. A determination of incapacity may only be made
22 by two persons, who shall be a physician or qualified health
23 care professional and a licensed mental health professional who
24 is a qualified health care professional. If after the
25 examination the principal is determined to lack capacity and is

1 in need of mental health treatment, a written certification,
2 substantially in the form provided in Subsection G of this
3 section, of the principal's condition shall be made a part of
4 the principal's medical record.

5 G. The following certification of the examination
6 of a principal determining whether the principal is in need of
7 mental health treatment and whether the principal does or does
8 not lack capacity may be used by examiners:

9 "OPTIONAL EXAMINER'S CERTIFICATION

10 We, the undersigned, have made an examination of _____,
11 and do hereby certify that we have made a careful personal
12 examination of the actual condition of the person and on such
13 examination we find that _____:

- 14 1. (Is) (Is not) in need of mental health treatment; and
- 15 2. (Does) (Does not) lack capacity to participate in decisions
16 about (her)(his) mental health treatment.

17 The facts and circumstances on which we base our opinions are
18 stated in the following report of symptoms and history of case,
19 which is hereby made a part hereof.

20 According to the advance directive for mental health treatment,
21 (name of patient) _____, wishes to receive
22 mental health treatment in accordance with the preferences and
23 instructions stated in the advance directive for mental health
24 treatment.

25 We are duly licensed to practice in this state of New Mexico,

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1 are not related to _____ by blood or marriage and have no
2 interest in her/his estate.

3 Witness our hands this _____ day of _____, 20__

4 _____ M.D., D.O., Ph.D., Other

5 _____ M.D., D.O., Ph.D., Other

6 Subscribed and sworn to before me this _____ day of

7 _____, 20__

8 _____

9 Notary Public

10 REPORT OF SYMPTOMS AND HISTORY OF CASE BY EXAMINERS

11 1. GENERAL

12 Complete name _____

13 Place of residence _____

14 Sex _____ Ethnicity _____

15 Age _____

16 Date of Birth _____

17 2. STATEMENT OF FACTS AND CIRCUMSTANCES

18 Our determination that the principal (is)(is not) in need for
19 mental health treatment is based on the

20 following: _____

21 _____

22 _____

23 Our determination that the principal does not have the capacity
24 to participate in the principal's mental health treatment
25 decisions is based on:

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underscoring material = new
[bracketed material] = delete

1 1. the principal's ability to understand and communicate the
2 nature of the proposed health care or mental health treatment
3 described as:

4 _____
5 _____

6 2. the principal's ability to understand and communicate the
7 consequences of the proposed health care or mental health
8 treatment described as:

9 _____
10 _____

11 3. the principal's ability to understand and communicate the
12 significant benefits, risks and alternatives to the proposed
13 health care or mental health treatment described as:

14 _____
15 _____

16 4. the principal's ability to understand and communicate a
17 choice about the proposed health care or mental health
18 treatment described as:

19 _____
20 _____

21 3. NAME AND RELATIONSHIPS OF FAMILY MEMBERS/OTHERS TO BE
22 NOTIFIED

23 Other data _____

24 Dated at _____, New Mexico, this _____ day

25 of _____, 20____

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underscored material = new
[bracketed material] = delete

1 _____ M.D., D.O., Ph.D., Other

2 Address

3 _____ M.D., D.O., Ph.D., Other

4 Address"."

5 Section 13. EFFECT OF COPY.--A copy of a written advance
6 directive for mental health treatment or revocation of an
7 advance directive for mental health treatment has the same
8 effect as the original.

9 Section 14. EFFECT OF THE MENTAL HEALTH CARE TREATMENT
10 DECISIONS ACT.--

11 A. The Mental Health Care Treatment Decisions Act
12 does not create a presumption concerning the intention of an
13 individual who has not made or who has revoked an advance
14 directive for mental health treatment.

15 B. Death resulting from the withholding or
16 withdrawal of health care in accordance with the Mental Health
17 Care Treatment Decisions Act does not for any purpose:

18 (1) constitute a suicide, a homicide or other
19 crime; or

20 (2) legally impair or invalidate a governing
21 instrument, notwithstanding any term of the governing
22 instrument to the contrary. "Governing instrument" means a
23 deed, will, trust, insurance or annuity policy, account with
24 POD (payment on death designation), security registered in
25 beneficiary form (TOD), pension, profit-sharing, retirement,

underscored material = new
[bracketed material] = delete

1 employment or similar benefit plan, instrument creating or
2 exercising a power of appointment or a dispositive, appointive
3 or nominative instrument of any similar type.

4 C. The Mental Health Care Treatment Decisions Act
5 does not authorize mercy killing, assisted suicide, euthanasia
6 or the provision, withholding or withdrawal of health care, to
7 the extent prohibited by other statutes of this state.

8 D. The Mental Health Care Treatment Decisions Act
9 does not authorize or require a health care provider or health
10 care institution to provide health care contrary to generally
11 accepted health care standards applicable to the health care
12 provider or health care institution.

13 E. The Mental Health Care Treatment Decisions Act
14 does not authorize an agent to consent to the admission of an
15 individual to a mental health care facility. If the
16 individual's written advance directive for mental health
17 treatment expressly permits treatment in a mental health care
18 facility, the agent may present the individual to a facility
19 for evaluation for admission.

20 F. The Mental Health Care Treatment Decisions Act
21 does not affect other statutes of this state governing
22 treatment for mental illness of an individual admitted to a
23 mental health care institution, including involuntary
24 commitment to a mental health care institution for mental
25 illness.

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