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April 2011 • Volume 5 • No. 2

The Psychiatric Advance Directive - An Often-Overlooked but Important Incapacity Planning Tool

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Approximately 5 per cent of Americans have serious, chronic mental illness, according to official government reports, and since 1955, there has been nearly a fourfold increase in the number of reported psychiatric care episodes per 100,000 U.S. population. Regardless of the reasons for this astounding rise, up to half of us may be affected in some way by mental illness within our lifetimes. Yet, reliable sources show that few patients have executed advance medical directives for psychiatric care. Think this information has little application to you as an estate planning attorney? Consider the following true stories of my personal friends, told with their permission. Details have been modified to protect anonymity.

A professional man in his 50s with multiple advanced degrees and a stellar resume suddenly begins "hearing voices" telling him to commit suicide, despite his zest for life and enthusiasm about starting a new career. After months of fruitless medical and psychiatric treatment, these strange phenomena are finally traced to hyponatremia, a serious and potentially fatal metabolic imbalance. Following treatment for a day in the hospital with intravenous saline and potassium, my friend's command hallucinations finally cease, and through diet and lifestyle changes, he gradually makes a full recovery.

A retired college professor erroneously diagnosed with an infection and treated for months with strong antibiotics suddenly becomes severely depressed and anxious. When conventional treatments fail, she is persuaded to undergo electro-convulsive therapy which provides some relief but wipes out entire years from her memory. Eventually the illness remits after she discontinues treatment. Today, enjoying semi-retirement, she looks back and wonders how, in a state of truly suicidal depression, she could have been considered competent to consent to the treatment, and is angry that her disclosure of having undergone ECT has disqualified her from obtaining long-term care insurance.

Illness - including psychiatric distress – results from complex interactions among genetics, environment, individual biology and personality. Mental illnesses affect sufferers through major changes in thought patterns, inability to regulate emotions and behavior aberrations. However, as seen above, physical illnesses or acute medication reactions frequently manifest through psychiatric symptoms. Despite what we are learning about the interrelationship between physical medicine and mental illness, researchers estimate that up to 80% of the physical causes of psychiatric phenomena are missed on initial evaluation.

Virtually anyone can suddenly manifest symptoms of psychiatric illness, as my friends' stories show. However, even individuals with severe and persistent mental illnesses like schizophrenia, bipolar disorder and post-traumatic stress disorder have periods of lucidity and stability, live independently and are employed . Some may be our clients – and it's important for them to have a say in the evaluation and treatment of their mental health issues should an emergency occur. In the course of incapacity planning, we almost invariably discuss advance healthcare directives, yet we may overlook the importance of planning for mental incapacity. I submit that in the interest of fully representing our clients, we need to be starting this conversation with them on a routine basis.

The Psychiatric Advance Directive is an important incapacity planning tool that allows an individual, while competent, to either appoint a surrogate to act on his behalf to authorize, limit or decline psychiatric care, to declare her wishes and preferences for mental health care in the event it's deemed necessary, or to combine a psychiatric care surrogate appointment with a pre-need declaration in a single document.

Psychiatric advance directives, like medical powers of attorney and living wills, represent extensions of the

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legal right of competent individuals to autonomy and self-determination in healthcare decision-making (see Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990) . Today, advance healthcare directives are allowed in every state and under federal law; free-standing PADs are specifically authorized in 25 state statutes, and 7 states and the Veterans Administration healthcare system provide for PAD provisions within general medical surrogacy documents. Most common state-mandated or suggested formats authorize springing powers requiring a medical determination of incompetence: another option is a shifting power that becomes effective on signature by the principal.

The WealthDocx document drafting system provides WealthCounsel members access to optional springing PAD provisions for a general medical advance directive. Obviously, the drafter must follow applicable jurisdictional law, best practices and common sense with respect to client competency, document format, execution formalities, distribution of copies and notification to interested individuals. When drafting a PAD for a competent client with a known psychiatric condition, it may be useful to obtain HIPAA releases to coordinate care directives with a health care team. Clients must be encouraged to thoroughly discuss medical and health care history and care preferences with appointed surrogates and medical providers while competent and should create separate writings outlining specific wishes in the event their official PAD documents lack such specificity.

Questions remain regarding the interaction between PADs, state involuntarily commitment statutes and individual civil liberties. One federal appeals court case has spoken to some of the relevant constitutional issues (see Hargrave v. Vermont, 340 F.3d 27 (2d Cir 2003)). Physician override of a PAD is also a concern: research in 2007 showed that almost half of U.S. doctors would consider ignoring their patients' expressed preferences for psychiatric care in an emergency situation. And, in the event a PAD is over-ridden by an involuntary commitment order, a designated surrogate may be required to act not according to patient wishes but "in the patient's best interest". Choice of a designated surrogate is therefore of the utmost importance: the individual should be not only thoroughly familiar with any currently existing psychiatric condition and the patient's wishes but also a persuasive, articulate advocate to convince treatment providers that the client's expressed wishes are in fact in her best interest.

Despite challenging legal and ethical issues, it has been widely shown that PADs promote patient autonomy and result in more positive treatment outcomes. Helping a client prepare for a psychiatric crisis through the use of a PAD may not provide a perfect solution, but it's certainly a good idea.

About the Author:
Suellen Fagin-Allen is an attorney and a licensed and national board certified mental health counselor in Orlando, Florida. Over the past 20 years she has maintained a private law practice focusing on estate and incapacity planning, estate administration, guardianship and mental health law. After nearly a decade practicing counseling and psychotherapy with mandated and forensic clients, she recently established a private counseling practice treating individuals with thought, mood, anxiety, stress and substance abuse disorders. Questions or comments about this article may be directed to Suellen@CounselingFL.com. For further reading on this and related subjects, the practitioner is encouraged to visit the National Resource Center on Psychiatric Advance Directives website, www.nrc-pad.org.