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The use of a Psychiatric Advanced Directive under the Colorado Patient Autonomy Act

Most senior patients and residents of skilled nursing or assisted living facilities have prepared an advanced directive for medical care to name an agent to make medical decisions. Typically this is accomplished by a Medical Durable Power of Attorney (MDPOA).¹ But does an agent under a MDPOA have the power to make medical decisions relating to mental health care?

A Psychiatric Advanced Directive (PAD) may be used to document the instructions or preferences of a person who has decisional capacity (the “principal”) regarding future mental health treatment, in preparation for the possibility that the principal may lose decisional capacity to give or withhold consent to treatment during episodes of mental illness.² In the past decade, twenty-five states have adopted some form of statute that specifically authorizes use of a PAD, but Colorado is not one of them. However, Colorado residents may still make advanced directives for mental health care.

Even though Colorado does not have a specific PAD section in its Colorado Patient Autonomy Act,³ Colorado’s MDPOA laws still allow the principal to appoint an agent to make a wide range of health care decisions for the principal in the event the principal loses the capacity to make decisions. If specific PAD language and instructions are included in the MDPOA, the instructions work to document the principal’s decisions concerning mental health treatment. When the principal loses

¹ Colorado’s Medical Power of Attorney statute is found at C.R.S. §15-14-506.

² Colorado Revised Statutes (“C.R.S.”) §15-14-505(4) defines “decisional capacity” as the ability to provide informed consent to or refusal of medical treatment or the ability to make an informed health care benefit decision.

³ C.R.S. §15-14-503 to 15-14-509



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decisional capacity as a result of an episode of mental illness, those wishes may be reflected in the medical decisions of the agent under the MDPOA.

To provide clarity about his or her intentions, the principal should document any specific instructions as to medications, hospitalization, electroshock and other treatments, including the refusal of any treatment modalities. The agent will be responsible for exercising substituted judgment on behalf of the principal as set forth in the instructions within the MDPOA. If the agent is unable to make a decision based on these express instructions, then the agent must make a decision in the “best interests” of the principal.⁴ Furthermore, the MDPOA document may address how the principal is deemed to lack decisional capacity, in order to avoid the necessity of court intervention to determine the patient’s condition. This could include written certification about the principal’s decisional capacity from the principal’s treating physician, or written certification from two qualified health care providers.⁵

There are two exceptions to mental health providers having to follow the principal’s specific mental health care instructions given to the agent in the MDPOA. First, a patient may not be subjected to involuntary hospitalization under Colorado law without a court order. The judicial process for involuntary mental health holds and commitments, described at C.R.S. 27-10-101 *et seq.*, cannot be avoided by following the instructions of an agent.⁶ Therefore, as a practical matter the MPDOA provisions for mental health treatment only apply to emergency events for which mental health hospitalization has not be initiated, or to a low-affect mental illness that can be managed in a treatment setting to which the principal was voluntarily admitted and in which the patient is treated in a “least restrictive”

⁴ C.R.S. §15-14-506(2)

⁵ C.R.S. §15-14-505(6) states, “health care provider” means any physician or any other individual who administers medical treatment to persons and who is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment or who is employed by or acting for such authorized person.

⁶ C.R.S. §15-14-506(4)(b) states, “Nothing in this article shall be construed to supersede any provision of article 1 of title 25, C.R.S., article 10 of title 27, C.R.S., or article 10.5 of title 27, C.R.S.” Article 10 of Title 27 are the involuntary hospitalization statutes.



setting. Second, the provider must treat the patient/principal in a medically appropriate way at all times, despite a different instruction from the agent.⁷

The MDPOA, including the PAD language and instructions, remains valid so long as it is not revoked. It can be revoked at any time by the principal during periods of adequate decisional capacity. The agent could also decide to cease acting for the principal at any time, and resign from further service under the MDPOA. (The Medical Power of Attorney automatically becomes invalid in the event of a legal separation or divorce if the spouse is named as the agent.) It is a good idea to review and update a Medical Durable Power of Attorney regularly, and to include successor agent provisions in the event the named agent is unable or refuses to serve.*

*This document was prepared by Attorneys Kristofer M. Simms and Sharon E. Caulfield of Caplan and Earnest LLC. The advice provided in this memo is intended for general educational purposes only and is not intended to provide legal advice to any specific organization.

⁷ C.R.S. §15-14-506(5)(b) states, “Nothing in this part 5 or in a medical durable power of attorney shall be construed to compel or authorize a health care provider or health care facility to administer medical treatment that is otherwise illegal, medically inappropriate, or contrary to any federal or state law.”