

ENROLLED HOUSE
BILL NO. 1353

By: Crocker, Perry and
Bryant of the House

and

Horner and Williams
(Penny) of the Senate

An Act relating to mental health; creating the "Advance Directives for Mental Health Treatment Act"; providing short title; stating legislative findings; defining terms; authorizing certain directives under certain circumstances; specifying certain requirements; providing for appointment of certain individuals under certain circumstances; establishing authority of appointed individuals; establishing certain forms; providing for notice under certain circumstances; providing for effect of advance directives under certain conditions; providing for delivery of directives; providing for revocation of directives; establishing certain requirements for compliance with directives; providing for transfer under certain circumstances; providing for certification under certain circumstances; providing for forms; providing for petition to district court under certain circumstances; limiting liability of certain individuals under certain circumstances; prohibiting certain conduct; establishing penalties; amending 76 O.S. 1991, Section 19, as amended by Section 1, Chapter 90, O.S.L. 1994 (76 O.S. Supp. 1994, Section 19), which relates to access to medical records; providing for the release of certain records to certain persons; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 11-101 of Title 43A, unless there is created a duplication in numbering, reads as follows:

This act shall be known and may be cited as the "Advance Directives for Mental Health Treatment Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 11-102 of Title 43A, unless there is created a duplication in numbering, reads as follows:

A. The Legislature finds that all competent persons have the fundamental right to control decisions relating to their own mental health treatment, including the decision to accept mental health treatment.

B. A capable adult may make an advance directive of mental health treatment preferences or instruction which may include, but is not limited to, consent to mental health treatment.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 11-103 of Title 43A, unless there is created a duplication in numbering, reads as follows:

Whenever used in the Advance Directives for Mental Health Treatment Act:

1. "Advance directive for mental health treatment" means a written document voluntarily executed by a declarant in accordance with the requirements of this act and includes:

- a. a declaration, or
- b. the appointment of an attorney-in-fact;

2. "Attending physician or psychologist" means the physician or psychologist who has primary responsibility for the mental health treatment of the declarant;

3. "Attorney-in-fact" means an individual eighteen (18) years old or older appointed by a declarant to make mental health treatment decisions on behalf of the declarant as provided by this act;

4. "Capable" means the person is able to receive and evaluate information effectively and communicate decisions regarding his or her mental health treatment;

5. "Declaration" means a written document voluntarily executed by a declarant stating the mental health treatment wishes of a declarant in the event the declarant is determined to be incapable and mental health treatment is necessary;

6. "Declarant" means a capable person eighteen (18) years of age or older who has executed an advance directive for mental health treatment in accordance with the provisions of this act;

7. "Health care facility" includes any program, institution, place, building or agency, or portion thereof, private or public, whether organized for profit or not, used, operated, or designed to provide medical diagnosis, treatment, rehabilitative or preventive care to any person. The term "health care facility" includes, but is not limited to, health care facilities that are commonly referred to as hospitals, outpatient clinics, organized ambulatory health care facilities, emergency care facilities and centers, health maintenance organizations, and others providing similarly organized services regardless of nomenclature;

8. "Mental health treatment" means convulsive treatment, treatment with psychoactive medication, and admission to and retention in a facility for a period up to twenty-eight (28) days;

9. "Physician" means an individual currently licensed to practice medicine in this state;

10. "Psychologist" means an individual currently licensed to practice in this state as a clinical psychologist; and

11. "Incapable" means that, in the opinion of two persons, who shall be physicians or psychologists, a person's ability to receive and evaluate information effectively or communicate decisions is impaired as the result of a mental illness to such an extent that the person currently lacks the capacity to make mental health treatment decisions.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 11-104 of Title 43A, unless there is created a duplication in numbering, reads as follows:

A. Any capable person eighteen (18) years of age or older may execute an advance directive for mental health treatment stating the mental health treatment wishes of the person in the event the person is determined to be incapable and mental health treatment is

determined to be necessary as provided by Section 10 of this act. An advance directive for mental health treatment may include but is not limited to consent to inpatient mental health treatment.

B. An advance directive for mental health treatment may be executed by:

1. Executing a declaration; or
2. Appointing an attorney-in-fact; or
3. Both executing a declaration and appointing an attorney-in-fact. If executed, the appointment of an attorney-in-fact shall be attached to the declaration.

C. The Advance Directives for Mental Health Treatment Act:

1. Shall not affect the right of an individual to make decisions about mental health treatment, so long as the individual is capable; and
2. Creates no presumption concerning the intention of an individual who has revoked or has not executed an advance directive for mental health treatment.

D. For the purpose of the Advance Directives for Mental Health Treatment Act:

1. If a person is incapable at the time of a determination that mental health treatment is necessary, an advance directive for mental health treatment executed in accordance with the Advance Directives for Mental Health Treatment Act is presumed to be valid; and

2. A physician, psychologist or health care facility may presume, in the absence of actual notice to the contrary, that a person who executed an advance directive for mental health treatment was of sound mind when the advance directive for mental health treatment was executed.

E. A person shall not be required to execute or to refrain from executing an advance directive for mental health treatment as a criterion for insurance, as a condition for receiving mental or physical health services, or as a condition of discharge from a health care facility.

F. The fact that a person has executed an advance directive for mental health treatment shall not constitute an indication of mental incompetence.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 11-105 of Title 43A, unless there is created a duplication in numbering, reads as follows:

A. An advance directive for mental health treatment is valid only if it is signed by the declarant and two capable witnesses eighteen (18) years of age or older. The witnesses shall attest that the declarant:

1. Is known to them;
2. Signed the advance directive for mental health treatment in their presence;
3. Appears to be capable; and
4. Is not acting under duress, fraud or undue influence.

B. None of the following persons shall be eligible to serve as attorney-in-fact to the signing of an advance directive for mental health treatment:

1. The attending physician or psychologist or an employee of the physician or psychologist; or
2. An owner, operator or employee of a health care facility in which the declarant is a patient or resident.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 11-106 of Title 43A, unless there is created a duplication in numbering, reads as follows:

A. A declaration stating the mental health treatment wishes of the declarant executed in accordance with the provisions of this act shall be substantially in the form provided by subsection E of this section.

B. A declarant may designate a capable person eighteen (18) years of age or older to act as attorney-in-fact to make mental health treatment decisions. An alternative attorney-in-fact may also be designated to act as attorney-in-fact if the original attorney-in-fact is unable or unwilling to act at any time. An appointment of an attorney-in-fact shall be substantially in the form provided by subsection E of this section.

C. An attorney-in-fact who has accepted the appointment in writing shall have authority to make decisions, in consultation with the attending physician or psychologist, about mental health treatment on behalf of the declarant only when the declarant is certified as incapable and to require mental health treatment as provided by Section 10 of this act.

1. These decisions shall be consistent with any wishes or instructions the declarant has expressed in the declaration. If the wishes or instructions of the declarant are not expressed, the attorney-in-fact shall act in what the attorney-in-fact believes to be in the best interest of the declarant.

2. The attorney-in-fact may consent to inpatient mental health treatment on behalf of the declarant if so authorized in the advance directive for mental health treatment.

D. An attorney-in-fact may withdraw by giving notice to the declarant. If a declarant is incapable, the attorney-in-fact may withdraw by giving notice to the named alternative attorney-in-fact if any, and if none then to the attending physician or provider. The attending physician or provider shall note the withdrawal of the last named attorney-in-fact as part of the declarant's medical record.

E. An advance directive for mental health treatment shall be notarized and shall be in substantially the following form:

ADVANCE DIRECTIVE FOR MENTAL HEALTH TREATMENT

I, _____, being of sound mind and eighteen (18) years of age or older, willfully and voluntarily make known my wishes about mental health treatment, by my instructions to others through my advance directive for mental health treatment, or by my appointment of an attorney-in-fact, or both. I thus do hereby declare:

I. DECLARATION FOR MENTAL HEALTH TREATMENT

If my attending physician or psychologist and another physician or psychologist 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 attending physician or psychologist and other health care providers, pursuant to the Advance Directives for Mental Health Treatment Act, to provide the mental health treatment I have indicated below by my signature.

I understand that "mental health treatment" means convulsive treatment, treatment with psychoactive medication, and admission to and retention in a health care facility for a period up to twenty-eight (28) days.

I direct the following concerning my mental health care: _____

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

Declarant's Signature _____ Date

Witness 1 _____ Date

Witness 2 _____ Date

II. APPOINTMENT OF ATTORNEY-IN-FACT

If my attending physician or psychologist and another physician or psychologist 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 attending physician or psychologist and other health care providers, pursuant to the Advance Directives for Mental Health Treatment Act, to follow the instructions of my attorney-in-fact.

I hereby appoint:

NAME _____
ADDRESS _____
TELEPHONE # _____

to act as my attorney-in-fact to make decisions regarding my mental health treatment if I become incapable of giving or withholding informed consent for that treatment.

If the person named above refuses or is unable to act on my behalf, or if I revoke that person's authority to act as my attorney-in-fact, I authorize the following person to act as my attorney-in-fact:

NAME _____
ADDRESS _____
TELEPHONE # _____

My attorney-in-fact is authorized to make decisions which are consistent with the wishes I have expressed in my declaration. If my wishes are not expressed, my attorney-in-fact is to act in what he or she believes to be my best interest.

(Signature of Declarant/Date)

III. CONFLICTING PROVISION

I understand that if I have completed both a declaration and have appointed an attorney-in-fact and if there is a conflict between my attorney-in-fact's decision and my declaration, my declaration shall take precedence unless I indicate otherwise.

(signature)

IV. OTHER PROVISIONS

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

b. This advance directive for mental health treatment shall be in effect until it is revoked.

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

d. I understand and agree that if I have any prior advance directives for mental health treatment, and if I sign this advance directive for mental health treatment, my prior advance directives for mental health treatment are revoked.

e. I understand the full importance of this advance directive for mental health treatment and I am emotionally and mentally competent to make this advance directive for mental health treatment.

Signed this _____ day of _____, 19 ____

(Signature)

City, County and State of Residence

This advance directive was signed in my presence.

(Signature of Witness)

(Address)

(Signature of Witness)

(Address)

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 11-107 of Title 43A, unless there is created a duplication in numbering, reads as follows:

A. The wishes of a declarant, at all times while the declarant is capable, shall supersede the effect of an advance directive for mental health treatment.

B. An advance directive for mental health treatment shall become operative when:

1. It is delivered to the declarant's physician or psychologist; and

2. The declarant is certified to be incapable and to require mental health treatment as provided by Section 10 of this act.

C. An advance directive for mental health treatment remains valid until:

1. Revoked, expired or superseded by a subsequent advance directive for mental health treatment; or

2. Superseded by a court order.

D. A court order shall supersede an advance directive for mental health treatment in all circumstances.

E. Mental health treatment instructions contained in a declaration executed in accordance with this act shall supersede any contrary or conflicting instructions given by an attorney-in-fact for mental health treatment decisions unless the authority given to the attorney-in-fact in the advance directive for mental health treatment expressly provides otherwise.

F. Except as provided by subsection E of this section, in the event that more than one valid advance directive for mental health treatment has been executed and not revoked, the last advance

directive for mental health treatment executed shall be construed to be the mental health treatment wishes of the declarant and shall become operative as provided by subsection B of this section.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 11-108 of Title 43A, unless there is created a duplication in numbering, reads as follows:

A. It shall be the responsibility of the declarant to provide for delivery of the advance directive for mental health treatment to the attending physician or psychologist.

1. In the event the declarant is comatose, incompetent, or otherwise mentally or physically incapable after executing the advance directive for mental health treatment, any other person may deliver the advance directive for mental health treatment to the attending physician or psychologist.

2. Any person having possession of another person's advance directive for mental health treatment and who becomes aware that the declarant is in circumstances under which the terms of the advance directive for mental health treatment may become operative shall deliver the advance directive for mental health treatment to the declarant's attending physician, psychologist or to any health care facility in which the declarant is a patient.

B. An attending physician, psychologist or health care facility notified of the advance directive for mental health treatment of a declarant shall promptly make the declaration a part of the medical records of the declarant.

C. An attending physician or other mental health treatment provider who has been notified of the existence of an advance directive for mental health treatment executed pursuant to this act shall make all reasonable efforts to obtain the advance directive for mental health treatment.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 11-109 of Title 43A, unless there is created a duplication in numbering, reads as follows:

A. An advance directive for mental health treatment may be revoked in whole or in part by the declarant at any time while the declarant is capable by any of the following methods:

1. By being destroyed by the declarant or by some person in the declarant's presence and at the declarant's direction;

2. By a written revocation signed and dated by the declarant expressing the declarant's intent to revoke;

3. By a declarant's unambiguous verbal expression, in the presence of two witnesses eighteen (18) years of age or older, of an intent to revoke the declaration; or

4. By a declarant's unambiguous verbal expression to an attending physician or psychologist.

B. The revocation shall become effective upon communication to the attending physician or psychologist by the declarant or by both witnesses. The attending physician or psychologist shall record the time, date, and place when the notification of the revocation was received.

C. In the absence of actual notice of the revocation of an advance directive for mental health treatment, no attending physician or psychologist, health care facility or other person acting under the direction of an attending physician or psychologist shall be subject to criminal prosecution or civil liability or be deemed to have engaged in unprofessional conduct as a result of the provision of medical treatment to a declarant in accordance with the Advance Directives for Mental Health Treatment Act unless the absence of actual notice resulted from the negligence of the health care provider, physician, or other person.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 11-110 of Title 43A, unless there is created a duplication in numbering, reads as follows:

A. The attending physician or psychologist shall continue to obtain the declarant's informed consent to all mental health treatment decisions when the declarant is capable of providing informed consent or refusal.

B. A declarant appearing to require mental health treatment shall be examined by two persons, who shall be physicians or psychologists. If after the examination the declarant is determined to be incapable and is in need of mental health treatment, a written certification, substantially in the form provided by subsection E of this section, of the declarant's condition shall be made a part of the declarant's medical record.

C. The attending physician or psychologist is authorized to act in accordance with an operative advance directive for mental health treatment when the declarant has been determined to be incapable and mental health treatment is necessary. Except as otherwise provided by this act with regard to conflicting instructions in an advance directive for mental health treatment:

1. An attending physician or psychologist and any other physician or psychologist under the attending physician's or psychologist's direction or control, having possession of the patient's declaration or having knowledge that the declaration is part of the patient's medical record, shall follow as closely as possible the terms of the declaration.

2. An attending physician or psychologist and any other physician or psychologist under the attending physician's direction or control, having possession of the patient's appointment of an attorney-in-fact or having knowledge of the appointment of an attorney-in-fact, shall follow as closely as possible the instruction of the attorney-in-fact.

D. An attending physician or psychologist who is unable to comply with the terms of the patient's declaration shall make the necessary arrangements to transfer the patient and the appropriate medical records without delay to another physician or psychologist.

1. A physician or psychologist who transfers the patient without unreasonable delay, or who makes a good faith attempt to do so, shall not be subject to criminal prosecution or civil liability, and shall not be found to have committed an act of unprofessional conduct for refusal to comply with the terms of the declaration. Transfer under these circumstances shall not constitute abandonment.

2. The failure of an attending physician or psychologist to transfer in accordance with this subsection shall constitute professional misconduct.

E. The following certification of the examination of a declarant determining whether the declarant is in need of mental health treatment and whether the declarant is or is not incapable may be utilized by examiners:

EXAMINER'S CERTIFICATION

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

1. (Is) (Is not) in need of mental health treatment; and
2. (Is) (Is not) incapable to participate in decisions about (her) (his) mental health treatment.

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

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

We are duly licensed to practice in the State of Oklahoma, are not related to _____ by blood or marriage, and have no interest in her/his estate.

Witness our hands this _____ day of _____, 19____
_____, M.D., D.O., Ph.D., Other
_____, M.D., D.O., Ph.D., Other

Subscribed and sworn to before me this _____ day of _____, 19____

Notary Public

REPORT OF SYMPTOMS AND HISTORY OF
CASE BY EXAMINERS

1. GENERAL

Complete name _____
Place of residence _____
Sex _____ Color _____
Age _____
Date of Birth _____

2. STATEMENT OF FACTS AND CIRCUMSTANCES

Our determination that the declarant (is) (is not) in need for mental health treatment is based on the following: _____

Our determination that the declarant (is) (is not) incapable of participating in mental health treatment decisions is based on the following: _____

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

Other data _____

Dated at _____, Oklahoma, this _____ day of _____, 19____

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

Address

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

Address

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 11-111 of Title 43A, unless there is created a duplication in numbering, reads as follows:

Any person may petition the district court for appointment of a guardian for a declarant when the person has good reason to believe that the provision of mental health treatment in a particular case:

1. Is contrary to the most recent expressed wishes of a declarant who was capable at the time of expressing the wishes;
2. Is being proposed pursuant to an advance directive for mental health treatment that has been falsified, forged, or coerced;

or

3. Is being considered without the benefit of a revocation which has been unlawfully concealed, destroyed, altered or canceled.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 11-112 of Title 43A, unless there is created a duplication in numbering, reads as follows:

A. In the absence of knowledge of the revocation of an advance directive for mental health treatment, a person is not subject to civil or criminal liability or discipline for unprofessional conduct for carrying out the advance directive for mental health treatment pursuant to the requirements of the Advance Directives for Mental Health Treatment Act.

B. A physician or psychologist whose actions under the Advance Directives for Mental Health Treatment Act are in accord with reasonable medical standards or standards of mental health treatment, is not subject to criminal or civil liability or discipline for unprofessional conduct with respect to those actions.

C. An individual designated as an attorney-in-fact pursuant to the provisions of this act, to make mental health treatment decisions for a declarant and whose decisions regarding the declarant are made in good faith pursuant to the Advance Directives for Mental Health Treatment Act, is not subject to criminal or civil liability, or discipline for unprofessional conduct with respect to those decisions.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 11-113 of Title 43A, unless there is created a duplication in numbering, reads as follows:

A. Any person who willfully conceals, cancels, defaces, alters, or obliterates the advance directive for mental health treatment of another without the declarant's consent, or who falsifies or forges a revocation of an advance directive of another, shall be, upon conviction, guilty of a misdemeanor.

B. A person who in any way falsifies or forges the advance directive for mental health treatment of another, or who willfully conceals or withholds personal knowledge of a revocation of an advance directive for mental health treatment, shall be, upon conviction, guilty of a misdemeanor.

C. A person who requires or prohibits the execution of an advance directive for mental health treatment as a condition for being insured for, or receiving, health care services shall be, upon conviction, guilty of a misdemeanor.

D. A person who coerces or fraudulently induces another to execute a declaration or revocation shall be, upon conviction, guilty of a felony.

E. The sanctions provided in this section do not displace any sanction applicable under other law.

SECTION 14. AMENDATORY 76 O.S. 1991, Section 19, as amended by Section 1, Chapter 90, O.S.L. 1994 (76 O.S. Supp. 1994, Section 19), is amended to read as follows:

Section 19. A. Any person who is or has been a patient of a doctor, hospital or other medical institution shall be entitled to obtain access to the information contained in all ~~his~~ the medical records of the person upon request, and shall be furnished copies of

all records pertaining to ~~his or her~~ that person's case upon request and upon the tender of the expense of such copy or copies. Cost of each copy shall not exceed twenty-five cents (\$0.25) per page. The physician, hospital or other medical professionals and institutions may not charge a fee for searching, retrieving, reviewing and preparing medical records of the person in order to determine which medical records are to be copied. Provided that this entitlement to medical records shall not apply to psychological or psychiatric records. In the case of psychological or psychiatric records, the patient shall not be entitled to copies unless access to said records is consented to by the treating physician or practitioner or is ordered by a court of competent jurisdiction upon a finding that it is in the best interest of the patient, but the patient may be provided access to information contained in said records, as provided in subsection B of Section 1-109 of Title 43A of the Oklahoma Statutes. The patient or, if the patient is a minor child or a guardian has been appointed for the patient, the guardian of the patient may authorize the release of the psychiatric or psychological records of the patient to the patient's attorney, a third party payor, or governmental entity. The execution of such authorization shall not be construed to authorize the patient personal access to said records or information.

B. In cases involving a claim for personal injury or death against any practitioner of the healing arts or a licensed hospital, arising out of patient care, where any person has placed ~~his~~ the physical or mental condition of that person in issue by the commencement of any action, proceeding or suit for damages, or where any person has placed in issue the physical or mental condition of any other person or deceased person by or through whom such person rightfully claims, ~~he~~ that person shall be deemed to waive any privilege granted by law concerning any communication made to a physician or health care provider with reference to any physical or mental condition or any knowledge obtained by such physician or health care provider by personal examination of any such patient; provided that, before any such communication, medical or hospital record or testimony is admitted in evidence in any proceeding it must be material and relevant to an issue therein, according to existing rules of evidence.

Any person who obtains any document pursuant to the provisions of this section shall provide copies of said document to any opposing party in said proceeding upon payment of the expense of copying said document, not to exceed twenty-five cents (\$0.25) for each page copied.

SECTION 15. This act shall become effective November 1, 1995.

Passed the House of Representatives the 18th day of May, 1995.

Speaker of the House of
Representatives

Passed the Senate the 18th day of May, 1995.

President of the Senate