

Legal Mechanisms for Family Involvement



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Legal Mechanisms for Family Involvement in Caring for Persons with Serious Mental Illness

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Continuity of care for adults¹ with serious mental illnesses remains a problem in Illinois, particularly for persons who may, from time to time, be admitted to an inpatient psychiatric facility. For a variety of reason, inpatient stays are usually quite brief. During these brief stays, hospitals are often unable to obtain information about the history of the treatment of the patients' illnesses, including what medications patients have received, whether those medications have been effective and what side-effects the persons may have experienced. Hospitals may also lack information about what types of discharge plans have been found to be successful or unsuccessful in the past.

This lack of information has many causes. Persons who are so seriously ill that they need inpatient care are often unable or unwilling to provide the needed information and/or unable or unwilling to identify the places where they have previously been treated or to give informed consent to obtain written records of previous treatment.² Often, even with written consent, there just is not time for the hospital to obtain those records before the person must be discharged.

Finally, some patients may require involuntary commitment and/or court-ordered psychotropic medication or electro-convulsive therapy (ECT) under the Mental Health and Developmental Disabilities Code, 405 ILCS 5/1-100, et seq. Here too, the courts need information about the history of the person's illness and treatment. The involuntary commitment standard expressly requires consideration of the patient's "behavioral history" and "evidence of the person's repeated past patterns of specific behavior and actions related to the person's illness." 405 ILCS 5/1-119. The statute governing court-ordered medication and ECT also requires proof "[t]hat the illness... has existed for a period marked by the continuing presence of ...symptoms or the repeated episodic occurrence of these symptoms." 405 ILCS 5/2-107.1 (a-5)(4)©. The evidence needed to help the court make these important determinations is often unavailable to the state's attorneys who are charge by statute (405 ILCS 5/3-101) with pursuing involuntary commitment and court-ordered medication or ETC.

Fortunately, many persons with serious mental illnesses have family members who are actively involved with caring for them. For example, it is not unusual for an adult with a serious mental illness to live with her or his parents or other relatives and/or be financially dependent on relatives. Family members often have substantial relevant information about the history of the person's illness and treatment and may even be in possession of the person's psychiatric records. Despite this, family members often find that various laws³ prevent them from helping their loved one to get appropriate care and making sure that mental health providers and the courts have the information that they need to make good decisions. This article is intended to outline the legal mechanisms that family member may use to assist mental health providers and the courts in making decisions correctly and improving patient outcomes.

1. Written consent to obtain records under the Mental Health and Developmental Disabilities Confidentiality Act. 740 ILCS 110/1, et seq. A person who is or has received mental health services may give written consent to any other persons to access her or his mental health records or communications. 740 ILCS 110/5. Family members may ask their loved ones for consent to obtain mental health records.

2. Guardianship of the Person, 755 ILCS 5/11a-1, et seq. A family member may petition the court to be appointed guardian of the person of an adult who "because of ...disability ...lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person" 755 ILCS 5/11a-3(a)

. a. Advantages

. i. Access to all health care records including mental health records

. ii. Control over most health care decisions

. iii. Must be notified 7 days in advance of a patient's discharge from an inpatient mental health facility. 405 ILCS 5/3-903(a)

. b. Disadvantages

. i. Expensive and time consuming

. ii. Not useful for most persons with mental illnesses who generally lack decisional capacity for only brief periods

. iii. Cannot be used to obtain psychiatric hospitalization—must use commitment proceedings under the MHDDCode. (See Section 4 below.)

. iv. Cannot be used to consent to psychotropic medications over the ward's objections—must use involuntary treatment hearing provisions in the MHDDCode. 405 ILCS 5/2-107.1(b). (See Section 5 below.)

3. Advance directives. Illinois has two laws which allow competent adults to designate someone to make decisions for them should they lose the ability to make decisions due to a serious mental illness (or other reason).

- . a. Mental Health Treatment Preference Declaration Act. 755 ILCS 43/1, et seq.
 - . i. Advantages
 - . (1) Irrevocable once principle becomes disabled. 755 ILCS 43/50
 - . (2) Allows access to records. 755 ILCS 43/30
 - . ii. Disadvantages
 - . (1) Only applies to hospitalization, psychotropic medication and electro-convulsive therapy. 755 ILCS 43/75
 - . (2) Only permits 17 days of hospitalization. 755 ILCS 43/75
- . b. Durable Power of Attorney for Healthcare. 755 ILCS 45/4-1, et seq.
 - . i. Advantages
 - . (1) Applies to all health care decisions
 - . (2) Allows access to records. 755 ILCS 45/4-10
 - . ii. Disadvantages
 - . (1) Revocable by ward even though s/he lacks decisional capacity. 755 ILCS 45/4-10
- . c. Durable power of Attorney for Health Care--with delayed revocation option. House Bill 6794 . This provision gives persons the option to create an advance directive which remains in effect for 30 days after the person decides to revoke it.
 - . i. Advantages
 - . (1) Allows agent to consent to treatment for 30 days following a revocation by the patient
 - . (2) Allows access to mental health records during this period

4. Involuntary commitment proceedings

- . a. Family members may petition to have a loved one committed to a hospital if involuntary inpatient care is needed to prevent harm to the person or others. 405 ILCS 5/3-7015
- . b. As a petitioner, a family member may request to be notified if a commitment petition is dismissed in favor of an informal or voluntary admission and has the right to object to the dismissal. 405 ILCS 5/3-801(b).
- . c. If the petition is dismissed the petitioner has right to be notified when the patient is being discharged, 405 ILCS 5/3-801(b) and 405 ILCS 5/3-902(d).
- . d. Petitioner has the right to hire her/his own counsel and participate in a commitment hearing. 405 ILCS 5/3-101.
- . e. Family participation may be helpful in obtaining the commitment of someone who needs it, but also in preventing the inappropriate commitment of someone who does not. The latter may occur because a person may not be committed if she or he will not come to harm if released to family or friends who are willing to help. 405 ILCS 5/1-119(2). The court may not be aware that such family members exist.
- . f. Family members may also petition to have a loved one committed to outpatient care under 405 ILCS 5/3-751, et seq.6

5. Court-ordered psychotropic medication and ETC. Family members may petition the court to order psychotropic medication or ECT for a loved one whether or not the loved one is in a hospital. 405 ILCS 5/2-107.1.7

6. Special provisions concerning access to information about hospitalization

- . a. Hospitals are required to ask a person at the time of admission if s/he wants anyone notified of the hospitalization and provide such notice if requested. 405 ILCS 5/2-113(a)
- . b. Anyone may ask a mental health facility if a person is hospitalized in that facility and the facility must notify the recipient of the request. If the recipient consents, the hospital must advise the person how to contact the recipient. 405 ILCS 5/2- 113(b), (c) and (d)
- . c. If a person lacks decisional capacity and the treating physician determines that disclosure would benefit her or him, disclosure of the fact that a person is in the hospital may be made to a relative involved in the person's treatment. Senate Bill 1970 8 .

7. Participation in treatment planning. At the beginning of treatment a mental health facility is required to create an individual treatment plan in consultation with the patient. A guardian, anyone designated under an advance directive (See Section 3 above) or anyone else designated by the patient must be permitted to participate in the creation of the treatment plan. 405 ILCS 5/2-102(a). Family members may ask their loved ones to designate them to participate in this important process.

8. Notice of restriction of rights. Upon admission, every patient must be notified of her or his right to designate someone to be notified if she or he is subjected to restraint, seclusion or the restriction of any other right in Chapter II of the MHDDCode. 405 ILCS 5/2-200 and 201. Family members may ask their hospitalized loved ones to designate them under this provision.

9. Access to discharge plan. Senate Bill 1970.9 Allows relatives who are actively involved in the patient's treatment to receive notice that the

patient will be discharged and a copy of the discharge plan if and only if the patient lacks decisional capacity and the disclosure is in the patient's best interest.

10. Providing records and other information to the hospital,

Although this is not required by law, many hospitals will accept records and information about a patient from family members and friends in order to insure appropriate care. This is important because hospitals are often unable to obtain records and information about past treatment in a timely manner even with the patient's full cooperation. Depending on the circumstances, if the hospital refuses to accept records offered to them in person, it may be appropriate to send them by certified mail or some delivery services which will confirm to the sender that the hospital has received them.

References

1 This article refers only to the laws governing adults with mental illnesses. The laws governing family involvement in the care of minors are substantially different.

2 In *Zinermon v. Burch* 494 U.S. 113, 110 S. Ct. 975; 108 L. Ed. 2d 100 (1990), the United State Supreme Court explained that, while the law presumes that people are competent, that presumption cannot be relied upon when someone is being admitted to an inpatient psychiatric facility.

3 These laws exist for the important purpose of protecting patient privacy and autonomy.

4 As of June 28, 2021, this bill has passed both chambers of the Illinois legislature and is awaiting action by the Governor.

5 The detailed standard for involuntary inpatient commitment is set forth

in 405 ILCS 5/1-119.

6 The detailed standard for involuntary outpatient commitment is set forth in 405 ILCS 5/1-119.1.

7 The detailed standard for court-ordered medication and ECT is set forth in 405 ILCS 5/2-107.1(a-5)(4).

8 As of June 28, 2021, this bill has passed both chambers of the Illinois legislature and is awaiting action by the Governor.
