

No. 2004-194

AN ACT

HB 2036

Amending Title 20 (Decedents, Estates and Fiduciaries) of the Pennsylvania Consolidated Statutes, providing for mental health care declarations and powers of attorney; further providing for the prudent investor rule; and repealing provisions relating to the applicability of requirements for charitable trusts with controlling interests in certain corporations.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Title 20 of the Pennsylvania Consolidated Statutes is amended by adding a chapter to read:

CHAPTER 58
MENTAL HEALTH CARE

Subchapter

- A. General Provisions
- B. Mental Health Declarations
- C. Mental Health Powers of Attorney

SUBCHAPTER A
GENERAL PROVISIONS

Sec.

- 5801. Applicability.
- 5802. Definitions.
- 5803. Legislative findings and intent.
- 5804. Compliance.
- 5805. Liability.
- 5806. Penalties.
- 5807. Rights and responsibilities.
- 5808. Combining mental health care instruments.

§ 5801. Applicability.

(a) General rule.—This chapter applies to mental health declarations and mental health powers of attorney.

(b) Preservation of existing rights.—The provisions of this chapter shall not be construed to impair or supersede any existing rights or responsibilities not addressed in this chapter.

§ 5802. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Attending physician.” A physician who has primary responsibility for the treatment and care of the declarant or principal.

“Declarant.” An individual who makes a declaration in accordance with this chapter.

“Declaration.” A writing made in accordance with this chapter that expresses a declarant’s wishes and instructions for mental health care and mental health care directions and which may contain other specific directions.

“Mental health care.” Any care, treatment, service or procedure to maintain, diagnose, treat or provide for mental health, including any medication program and therapeutical treatment.

“Mental health care agent.” An individual designated by a principal in a mental health power of attorney.

“Mental health care provider.” A person who is licensed, certified or otherwise authorized by the laws of this Commonwealth to administer or provide mental health care in the ordinary course of business or practice of a profession.

“Mental health power of attorney.” A writing made by a principal designating an individual to make mental health care decisions for the principal.

“Mental health treatment professional.” A licensed physician who has successfully completed a residency program in psychiatry or a person trained and licensed in social work, psychology or nursing who has a graduate degree and clinical experience in mental health.

“Principal.” An individual who makes a mental health power of attorney in accordance with this chapter.

§ 5803. Legislative findings and intent.

(a) Intent.—This chapter provides a means for competent adults to control their mental health care either directly through instructions written in advance or indirectly through a mental health care agent.

(b) Presumption not created.—This chapter shall not be construed to create any presumption regarding the intent of an individual who has not executed a declaration or mental health care power of attorney to consent to the use or withholding of treatment.

(c) Findings in general.—The General Assembly finds that all capable adults have a qualified right to control decisions relating to their own mental health care.

§ 5804. Compliance.

(a) Duty to comply.—

(1) An attending physician and mental health care provider shall comply with mental health declarations and powers of attorney.

(2) If an attending physician or other mental health care provider cannot in good conscience comply with a declaration or mental health care decision of a mental health care agent because the instructions are contrary to accepted clinical practice and medical standards or because

treatment is unavailable or if the policies of a mental health care provider preclude compliance with a declaration or mental health care decision of a mental health care agent, immediately upon receipt of the declaration or power of attorney and as soon as any possibility of noncompliance becomes apparent, the attending physician or mental health care provider shall so inform the following:

(i) The declarant if the declarant is competent.

(ii) The substitute named in the declaration if the declarant is incompetent.

(iii) The guardian or other legal representative of the declarant if the declarant is incompetent and a substitute is not named in the declaration.

(iv) The mental health care agent of the principal.

(3) The physician or mental health care provider shall document the reasons for noncompliance.

(b) Transfer.—An attending physician or mental health care provider under subsection (a)(2) shall make every reasonable effort to assist in the transfer of the declarant or principal to another physician or mental health care provider who will comply with the declaration or mental health care decision of the mental health care agent. While the transfer is pending, the patient shall be treated consistent with the declaration or mental health care decision of the mental health care agent. If reasonable efforts to transfer fail, the patient may be discharged.

§ 5805. Liability.

(a) General rule.—A person who is a physician, another mental health care provider or another person who acts in good faith and consistent with this chapter may not be subject to criminal or civil liability, discipline for unprofessional conduct or administrative sanctions and may not be found to have committed an act of unprofessional conduct by any professional board or administrative body with such authority as a result of any of the following:

(1) Complying with a direction or decision of an individual who the person believes in good faith has authority to act as a principal's mental health care agent so long as the direction or decision is not clearly contrary to the terms of the mental health power of attorney.

(2) Refusing to comply with a direction or decision of an individual based on a good faith belief that the individual lacks authority to act as a principal's mental health care agent.

(3) Complying with a mental health care power of attorney or declaration under the assumption that it was valid when made and has not been amended or revoked.

(4) Disclosing mental health care information to another person based upon a good faith belief that the disclosure is authorized, permitted or required by this chapter.

(5) Refusing to comply with the direction or decision of an individual due to conflicts with a provider's contractual, network or payment policy restrictions.

(6) Refusing to comply with a declaration or mental health power of attorney which violates accepted clinical standards or medical standards of care.

(7) Making a determination that the patient lacks capacity to make mental health decisions that causes a declaration or a mental health power of attorney to become effective.

(8) Failing to determine that a patient lacks capacity to make mental health decisions for the purposes of this chapter.

(b) Same effect as if dealing with principal.—Any attending physician, mental health care provider and other person who acts under subsection (a) shall be protected and released to the same extent as if dealing directly with a competent principal.

(c) Good faith of mental health care agent.—A mental health care agent who acts according to the terms of a mental health power of attorney may not be subject to civil or criminal liability for acting in good faith for a principal or failing in good faith to act for a principal.

§ 5806. Penalties.

(a) Offense defined.—A person commits a felony of the third degree by willfully:

(1) Concealing, canceling, altering, defacing, obliterating or damaging a declaration without the consent of the declarant.

(2) Concealing, canceling, altering, defacing, obliterating or damaging a mental health power of attorney or any amendment or revocation thereof without the consent of the principal.

(3) Causing a person to execute a declaration or power of attorney under this chapter by undue influence, fraud or duress.

(4) Falsifying or forging a mental health power of attorney or declaration or any amendment or revocation thereof, the result of which is a direct change in the mental health care provided to the principal.

(b) Removal and liability.—An agent who willfully fails to comply with a mental health power of attorney may be removed and sued for actual damages.

§ 5807. Rights and responsibilities.

(a) Declarants and principals.—Persons who execute a declaration or a mental health power of attorney shall have the following rights and responsibilities:

(1) For the purposes of this chapter, persons are presumed capable of making mental health decisions, including the execution of a mental health declaration or power of attorney, unless they are adjudicated incapacitated, involuntarily committed or found to be incapable of making mental health decisions after examination by a psychiatrist and one of the following: another psychiatrist, psychologist, family physician, attending

physician or mental health treatment professional. Whenever possible, at least one of the decision makers shall be a treating professional of the declarant or principal.

(2) Persons shall be required to notify their mental health care provider of the existence of any declaration or mental health power of attorney.

(3) Persons shall execute or amend their declarations or mental health powers of attorney every two years; however, if a person is incapable of making mental health care decisions at the time this document would expire, the document shall remain in effect and be reviewed at the time when the person regains capacity.

(4) Persons shall give notice of amendment and revocation to providers, agents and guardians, if any.

(b) Providers.—Mental health treatment providers shall have the following rights and responsibilities:

(1) Inquire as to the existence of declarations or powers of attorney for persons in their care.

(2) Inform persons who are being discharged from treatment about the availability of mental health declarations and powers of attorney as part of discharge planning.

(3) Not require declarations or powers of attorney as conditions of treatment. Mental health treatment providers may not choose whether to accept a person for treatment based solely on the existence or absence of a mental health declaration or power of attorney.

§ 5808. Combining mental health instruments.

(a) General rule.—A declaration and mental health power of attorney may be combined into one mental health document.

(b) Form.—A combined declaration and mental health power of attorney may be in the following form or any other written form which contains the information required under Subchapters B (relating to mental health declarations) and C (relating to mental health powers of attorney):

Combined Mental Health Care Declaration
and Power of Attorney Form

Part I. Introduction.

I, _____, having capacity to make mental health decisions, willfully and voluntarily make this declaration and power of attorney regarding my mental health care.

I understand that mental health care includes any care, treatment, service or procedure to maintain, diagnose, treat or provide for mental health, including any medication program and therapeutic treatment. Electroconvulsive therapy may be administered only if I have specifically consented to it in this document. I will be the subject of laboratory trials or research only if specifically provided for in this document. Mental health care does not include psychosurgery or termination of parental rights.

I understand that my incapacity will be determined by examination by a psychiatrist and one of the following: another psychiatrist, psychologist, family physician, attending physician or mental health treatment professional. Whenever possible, one of the decision makers will be one of my treating professionals.

Part II. Mental Health Declaration.

A. When this declaration becomes effective.

This declaration becomes effective at the following designated time:

- When I am deemed incapable of making mental health care decisions.
- When the following condition is met:

(List condition)

B. Treatment preferences.

1. Choice of treatment facility.

In the event that I require commitment to a psychiatric treatment facility, I would prefer to be admitted to the following facility:

(Insert name and address of facility)

In the event that I require commitment to a psychiatric treatment facility, I do not wish to be committed to the following facility:

(Insert name and address of facility)

I understand that my physician may have to place me in a facility that is not my preference.

2. Preferences regarding medications for psychiatric treatment.

I consent to the medications that my treating physician recommends.

I consent to the medications that my treating physician recommends with the following exception, preference or limitation:

(List medication and reason for exception, preference or limitation)

The exception, preference or limitation applies to generic, brand name and trade name equivalents. I understand that dosage instructions are not binding on my physician.

I do not consent to the use of any medications.

I have designated an agent under the power of attorney portion of this document to make decisions related to medication.

3. Preferences regarding electroconvulsive therapy (ECT).

I consent to the administration of electroconvulsive therapy.

I do not consent to the administration of electroconvulsive therapy.

I have designated an agent under the power of attorney portion of this document to make decisions related to electroconvulsive therapy.

4. Preferences for experimental studies or drug trials.

I consent to participation in experimental studies if my treating physician believes that the potential benefits to me outweigh the possible risks to me.

I have designated an agent under the power of attorney portion of this document to make decisions related to experimental studies.

I do not consent to participation in experimental studies.

- () I consent to participation in drug trials if my treating physician believes that the potential benefits to me outweigh the possible risks to me.
- () I have designated an agent under the power of attorney portion of this document to make decisions related to drug trials.
- () I do not consent to participation in any drug trials.

5. Additional instructions or information.

Examples of other instructions or information that may be included:

Activities that help or worsen symptoms.

Type of intervention preferred in the event of a crisis.

Mental and physical health history.

Dietary requirements.

Religious preferences.

Temporary custody of children.

Family notification.

Limitations on the release or disclosure of mental health records.

Other matters of importance.

C. Revocation.

This declaration may be revoked in whole or in part at any time, either orally or in writing, as long as I have not been found to be incapable of making mental health decisions.

My revocation will be effective upon communication to my attending physician or other mental health care provider, either by me or a witness to my revocation, of the intent to revoke. If I choose to revoke a particular instruction contained in this declaration in the manner specified, I understand that the other instructions contained in this declaration will remain effective until:

- (1) I revoke this declaration in its entirety;
- (2) I make a new combined mental health declaration and power of attorney; or
- (3) two years after the date this document was executed.

D. Termination.

I understand that this declaration will automatically terminate two years from the date of execution unless I am deemed incapable of making mental health care decisions at the time that this declaration would expire.

(Specify date)

E. Preference as to a court-appointed guardian.

I understand that I may nominate a guardian of my person for consideration by the court if incapacity proceedings are commenced under 20 Pa.C.S. § 5511. I understand that the court will appoint a guardian in accordance with my most recent nomination except for good cause or disqualification. In the event a court decides to appoint a guardian, I desire the following person to be appointed:

(Insert name, address, telephone number of the designated person)

() The appointment of a guardian of my person will not give the guardian the power to revoke, suspend or terminate this declaration.

() Upon appointment of a guardian, I authorize the guardian to revoke, suspend or terminate this declaration.

Part III. Mental Health Power of Attorney.

I, _____, having the capacity to make mental health decisions, authorize my designated health care agent to make certain decisions on my behalf regarding my mental health care. If I have not expressed a choice in this document or in the accompanying declaration, I authorize my agent to make the decision that my agent determines is the decision I would make if I were competent to do so.

A. Designation of agent.

I hereby designate and appoint the following person as my agent to make mental health care decisions for me as authorized in this document. This authorization applies only to mental health decisions that are not addressed in the accompanying signed declaration.

(Insert name of designated person)

Signed:

(My name, address, telephone number)

Witnesses' signatures:

(Insert names, addresses, telephone numbers of witnesses)

Agent's acceptance:

I hereby accept designation as mental health care agent for

(Insert name of declarant)

Agent's signature:

(Insert name, address, telephone number of designated person)

B. Designation of alternative agent.

In the event that my first agent is unavailable or unable to serve as my mental health care agent, I hereby designate and appoint the following individual as my alternative mental health care agent to make mental health care decisions for me as authorized in this document:

(Insert name of designated person)

Signed:

(My name, address, telephone number)

Witnesses' signatures:

(Insert names, addresses, telephone numbers of witnesses)

Alternative agent's acceptance:

I hereby accept designation as alternative mental health care agent for

(Insert name of declarant)

Alternative agent's signature:

(Insert name, address, telephone number of alternative agent)

C. When this power of attorney become effective.

This power of attorney will become effective at the following designated time:

() When I am deemed incapable of making mental health care decisions.

() When the following condition is met:

(List condition)

D. Authority granted to my mental health care agent.

I hereby grant to my agent full power and authority to make mental health care decisions for me consistent with the instructions and limitations set forth in this document. If I have not expressed a choice in this power of attorney or in the accompanying declaration, I authorize my agent to make the decision that my agent determines is the decision I would make if I were competent to do so.

(1) Preferences regarding medications for psychiatric treatment.

() My agent is authorized to consent to the use of any medications after consultation with my treating psychiatrist and any other persons my agent considers appropriate.

() My agent is not authorized to consent to the use of any medications.

(2) Preferences regarding electroconvulsive therapy (ECT).

() My agent is authorized to consent to the administration of electroconvulsive therapy.

() My agent is not authorized to consent to the administration of electroconvulsive therapy.

(3) Preferences for experimental studies or drug trials.

() My agent is authorized to consent to my participation in experimental studies if, after consultation with my treating physician and any other individuals my agent deems appropriate, my agent believes that the potential benefits to me outweigh the possible risks to me.

() My agent is not authorized to consent to my participation in experimental studies.

() My agent is authorized to consent to my participation in drug trials if, after consultation with my treating physician and any other individuals my agent deems appropriate, my agent believes that the potential benefits to me outweigh the possible risks to me.

() My agent is not authorized to consent to my participation in drug trials.

E. Revocation.

This power of attorney may be revoked in whole or in part at any time, either orally or in writing, as long as I have not been found to be incapable of making mental health decisions.

My revocation will be effective upon communication to my attending physician or other mental health care provider, either by me or a witness to my revocation, of the intent to revoke. If I choose to revoke a particular instruction contained in this power of attorney in the manner specified, I understand that the other instructions contained in this power of attorney will remain effective until:

(1) I revoke this power of attorney in its entirety;

(2) I make a new combined mental health care declaration and power of attorney; or

(3) two years from the date this document was executed. I understand that this power of attorney will automatically terminate two years from the date of execution unless I am deemed incapable of making mental health care decisions at the time that the power of attorney would expire.

I am making this combined mental health care declaration and power of attorney on the (insert day) day of (insert month), (insert year).

My signature:

(My name, address, telephone number)

Witnesses' signatures:

(Names, addresses, telephone numbers of witnesses).

If the principal making this combined mental health care declaration and power of attorney is unable to sign this document, another individual may sign on behalf of and at the direction of the principal.

Signature of person signing on my behalf:

(Name, address, telephone number)

SUBCHAPTER B MENTAL HEALTH DECLARATIONS

Sec.

5821. Short title of subchapter.

5822. Execution.

5823. Form.

5824. Operation.

5825. Revocation.

5826. Amendment.

§ 5821. Short title of subchapter.

This subchapter shall be known and may be cited as the Advance Directive for Mental Health Act.

§ 5822. Execution.

(a) Who may make.—An individual who is at least 18 years of age or an emancipated minor and has not been deemed incapacitated pursuant to section 5511 (relating to petition and hearing; independent evaluation) or severely mentally disabled pursuant to Article III of the act of July 9, 1976 (P.L.817, No.143), known as the Mental Health Procedures Act, may make a declaration governing the initiation, continuation, withholding or withdrawal of mental health treatment.

(b) Requirements.—A declaration must be:

(1) Dated and signed by the declarant by signature or mark or by another individual on behalf of and at the direction of the declarant.

(2) Witnessed by two individuals, each of whom must be at least 18 years of age.

(c) Witnesses.—

(1) An individual who signs a declaration on behalf of and at the direction of a declarant may not witness the declaration.

(2) A mental health care provider and its agent may not sign a declaration on behalf of and at the direction of a declarant if the mental health care provider or agent provides mental health care services to the declarant.

§ 5823. Form.

A declaration may be in the following form or any other written form that expresses the wishes of a declarant regarding the initiation, continuation or refusal of mental health treatment and may include other specific directions, including, but not limited to, designation of another individual to make mental health treatment decisions for the declarant if the declarant is incapable of making mental health decisions:

Mental Health Declaration.

I, _____, having the capacity to make mental health decisions, willfully and voluntarily make this declaration regarding my mental health care.

I understand that mental health care includes any care, treatment, service or procedure to maintain, diagnose, treat or provide for mental health, including any medication program and therapeutic treatment. Electroconvulsive therapy may be administered only if I have specifically consented to it in this document. I will be the subject of laboratory trials or research only if specifically provided for in this document. Mental health care does not include psychosurgery or termination of parental rights.

I understand that my incapacity will be determined by examination by a psychiatrist and one of the following: another psychiatrist, psychologist, family physician, attending physician or mental health treatment professional. Whenever possible, one of the decision makers will be one of my treating professionals.

A. When this declaration becomes effective.

This declaration becomes effective at the following designated time:

- () When I am deemed incapable of making mental health care decisions.
- () When the following condition is met:

(List condition)

B. Treatment preferences.

1. Choice of treatment facility.

() In the event that I require commitment to a psychiatric treatment facility, I would prefer to be admitted to the following facility:

(Insert name and address of facility)

() In the event that I require commitment to a psychiatric treatment facility, I do not wish to be committed to the following facility:

(Insert name and address of facility)

I understand that my physician may have to place me in a facility that is not my preference.

2. Preferences regarding medications for psychiatric treatment.

() I consent to the medications that my treating physician recommends with the following exception, preference or limitation:

(List medication and reason for exception, preference or limitation)

This exception, preference or limitation applies to generic, brand name and trade name equivalents. I understand that dosage instructions are not binding on my physician.

() I do not consent to the use of any medications.

3. Preferences regarding electroconvulsive therapy (ECT).

() I consent to the administration of electroconvulsive therapy.

() I do not consent to the administration of electroconvulsive therapy.

4. Preferences for experimental studies or drug trials.

() I consent to participation in experimental studies if my treating physician believes that the potential benefits to me outweigh the possible risks to me.

() I do not consent to participation in experimental studies.

() I consent to participation in drug trials if my treating physician believes that the potential benefits to me outweigh the possible risks to me.

() I do not consent to participation in any drug trials.

5. Additional instructions or information.

Examples of other instructions or information that may be included:

Activities that help or worsen symptoms.

Type of intervention preferred in the event of a crisis.

Mental and physical health history.

Dietary requirements.

Religious preferences.

Temporary custody of children.

Family notification.

Limitations on the release or disclosure of mental health records.

Other matters of importance.

C. Revocation.

This declaration may be revoked in whole or in part at any time, either orally or in writing, as long as I have not been found to be incapable of making mental health decisions.

My revocation will be effective upon communication to my attending physician or other mental health care provider, either by me or a witness to my revocation, of the intent to revoke. If I choose to revoke a particular instruction contained in this declaration in the manner specified, I understand that the other instructions contained in this declaration will remain effective until:

(1) I revoke this declaration in its entirety;

(2) I make a new mental health care declaration; or

(3) two years after the date this document was executed.

D. Termination.

I understand that this declaration will automatically terminate two years from the date of execution unless I am deemed incapable of making mental health care decisions at the time that the declaration would expire.

E. Preference as to a court-appointed guardian.

I understand that I may nominate a guardian of my person for consideration by the court if incapacity proceedings are commenced pursuant to 20 Pa.C.S. § 5511. I understand that the court will appoint a guardian in accordance with my most recent nomination except for good cause or disqualification. In the event a court decides to appoint a guardian, I desire the following person to be appointed:

(Insert name, address and telephone number
of designated person)

() The appointment of a guardian of my person will not give the guardian the power to revoke, suspend or terminate this declaration.

() Upon appointment of a guardian, I authorize the guardian to revoke, suspend or terminate this declaration.

I am making this declaration on the (insert day) of (insert month), (insert year).

My signature:

(My name, address, telephone number)

Witnesses' signatures:

(Names, addresses, telephone numbers of witnesses)

If the principal making this declaration is unable to sign it, another individual may sign on behalf of and at the direction of the principal.

Signature of person signing on my behalf:

(Name, address and telephone number)

§ 5824. Operation.

(a) When operative.—A declaration becomes operative when:

(1) A copy is provided to the attending physician.

(2) The conditions stated in the declaration are met.

(b) Compliance.—When a declaration becomes operative, the attending physician and other mental health care providers shall act in accordance with its provisions or comply with the transfer provisions of section 5804 (relating to compliance).

(c) Invalidity of specific direction.—If a specific direction in the declaration is held to be invalid, the invalidity shall not be construed to negate other directions in the declaration that can be effected without the invalid direction.

(d) Mental health record.—A physician or other mental health care provider to whom a copy of a declaration is furnished shall make it a part of the mental health record of the declarant for at least two years from the date of execution and, if unwilling to comply with the declaration, promptly so advise those listed in section 5804(a)(2).

(e) Duration.—A declaration shall be valid until revoked by the declarant or until two years from the date of execution. If a declaration for mental

health treatment has been invoked and is in effect at the specified expiration date after its execution, the declaration shall remain effective until the principal is no longer incapable.

(f) Absence of declaration.—If an individual does not make a declaration, a presumption does not arise regarding the intent of the individual to consent to or to refuse a mental health treatment.

§ 5825. Revocation.

(a) When declaration may be revoked.—A declaration may be revoked by the declarant at any time, either orally or in writing, in whole or in part, unless the individual has been found to be incapable of making mental health decisions or the individual has been involuntarily committed.

(b) Capacity to revoke.—Subsection (a) notwithstanding, during a period of involuntary commitment pursuant to Article III of the act of July 9, 1976 (P.L.817, No.143), known as the Mental Health Procedures Act, a declarant may revoke the declaration only if found to be capable of making mental health decisions after examination by a psychiatrist and one of the following: another psychiatrist, a psychologist, a family physician, an attending physician or a mental health treatment professional. Whenever possible, at least one of the decision makers shall be a treating professional of the declarant or principal.

(c) Effect of revocation.—A revocation of a declaration shall be effective upon communication to the attending physician or other mental health care provider by the declarant or a witness to the revocation of the intent to revoke.

(d) Mental health record.—An attending physician or other mental health care provider shall make revocation, a finding of capacity or a declaration part of the mental health record of the declarant.

§ 5826. Amendment.

(a) Capacity to amend.—While having the capacity to make mental health decisions, a declarant may amend a declaration by a writing executed in accordance with the provisions of section 5822 (relating to execution).

(b) Determination of capacity.—During the period of involuntary treatment pursuant to Article III of the act of July 9, 1976 (P.L.817, No.143), known as the Mental Health Procedures Act, a declarant may amend the declaration if the individual is found to be capable of making mental health decisions after examination by a psychiatrist and one of the following: another psychiatrist, a psychologist, family physician, attending physician or mental health treatment professional. Whenever possible, at least one of the decision makers shall be a treating professional of the declarant or principal.

SUBCHAPTER C
MENTAL HEALTH POWERS OF ATTORNEY

Sec.

5831. Short title of subchapter.

5832. Execution.

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- 5842. Duties of attending physician and mental health care provider.
- 5843. Construction.
- 5844. Conflicting provisions.
- 5845. Validity.

§ 5831. Short title of subchapter.

This subchapter shall be known and may be cited as the Mental Health Care Agents Act.

§ 5832. Execution.

(a) Who may make.—An individual who is at least 18 years of age or an emancipated minor and who has not been deemed incapacitated pursuant to section 5511 (relating to petition and hearing; independent evaluation) or found to be severely mentally disabled pursuant to Article III of the act of July 9, 1976 (P.L.817, No.143), known as the Mental Health Procedures Act, may make a mental health power of attorney governing the initiation, continuation, withholding or withdrawal of mental health treatment.

(b) Requirements.—A mental health power of attorney must be:

(1) Dated and signed by the principal by signature or mark or by another individual on behalf of and at the direction of the principal.

(2) Witnessed by two individuals, each of whom must be at least 18 years of age.

(c) Witnesses.—

(1) An individual who signs a mental health power of attorney on behalf of and at the direction of a principal may not witness the mental health power of attorney.

(2) A mental health care provider and its agent may not sign a mental health power of attorney on behalf of and at the direction of a principal if the mental health care provider or agent provides mental health care services to the principal.

§ 5833. Form.

(a) Requirements.—A mental health power of attorney must do the following:

(1) Identify the principal and appoint the mental health care agent.

(2) Declare that the principal authorizes the mental health care agent to make mental health care decisions on behalf of the principal.

(b) Optional provisions.—A mental health power of attorney may:

(1) Describe any limitations that the principal imposes upon the authority of the mental health care agent.

(2) Indicate the intent of the principal regarding the initiation, continuation or refusal of mental health treatment.

(3) Nominate a guardian of the person of the principal as provided in Subchapter C of Chapter 55 (relating to appointment of guardian; bonds; removal and discharge).

(4) Contain other provisions as the principal may specify regarding the implementation of mental health care decisions and related actions by the mental health care agent.

(c) Written form.—A mental health power of attorney may be in the following form or any other written form identifying the principal, appointing a mental health care agent and declaring that the principal authorizes the mental health care agent to make mental health care decisions on behalf of the principal:

Mental Health Power of Attorney

I, _____, having the capacity to make mental health decisions, authorize my designated health care agent to make certain decisions on my behalf regarding my mental health care. If I have not expressed a choice in this document, I authorize my agent to make the decision that my agent determines is the decision I would make if I were competent to do so.

I understand that mental health care includes any care, treatment, service or procedure to maintain, diagnose, treat or provide for mental health, including any medication program and therapeutic treatment. Electroconvulsive therapy may be administered only if I have specifically consented to it in this document. I will be the subject of laboratory trials or research only if specifically provided for in this document. Mental health care does not include psychosurgery or termination of parental rights.

I understand that my incapacity will be determined by examination by a psychiatrist and one of the following: another psychiatrist, psychologist, family physician, attending physician or mental health treatment professional. Whenever possible, one of the decision makers shall be one of my treating professionals.

A. Designation of agent.

I hereby designate and appoint the following person as my agent to make mental health care decisions for me as authorized in this document:

(Insert name of designated person)

Signed:

(My name, address, telephone number)

(Witnesses' signatures)

(Names, addresses, telephone numbers of witnesses)

Agent's acceptance:

I hereby accept designation as mental health care agent for (Insert name of declarant)

Agent's signature:

(Insert name, address, telephone number of designated person)

B. Designation of alternative agent.

In the event that my first agent is unavailable or unable to serve as my mental health care agent, I hereby designate and appoint the following individual as my alternative mental health care agent to make mental health care decisions for me as authorized in this document:

(Insert name of designated person)

Signed:

(Witnesses' signatures)

(Names, addresses, telephone numbers of witnesses)

Alternative agent's acceptance:

I hereby accept designation as alternative mental health care agent for

(Insert name of declarant)

Alternative agent's signature:

(Insert name, address, telephone number)

C. When this power of attorney becomes effective.

This power of attorney will become effective at the following designated time:

() When I am deemed incapable of making mental health care decisions.

() When the following condition is met:

(List condition)

D. Authority granted to my mental health care agent.

I hereby grant to my agent full power and authority to make mental health care decisions for me consistent with the instructions and limitations set forth in this power of attorney. If I have not expressed a choice in this power of attorney, I authorize my agent to make the decision that my agent determines is the decision I would make if I were competent to do so.

E. Treatment preferences.

1. Choice of treatment facility.

() In the event that I require commitment to a psychiatric treatment facility, I would prefer to be admitted to the following facility:

(Insert name and address of facility)

() In the event that I require commitment to a psychiatric treatment facility, I do not wish to be committed to the following facility:

(Insert name and address of facility)

I understand that my physician may have to place me in a facility that is not my preference.

2. Preferences regarding medications for psychiatric treatment.

() I consent to the medications that my agent agrees to after consultation with my treating physician and any other persons my agent considers appropriate.

() I consent to the medications that my agent agrees to, with the following exception or limitation:

(List exception or limitation)

This exception or limitation applies to generic, brand name and trade name equivalents.

() My agent is not authorized to consent to the use of any medications.

3. Preferences regarding electroconvulsive therapy (ECT).

() My agent is authorized to consent to the administration of electroconvulsive therapy.

() My agent is not authorized to consent to the administration of electroconvulsive therapy.

4. Preferences for experimental studies or drug trials.

() My agent is authorized to consent to my participation in experimental studies if, after consultation with my treating physician and any other individuals my agent deems appropriate, my agent believes that the potential benefits to me outweigh the possible risks to me.

() My agent is not authorized to consent to my participation in experimental studies.

() My agent is authorized to consent to my participation in drug trials if, after consultation with my treating physician and any other individuals my agent deems appropriate, my agent believes that the potential benefits to me outweigh the possible risks to me.

() My agent is not authorized to consent to my participation in drug trials.

5. Additional information and instructions.

Examples of other information that may be included:

Activities that help or worsen symptoms.

Type of intervention preferred in the event of a crisis.

Mental and physical health history.

Dietary requirements.

Religious preferences.

Temporary custody of children.

Family notification.

Limitations on release or disclosure of mental health records.

Other matters of importance.

F. Revocation.

This power of attorney may be revoked in whole or in part at any time, either orally or in writing, as long as I have not been found to be incapable of making mental health decisions.

My revocation will be effective upon communication to my attending physician or other mental health care provider, either by me or a witness to my revocation, of the intent to revoke. If I choose to revoke a particular instruction contained in this power of attorney in the manner specified, I understand that the other instructions contained in this power of attorney will remain effective until:

- (1) I revoke this power of attorney in its entirety;
- (2) I make a new mental health power of attorney; or
- (3) two years after the date this document was executed.

G. Termination.

I understand that this power of attorney will automatically terminate two years from the date of execution unless I am deemed incapable of making mental health care decisions at the time the power of attorney would expire.

H. Preference as to a court-appointed guardian.

I understand that I may nominate a guardian of my person for consideration by the court if incapacity proceedings are commenced pursuant to 20 Pa.C.S. § 5511. I understand that the court will appoint a guardian in accordance with my most recent nomination except for good cause or disqualification. In the event a court decides to appoint a guardian, I desire the following person to be appointed:

(Insert name, address, telephone number of designated person)

() The appointment of a guardian of my person will not give the guardian the power to revoke, suspend or terminate this power of attorney.

() Upon appointment of a guardian, I authorize the guardian to revoke, suspend or terminate this power of attorney.

I am making this power of attorney on the (insert day) of (insert month), (insert year).

My signature:

(My name, address, telephone number)

Witnesses' signatures:

(Names, addresses, telephone numbers of witnesses)

If the principal making this power of attorney is unable to sign it, another individual may sign on behalf of and at the direction of the principal.

Signature of person signing on my behalf:

(Name, address, telephone number)

§ 5834. Operation.

(a) When operative.—A mental health power of attorney shall become operative when:

- (1) A copy is provided to the attending physician.
- (2) The conditions stated in the power of attorney are met.

(b) Invalidity of specific direction.—If a specific direction in a mental health power of attorney is held to be invalid, the invalidity does not negate other directions in the mental health power of attorney that can be effected without the invalid direction.

(c) Duration.—A mental health power of attorney shall be valid until revoked by the principal or until two years after the date of execution. If a mental health power of attorney for mental health treatment has been invoked and is in effect at the specified date of expiration after its execution, the mental health power of attorney shall remain effective until the principal is no longer incapable.

(d) Court approval unnecessary.—A mental health care decision made by a mental health care agent for a principal shall be effective without court approval.

§ 5835. Appointment of mental health care agents.

(a) Successor mental health care agents.—A principal may appoint one or more successor agents who shall serve in the order named in the mental health power of attorney unless the principal expressly directs to the contrary.

(b) Who may not be appointed mental health care agent.—Unless related to the principal by blood, marriage or adoption, a principal may not appoint any of the following to be the mental health care agent:

(1) The principal's attending physician or other mental health care provider or an employee of the attending physician or other mental health care provider.

(2) An owner, operator or employee of a residential facility in which the principal receives care.

§ 5836. Authority of mental health care agent.

(a) Extent of authority.—Except as expressly provided otherwise in a mental health power of attorney and subject to subsections (b) and (c), a mental health care agent may make any mental health care decision and exercise any right and power regarding the principal's care, custody and mental health care treatment that the principal could have made and exercised.

(b) Powers not granted.—A mental health power of attorney may not convey the power to relinquish parental rights or consent to psychosurgery.

(c) Powers and duties only specifically granted.—Unless specifically included in a mental health power of attorney, the agent shall not have the power to consent to electroconvulsive therapy or to experimental procedures or research.

(d) Mental health care decisions.—After consultation with mental health care providers and after consideration of the prognosis and acceptable alternatives regarding diagnosis, treatments and side effects, a mental health care agent shall make mental health care decisions in accordance with the mental health care agent's understanding and interpretation of the instructions given by the principal at a time when the principal had the capacity to make and communicate mental health care decisions. Instructions include a declaration made by the principal and any clear written or verbal directions that cover the situation presented. In the absence of instructions, the mental health care agent shall make mental health care decisions conforming with the mental health care agent's assessment of the principal's preferences.

(e) Mental health care information.—

(1) Unless specifically provided otherwise in a mental health power of attorney, a mental health care agent shall have the same rights and limitations as the principal to request, examine, copy and consent or refuse to consent to the disclosure of mental health care information.

(2) Disclosure of mental health care information to a mental health care agent shall not be construed to constitute a waiver of any evidentiary privilege or right to assert confidentiality.

(3) A mental health care provider that discloses mental health care information to a mental health care agent in good faith shall not be liable for the disclosure.

(4) A mental health care agent may not disclose mental health care information regarding the principal except as is reasonably necessary to perform the agent's obligations to the principal or as otherwise required by law.

(f) Liability of agent.—A mental health care agent shall not be personally liable for the costs of care and treatment of the principal.

§ 5837. Removal of agent.

(a) Grounds for removal.—A mental health care agent may be removed by the court for any of the following reasons:

- (1) Death or incapacity.
- (2) Noncompliance with a mental health power of attorney.
- (3) Physical assault or threats of harm.
- (4) Coercion.
- (5) Voluntary withdrawal by the agent.
- (6) Divorce.

(b) Notice of voluntary withdrawal.—

(1) A mental health care agent who voluntarily withdraws shall inform the principal.

(2) If the mental health power of attorney is in effect, the agent shall notify providers of mental health treatment.

(c) Challenges.—Third parties may challenge the authority of a mental health agent in the orphan's court division of the court of common pleas.

(d) Effect of removal.—If a mental health power of attorney provides for a substitute agent, then the substitute agent shall assume responsibility when the agent is removed. If the power of attorney does not provide for a substitute, then a mental health care provider shall follow any instructions in the power of attorney.

§ 5838. Effect of divorce.

If the spouse of a principal is designated as the principal's mental health care agent and thereafter either spouse files an action in divorce, the designation of the spouse as mental health care agent shall be revoked as of the time the action is filed unless it clearly appears from the mental health power of attorney that the designation was intended to continue to be effective notwithstanding the filing of an action in divorce by either spouse.

§ 5839. Revocation.

(a) When a mental health power of attorney may be revoked.—A mental health power of attorney may be revoked by the principal at any time, either orally or in writing in whole or in part, unless the principal has been found to

be incapable of making mental health treatment decisions or the principal has been involuntarily committed.

(b) Capacity to revoke.—Notwithstanding subsection (a), during a period of involuntary commitment pursuant to Article III of the act of July 9, 1976 (P.L.817, No.143), known as the Mental Health Procedures Act, a principal may revoke the mental health power of attorney only if found to be capable of making mental health decisions after examination by a psychiatrist and one of the following: another psychiatrist, a psychologist, a family physician, an attending physician or a mental health treatment professional. Whenever possible, at least one of the decision makers shall be a treating professional of the declarant or principal.

(c) Effect of revocation.—A revocation shall be effective upon communication to the attending physician or other mental health care provider by the principal or a witness to the revocation of the intent to revoke.

(d) Mental health record.—The attending physician or other mental health care provider shall make the revocation or a finding of capacity part of the mental health record of the declarant.

(e) Reliance on mental health power of attorney.—A physician or other mental health care provider may rely on the effectiveness of a mental health power of attorney unless notified of its revocation.

(f) Subsequent action by agent.—A mental health care agent who has notice of the revocation of a mental health power of attorney may not make or attempt to make mental health care decisions for the principal.

§ 5840. Amendment.

While having the capacity to make mental health decisions, a principal may amend a mental health power of attorney by a writing executed in accordance with the provisions of section 5832 (relating to execution).

§ 5841. Relation of mental health care agent to court-appointed guardian and other agents.

(a) Procedure.—

(1) Upon receipt of notice of a guardianship proceeding, a provider shall notify the court and the agent at the guardianship proceeding of the existence of a mental health advance directive.

(2) Upon receipt of a notice of guardianship proceeding, the agent shall inform the court of the contents of the mental health advance directive.

(b) Accountability of mental health care agent.—

(1) If a principal who has executed a mental health power of attorney is later adjudicated an incapacitated person, the mental health power of attorney shall remain in effect.

(2) The court shall give preference to allowing the agent to continue making mental health care decisions as provided in the mental health advance directive unless the principal specified that the guardian has the

power to terminate, revoke or suspend the mental health power of attorney in the advance directive.

(3) If, after thorough examination, the court grants the powers contained in the mental health advance directive to the guardian, the guardian shall be bound by the same obligations as the agent would have been.

(c) Nomination of guardian of person.—In a mental health power of attorney, a principal may nominate the guardian of the person for the principal for consideration by the court if incapacity proceedings for the principal’s person are thereafter commenced. If the court determines that the appointment of a guardian is necessary, the court shall appoint in accordance with the principal’s most recent nomination except for good cause or disqualification.

§ 5842. Duties of attending physician and mental health care provider.

(a) Compliance with decisions of mental health care agent.—Subject to any limitation specified in a mental health power of attorney, an attending physician or mental health care provider shall comply with a mental health care decision made by a mental health care agent to the same extent as if the decision had been made by the principal.

(b) Mental health record.—

(1) An attending physician or mental health care provider who is given a mental health power of attorney shall arrange for the mental health power of attorney or a copy to be placed in the mental health record of the principal.

(2) An attending physician or mental health care provider to whom an amendment or revocation of a mental health power of attorney is communicated shall promptly enter the information in the mental health record of the principal and maintain a copy if one is furnished.

(c) Record of determination.—An attending physician who determines that a principal is unable to make or has regained the capacity to make mental health treatment decisions or makes a determination that affects the authority of a mental health care agent shall enter the determination in the mental health record of the principal and, if possible, promptly inform the principal and any mental health care agent of the determination.

§ 5843. Construction.

(a) General rule.—Nothing in this subchapter shall be construed to:

(1) Affect the requirements of other laws of this Commonwealth regarding consent to observation, diagnosis, treatment or hospitalization for a mental illness.

(2) Authorize a mental health care agent to consent to any mental health care prohibited by the laws of this Commonwealth.

(3) Affect the laws of this Commonwealth regarding any of the following:

(i) The standard of care of a mental health care provider required in the administration of mental health care or the clinical decision-making authority of the mental health care provider.

(ii) When consent is required for mental health care.

(iii) Informed consent for mental health care.

(4) Affect the ability to admit a person to a mental health facility under the voluntary and involuntary commitment provisions of the act of July 9, 1976 (P.L.817, No.143), known as the Mental Health Procedures Act.

(b) Disclosure.—

(1) The disclosure requirements of section 5836(e) (relating to authority of mental health care agent) shall supersede any provision in any other State statute or regulation that requires a principal to consent to disclosure or which otherwise conflicts with section 5836(e), including, but not limited to, the following:

(i) The act of April 14, 1972 (P.L.221, No.63), known as the Pennsylvania Drug and Alcohol Abuse Control Act.

(ii) Section 111 of the act of July 9, 1976 (P.L.817, No.143), known as the Mental Health Procedures Act.

(iii) The act of October 5, 1978 (P.L.1109, No.261), known as the Osteopathic Medical Practice Act.

(iv) Section 41 of the act of December 20, 1985 (P.L.457, No.112), known as the Medical Practice Act of 1985.

(v) The act of November 29, 1990 (P.L.585, No.148), known as the Confidentiality of HIV-Related Information Act.

(2) The disclosure requirements under section 5836(e) shall not apply to the extent that the disclosure would be prohibited by Federal law and implementing regulations.

(c) Notice and acknowledgment requirements.—The notice and acknowledgment requirements of section 5601(c) and (d) (relating to general provisions) shall not apply to a power of attorney that provides exclusively for mental health care decision making.

(d) Legal remedies.—An interested party may file a petition seeking a determination that following the directions in the declaration or the mental health power of attorney may cause potential irreparable harm or death. In that event, the court may invalidate some or all of the provisions and issue orders appropriate to the circumstances authorizing treatment. The courts shall issue an order within 72 hours from the filing of the petition.

§ 5844. Conflicting provisions.

If a provision of a mental health power of attorney conflicts with:

(1) The provision of another mental health power of attorney or with a provision of a declaration, the provision of the instrument latest in date of execution shall prevail to the extent of the conflict.

(2) A power of attorney, the provision in the mental health power of attorney shall prevail to the extent of the conflict regardless of the date of execution.

§ 5845. Validity.

This subchapter shall not be construed to limit the validity of a health care power of attorney executed prior to the effective date of this subchapter. A mental health power of attorney executed in another state or jurisdiction and in conformity with the laws of that state or jurisdiction shall be considered valid in this Commonwealth, except to the extent that the mental health power of attorney executed in another state or jurisdiction would allow a mental health care agent to make a mental health care decision inconsistent with the laws of this Commonwealth.

Section 2. Section 7203(d) of Title 20 is amended to read:

§ 7203. Prudent investor rule.

* * *

(d) Requirements for charitable trusts **[holding a controlling interest in]** *having voting control of* certain publicly traded business corporations.—

(1) Notwithstanding any other legal requirement or process which may include court review of the activities of a charitable trust, a fiduciary for a charitable trust with *a majority of its* beneficiaries at a principal location within this Commonwealth **[holding a controlling interest in]** *having voting control of* a publicly traded business corporation received as an asset from the settlor shall not consummate any **[investment or management decision executing a change in the trust's]** *transaction, or vote to permit consummation of or otherwise act to consummate any transaction, which would result in the trust no longer having voting control of that corporation, by sale, merger, consolidation or otherwise, without:*

(i) serving notice upon the Attorney General at least 60 days prior to **[executing]** the **[change in control]** *consummation of the transaction;* and

(ii) directing that at least 30 days' prior notice of the **[execution of the change in control]** *consummation of the transaction* be provided by the *publicly traded business corporation controlled by the trust* to employees of **[the publicly traded business]** *that corporation [held by the trust]* who are located in this Commonwealth.

(2) In addition to any other power or duty provided by law, the Attorney General also has the power to **[obtain]** *seek* judicial review pursuant to this subsection *from the court having jurisdiction over the trust* if the Attorney General concludes that the **[fiduciary should be prevented from executing such a change in control.]** *consummation of a transaction described in paragraph (1) is unnecessary for the future economic viability of the corporation and would constitute a failure to comply with the provisions of subsection (c) or an impairment of the charitable purpose of the trust.*

(3) In **[obtaining judicial approval]** *a judicial proceeding commenced by the Attorney General* under this subsection, the **[fiduciary]** *Attorney General* must prove by **[clear and convincing]** *a*

preponderance of the evidence that [executing the change in the trust's] consummation of a transaction which would result in the charitable trust no longer having voting control of the corporation [is necessary to maintain the economic viability of the corporation and prevent a significant diminution of trust assets or to avoid] is unnecessary for the future economic viability of the corporation and must be prevented in order to avoid noncompliance with the provisions of subsection (c) or an impairment of the charitable purpose of the trust.

(3.1) If a fiduciary provides the notice under paragraph (1)(i), the following apply:

(i) Except as set forth in subparagraph (ii), upon expiration of the notice period under paragraph (1)(i), the fiduciary may:

(A) vote to permit consummation of a transaction described in paragraph (1); or

(B) otherwise act to consummate the transaction described in paragraph (1).

(ii) The fiduciary has no authority under subparagraph (i) if the Attorney General has, within 30 days of receiving the notice under paragraph (1)(i), commenced a judicial proceeding under paragraph (2).

(iii) If the fiduciary is enjoined in a judicial proceeding under subparagraph (ii), the fiduciary shall not have authority under subparagraph (i)(A) or (B) unless the injunction is dissolved by:

(A) stipulation of the fiduciary and the Attorney General; or

(B) an order of a court of competent jurisdiction which is not subject to further judicial review as of right.

(4) In the event court approval to consummate a transaction described in paragraph (1) is obtained pursuant to this subsection, the court shall ensure that the provisions of 15 Pa.C.S. Ch. 25 Subchs. I (relating to severance compensation for employees terminated following certain control-share acquisitions) and J (relating to business combination transactions - labor contracts) apply to the [execution of a change in the trust's control effectuated by the fiduciary of a charitable trust with beneficiaries at a principal location within this Commonwealth holding a controlling interest in a publicly traded] business corporation [received as an asset from the settlor.] described in paragraph (1) upon the consummation of the transaction.

(5) A fiduciary of a charitable trust with a majority of its beneficiaries at a principal location within this Commonwealth [holding a controlling interest in] having voting control of a publicly traded business corporation received as an asset from the settlor shall not be subject to liability for the commercially reasonable sale of certain shares of the corporation not necessary to maintain voting control and for which no control premium is realized if the fiduciary reasonably determined that

such sale was authorized in a manner consistent with the requirements of this section and other applicable provisions of this title.

(6) The requirements of this subsection shall not apply to a noncharitable trust, including a noncharitable trust with a charitable remainder and a charitable trust which reverts to noncharitable purposes.

(7) As used in this subsection, the term "voting control" means a majority of the voting power of the outstanding shares of stock entitled to vote on the election of directors.

Section 3. Section 4 of the act of November 6, 2002 (P.L.1101, No.133), entitled "An act amending Title 20 (Decedents, Estates and Fiduciaries) of the Pennsylvania Consolidated Statutes, further providing for the prudent investor rule; codifying existing law setting forth the applicability of provisions relating to diversification; and making a repeal," is repealed.

Section 4. The provisions of this act are severable. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application.

Section 5. This act shall take effect as follows:

- (1) The following provisions shall take effect immediately:
 - (i) the amendment of 20 Pa.C.S. § 7203(d).
 - (ii) Section 3 of this act.
 - (iii) This section.
- (2) The remainder of this act shall take effect in 60 days.

APPROVED—The 30th day of November, A.D. 2004.

EDWARD G. RENDELL