

The page features a decorative design with three blue circles of varying sizes and two thin blue lines that intersect to form a large triangular shape. One circle is large and positioned in the upper right, another is smaller and positioned in the middle right, and a third is very large and positioned in the lower right. The lines are thin and light blue, extending from the top left towards the bottom right.

Caesar & Howie
The Central Scotland Law Group

Guide to Advance Statements

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The Caesar & Howie Group
01/11/2011

The Mental Health (Care and Treatment) (Scotland) Act 2003 provides a framework for the compulsory treatment and detention of people suffering from a mental disorder. The Act however seeks to give patients various rights with Mental Health Tribunals and the Mental Welfare Commission for Scotland providing safeguards for patients against the abuse of powers of compulsion. This is not the place to review the Act itself but it is important to note that the Act is based on a set of principles which create various rights for patients. One of these rights is for a person suffering from a mental disorder to be entitled to write an Advance Statement which would normally influence any treatment or therapy received.

1. DOCUMENTS RELATING TO HEALTH

There are a number of documents which relate to the health of people, medical treatments and the law. This can be confusing and it is as well to try to differentiate these.

The main ones are:

AN ADVANCE DIRECTIVE – sometimes called a Living Will. This is a written statement by someone outlining their wishes as to medical treatment and in particular the refusal of certain treatments in the last stages of their lives.

AN ADVANCE CARE PLAN – this is a plan usually written by medical professionals in conjunction with the patient charting the course of future medical treatment and related issues for a patient suffering a terminal illness

A CARE PLAN – this is the term often used to describe future treatment plans relating to people with a mental disorder. It is completely different from an advance care plan.

A STATEMENT OF VALUES – sometimes known as a personal statement or statement of wishes. This is a written statement by someone for the benefit of their carers and doctors outlining likes and dislikes and all things of importance to the writer. The idea is to help those making medical and other decisions to come to decisions which are most likely to accord with the values of the writer.

AN ADVANCE STATEMENT - this is a specific document recognized in the Mental Health (Care and Treatment) (Scotland) Act 2003. This Act allows people with a mental disorder to make a written statement, which has legal effect, as to how they would wish to be treated should they become too unwell to make decisions for themselves. This statement refers to future treatment and does not relate to terminal illness as an advance directive does. It is this document which is the subject of this guide.

2. WHAT AN ADVANCE STATEMENT DOES

People who suffer from a mental disorder (including dementia) may be subject to receiving compulsory treatment or hospitalization, subject to various safeguards.

Because compulsory treatment is possible it is important that those patients have the opportunity to make their views clear and this is the reasoning behind the legislation.

The Advance Statement has status in law and must be taken into account in any treatment decisions taken in future in respect of the person making the statement.

Typically an Advance Statement may outline preferences for particular drugs or types of treatment and also drugs, treatments or therapies not wanted by the patient. Someone may state “I do not want tranquilizer X because it always makes me feel really ill” or “I do not want treatment Y because I always put on weight”. Doctors must take these preferences into account. A doctor could decide not to follow what is in an Advance Statement but if he or she does, the reason must be stated in writing, and copied to various parties including the Mental Welfare Commission. Any such decision could be reviewed at a Mental Health Tribunal.

3. THE FORM OF AN ADVANCE STATEMENT

Anyone can make an Advance Statement – even people under 16 – provided they can understand the nature and consequences of the procedure and treatments. You do not need to be ill to make a statement – you can make one covering possible future illness.

To be valid a statement must be in writing and clear – with the full name and address of the person making the statement properly mentioned. In addition the statement must be signed and also witnessed. Not everyone can be a witness to an Advance Statement – witnesses can only be drawn from a limited group of people, principally health professionals, social workers, care professionals and solicitors. The witness must certify in writing that the person signing the statement did understand the importance of the document and what it was intended to achieve. The witness would normally add a docquet as follows “I certify that in my opinion Mr. X has the capacity of properly intending the wishes set out above. I hereby witness his signature”.

An Advance Statement, or a similar signed nomination, can be used to appoint a “Named Person” who would look after the person’s interests if treatment were required under the Act. A Named Person has limited powers and these are only related to treatment. The Named Person could be the same person as a Welfare Attorney – and often is – but a Welfare Attorney has to be appointed by a different process than an Advance Statement.

An Advance Statement should not be used to suggest to doctors caring for you that inappropriate things should happen. For example if you were to state you did not want basic care, or you wished treatments known not to work, or you wished your life to be ended – these parts of any statement would be ignored.

4. COMMUNICATION

It is no use completing an Advance Statement, telling no one of its existence and hiding it in a drawer somewhere. The whole point of the document is to inform others of the person's wishes – therefore wide communication of the document to the relevant people is recommended. When someone makes a statement they should copy it to their General Practitioner, their Hospital Consultant (if any), their Welfare Attorney (if any) and their nearest relative and main carer, as well as any Mental Health Officer or other professionals involved. The more people involved in care and treatment who know the patient's wishes the better.

5. REVIEW AND REVOCATION

Illnesses and treatments are not static issues. Illness can get worse or better and treatments can change and develop. It is therefore sensible to consider an Advance Statement as a "live document" which should be subject to regular review and updating to take account of current circumstances. When updating, a new statement should be completed and any old statement should be revoked in writing. Again the revocation document must be witnessed by one of the same group of professionals as mentioned previously, who must again certify that the person revoking has the capacity to revoke.

6. NAMED PERSONS AND WELFARE ATTORNEYS

As mentioned above, the Act gives people the right to nominate a Named Person. This person has the right to be consulted over medical treatments and also has the right to call for review of decisions at a Mental Health Tribunal. Named Persons' rights are however limited to compulsory treatments. If someone is receiving treatment voluntarily the Named Person has no rights. They also have substantially fewer powers than Welfare Attorneys. In our view all adults should appoint a Welfare Attorney anyway to ensure someone can act for them if they become incapacitated, whether by reason of mental disorder or otherwise. Incapacity can arise through a sudden illness or an accident as well as anticipated illness. Obviously it is particularly important for anyone suffering from a mental illness which could be progressive to appoint a Welfare Attorney. Ideally the Welfare Attorney will also be the Named Person in the Advance Statement or

nomination but should also have all the legal powers open to an Attorney. It is critically important to appoint an Attorney before an illness becomes so bad the person has lost legal capacity – then no voluntary appointment is possible and a court action is necessary to appoint a Guardian or Intervener.

7. LEGAL ADVICE AND ASSISTANCE

This is a very straightforward form of legal aid available to those who qualify financially should anyone wish to consult a lawyer in preparing or witnessing an Advance Statement.

8. OTHER PERSONNEL

Various people may be involved where someone loses capacity through mental disorder. Here are some:-

WELFARE ATTORNEY - Someone appointed while a person has capacity to deal with welfare decisions when a person becomes incapacitated.

RESPONSIBLE MEDICAL OFFICER (RMO) - The Medical Practitioner responsible for someone's care and treatment under The Mental Health (Care and Treatment) (Scotland) Act 2003. This is usually a Consultant Psychiatrist.

MENTAL HEALTH OFFICER (MHO) - A Social Worker specially trained in mental health issues.

NAMED PERSON - Someone (named by the patient) who may look after the patient's interests if he or she has to be treated compulsorily.

INDEPENDENT ADVOCATE - Independent Advocates can help people express their wishes about care and treatment. Independent advocacy services are offered by particular charities.

COMMUNITY PSYCHIATRIC NURSE (CPN) - A NHS nursing officer with particular mental health training and responsibilities for patients with mental disorders.