Georgia State University Law Review

Volume 39
Issue 1 *Fall 2022*

Article 13

2022

HB 752: Psychiatric Advance Directive Act

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MENTAL HEALTH

Psychiatric Advance Directive: Amend Title 37 of the Official Code of Georgia Annotated, Relating to Mental Health, so as to Provide for a Psychiatric Advance Directive; Provide for a Competent Adult to Express His or Her Mental Health Care Treatment Preferences and Desires Directly Through Instructions Written in Advance and Indirectly Through Appointing an Agent to Make Mental Health Care Decisions on Behalf of that Person; Provide a Short Title; Provide for Intent; Provide for Definitions; Provide for the Scope, Use, and Authority of a Psychiatric Advance Directive; Provide for the Appointment, Powers, Duties, and Access to Information of a Mental Health Care Agent; Provide for Limitations on Serving as a Mental Health Care Agent and for an Agent's Ability to Withdraw as Agent; Provide for Revocation of a Psychiatric Advance Directive; Provide for the Use and Effectiveness of a Psychiatric Advance Directive; Provide for the Responsibilities and Duties of Physicians and Other Providers Using a Psychiatric Advance Directive; Provide for Civil and Criminal Immunity Under Certain Circumstances; Provide a Statutory Psychiatric Advance Directive Form; Provide for Construction of Such Form; Amend Titles 10, 16, 19, 29, 31, 37, and 49 of the Official Code of Georgia Annotated, Relating to Commerce and Trade, Crimes and Offenses, Domestic Relations, Guardian and Ward, Health, Mental Health, and Social Services, Respectively, so as to Provide for Interaction and Relationship with Advance Directives for Health Care; Provide for Application; Provide for Statutory Construction; Authorize a Health Care Facility to Prepare or Offer to Prepare an Advance Directive for Health Care if There Is No Coercion and the Person Consents; Provide for Conforming References and Consistent Terminology; Provide for Related Matters; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS: O.C.G.A. §§ 10-6B-3 (amended); 16-5-5, -101, -102.1 (amended); 19-8-23 (amended); 29-4-10, -21 (amended); 29-5-21 (amended);

	31-8-55 (amended); 31-9-2 (amended); 31-32-2, -4, -7, -10, -12, -14 (amended); 31-33-2 (amended); 31-36A-3, -6 (amended); 37-1-1, -20 (amended); 37-2-30 (amended); 37-3-20 (amended); 37-3-147, -148 (amended); 37-4-107, -108 (amended); 37-7-147, -148 (amended); 37-11-1, -2, -3, -4, -5, -6, -7, -8, -9, -10, -11, -12, -13, -14, -15, -16 (new); 49-6-72, -82 (amended)
BILL NUMBER:	HB 752
ACT NUMBER:	836
GEORGIA LAWS:	2022 Ga. Laws 611
EFFECTIVE DATE:	July 1, 2022
SUMMARY:	The Act amends Georgia laws relating to mental health and provides a statutory psychiatric advance directive form. The Act allows citizens with diagnosed mental health disorders to appoint a mental health agent to make treatment decisions on their behalf. The Act delineates the responsibilities, duties, and immunities of physicians and other providers using a psychiatric advance directive and clarifies the psychiatric advance directive's interaction and relationship with other types of advance directives for health care.

History

First appearing in the 1980s, psychiatric advance directives (PADs) are legal devices that empower incompetent psychiatric patients to be treated in accordance with their treatment preferences during periods of crisis.[1] PADs are linked to the Supreme Court case *Cruzan v.*

1. Jeffrey W. Swanson, S. Van McCrary, Marvin S. Swartz, Eric B. Elbogen & Richard A. Van Dorn,

Director, Missouri Department of Health, which held that an incompetent individual's refusal of life-sustaining treatment must be based on clear and convincing evidence.[2] This case revealed the necessity for legal devices that reflect the prior cogent intent of the presently incompetent.[3] In the aftermath of *Cruzan*, Congress passed the Patient Self-Determination Act (the PSDA).[4] PSDA's sponsoring legislators referenced the *Cruzan* decision and expressed their hopes that the bill would mitigate end-of-life confusion when the patient lost the ability to competently express a treatment preference.[5]

In 1981, the Georgia General Assembly first addressed prior recorded treatment preferences for the incompetent, commonly referred to as advance directives, by creating the Georgia Living Will.[6] A living will is a legal device that enables competent adults to instruct physicians regarding treatment preferences should the adult become incompetent and require life-sustaining care.[7] The Georgia General Assembly provided an additional option in 1990 when, in response to the *Cruzan* decision, it passed the Georgia Durable Power of Attorney for Health Care Act.[8] This legislation enabled competent adults to appoint someone to make healthcare decisions on their behalf in the event of incompetency or incapacity, effectively creating a broader power of delegation than the limited scope of a living will.[9] In 2007,

Superseding Psychiatric Advance Directives: Ethical and Legal Considerations, 34 J. AM. ACAD. PSYCHIATRY L., 385, 385 (2006).

2. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 286–87 (1990).

3. *See id.* at 265 (holding that there was no clear and convincing evidence to have life-sustaining treatment withdrawn because there was no written legal device evidencing the desire); Robert D. Fleischner, *Advance Directives for Mental Health Care: An Analysis of State Statutes*, 4 PSYCH. PUB. POL'Y & L. 788, 790 (1998) (arguing that *Cruzan* created a "procedural standard . . . [that] greatly increase[ed] the utility and advisability of written health care directives"); Daniel D. Munster, Eldercare & Special Needs L. Prac. of Daniel D. Munster, The Georgia Psychiatric Advance Directive Act: O.C.G.A. § 37-11-1 et seq. 2 (June 8, 2022) [hereinafter Munster HB 752 Presentation].

4. Edward J. Larson & Thomas A. Eaton, *The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act*, 32 WAKE FOREST L. REV. 249, 255–56 (1997).

5. *Id.*; Sander M. Levin, *So That There Will Be No More Nancy Cruzans*, WASH. POST (July 6, 1990), https://www.washingtonpost.com/archive/opinions/1990/07/06/so-that-there-will-be-no-more-nancy-cruzans/e8436adf-1f96-48a6-9c6e-a8d7d7d3cfda/ [https://perma.cc/E729-VAFN].

6. Munster HB 752 Presentation, *supra* note 3, at 3.

7. Charles R. Adams III & Cynthia Trimboli Adams, *An Overview of Georgia's Living Will Legislation*, 36 MERCER L. REV. 45, 70 (1984).

8. Munster HB 752 Presentation, *supra* note 3, at 4.

9. DIV. OF AGING SERVS., GA. DEP'T OF HUM. RES., UNDERSTANDING THE DURABLE POWER OF ATTORNEY FOR HEALTH CARE 2, 4, https://www.southernjudicialcircuit.com/selfhelp/miscforms/PowerofattyDurableHealthCare.pdf

the Georgia General Assembly replaced the Georgia Living Will and Georgia Durable Power of Attorney for Health Care Act with the Georgia Advance Directive for Health Care Act.[10] This new legislation merged the two older forms into one, creating a single, more comprehensive document for the medical community's use.[11] Prior advance directives made under the Georgia Living Will or Georgia Durable Power of Attorney for Health Care Act remained valid after the change in law.[12]

Critically, the Georgia Advance Directive for Health Care Act did not allow the health care agent to make decisions related to "psychosurgery, sterilization, or treatment or involuntary hospitalization for mental or emotional illness, developmental disability, or addictive disease."[13] This void prompted Georgia legislators to introduce PAD legislation five times between 2007 and 2017, each bill failing in the face of opposition from medical providers who worried about their responsibility in a mental health crisis and the possibility of being bound to potentially inappropriate treatments.[14] In 2020, however, in line with the national trend favoring PADs, both the Georgia State Bar and Representative Sharon Cooper (R-43), Chairperson of the House Health and Human Services Committee, agreed to sponsor House Bill (HB) 752.[15] Aided by the momentum of the passage of House Bill (HB) 1013, the Mental Health Parity Act, and provisions that alleviated liability concerns for medical providers complying or failing to comply in good faith with PADs, the Georgia

[https://perma.cc/S7AA-Z7JL].

10. *Georgia Advance Directive for Health Care*, NORTHSIDE HOSP. 1 (2014), https://www.northside.com/docs/default-source/default-document-library/6241-advance-directives.pdf?sfvrsn=45ffc436_4&PageID=DOC001236 [https://perma.cc/G8RL-AGQP]; *Georgia Advance Directive for Healthcare*, CARROLL CNTY., https://www.carrollcountyga.com/753/Georgia-Advance-Directive-for-Healthcare [https://perma.cc/3S8R-9EZU].

11. CARROLL CNTY., *supra* note 10.

12. NORTHSIDE HOSP., *supra* note 10.

13. O.C.G.A. § 31-32-4(3) (2021). House Bill (HB 752) revised the language to provide that a "health care agent does not have the power to make health care decisions . . . regarding sterilization, involuntary hospitalization, or involuntary treatment for mental or emotional illness, developmental disability, or addictive disease." *Id.*

14. Munster HB 752 Presentation, *supra* note 3, at 4; Interview with Stan Jones, Partner, Nelson Mullins (June 26, 2022) [hereinafter Jones Interview] (on file with the Georgia State University Law Review) (describing how medical providers were previously opposed to a PAD legislation out of concern that they would not have flexibility to refuse to follow the PAD or make medically sound decisions in the event of ambiguity or contradiction between the PAD and another legal instrument).

15. Munster HB 752 Presentation, *supra* note 3, at 5.

General Assembly unanimously passed HB 752, the Psychiatric Advance Directive Act (PAD Act), on April 1, 2022.[16] Governor Brian Kemp (R) signed the bill on May 9, 2022, making Georgia the forty-seventh state to allow adults to write an advance directive for future mental health treatment and the fiftieth state to allow adults to appoint a healthcare agent to make mental health decisions for them.[17]

Bill Tracking of HB 752

Consideration and Passage by the House

Representative Sharon Cooper (R-43rd) sponsored HB 752 in the House with Representative Katie Dempsey (R-13th), Representative Don Hogan (R-179th), Representative Mary Margaret Oliver (D-82nd), Representative Matt Hatchett (R-150th), and Representative Lee Hawkins (R-27th) cosponsoring.[18] Representative Cooper introduced the bill into the House hopper on March 10, 2021.[19] The House first read the bill on March 11, 2021, and conducted a second reading on March 15, 2021, before assigning the bill to the House Committee on Health and Human Services.[20]

The Committee favorably reported the bill on January 26, 2022.[21] On February 3, 2022, the House read the bill for the third time and passed the bill by a vote of 165 to 0.[22]

16. State of Georgia Final Composite Status Sheet, HB 752, May 19, 2022; Georgia House of Representatives Voting Record, HB 752, #842 (Apr. 1, 2022); Interview with Sen. John F. Kennedy (R-18th) (May 28, 2022) [hereinafter Kennedy Interview] (on file with the Georgia State University Law Review); Jones Interview, *supra* note 14.

17. State of Georgia Final Composite Status Sheet, HB 752, May 19, 2022; *Questions About Psychiatric Advance Directives*, NAT'L RES. CTR. ON PSYCHIATRIC ADVANCE DIRECTIVES, https://nrc-pad.org/images/stories/PDFs/overview%20of%20pads%20in%20the%20us.pdf [https://perma.cc/N5B4-K7Y6].

18. Georgia General Assembly, HB 752, Bill Tracking [hereinafter HB 752, Bill Tracking], https://www.legis.ga.gov/legislation/60440 [https://perma.cc/5WMS-BVQ5].

19. *Id.*

20. State of Georgia Final Composite Status Sheet, HB 752, May 19, 2022; HB 752, Bill Tracking, *supra* note 18.

21. State of Georgia Final Composite Status Sheet, HB 752, May 19, 2022.

22. *Id.*; Georgia House of Representatives Voting Record, HB 752, #478 (Feb. 3, 2022).

Consideration and Passage by the Senate

Senator John Kennedy (R-18th) sponsored the bill in the Senate.[23] The Senate read the bill for the first time on February 7, 2021, and referred it to the Senate Judiciary Committee that same day.[24] The Senate Judiciary Committee then modified the bill by detailing how a PAD can be revoked, how the mental health agent must seek a transfer to a new health care facility if a provider declines to comply with a PAD, and how a health care facility may provide people with PADs.[25] The committee favorably reported the bill by substitute on March 25, 2022.[26] The Senate then read the bill for a second time on March 28, 2022, and a third time on March 30, 2022.[27] Following the third reading, the Senate passed the bill unanimously by a vote of 55 to 0.[28]

The House unanimously agreed to the Senate's revised bill on April 1, 2022, by a vote of 155 to 0.[29] The House then sent the bill to Governor Brian Kemp (R) on April 8, 2022, and he signed it into law as Act 836 on May 9, 2022, with an effective date of July 1, 2022.[30]

The Act

The Act adds Chapter 11 to Title 37 of the Official Code of Georgia Annotated to provide for a PAD.[31] Further, the Act amends the following portions of the Official Code of Georgia Annotated: Chapter 6B of Title 10, "relating to applicability of the 'Georgia Power of Attorney Act'"; Chapter 5 of Title 16, "relating to assisted suicide and notification of licensing board regarding violation," "neglect to a

23. HB 752, Bill Tracking, *supra* note 18.

24. State of Georgia Final Composite Status Sheet, HB 752, May 19, 2022; HB 752, Bill Tracking, *supra* note 18.

25. *Compare* HB 752 (HCS), § 1-1, p. 10, ll. 219–22, 2022 Ga. Gen. Assemb., *with* HB 752 (SCS), § 1-1, pp. 10–12, ll. 221–69, 2022 Ga. Gen. Assemb. *Compare* HB 752 (HCS), § 1-1, p. 12, ll. 288–93, 2022 Ga. Gen. Assemb., *with* HB 752 (SCS) § 1-1, pp. 14–15, ll. 335–44, 2022 Ga. Gen. Assemb. HB 752 (SCS) § 2-15, p. 44, ll. 1041–47, 2022 Ga. Gen. Assemb.

26. State of Georgia Final Composite Status Sheet, HB 752, May 19, 2022.

27. *Id.*

28. *Id.*; Georgia Senate Voting Record, HB 752, #751 (Mar. 30, 2022).

29. State of Georgia Final Composite Status Sheet, HB 752, May 19, 2022; Georgia House of Representatives Voting Record, HB 752, #842 (Apr. 1, 2022).

30. State of Georgia Final Composite Status Sheet, HB 752, May 19, 2022; HB 752, Bill Tracking, *supra* note 18.

31. 2022 Ga. Laws 611, § 1-1, at 611–33 (codified at O.C.G.A. §§ 37-11-1 to -16 (2022)).

disabled adult, elder person, or resident," and "trafficking of a disabled adult, elder person, or resident"; Chapter 8 of Title 19, "relating to where records of adoption are kept, examination by parties and attorneys, and use of information by agency and department"; Chapter 4 of Title 29, relating to guardian petitions and appointment and "rights and privileges removed from ward upon appointment of guardian"; Chapter 5 of Title 29, "relating to rights and powers removed from ward upon appointment of conservator"; Chapter 8 of Title 31, "relating to entry and investigative authority, cooperation of government agencies, and communication with residents"; Chapter 9 of Title 31, "relating to persons authorized to consent to surgical or medical treatment"; Chapter 32 of Title 31, "relating to definitions relative to the 'Georgia Advance Directive for Health Care Act,'" "the advance directive for health care form," "duties and responsibilities of health care agents," "immunity from liability or disciplinary action," "restriction on requiring and preparing advance directives for health care," and "effect of chapter on other legal rights and duties"; Chapter 33 of Title 31, "relating to furnishing copy of records to patient, provider, or other authorized person"; Chapter 36A of Title 31, "relating to definitions relative to the 'Temporary Health Care Placement Decision Maker for Adult Act'" and "persons authorized to consent, expiration of authorization, limitations on authority to consent, effect on other laws, and immunity from liability or disciplinary action"; Chapter 1 of Title 37, "relating to definitions relative to governing and regulation of mental health" and "obligations of the Department of Behavioral Health and Developmental Disabilities"; Chapter 2 of Title 37, "relating to definitions relative to the Office of Disability Services Ombudsman"; Chapter 3 of Title 37, "relating to admission of voluntary patients, consent of parent or guardian to treatment, and giving notice of rights to patient at time of admission," "representatives and guardians ad litem, notification provisions, and duration and scope of guardianship ad litem," and "right of patients or representatives to petition for writ of habeas corpus and for judicial protection of rights and privileges granted by this chapter"; Chapter 4 of Title 37, "relating to appointment of client representatives and guardians ad litem, notification provisions, and duration and scope of guardianship ad litem" and "right of clients or representatives to petition for writ of habeas corpus and for judicial

protection of rights and privileges granted by this chapter"; Chapter 7 of Title 37, "relating to appointment of patient representatives and guardians ad litem, notice provisions, and duration and scope of guardianship ad litem" and "rights of patients or representatives to petition for writ of habeas corpus and for judicial protection of rights and privileges granted by this chapter"; and Chapter 6 of Title 49, "relating to definitions relative to the 'Georgia Family Caregiver Support Act'" and "definitions relative to licensure of adult day centers."[32] The Act's purpose is to provide a legal mechanism for competent adults to convey their mental health treatment preferences, either through writing or an agent, in "recognition of the fundamental right of an individual to have power over decisions relating to his or her mental health care as a matter of public policy."[33]

Part 1

Part 1 of the Act creates the PAD.[34] It articulates the mechanics of the Act and contains a blank PAD form.[35] Code section 37-11-4 provides examples of what information a PAD may include, such as names and telephone numbers of people to reach out to in an emergency or "[r]esponses that have been known to de-escalate a declarant's mental health crisis."[36] Code sections 37-11-5 through 37-11-8 establish the means by which an adult can "designate a competent adult to act as his or her agent to make decisions about his or her mental care," the agent's right to access information regarding the declarant's mental health care, restrictions on who can serve as the declarant's mental health agent, and the means by which an agent can withdraw.[37]

Additionally, Part 1 of the Act addresses PAD signature and witness requirements and revocation procedures.[38] Code sections 37-11-11 through 37-11-13 address how health care providers include the PAD in the patient's medical record, outline procedures for when a provider

32. 2022 Ga. Laws 611, §§ 1-1 to 2-31, at 612–48.
33. 2022 Ga. Laws 611, at 611–12; *id.* § 1-1, at 612 (codified at § 37-11-2).
34. 2022 Ga. Laws 611, § 1-1, at 613–33 (codified at §§ 37-11-1 to -16).
35. *Id.*
36. § 37-11-4(b).
37. §§ 37-11-5 to -8.
38. 2022 Ga. Laws 611, § 1-1, at 616–18 (codified at §§ 37-11-9 to -10).

need not comply with the PAD, and immunize "[e]ach provider, facility or other person who acts in good faith reliance on any instructions" in the PAD from liability.[39] Critically, the Act allows health care providers to not follow the PAD if the provider believes that treatment requested in the PAD is "inconsistent with reasonable medical standards to benefit the [patient] or has proven ineffective in treating [the patient's] mental health condition."[40] Additionally, if "act[ing] in good faith," the Act states that "no provider, facility, or person shall be subject to civil or criminal liability . . . solely for complying with [or failing to comply with] any instructions" in a PAD or from a mental health agent.[41] The flexibility to reject a PAD's instructions and broad liability limitation were instrumental in winning the support of medical health care providers for this legislation.[42]

Finally, Part 1 limits the liability of law enforcement officers who act "in good faith reliance on" a PAD's instructions and contains a model PAD form.[43]

Part 2

Part 2 of the Act amends thirty-one separate provisions of the Official Code of Georgia Annotated relating to a PAD or mental health care agent.[44] Section 2-1 excludes "mental health care decisions" from powers of attorney in Code section 10-6B-3.[45] Section 2-2 adds a PAD to the measures listed in Code section 16-5-5 which, if followed, do not amount to the assisting of suicide.[46] Sections 2-3 and 2-4 amend Code sections 16-5-101 and 16-5-102.1, respectively, to add a PAD to measures which, if followed, do not amount to neglect or trafficking of disabled or elder persons.[47]

39. §§ 37-11-11 to -13.
40. 2022 Ga. Laws 611, § 1-1, at 619 (codified at § 37-11-12(a)(1)(C)).
41. 2022 Ga. Laws 611, § 1-1, at 619–20 (codified at § 37-11-13(a)–(b)).
42. Jones Interview, *supra* note 14.
43. 2022 Ga. Laws 611, § 1-1, at 621–33 (codified at §§ 37-11-14, -16).
44. 2022 Ga. Laws 611, §§ 2-1 to 2-31, at 634–48 (codified at §§ 10-6B-3; 16-5-5, -101, -102.1; 19-8-23; 29-4-10, -21; 29-5-21; 31-8-55; 31-9-2; 31-32-2, -4, -7, -10, -12, -14; 31-33-2; 31-36A-3, -6; 37-1-1, -20; 37-2-30; 37-3-20, -147, -148; 37-4-107, -108; 37-7-147, -148; 49-6-72, -82).
45. 2022 Ga. Laws 611, § 2-1, at 634 (codified at § 10-6B-3(2)).
46. 2022 Ga. Laws 611, § 2-2, at 634–35 (codified at § 16-5-5(c)(3)–(4)).
47. 2022 Ga. Laws 611, §§ 2-3 to 2-4, at 635 (codified at §§ 16-5-101(b), -102.1(f)).

Section 2-5 adds "mental health care agent" to the list of persons who can obtain information on behalf of the adopted individual under Code section 19-8-23.[48] Section 2-6 amends Code section 29-4-10 to include a PAD in the list of what must be included in a petition for the appointment of a guardian.[49] Sections 2-7 and 2-8 amend Code sections 29-4-21 and 29-5-21, respectively, to add "a mental health care agent under a [PAD]" to the list of agents whose power is not diminished by the appointment of a guardian or conservator.[50] Section 2-9 amends Code section 31-8-55 to add "a mental health care agent under a [PAD]" to a list of individuals within the definition of "legal representative" who can provide access to the medical records of the declarant to the state ombudsman in the event of an investigation of a long-term care facility.[51] Section 2-10 adds a PAD, or a person authorized under such document, to the list of individuals who can consent to surgical or medical treatment under Code section 31-9-2.[52]

Section 2-11 adds definitions for "mental health care," "mental health care agent," and PAD to the definitions under Code section 31-32-2 related to the Georgia Advance Directive for Health Care Act.[53] Section 2-12 amends Code section 31-32-4 to add that a "health care agent does not have the power to make health care decisions" related to "mental or emotional illness, developmental disability, or addictive disease" and does not have the authority "to make health care decisions that are otherwise covered under a [PAD]."[54] Section 2-13 amends Code section 31-32-7 to clarify that a health care agent can consent to "involuntary treatment" and that the "duties and responsibilities of a health care agent . . . shall be subordinate to the duties and responsibilities of a mental health care agent" with respect to issues regarding mental health.[55]

Section 2-14 relieves any health care provider or facility "who relies in good faith on the direction of [a] mental health care agent" from

48. 2022 Ga. Laws 611, § 2-5, at 635–36 (codified at § 19-8-23(d)(1)).
49. 2022 Ga. Laws 611, § 2-6, at 636 (codified at § 29-4-10(b)(6)).
50. 2022 Ga. Laws 611, §§ 2-7 to 2-8, at 636 (codified at §§ 29-4-21(b), 29-5-21(b)).
51. 2022 Ga. Laws 611, § 2-9, at 637 (codified at § 31-8-55(b)).
52. 2022 Ga. Laws 611, § 2-10, at 637 (codified at § 31-9-2(a)(1)–(1.1)).
53. 2022 Ga. Laws 611, § 2-11, at 637 (codified at § 31-32-2(10.1)–(10.2), (12.1)).
54. 2022 Ga. Laws 611, § 2-12, at 638–39 (codified at § 31-32-4).
55. 2022 Ga. Laws 611, § 2-13, at 639 (codified at § 31-32-7(e)(1), (g)).

civil or criminal liability under Code section 31-32-10.[56] Section 2-15 amends Code section 32-32-12 to mandate that health care facilities shall only offer to prepare an advance directive for health care if requested by an individual "or[] if [the] offer is not coercive in nature and such person consents to such offer."[57]

Section 2-16 adds subsection (g) to Code section 31-32-14 to state that nothing in an advance directive for health care "shall supersede the duties and responsibilities of a mental health care agent . . . or the terms of a [PAD] executed by the declarant before, simultaneously with, or after the advance directive for health care under which the health care agent is acting."[58] Section 2-17 adds a person authorized under a PAD to the list of individuals to which a health care provider can release medical records under Code section 31-33-2.[59]

Sections 2-18 and 2-19 amend Code sections 31-36A-3 and 31-36A-6, respectively, to define PAD and add a PAD as an authorizing legal instrument through which an agent can consent to transfer, admission, or discharge from a medical facility.[60] Section 2-20 adds definitions for "mental health care agent" and PAD to Code section 37-1-1.[61]

Section 2-21 adds "the mental health care agent" to a list of people in paragraph (18) of Code section 37-1-20 who cannot own or lease a host home, along with the conservator of the property or the health care agent of someone served, as defined in this section and supported by the Department of Behavioral Health and Developmental Disabilities.[62] Section 2-22 adds "a mental health care agent under a [PAD]" to the definition of a "health care agent" and defines PAD under Code section 37-2-30.[63]

Section 2-23 amends Code section 37-3-20 to add patients who have a PAD and whose mental health care agents have applied for treatment to a list of patients that a medical facility's chief medical officer may

56. 2022 Ga. Laws 611, § 2-14, at 639 (codified at § 31-32-10(a)(4)–(6)).
57. 2022 Ga. Laws 611, § 2-15, at 640 (codified at § 31-32-12(b)).
58. 2022 Ga. Laws 611, § 2-16, at 640 (codified at § 31-32-14(g)).
59. 2022 Ga. Laws 611, § 2-17, at 640 (codified at § 31-33-2(a)(2)).
60. 2022 Ga. Laws 611, §§ 2-18 to 2-19, at 640–41 (codified at §§ 31-36A-3(1.1), -6(a)(2)).
61. 2022 Ga. Laws 611, § 2-20, at 641 (codified at § 37-1-1(11.1), (16.1)).
62. 2022 Ga. Laws 611, § 2-21, at 641 (codified at § 37-1-20(18)).
63. 2022 Ga. Laws 611, § 2-22, at 642 (codified at § 37-2-30(7), (9.1)).

receive for observation and diagnosis.[64] Sections 2-24 and 2-26 amend Code sections 37-3-147 and 37-4-107, respectively, to make the "mental health care agent" the first person a medical facility can choose as a representative after an individual has been admitted to a medical facility.[65] Sections 2-25 and 2–27 amend Code sections 37-3-148 and 37-4-108, respectively, to add that if a "mental health care agent" or "legal guardian" detains a person, the detained person can petition for a writ of habeas corpus.[66] Section 2-28 makes the "mental health care agent" the first person a facility can select as a patient's representative if a patient is admitted to a facility and fails to designate a representative.[67] Section 2-29 defines "a mental health care agent named in such person's [PAD]" and "a legal guardian of such person" as people who can petition for a writ of habeas corpus on behalf of a detained individual.[68] Section 2-30 adds "a mental health care agent under a valid [PAD]" to the definition of "primary caregiver" under Code section 49-6-72, relating to the Georgia Family Caregiver Support Act.[69] Finally, Section 2-31 adds "a mental health care agent under a valid [PAD]" to the definition of "primary caregiver" under Code section 49-6-82.[70]

Analysis

In 2021, Mental Health America ranked Georgia the twenty-seventh state in its overall mental health care ratings and forty-eighth in its citizens' ability to access mental health care, resources, and insurance.[71] The non-profit also estimated a twenty percent likelihood that Georgians with serious mental illness will wind up "in prison

64. 2022 Ga. Laws 611, § 2-23, at 642 (codified at § 37-3-20(a)–(b)).

65. 2022 Ga. Laws 611, § 2-24, at 642–43 (codified at § 37-3-147(b)); 2022 Ga. Laws 611, § 2-26, at 644–45 (codified at § 37-4-107).

66. 2022 Ga. Laws 611, § 2-25, at 644 (codified at § 37-3-148(a)); 2022 Ga. Laws 611, § 2-27, at 645 (codified at § 37-4-108).

67. 2022 Ga. Laws 611, § 2-28, at 646–47 (codified at § 37-7-147(b)).

68. 2022 Ga. Laws 611, § 2-29, at 647 (codified at § 37-7-148(a)).

69. 2022 Ga. Laws 611, § 2-30, at 647–48 (codified at § 49-6-72(9)).

70. 2022 Ga. Laws 611, § 2-31, at 648 (codified at § 49-6-82(7)).

71. Ellen Eldridge, *Georgia Improves Its Mental Health Rating—on Data Collected Before COVID. But Challenges Remain*, GPB NEWS (Oct. 19, 2021, 12:00 PM), https://www.gpb.org/news/2021/10/19/georgia-improves-its-mental-health-rating-on-data-collected-covid-challenges-remain [https://perma.cc/2YWW-38JH] (using statistics from 2019 and estimating that the pandemic has only worsened this data).

instead of a hospital."[72] These dire analyses helped fuel the Georgia legislature to pass historic legislation to improve the "state's lagging mental health system."[73] HB 1013 provides more major changes to mental health care laws than HB 752, but HB 752 attempts to provide a solution to a niche population by creating a PAD for those with long-term mental illness.[74] Although HB 752 creates a model form for PADs, its effectiveness will be determined by how it impacts patients' health, autonomy, and relationship with health care providers.

Interplay with Georgia Advance Directive of Healthcare

HB 752 grants new powers to designated healthcare agents. First, the Act expands healthcare agents' scope of authority to allow them to consent, withhold consent, or withdraw consent to psychosurgery.[75] Relatedly, the Act expands agents' power to make health care decisions regarding psychosurgery.[76]

The Act interacts with Georgia's Advance Directive for Health Care (ADHC). To begin with, unless a patient indicates otherwise, the PAD always takes precedence over an ADHC in mental health matters.[77] The Code section related to the health care agent's duties and responsibilities expressly states that "the duties and responsibilities of a health care agent under this chapter shall be subordinate to the duties

72. MENTAL HEALTH AM. OF GA., https://www.mhageorgia.org/ [https://perma.cc/26LG-6WS8].

73. Jeff Amy, *Georgia House Passes Broad Changes to Mental Health Programs*, U.S. NEWS (Mar. 8, 2022, 12:56 PM), https://www.usnews.com/news/best-states/georgia/articles/2022-03-08/georgia-house-passes-broad-changes-to-mental-health-programs [https://perma.cc/ZSG7-PR8T].

74. Video Recording of the House Health and Human Services Committee at 8 min., 50 sec. (Nov. 15, 2021) [hereinafter House HHS Committee Video] (remarks by Daniel Munster, Attorney, The Eldercare & Special Needs Law Practice of Daniel Munster), https://www.youtube.com/watch?v=3xI7VgehdsQ&t=2s [https://perma.cc/CR25-4PD4]; *see* Robert D. Miller, *Advance Directives for Psychiatric Treatment: A View from the Trenches*, 4 PSYCH. PUB. POL'Y & L. 728, 739 (1998) ("[PADs], by contrast, appear to be designed to be executed by those who are *already* mentally disordered, to take effect if those disorders become sufficiently severe to require hospitalization or involuntary treatment.").

75. *Compare* O.C.G.A. § 31-32-7(e)(1) (2021), *with* 2022 Ga. Law 611, § 2-13, at 639 (codified at O.C.G.A. § 31-32-7(e)(1) (2022)).

76. *Compare* O.C.G.A. § 31-32-4 (2021), *with* 2022 Ga. Law 611, § 2-12, at 639 (codified at O.C.G.A. § 31-32-4 (2022)). The ADHC form provides that "[the patient's] health care agent does not have the power to make health care decisions for me regarding sterilization, involuntary hospitalization, or involuntary treatment for mental or emotional illness, developmental disability, or addictive disease." O.C.G.A. § 31-32-4 (2022).

77. § 37-11-4(f).

and responsibilities of a mental health care agent."[78] Moreover, the ADHC template clarifies the two agent roles by specifying that the "health care agent does not have the power to make health care decisions that are otherwise covered under a [PAD]."[79] Finally, executing a PAD in no way forecloses use of an ADHC in conjunction with a PAD.[80] Without a PAD, a health care agent under an ADHC can make health care decisions regarding mental health care, excluding "sterilization, involuntary hospitalization, or involuntary treatment covered for mental or emotional illness, developmental disability, or addictive disease."[81]

Potential Legal Challenge

The Act's unanimous passage indicates that it is unlikely to face near-term legal challenges. Patients, however, may challenge the Act's validity once PADs become more widespread.

Precedent exists in other states for overriding PADs. *Hargrave v. Vermont* is the leading case.[82] The Second Circuit's decision "impose[d] an obligation on the state of Vermont to provide inpatient custodial care to acutely ill patients like Nancy Hargrave on an indefinite basis, allowing their symptoms to remain untreated if they have documented in advance a (presumably competent) wish to forego medication."[83] The State of Vermont did not appeal the case for two potential reasons. First, state officials determined that the decision would only affect a small number of patients.[84] Second, Vermont "was

78. § 31-32-7(g).
79. § 31-32-4.
80. *See id.*
81. *Id.*
82. Swanson et al., *supra* note 1, at 389; Hargrave v. Vermont, 340 F.3d 27, 30 (2d Cir. 2003). Vermont resident Nancy Hargrave suffered from paranoid schizophrenia. *Id.* at 32. In 1997, the Vermont State Hospital twice administered psychiatric medication over Hargrave's objection in a non-emergency situation. *Id.* In 1999, Hargrave executed a durable power of attorney for health care (DPOA), "designating a guardian in the case of incapacity and refusing the administration of 'any and all anti-psychotic, neuroleptic, psychotropic or psychoactive medications,' and electroconvulsive therapy." *Id.* In 1998, however, Vermont passed "Act 114," establishing a third means to override DPOAs. *Id.* at 31. Hence, Hargrave brought suit against Vermont, seeking injunctive relief, and the United States District Court for the District of Vermont granted the relief. *Id.* at 30. The Second Circuit of the U.S. Court of Appeals affirmed. *Id.*
83. Swanson et al., *supra* note 1, at 390.
84. *Id.*

willing to assume financial responsibility [if] extended inpatient care would be needed in such cases."[85] But other states, such as Georgia, "may be less willing to . . . financ[e] essentially custodial care for severely ill but otherwise treatable psychiatric patients—particularly in the absence of a determination of dangerousness."[86]

PAD Benefits and Barriers

The Act aims to help individuals with chronic mental illness by attempting to give them greater autonomy in their health care treatment plans.[87] The Act's model form follows the "hybrid directive" route.[88] A hybrid directive contains elements of (1) an instructional form, which provides medical personnel with a detailed list of treatment preferences and refusals, and (2) a proxy form, which assigns a mental health care agent.[89] The hybrid set-up gives patients the opportunity to participate in the decision-making process when it comes to their medical care and treatment preferences.[90]

The hybrid directive, along with the act of planning health care decisions, "has salutary therapeutic effects."[91] These effects may include incentivizing a "person to take preventative measures," "counter[ing] the infantilization typical of institutionalization," "reduc[ing] stress and anxiety" while raising "self-esteem and [feelings of] self-control" in a patient, decreasing stigmatization, and increasing the rate of patient compliance during treatment.[92] Importantly, encouraging proactivity with regard to mental health may lead to earlier interventions during acute manic episodes, helping "halt[] the downward spiral" that may otherwise devastate many

85. *Id.*

86. *See id.*

87. Munster HB 752 Presentation, *supra* note 3, at 2, 9.

88. Elizabeth M. Gallagher, *Advance Directives for Psychiatric Care: A Theoretical and Practical Overview for Legal Professionals*, 4 PSYCH. PUB. POL'Y & L. 746, 754 (1998); *see* 2022 Ga. Law 611, § 1-1, at 621–33 (codified at O.C.G.A. § 37-11-16 (2022)).

89. Gallagher, *supra* note 88, at 754.

90. *Id.* at 747.

91. Justine A. Dunlap, *Mental Health Advance Directives: Having One's Say?*, 89 KY. L.J. 327, 386 (2000).

92. Miller, *supra* note 74, at 735–36; Jeffrey Swanson, Marvin Swartz, Joelle Ferron, Eric Elbogen & Richard Van Dorn, *Psychiatric Advance Directives Among Public Mental Health Consumers in Five U.S. Cities: Prevalence, Demand, and Correlates*, 34 J. AM. ACAD. PSYCHIATRY L., 43, 44 (2006); Gallagher, *supra* note 88, at 747.

aspects of a person's life.[93] In addition, PADs could benefit minorities and vulnerable populations as well as empower parents who are still involved in the care of their adult children.[94]

Despite the potential benefits of completing a PAD, other states have faced challenges in reaching their desired demographic. In a 2006 study, researchers surveyed five states with "diverse populations and mental health service systems"—California, Florida, Illinois, Massachusetts, and North Carolina—looking to gauge general interest and accessibility of their PAD initiatives.[95] They found that "about 7 in 10 consumers in public-sector treatment would like to complete a [PAD] (and say they would do so if provided assistance), [yet] fewer than 1 in 10 have actually completed one."[96] The study found that people did not complete a PAD for a myriad of reasons: "lack of awareness of PAD laws, misunderstanding PADs, and lack[] [of] economic and other resources that may be necessary to complete PADs."[97] Additionally, the study found higher demand for PADs among participants who were female; were nonwhite; had a history of self-harm, arrest, and decreased personal autonomy; and felt pressured to take medication.[98] Furthermore, other studies have suggested additional reasons why written medical advance directives have had limited success and have not been widely adopted.[99] Perhaps more importantly, even when physicians are aware of advance directives, the documents often have limited or no effect on clinical decisions.[100]

93. Breanne M. Sheetz, *The Choice to Limit Choice: Using Psychiatric Advance Directives to Manage the Effects of Mental Illness and Support Self-Responsibility*, 40 U. MICH. J.L. REFORM 401, 404 (2007) (using bipolar disorder as an example and citing how acute manic episodes have led people into "bankruptcy, . . . damaged relationships, and . . . productivity and reputational losses at school and work").

94. Swanson et al., *supra* note 92, at 50 (showing that PADs appeal to demographics that have previously been involuntarily admitted to a health care facility, have someone directly assisting them with treatment, encounter police during mental health episodes, and experience pressure in their mental health care treatment); Video Recording of Senate Committee on Judiciary Meeting at 1 min, 50 sec. (Mar. 24, 2022) [hereinafter Senate Committee on Judiciary Video] (remarks by Rep. Sharon Cooper (R-43d)), https://vimeo.com/showcase/8821960/video/691966765 [https://perma.cc/KK48-Z33B].

95. Swanson et al. *supra* note 92, at 44, 55.

96. *Id.* at 55–56.

97. *Id.* at 56.

98. *Id.* at 54.

99. Swanson et al., *supra* note 1, at 389.

100. *Id.*

Accessibility may be a challenge for individuals wanting to complete a PAD. If an individual wants a PAD prepared by a health care facility, the individual must request it.[101] A health care facility can only offer to prepare a PAD if the "offer is not coercive in nature and [the patient] consents to such offer."[102] The effectiveness of Georgia's PAD will be measured by how well it can overcome common PAD barriers and give people the ability to complete a PAD before experiencing the travails of the health care system with an adverse mental health condition.

Involuntary Hospitalization

In addition to PADs' potential benefits, the Act seeks to address the specific problem of involuntary hospital admissions.[103] The first part of the PAD allows the individual to list, in part, what treatments have or have not worked well in the past, which techniques could de-escalate the crisis, and preferred facilities should hospitalization be needed.[104] Commonly, during acute manic episodes, people will refuse care and may therefore only receive care through involuntary commitment.[105] Moreover, even if one's capacity has been "temporarily destroyed," that person may not meet the criteria for commitment, which may delay treatment.[106]

In conjunction with HB 1013, which relaxes the commitment threshold, the PAD will allow for voluntary commitments, therefore mitigating the need to navigate bureaucratic and legal labyrinths and increasing the time-efficacy of receiving care.[107] Similar to the Ulysses arrangement, PADs will hopefully aid patients in circumnavigating "acute episodes of mental illness [that] act directly to deprive patients

101. O.C.G.A. § 31-32-12(b) (2022)).

102. *Id.*

103. House HHS Committee Video, *supra* note 74, at 18 min., 53 sec. (remarks by Dr. Peter Ash, Psychiatrist and Professor, Emory University).

104. § 37-11-16.

105. Judy A. Clausen, *Making the Case for a Model Mental Health Advance Directive Statute*, 14 YALE J. HEALTH POL'Y L. & ETHICS 1, 5 (2014).

106. *Id.*

107. Amy, *supra* note 73. Georgia law previously required "a danger of 'imminently life-endangering crisis'" to justify involuntary commitments. *Id*. (quoting HB 1013, as introduced, 2022 Ga. Gen. Assemb.). "The new bill [HB 1013] would instead allow someone to be taken in if an officer or worker has 'a reasonable expectation' that 'significant psychiatric deterioration will occur in the near future.'" *Id*.

of capacity and can distort judgment . . . caus[ing] patients to refuse treatment to which they would consent if they were not influenced by the episode."[108] But there are still problems under Ulysses arrangements—specifically when hospitalization is needed.[109] Here lies one of the Act's gray areas: When does a voluntary commitment become involuntary?[110]

Questions about Capacity

One of the underlying issues with involuntary hospitalization is capacity. PAD opponents are quick to point out that the targeted demographic already possesses a mental illness "sufficiently severe [enough] to require hospitalization or involuntary treatment," but the directive "assumes that the patients are competent when they execute their directives."[111] The Act defines "capable" as "not incapable of making mental health care decisions" and defines "competent adult" as "a person of sound mind who is 18 years of age or older or is an emancipated minor."[112] PADs require their declarants to be competent adults who have a "decided and rational desire" to create a PAD, and PADs can only be revoked when the declarant is capable.[113]

By avoiding asymmetry in its creation and revocation capability requirements, Georgia PADs seek to mitigate complications when people who are suffering acute manic episodes voice their technically competent objections to treatments previously consented to in their PADs.[114] Further, requiring capacity to revoke PADs protects against

108. Clausen, *supra* note 105, at 7. Ulysses arrangements take their name from Ulysses in Homer's *The Odyssey*, who famously told his sailors to leave him tied to his ship's mast, even in the face of subsequent pleas "to cut him loose" during the siren song. Dunlap, *supra* note 91, at 352 n.170.

109. Miller, *supra* note 76, at 740–41 (detailing rights and responsibilities, as well as the problems and costs, of patients and clinicians in such situations).

110. *See* House HHS Committee Video, *supra* note 76, at 16 min., 38 sec. (remarks by Rep. Mark Newton, MD (R-123rd)) (raising concerns over preferred facilities not being available to a committed patient).

111. Miller, *supra* note 74, at 739.

112. 2022 Ga. Laws 611, § 1-1, at 612 (codified at O.C.G.A. § 37-11-3(1)–(2) (2022)).

113. §§ 37-11-9 to -10.

114. *See* Gallagher, *supra* note 88, at 781. The treatment options that PADs should permit, which the Georgia PAD contains and which may cause severe harm if excluded, include "consent in advance to intrusive treatments like hospitalization and medication" and the option to waive their right to refuse certain treatments, so that people may "obtain treatment even when their symptoms cause them to deny their need for it." Sheetz, *supra* note 93, at 412.

complications for those suffering from dementia.[115] These capacity requirements strive to diminish the gray area between involuntary and voluntary mental health treatments.

Enforceability

The Act's effectiveness will also be measured by PADs' enforceability and medical feasibility. The Act gives health care providers leeway in disregarding the treatment preferences written in the PAD, depending on that treatment's availability, the present standard of care, or if substantial harm would result.[116] Indeed, mental health care agents—not health care providers—are responsible for coordinating a transfer to a different facility if a provider chooses not to comply with a PAD.[117] Ideally, PADs, which outline "what treatments have and have not been effective in the past, or how particular treatment approaches affect the patient," should be welcomed by the medical community "because of their potential to minimize conflict and to foster a collaborative, rather than adversarial, relationship with patients."[118]

However, the large carve-outs for health care providers may undermine the autonomy PADs seek to provide patients if exercised too often or liberally.[119] "PADs are qualified and nested in larger structures of law and policy that protect the interests of parties other than the patient, and which . . . favor the clinician's professional judgment . . . ."[120] Thus, the most effective PADs will likely be those written with an individual's preferred health care provider in mind. This situation, in turn, has the ability to overpower the autonomy promised by the PAD if the PAD becomes a list of clinicians' preferred treatments rather than a collaborative effort that best fits the patient.

115. Leslie Pickering Francis, *Decisionmaking at the End of Life: Patients with Alzheimer's or Other Dementias*, 35 GA. L. REV. 539, 559–60 (2001).

116. *See* 2022 Ga. Laws 611, § 1-1, at 618–19 (codified at § 37-11-12).

117. *See* 2022 Ga. Laws 611, § 1-1, at 619–20 (codified at § 37-11-13).

118. Gallagher, *supra* note 88, at 776.

119. Swanson et al., *supra* note 1, at 392 ("PAD statutes contain a large contradiction: among the provisions of these 'let-the-patient decide' laws are exceptions, which, in effect, render PADs as 'let the doctor decide after all' (or, perhaps more accurately, 'let the doctor decide whether the patient gets to decide').").

120. *Id.*

Ultimately, for PADs to succeed, the health care provider exception cannot swallow the purpose of the PAD, or the PAD will be relegated to being a niche pleasantry with no actual bite.

Conclusion

In what has been called the "Year for Mental Health" in Georgia, HB 752 complements HB 1013 by establishing an advance directive for Georgians who encounter challenges with mental health, addiction, and developmental disabilities.[121] Fourteen years since the introduction of the first PAD legislation, the combination of changing attitudes towards mental health and liability limiting provisions for medical providers helped HB 752 become law without meaningful opposition.[122] PADs should be particularly helpful for people with chronic mental illness and families struggling to get mental health treatment for their adult children. However, since medical providers can refuse to follow a PAD so long as they are acting in good faith, questions remain about the ultimate efficacy of this latest edition to Georgia advance directory law.[123]

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121. Eve H. Byrd, *With New Law, 2022 Is the Year for Mental Health in Georgia*, CARTER CTR. (Apr. 7, 2022), https://www.cartercenter.org/news/features/blogs/2022/with-new-law-2022-is-the-year-for-mental-health-in-georgia.html [https://perma.cc/2DGZ-WSLB].

122. Jones Interview, *supra* note 14.

123. *See* O.C.G.A. § 37-11-13 (2022); Swanson et al., *supra* note 1, at 392.