

Mental Health Matters

The newsletter of the Illinois State Bar Association's Section on Mental Health Law

NIU Health Advocacy Clinic: Empowering Those Experiencing Homelessness and Mental Illness Through Advanced Directives

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BY COLLEEN BORACA

One Friday morning years ago, “Josh”¹ stopped by my office. He was a 56-year-old man who was living in Aurora at Hessed House, the second largest homeless shelter

in Illinois. Josh was no stranger to me, as our clinic helped him obtain Social Security benefits the prior year. He could

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Appellate Update

BY ANDREAS LIEWALD

MacKenna v. Pantano, 2023 IL App (1st) 210486 (opinion filed May 10, 2023).

Appeal arose following the circuit court's entry of a finding of contempt against plaintiff, executor of the Estate of Diana Ursitti, deceased, following plaintiff's refusal to produce Ursitti's unredacted medical records. ¶1. Ursitti was treated by defendants, before dying from lung cancer. ¶1.

Plaintiff alleged that defendants were negligent in timely diagnosing Ursitti's lung cancer, which led to her death. ¶2, 5. During discovery, certain defendants indicated that they were going to testify

regarding Ursitti's mental health records at their depositions, to find out *inter alia* whether she had a history of depression memory lapses. ¶2, 5, 6. Plaintiff filed a motion for a protective order, contending that defendants were not permitted to rely on Ursitti's mental health records because plaintiff's claim did not concern Ursitti's mental health. ¶2. The court granted in part and denied in part plaintiff's motion, finding that defendant, Dr. Rao, could testify at his deposition based on his own Ursitti mental health records and those kept by his employer, defendant Elk Grove

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no longer work because he suffered from schizoaffective disorder as well as deep-vein thrombosis and severe asthma. The week before stopping by my office, Josh had attended a presentation about powers of attorney (“POA”) for health care given by law students. He wanted to know if it would be a good idea for him to complete one.

I direct the Northern Illinois University (NIU) College of Law Health Advocacy Clinic. Founded in 2014, the clinic is a medical-legal partnership between NIU College of Law, Aunt Martha’s Health and Outreach Center and Hesed House. In medical-legal partnerships, medical professionals, lawyers, social worker, and other professionals work together to resolve legal needs negatively impacting a client’s health.² NIU law students spend between 8-16 hours per week on-site at Hesed House working with clients like Josh.

In 2022, 582,462 people experienced homelessness in the U.S.³ In Illinois, 9,212 individuals were homeless on a given night in 2022.⁴ Additionally, 21.1 percent of people experiencing homelessness in the U.S. have a serious mental health condition.⁵ When the clinic opened, we wanted to provide services to help this population that has unique legal needs. We started by representing clients with applying for and appealing the denials of public benefits such as Medicaid, Supplemental Nutritional Assistance Program (SNAP) and Social Security SSI/SSDI. Shortly thereafter, one of the residents at Hesed House had a major cardiac attack that left him unconscious. He had no paperwork regarding his medical wishes. After this incident, Health Advocacy Clinic students began assisting Hesed House clients with advanced care planning, primarily completing POAs for health care. POAs are advanced directives that allow a principal to name an agent to make health care decisions if he/she becomes unable to do so himself/herself.⁶ Agents can make decisions about physical and mental health conditions as well as disposition of remains after principals die.⁷ POAs do not expire

and are in effect unless principals decide to revoke or change them. To spread the word about POAs, clinic students started hosting “Power of Attorney Days” at Hesed House, where they led information sessions about POAs and then helped clients complete them.

Back to Josh. He had three questions for me about POAs, all questions that demonstrate why it is a good idea for homeless clients to complete them.⁸ First, he asked if it was okay if he named a friend to make decisions for him instead of a family member. His parents were deceased, he was divorced, and he was estranged from his adult daughter. Stories like this are not unusual for many of the homeless clients we work with, as they have lost contact with their families. Josh and I discussed why his situation would make having a POA more important. If no advanced directive exists, the Illinois Health Care Surrogate Act⁹ designates individuals in a specific order who can make medical decisions for individuals lacking decisional capacity. First, the patient’s guardian of the person; second, the patient’s spouse; next, any adult son or daughter of the patient.¹⁰ Josh was confident that one of his friends would be more familiar with his beliefs and more likely to honor his wishes than his daughter who “hates me.” Josh could name his friend as his agent in a POA. The Health Care Surrogacy Act does not apply if a valid POA has been executed,¹¹ so his daughter would not be allowed to make decisions. He seemed content with this explanation.

Josh’s second question surprised me. As background, he was diagnosed with schizoaffective disorder in his early 20s and had been hospitalized “dozens” of times for his symptoms. The frequency Josh’s hospitalizations increased after he became homeless. At the time we talked, he said that things had been going well since he started Seroquel in addition to other medications. He discussed how his life had been a pattern of stability followed by developing side effects from medications. Often, he stopped

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taking them. Josh felt out of control during these times. I thought his second question was going to involve whether he could still sign a power of attorney for health care despite having a mental health diagnosis.¹² Instead he asked if he could change his POA even if he was symptomatic. We talked about how the Illinois Power of Attorney Act states that a health care agency may be revoked at any time, *without regard to the principal's mental or physical condition* [emphasis added].¹³ I did tell him that Illinois law had changed to allow individuals to select a 30-day delay after they communicate their intent to change their POA.¹⁴ This option could help prevent Josh from changing his POA when symptomatic, a time when he may need it the most. It could also result in having someone making decisions about his health care for 30 days who he no longer trusted or believed would carry out his wishes during a time of crisis. He appreciated both options of revoking it at any time, as well as delayed revocation, and said he would think about which one to select.

Josh's final question was whether there were any other advanced care planning documents he should complete. Although the law students had not covered it in their POA education sessions, Josh and I discussed declarations for mental health treatment. These are advance directives that address mental health care and provide specific wishes regarding psychotropic medications, electroconvulsive therapy, admission to and retention in facility and selections of physicians.¹⁵ An attorney-in-fact can be designated to make decisions for someone. The mental health declaration would allow Josh, who has tried various medications in his lifetime, the opportunity to provide information to his attorney-in-fact about treatment preferences. Josh and I talked about how these documents need to be redone every three years.¹⁶ Additionally, revocation of a mental health declaration is different than a POA that can happen at any time without regard for decision making capacity. To revoke a declaration, a physician needs to confirm that someone is capable of giving or withholding consent for mental health treatment.¹⁷ Josh asked how many mental health declarations I had helped clients complete, and I was not proud of the

answer: none. Many years ago, I attempted to assist a client but quickly became uncomfortable when the client asked my opinion on what medications and dosages should be included in the declaration. It simply was outside my expertise, and it became clear that the best way to complete these would include clients, attorneys, and mental health providers. Perhaps our future "Mental Health Declarations" days could involve all these individuals. This type of collaboration is what makes the medical-legal partnership model so effective.

Ultimately, Josh completed a power of attorney for health care naming his friend as his agent. Before we could complete the mental health declaration, he left Hesse House. If he ever returns, we will be ready to do so. Hopefully, we can help other individuals experiencing homelessness and mental health challenges take control of their health care wishes through advanced directives. ■

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Thank you to Brittany Malone, a 2023 NIU College of Law graduate, who assisted with the research for this article during her time as a graduate assistant in the Health Advocacy Clinic.

1. The client's real name has been changed to protect confidentiality.
2. For more on the medical-legal partnership model, visit the National Center for Medical-Legal Partnership's website at [Home -- National Center for Medical-Legal Partnership](#) (last visited July 18, 2023).
3. *State of Homelessness: 2023 Edition*, National Alliance to End Homelessness, found at [Homelessness in America \(endhomelessness.org\)](#) (last visited July 18, 2023).
4. *State of Homelessness: State and CoC Dashboards*, National Alliance to End Homelessness, found at [SOH: State and CoC Dashboards - National Alliance to End Homelessness](#) (last visited July 18, 2023).
5. *Mental Health by the Numbers*, National Alliance on Mental Illness, found at [Mental Health By the Numbers | NAMI: National Alliance on Mental Illness](#) (last visited July 18, 2023).
6. See 755 ILCS 45/4.
7. See 755 ILCS 45/4-3.
8. While Josh's questions demonstrated why having advanced directives is important for unhoused individuals, I am a firm believer that everyone should do advanced care planning.
9. See 755 ILCS 40.
10. See 755 ILCS 40/25(a)(1)-(3).
11. See 755 ILCS 40/15.
12. I am asked this question often. Simply being diagnosed with a mental illness does not prevent someone from being able to sign a POA. There are various factors that are used to assess someone's capacity. This topic could be its own article,

maybe a future one.

13. See 755 ILCS 45/4-6.

14. Illinois House Bill 679, effective July 30, 2021 into 755 ILCS 45/4-6.

15. See 755 ILCS 43.

16. See 755 ILCS 43/10(2).

17. See 755 ILCS 43/50.

Appellate Update

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Medical Association. ¶2, 11. The court subsequently denied plaintiff's motion to reconsider. ¶2, 13. Plaintiff refused to produce the unredacted mental health records and asked the court to find her in contempt and fine her \$1 so that she could appeal the court's ruling. ¶2, 15.

On appeal, plaintiff argued that the trial court erred in finding in her contempt and in ordering her to produce Ursitti's unredacted medical records under section 10(a) of the Mental Health and Developmental Disabilities Confidentiality Act (Act) (740 ILCS 110/1 *et seq.* (West 2018)). ¶3, 17. Plaintiff maintained that, under the Act, mental health records are privileged unless the plaintiff directly puts the records at issue or if the plaintiff affirmatively waives the protections of the Act. ¶3, 17. Plaintiff asserted that she did not put the records "at issue," that the medical malpractice action did not concern Ursitti's mental health and that she did not waive her rights under the Act. ¶3, 8, 17. Plaintiff also argued that the trial court failed to make the necessary findings for the production of the medical records in its order, ignoring such factors as whether the production of the records would be unduly prejudicial or whether the disclosure was more important than protection from injury for Ursitti. ¶3.

The appellate court found the supreme court's ruling in *Reda*, 199 Ill. 2d 47 (2002) compelling. ¶29. In *Reda*, one of the plaintiffs was admitted to the hospital and underwent surgery for a knee replacement. *Id.* at 50. ¶29. The plaintiff developed acute thrombosis in his right leg and also suffered neurological damage. *Id.* at 50, 51, 58. ¶29. The plaintiff alleged that the defendant doctors failed to timely diagnose and treat his worsening condition. *Id.* at 50. ¶29. During discovery, defendants requested treatment records from the plaintiff's doctor. *Id.* at 51. ¶29. The doctor refused, [*17] explaining that the plaintiff had not authorized their release. *Id.* ¶29. The plaintiffs objected to the defendants' discovery request, citing the "mental-health-therapist-patient privilege"

under the Act. *Id.* ¶29.

The supreme court in *Reda* found that the plaintiff had not introduced his mental condition as an element of his medical malpractice claim and, therefore, had not waived the statutory privilege under the Act. *Id.* at 58, 63. ¶30. The court found that the plaintiff did not place his mental condition at issue simply by alleging that he suffered neurological damage. *Id.* at 58. ¶30. The court cautioned that, if a defendant were permitted to directly implicate psychological [*18] damage in cases involving neurological injury, then "in every case in which the plaintiff claimed damages stemming from a physical injury to the brain, the door to discovery of the plaintiff's mental-health records would automatically open, and the limited exception in section 10(a)(1) of the Act would effectively eviscerate the privilege." *Id.* ¶30.

The appellate court applied same analysis as in *Reda*. ¶32. Here, plaintiff's claims did not concern Ursitti's mental health. ¶32. Plaintiff's claims were solely based on defendants' failure to timely diagnose Ursitti's lung cancer by, *inter alia*, failing to order chest X-rays and CT scans. ¶32. Because plaintiff's claims did not put Ursitti's mental condition "at issue," defendants were not permitted to disclose or testify to Ursitti's mental health records. ¶32. "As the supreme court explained in *Reda*, defendants cannot circumvent the protections of the Act by arguing that the mental health records are relevant to their defense." *Id.* at 59. ¶32. "In essence, defendants may not put Ursitti's mental health "at issue" where plaintiff's claims do not do so." ¶32. Any "unfairness" that would result to defendants by denying them access to Ursitti's mental health records, must give way to the privilege created by the Act. *Id.* ¶32.

The appellate court found that defendants did not make the necessary showing to bring Ursitti's records within the narrow exceptions provided in either section 10(a)(2) or 10(a)(3) of the Act. ¶50. It found that the circumstances presented

in this case did not present the "truly extraordinary circumstances" necessary to apply the fundamental fairness exception to the privileges of the Act. ¶48. However, the appellate court also held that if defendant can show that he was actually treating [*30] Ursitti for her mental health issues, and/or that somehow her mental health issues precluded him from ordering tests for lung cancer, then he may attempt to assert the exception to the privilege. ¶50. The appellate court found that there has been no showing of this to date. ¶50.

The appellate court found that the trial court erred in ordering plaintiff to produce Ursitti's unredacted mental health records and in finding that Dr. Rao, and his experts, could review and testify to those records. ¶50. Further, it reversed the contempt finding against plaintiff. See *Reda*, 199 Ill. 2d at 63 ("where the trial court's discovery order is invalid, a contempt judgment for failure to comply with the discovery order must be reversed" (quoting *In re Marriage of Bonneau*, 294 Ill. App. 3d 720, 723, 691 N.E.2d 123, 229 Ill. Dec. 187 (1998))). ¶50.

The appellate court reversed the judgment of the circuit court and remanded for further proceedings. ¶3, 52.

People v. I.M., 2023 IL App (2d) 220137-U (Order filed April 28, 2023) (The Order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).)

[*P2] The issue on appeal is whether the trial court erred in granting the State's motion to strike the petition of respondent, I.M., for a certificate of innocence which was filed pursuant to [section 2-702 of the Code of Civil Procedure](#) (Code) ([735 ILCS 5/2-702](#) (West 2020)) as respondent's effort to pursue his claim of "wrongful confinement" in a mental institution.

[*P1] Held: [Section 2-702 of the Code of Civil Procedure](#) ([735 ILCS 5/2-702](#) (West 2020)), which establishes the procedures by which one can file a petition for a certificate of innocence, is inapplicable to respondent's

wrongful confinement claim because he was involuntarily admitted to a mental hospital and not convicted of a felony and imprisoned which is required by statute to seek a certificate of innocence; therefore, the trial court's decision to strike respondent's petition was proper.

Affirmed. ■

Andreas Liewald is a staff attorney with the Illinois Guardianship and Advocacy Commission, West Suburban (Hines) Office. He is also the 2023-24 secretary of the ISBA Mental Health Law Section Council.

UIS Students Raise Awareness About College Mental Health

BY CARLEE BRONKEMA

Dozens of backpacks hung on display in the quad at the University of Illinois Springfield on Monday, September 25.

Each backpack had pieces of paper attached to it, which shared the story of someone's experience with suicide. Some of them were written by family members after they lost a loved one to suicide, others were written by those who attempted to take their own life.

"It just really speaks to how impactful and how relatable mental health issues are on college campuses," said Professor Frances Shem, who is also the faculty advisor for the Active Minds chapter on campus, who organized the event. "Oftentimes you don't necessarily realize that people are struggling with mental health issues. They may seem like they're doing very well and very put together on the outside."

The backpacks came from a national campaign run by the national non-profit **Active Minds**. Student organizers say this exhibit is worthwhile to help their classmates feel more comfortable addressing their mental health concerns.

"The hope is just to get more people involved in speaking up about the mental health issues we deal with on a daily basis," said TJ Fields, the Coordinator for the Send Silence Packing Tour. "If you affect one person that's affecting the whole community, you can touch a lot of people."

While UIS students hosted a **different version of Sending Silence Packing** last year, a new addition this year was a Hope Wall, which asked students to write

encouragement for their fellow students. The goal was to help students leave the event feel supported and positive about the future.

"If somebody goes through the entire exhibit and gets absolutely nothing out of it, but they go to the Hope Wall and see encouragement written out and say that to a friend who is struggling, then I see that as a success because it's a stepping stone for that one person," said Pavani Unnam the Co-president of the Active Minds chapter at UIS.

Student volunteers and members of the on-campus counseling team were present to talk to students about mental health, and offer resources for future issues. ■

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