



RULE 1-130. APPOINTMENT OF A TREATMENT GUARDIAN

West's New Mexico Statutes Annotated : State Court Rules (Approx. 3 pages)

West's New Mexico Statutes Annotated

State Court Rules

1. Rules of Civil Procedure for the District Courts

Article 12. Domestic Relations Rules

NMRA, Rule 1-130

RULE 1-130. APPOINTMENT OF A TREATMENT GUARDIAN

Currentness

A. Definitions. For purposes of this rule, the following definitions shall apply:

(1) *Capacity to make mental health treatment decisions.* A person has capacity to make mental health treatment decisions when the person has the ability to understand and appreciate the nature and consequences of proposed mental health treatment, including significant benefits and risks and alternatives to the proposed mental health treatment, and to make and communicate an informed mental health treatment decision;

(2) *Mental health treatment.* Mental health treatment includes the administration of psychotropic medication, psychosurgery, convulsive therapy, experimental treatment, or a behavior modification program involving aversive stimuli or substantial deprivations;

(3) *Mental health treatment facility.* A mental health treatment facility is an inpatient facility that provides treatment for psychiatric disorders or habilitation for developmental disabilities;

(4) *Penal institution.* A penal institution is a place for the confinement of persons in lawful detention, including a jail, detention facility, prison, or correctional facility;

(5) *Respondent.* A respondent is a person who is the subject of a petition to appoint a treatment guardian; and

(6) *Treatment guardian.* A treatment guardian is an individual or entity appointed under Section 43-1-15 NMSA 1978 to make mental health treatment decisions for a person who has been found by clear and convincing evidence to be incapable of making the person's own mental health treatment decisions.

B. Scope. This rule governs the appointment of a treatment guardian under Section 43-1-15 NMSA 1978. The procedures set forth in this rule shall apply when the following circumstances have been met:

(1) a mental health or developmental disabilities professional or physician has proposed a course of mental health treatment for the respondent; and

(2) the mental health or developmental disabilities professional or physician or any interested person believes that the respondent lacks the capacity to make mental health treatment decisions.

C. Petition. Any interested person authorized under Section 43-1-15(B) NMSA 1978 may petition the court to appoint a treatment guardian under the circumstances described in Paragraph B of this rule. The petition shall

(1) identify the respondent's name, age, and county of residence;

(2) identify the respondent's last-known location at the time of the filing of the petition, whether a mental health treatment facility, penal institution, the respondent's home address, or other location;

(3) identify the respondent's current mental health diagnosis;

(4) describe the respondent's symptoms or behaviors that support the diagnosis;

(5) state where the respondent currently receives treatment, whether in an institution or a

facility or in the community;

(6) provide the name and address of the respondent's mental health or developmental disabilities professional or physician and describe the proposed course of treatment;

(7) provide the date (if any) on which the respondent last received emergency medications pursuant to Section 43-1-15(M) NMSA 1978;

(8) allege that the respondent is incapable of giving or withholding informed consent to the proposed course of treatment and therefore lacks capacity to make his or her own mental health care treatment decisions;

(9) describe the efforts made by the mental health or developmental disabilities professional or physician to discuss the proposed course of treatment with the respondent;

(10) identify the proposed treatment guardian;

(11) state the proposed treatment guardian's relationship to the respondent, if any;

(12) allege that the proposed treatment guardian has received a copy of Form 4-931 NMRA from the petitioner;

(13) identify any previously designated or court-appointed agents for the respondent;

(14) identify any witnesses that the petitioner intends to call at the hearing on the petition; and

(15) request the appointment of a treatment guardian for a specified period of time not to exceed one year.

D. Notice of hearing. Upon the filing of a petition, the court shall issue a notice of hearing. The hearing shall be set for a date no later than three (3) business days after the filing of the petition, provided that the court may extend the time for a hearing for good cause shown, including the inability of the petitioner to prove that the respondent and the respondent's attorney were served prior to the hearing.

E. Service. The petition and notice of hearing shall be served as soon as practicable on the respondent and on the respondent's attorney as provided in Paragraphs D through F of Rule 1-004 NMRA. Effective service shall be presumed if the respondent appears at the hearing and is represented by counsel.

F. Hearing. Unless the respondent knowingly waives the right to a hearing, the hearing shall conform with the following requirements:

(1) The respondent shall be represented by counsel as required by Section 43-1-4(B) NMSA 1978, and shall have the right to be present, to call witnesses, and to cross-examine opposing witnesses;

(2) The petitioner shall introduce the sworn testimony of a physician or of a mental health or developmental disabilities professional acceptable to the court. The professional or physician shall testify about the conclusion that the respondent lacks capacity to make mental health treatment decisions and the reasons supporting the proposed mental health treatment;

(3) The petitioner shall introduce evidence that the proposed treatment guardian understands and accepts the duties and responsibilities set forth in Sections 43-1-15 and 43-1-19 NMSA 1978; and

(4) If the court determines by clear and convincing evidence that the respondent lacks capacity to make mental health treatment decisions, it shall issue a written order appointing a treatment guardian for a specified period not to exceed one year. The order shall include written findings that the respondent lacks capacity to make mental health treatment decisions and that the treatment guardian understands the duties and responsibilities set forth in Sections 43-1-15 and 43-1-19 NMSA 1978.

G. Substitution of treatment guardian. If during a term of appointment, the treatment guardian, the mental health or developmental disabilities professional or physician, the respondent, or any other interested person believes that a substitute treatment guardian should be appointed, such person may move the court for a substitute treatment guardian to

complete the current term of appointment. A copy of Form 4-931 NMRA, signed by the proposed substitute treatment guardian, shall be attached to the motion. If the motion is due to a change in the respondent's physical location, the court shall consider the proposed substitute treatment guardian's availability at the respondent's new location.

Credits

[Adopted effective Dec. 31, 2014.]

Editors' Notes

COMMITTEE COMMENTARY

In general

This rule and the accompanying forms resulted from the appointment of the Ad Hoc Committee on Rules for Mental Health Proceedings (the committee). The rule governs proceedings for the appointment of a treatment guardian under NMSA 1978, Section 43-1-15, and is intended to raise the profile of an important, but rarely used, procedure for providing mental health treatment to individuals who lack the capacity to consent to such treatment. A treatment guardian may be appointed when the requirements of this rule have been satisfied, regardless of the respondent's status as an inpatient, outpatient, detainee, or inmate. If the appointment is made while the respondent is admitted to a mental health facility or housed in a penal institution, the appointment may be limited to the duration of the respondent's admission, detention, or sentence, so long as the appointment does not exceed one year.

A primary aim of this rule is to increase the likelihood that individuals will access mental health treatment in the community without unnecessary detention or incarceration. For that reason, the issuance of a bench warrant to compel attendance at a hearing under this rule is strongly discouraged.

The appointment of a treatment guardian is not an emergency proceeding. Other statutory procedures are available for involuntarily administering emergency medication to an individual who is in crisis, *see, e.g.*, NMSA 1978, § 43-1-15(G), and for involuntarily detaining an individual for evaluation and treatment, *see id.* § 43-1-10. The relief provided for in this rule should not be awarded based solely on the respondent's failure to appear at the hearing or to answer the allegations in the petition. Nothing in this rule, however, is intended to prevent the court from appointing a treatment guardian in the respondent's absence, so long as the requirements of this rule have been satisfied, including proof of service upon the respondent and the respondent's attorney and a finding supported by clear and convincing evidence that the respondent lacks capacity to make mental health treatment decisions.

Capacity to make mental health treatment decisions

Section 43-1-15(B) provides that certain individuals or entities who believe that a client is "incapable of informed consent" may petition for the appointment of a treatment guardian. However, the statute does not define the phrase "incapable of informed consent." *But see* NMSA 1978, § 43-1-15(B) ("if the client is capable of understanding the proposed nature of treatment and its consequences and is capable of informed consent, the client's consent shall be obtained before the treatment is performed."). The committee, therefore, elected to use the phrase "capacity to make mental health treatment decisions" and to define the phrase in accordance with the Mental Health Care Treatment Decisions Act, NMSA 1978, §§ 24-7B-1 to 24-7B-16. *See* NMSA 1978, § 24-7B-3(C) (defining "capacity" under the Mental Health Care Treatment Decisions Act).

Substitution of treatment guardian

Paragraph G permits a motion for substitution of a treatment guardian, which may be appropriate under a variety of circumstances. In particular, if a treatment guardian's term coincides with a respondent's temporary stay at a mental health facility or penal institution, a substitute treatment guardian may be necessary to maximize the treatment guardian's availability and effectiveness when the respondent is released to a location that is geographically remote from the facility or institution.

[Commentary adopted effective December 31, 2014.]

NMRA, Rule 1-130, NM R DIST CT RCP Rule 1-130
State court rules are current with amendments received through 3/1/2015. Local federal district and bankruptcy court rules are current with amendments received through December 1, 2013.

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