

**PROPOSED REVISIONS TO THE GUARDIANSHIP AND CONSERVATORSHIP
RULES
PROPOSAL 2019-002**

March 4, 2019

The Ad hoc Guardianship and Conservatorship Rules and Forms Committee has recommended the adoption of new Rule 1-143 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 3, 2019, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

[NEW MATERIAL]

1-143. Guardianship and conservatorship proceedings; appointment of visitor, qualified health care professional, and guardian ad litem; timing of reports.

A. **Scope; computation of time.** This rule governs the appointment of and filing of reports by a visitor, qualified health care professional, and guardian *ad litem* in a guardianship or conservatorship proceeding under Chapter 45, Article 5, Parts 3 and 4 NMSA 1978. All time periods set forth in this rule, regardless of length, shall be computed using calendar days as provided in Rule 1-006(A)(1) NMRA.

B. **Appointment.** Upon the filing of a petition for the appointment of a guardian or conservator, the court shall appoint a qualified health care professional, visitor, and if necessary, a guardian *ad litem*.

C. **Timing of reports.** An order of appointment under Paragraph B of this rule shall require the appointee to file a report as follows.

(1) **Qualified health care professional.** A qualified health care professional shall file the report required under Section 45-5-303(E) or 45-5-407(C) NMSA 1978 no later than fourteen (14) days before the hearing on a petition to appoint a guardian or conservator.

(2) **Visitor.** A visitor shall file the report required under Section 45-5-303(F) or

45-5-407(D) NMSA 1978 no later than eleven (11) days before the hearing on a petition to appoint a guardian or conservator.

(3) **Guardian ad litem.** A guardian ad litem shall file a report no later than seven (7) days before the hearing on a petition to appoint a guardian or conservator.

D. **Provision of reports.** Within three (3) days of the filing of a report required under Paragraph C of this rule, the petitioner shall provide a copy of the report to the alleged incapacitated person, the visitor, the guardian *ad litem*, any attorney of record, any agent under a power of attorney unless the court orders otherwise, and any other person the court determines under Rule 1-079.1(B)(4) or (C)(4) NMRA. The report may be provided to such persons in any manner reasonably calculated to afford a meaningful opportunity to review the report before the hearing on the petition to appoint a guardian or conservator. Prior to the hearing, the guardian ad litem shall review the reports with the alleged incapacitated person.

[Approved by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The time limits set forth in this rule are intended to provide a meaningful opportunity to review the reports before the hearing on the petition for the alleged incapacitated person and any other person entitled to access the reports under Rule 1-079.1 NMRA.

[Approved by Supreme Court Order No. _____, effective _____.]

Google Groups

Rule 1-143

Margaret Graham <mgraham@pbwslaw.com>
Posted in group: nmsupremecourtclerk

SUPREME COURT OF NEW MEXICO
FILED

Mar 26, 2019 12:26 PM

MAR 26 2019

Dear Committee Members,



I have had the opportunity to review the proposed Rule 1-143 with regard to reviewing the reports of the court-appointed professionals with the Alleged Incapacitated Person. I have several concerns with regard to this new requirement. While it is certainly reasonable and appropriate for the Alleged Incapacitated Person to have the opportunity to review these reports prior to the hearing, to make it a requirement that the Guardian ad Litem review the reports with the Alleged Incapacitate Person may present significant problems and expenses for the AIP.

Requiring that the GAL review the reports with the AIP will necessitate the GAL making another visit to the AIP which will thereby incur an additional expense to an estate that may not be particularly solvent. In addition, if the AIP then believes that the GAL is the author of all of the reports, or associates the GAL directly with the content of the reports, the AIP may lose faith and trust in the GAL and may not feel comfortable confiding in that person with regard to their wishes going forward.

In some cases, the AIP may be able to read and understand the reports without having someone review the reports with them. To have someone do so may seem condescending and demeaning to the AIP. However, other AIP's may not be able to

comprehend the reports or their meaning regardless of who reviews them or how they are explained. This could be a waste of time and funds at best or even be frustrating, confusing or frightening for those AIP's at worst. Of course, there likely will be AIP's who will be able to appreciate the contents of the reports and their significance if they are properly explained to them and would benefit from having this done.

In order to address each of these potential situations while keeping in mind the potential cost to the estate of the AIP, I suggest that the Qualified Health Care Professional be required to opine in his or her report as to whether the AIP will be able to comprehend the reports if provided them to read, will be able to comprehend them if the reports are verbally explained to them, or whether there is no manner of delivery of the information that would enable the AIP to understand or comprehend the content and significance of the reports. With this information, the parties would be able to determine whether it would be appropriate to have the reports delivered to the AIP to read, to have the GAL review the reports with the AIP, or whether neither will accomplish the intended goal of helping the AIP understand the content and significance of the reports. This would also allow for better use of the AIP's often limited funds, of the GAL's time, and possibly help preserve the GAL's relationship with the AIP.

Thank you for your consideration of these comments.

MARGARET "PEGGY" GRAHAM

ATTORNEY



PREGENZER
BAYSINGER
& WIDEMAN
SALE, PC

2424 Louisiana Blvd NE, Suite 200

Albuquerque, NM 87110

Phone (505) 872-0505

Fax: (505) 872-1009

Email: mgraham@pbwslaw.com

Web: www.pbwslaw.com



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Google Groups

Rule proposal comment for New Rule 1-143

Brian Smith <brian@smithlawnm.com>

Mar 27, 2019 1:00 PM

Posted in group: **nmsupremecourtclerk**

I am an attorney who practices as both a petitioner and a GAL in adult guardianship cases. The proposed rule creates a greater cost to the overall guardianship case by requiring the GAL to make a second visit to the AIP and review the professionals' reports with the AIP. My concern is that greater cost will hinder those of lesser means in obtaining a guardianship. Often those of lesser mean are those who need the protection of a guardianship most. Greater expense very often could inhibit procurement of an adult guardianship.

Thank you for your consideration.

Brian T. Smith, Attorney
The Law Office of Brian T. Smith, LLC
Office: 5121 Masthead NE, Albuquerque, NM 87109
Mail: P.O. Box 3532, Albuquerque, NM 87190
Tel: 505-926-0191

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April 3, 2019

APR - 3 2019



Shasta N. Inman, Esq.
Attorney at Law

3321 Candelaria Rd NE, Ste 303
Condo B - Diamond Suites
Albuquerque, NM 87107

Shasta.Inman@gmail.com

(505) 227-4554 [main]
(505) 322-8313 [direct]
(505) 216-0702 [fax]

Kelly Ramirez, Legal Assistant
InmanFamilyLawAssistant@gmail.com

Joey D. Moya, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, NM 87504-0848
nmsupremecourtclerk@nmcourts.gov
sent via email only



Re: Proposed Rule Changes
Proposed 2019-002
Rule 1-143

To the Honorable New Mexico Supreme Court,
Joey D. Moya, Clerk:

I am writing to provide a comment to Proposal 2019-002, Rule 1-143.

I am a contract attorney with the Developmental Disabilities Planning Counsel, Office of Guardianship (OOG), working on OOG cases since July 2017. I have served as an OOG petitioning attorney on 13 cases (including multiple emergency petitions); as a guardian ad litem in nine OOG cases; and as an OOG petitioning attorney or guardian ad litem in 18 Ayudando transfer cases. I have also handled numerous private cases on both sides. My guardianship and conservatorship cases (both private and through contract) have been in the following counties: Bernalillo, Valencia, Santa Fe, Rio Arriba, and San Miguel.

In my opinion, Subsections A, B, & C of the proposed Rule 1-143 will be very helpful in clarifying the timelines in which the qualified health care professional (QHCP), court visitor, and guardian ad litem must comply with their duties.

It will also be helpful in clarifying that QHCP reports need not be filed concurrently with a Petition for guardianship. I have had case(s) in which a Petition and Request for Hearing was rejected by the court because a QHCP report was not filed concurrently.

With the timelines in proposed Rule 1-143, however, it will be imperative that courts adhere to the rule that

went into effect in January 2019: Rule 1-004.1(A)(2), regarding setting the hearing on the petition for no sooner than sixty (60) days after the filing of the petition.

Some courts are still "short-setting" the hearings, and with the timelines as set forth in Proposed 2019-002, "short-setting" of hearings may cause problems with appointed persons being able to adequately interview all necessary individuals for reports and prepare thorough reports by the Rule 1-143 deadlines.

I do not feel, however, that Subsection D of the proposal will be helpful in protecting the rights of alleged incapacitated persons or providing for judicial economy. The "protected person," the petitioner, the court visitor, guardian ad litem, an attorney of record, power of attorney, and other persons allowed by the court, already have access to reports under Section 45-5-303(L) and Rule 1-079.1(B)(4).

It is implied in Section 45-5-303(F)'s duty that a court visitor assess the protected person's ability, that the court visitor will review the qualified health care professional (QHCP)'s report. And Section 45-5-303.1 provides that the guardian ad litem *shall* review both the court visitor report and the QHCP report.

Furthermore, it is already common practice that professionals involved in these cases request copies of reports that they are permitted to access, directly from the reports' author, if they feel reviewing such a report prior to or during the hearing is necessary. Giving the duty of distribution to the Petitioning Attorney (as Rule 1-143(D) is written) does not support judicial economy.

It is also common practice that the court visitor and guardian ad litem discuss their respective recommendations during the guardian ad litem's required interview of the visitor under Section 45-5-303.1. A Rule that provides for the Petitioning Attorney to distribute the reports of other professionals to persons already permitted to request those reports, is, in my opinion, unnecessary.

Regarding the guardian ad litem's duty to review the reports with the alleged incapacitated person prior to the hearing: in theory, this is an excellent requirement. In practice, however, this could be very difficult and impractical to meet, and it would not provide a great benefit to the alleged incapacitated persons (AIP) in many cases.

I am frequently encountering cases with the OOG in which the AIP refuses to speak with me as their guardian ad litem (generally due to severe mental health issues, paranoia, dysregulated anger, substance use, etc. etc. etc.). I have even been physically attacked by a client in my attempt to complete an initial interview with them. I am also frequently encountering OOG cases in which the AIP is so profoundly incapacitated (and there is no debate regarding that categorization, as between the QHCP, visitor, the person's other providers and myself) that the person cannot at all understand the reports—or even that a report is being reviewed with them.

Further still, the way that the rule is written can lead to severe privacy and safety concerns for the AIP in some cases. If the Petitioning Attorney must provide a report to the AIP within 3 days of its filing, and, for example, a GAL report is due at least 7 days prior to a hearing, that provides at least 4 days during which a problematic or unsafe caregiver has access to the AIP's copy of the GAL report

and can take retributive action that could potentially (and intentionally) harm the AIP: whether emotionally, financially, physically, or numerous other ways.

The point is, there are an infinite number of factual scenarios that make this requirement—in some circumstances—more burdensome than beneficial.

If there were a qualification in the Rule's language that provided for these additional circumstances, relating to the AIP's physical and mental health and the safety of the GAL, I believe that would be helpful and also serve to protect the alleged incapacitated person's rights.

The additional rule language regarding the provision of reports to other professionals is simply superfluous and unnecessary.

Thank you for your time and attention in this matter.

Sincerely,



Shasta N. Inman, Esq.