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HOUSE BILL 559

50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011

INTRODUCED BY

Dennis J. Kintigh

AN ACT

RELATING TO BEHAVIORAL HEALTH; AMENDING A SECTION OF THE MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES CODE TO PROVIDE FOR FURTHER PROCEDURES AND CLIENT REPRESENTATION IN DETERMINATIONS OF WHETHER A PATIENT IS CAPABLE OF INFORMED CONSENT FOR BEHAVIORAL HEALTH TREATMENT AND FOR THE APPOINTMENT OF A TREATMENT GUARDIAN.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 43-1-15 NMSA 1978 (being Laws 1977, Chapter 279, Section 14, as amended) is amended to read:

"43-1-15. CONSENT TO TREATMENT--ADULT CLIENTS.--

A. No psychotropic medication, psychosurgery, convulsive therapy, experimental treatment or behavior modification program involving aversive stimuli or substantial deprivations shall be administered to a client without proper

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1 consent. If the client is capable of understanding the
2 proposed nature of treatment and its consequences and is
3 capable of informed consent, the client's consent shall be
4 obtained before the treatment is performed. A client shall not
5 be presumed to be incapable of giving consent for
6 administration of psychotropic medications solely because the
7 client has been involuntarily committed to a treatment facility
8 or is awaiting a hearing on whether the client should be
9 involuntarily committed to a treatment facility.

10 B. If the mental health or developmental
11 disabilities professional or physician who is proposing this or
12 any other course of treatment or any other interested person
13 believes that the client is incapable of informed consent, the
14 mental health or developmental disabilities professional or
15 physician or other interested person may petition the court for
16 the appointment of a treatment guardian to make a substitute
17 decision for the client.

18 ~~[G. This original petition shall be served on the~~
19 ~~client and the client's attorney. A hearing on the petition~~
20 ~~shall be held within three court days. At the hearing, the~~
21 ~~client shall be represented by counsel and shall have the right~~
22 ~~to be present, to present witnesses and to cross-examine~~
23 ~~opposing witnesses.]~~

24 C. The sworn petition for appointment of a
25 treatment guardian shall set forth:

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- 1 (1) the name of the client;
2 (2) the client's date of birth;
3 (3) the client's primary place of residence,
4 if known;
5 (4) a belief that the client suffers from a
6 mental illness and the facts that form the basis for that
7 belief;
8 (5) an acknowledgment that within ten days
9 before the petition was filed, the client:
10 (a) was advised to seek appropriate
11 voluntary mental health treatment that would restore the
12 client's functions in order that the client could give informed
13 consent; and
14 (b) refused voluntary mental health
15 treatment;
16 (6) that the client is not capable of informed
17 consent and the facts that form the basis for this belief;
18 (7) the name and business address of the
19 client's treating mental health professional, if known and
20 applicable;
21 (8) whether the client is in a treatment
22 facility and, if so, the name and location of that facility;
23 and
24 (9) the potential sources of payment for the
25 client's treatment and evaluation.

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1 D. The client shall be assigned an attorney by the
2 court upon the filing of the petition. The department of
3 health shall provide the attorney assigned to the client. A
4 copy of the original petition, assignment of the client's
5 attorney and notice of hearing shall be served on the client.
6 If the client is not in a treatment facility, the office of the
7 sheriff in the county of filing shall serve the client with the
8 required documents. The court shall send a copy of the
9 petition, assignment of the client's attorney and notice of
10 hearing to the department of health via facsimile within one
11 day of the filing of the petition. The court shall send a copy
12 of the petition, assignment of the client's attorney and notice
13 of hearing to the assigned client's attorney via facsimile
14 within one day of the filing of the petition.

15 E. If the client is in a treatment facility at the
16 time the petition is filed, a hearing on the petition shall be
17 held within three court days of the filing date. If the client
18 is not in a treatment facility when the petition is filed, a
19 hearing on the petition shall be held within fifteen court days
20 of the date of filing. At the hearing, the client shall be
21 represented by counsel and shall have the right to be present,
22 to present witnesses and to cross-examine opposing witnesses.

23 F. If the person who filed a petition pursuant to
24 this section is not a mental health or developmental
25 disabilities professional or physician, within two days of the

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1 filing of a petition pursuant to this section the court shall
2 order an evaluation of the client's capacity for informed
3 consent and appoint a mental health or developmental
4 disabilities professional or physician to perform the
5 evaluation.

6 G. In order to obtain an evaluation of the client
7 for a professional opinion, pursuant to Subsection F of this
8 section, as to whether the client is capable of informed
9 consent, the court shall order the department to provide a
10 mental health or developmental disabilities professional or
11 physician if:

12 (1) the person who filed a petition pursuant
13 to this section is not a mental health or developmental
14 disabilities professional or physician;

15 (2) the client has no treating mental health
16 or developmental disabilities professional or physician or the
17 client's mental health or developmental disabilities
18 professional or physician is not available to testify as to the
19 client's capacity for informed consent; and

20 (3) there are no funds or public or private
21 third-party payor sources, including health insurance,
22 available to the client to pay a mental health or developmental
23 disabilities professional or physician to provide an opinion as
24 to the client's capacity for informed consent.

25 H. If the court orders the department to provide a

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1 mental health or developmental disabilities professional or
2 physician to evaluate the client and opine whether the client
3 is capable of informed consent pursuant to Subsection G of this
4 section and the department has no funds available to provide
5 the evaluation, the court shall dismiss a petition filed
6 pursuant to this section.

7 I. Within five days after the court, pursuant to
8 Subsection F of this section, has issued an order for
9 evaluation of a client and appointed a mental health or
10 developmental disabilities professional or physician, the court
11 shall inform the office of the sheriff in the county where the
12 petition was filed of the time and place of the evaluation. The
13 office of the sheriff shall serve a notice that indicates the
14 time and place for the evaluation and that the court has the
15 authority to issue an order allowing for the client to be
16 transported by law enforcement to the evaluation. If the client
17 fails to appear for or fully participate in the evaluation, the
18 department shall petition the court for an ex parte order to
19 compel the client to appear before the court. The court shall
20 issue an ex parte order for the client to appear in court
21 within five court days of the order's service upon the client.
22 The time limits for the hearing to determine whether the client
23 is capable of informed consent shall be tolled upon the filing
24 of the ex parte order. The office of the sheriff shall serve
25 the client with the ex parte order. At the hearing on the

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1 matter of the client's failure to comply with the court's order
2 to be evaluated, the court shall explain the nature of the
3 proceedings to the client and make a finding as to whether
4 there is probable cause to believe that the client is not
5 capable of making the client's own treatment decisions. Upon a
6 finding of no probable cause, the court shall dismiss the
7 petition for a hearing on the matter of the petition for
8 appointment of a treatment guardian. Upon a finding of
9 probable cause, the court shall order the client to be
10 evaluated at the time and place that the mental health or
11 developmental disabilities professional or physician appointed
12 to perform the evaluation has designated and order the office
13 of the sheriff to transport the client to the evaluation. The
14 court shall also set a new date for the hearing on the matter
15 of the petition for appointment of a treatment guardian that
16 shall be held no more than ten days from the evaluation.

17 J. At the evaluation, the mental health or
18 developmental disabilities professional or physician appointed
19 to perform the evaluation shall ask the client what, if any,
20 treatment the client is willing to accept or prefers and what
21 decisions the client has found to have been effective in
22 similar circumstances. This information shall be documented in
23 the client's medical record.

24 K. If, after the client's evaluation, the mental
25 health or developmental disabilities professional or physician

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1 appointed to perform the evaluation has found that the client
2 is capable of informed consent, the evaluator shall inform the
3 court. The court shall notify the petitioner that no probable
4 cause has been found for the client's lack of capacity of
5 informed consent and dismiss the petition.

6 ~~[D-]~~ L. When appointing a treatment guardian for an
7 adult, the court shall give priority to a court-appointed
8 guardian or, if no guardian has been appointed by a court, to
9 an agent designated or nominated by the client when the client
10 had capacity.

11 M. If, after notice, the client fails to appear at
12 the hearing on the matter of the petition for appointment of a
13 treatment guardian, the court may conduct the hearing in the
14 client's absence.

15 N. The court shall not hold the client in contempt
16 of court for failure to comply with a court order.

17 ~~[E-]~~ O. If after the hearing the court finds by
18 clear convincing evidence that the client is not capable of
19 making the client's own treatment decisions, the court may
20 order the appointment of a treatment guardian.

21 ~~[F-]~~ P. The treatment guardian shall make a
22 decision on behalf of the client whether to accept treatment,
23 depending on whether the treatment appears to be in the
24 client's best interest and is the least drastic means for
25 accomplishing the treatment objective. In making a decision,

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1 the treatment guardian shall consult with the client and
2 consider the client's expressed opinions, if any, even if those
3 opinions do not constitute valid consent or rejection of
4 treatment. If the client is unavailable, the treatment
5 guardian may rely upon preferences the client has expressed to
6 a mental health or developmental disabilities professional or
7 physician with whom the client had an opportunity to provide
8 these preferences. The treatment guardian shall give
9 consideration to:

10 (1) previous decisions made by the client in
11 similar circumstances when the client was able to make
12 treatment decisions; and

13 (2) the information contained in the client's
14 valid advance directive.

15 ~~[G.]~~ Q. If a client who is not a resident of a
16 medical facility and for whom a treatment guardian has been
17 appointed refuses to comply with the decision of the treatment
18 guardian, the treatment guardian may apply to the court for an
19 enforcement order. Such an order may authorize a peace officer
20 to take the client into custody and to transport the client to
21 an evaluation facility and may authorize the facility forcibly
22 to administer treatment.

23 ~~[H.]~~ R. The treatment guardian shall consult with
24 the physician or other professional who is proposing treatment,
25 the client's attorney and interested friends, relatives or

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1 other agents or guardians of the client to the extent
2 reasonably practical in making a decision.

3 ~~[F.]~~ S. If the client, physician or other
4 professional wishes to appeal the decision of the treatment
5 guardian, the client, physician or other professional may do
6 so, filing an appeal with the court within three calendar days
7 of receiving notice of the treatment guardian's decision. ~~[If~~
8 ~~such a decision, the client shall be represented by counsel.]~~
9 The treating mental health professional shall provide written
10 notice of the treatment guardian's decision to the client.
11 During an appeal of the treatment guardian's decision, the
12 client shall be represented by counsel that the department
13 provides. The court may overrule the treatment guardian's
14 decision if it finds that decision to be against the best
15 interest of the client.

16 T. The department shall provide funding to the
17 office of guardianship that is sufficient to train treatment
18 guardians.

19 ~~[J.]~~ U. When the court appoints a treatment
20 guardian, it shall specify the length of time during which the
21 treatment guardian may exercise the treatment guardian's
22 powers, up to a maximum period of one year. The court's
23 decision shall be based upon the recommendation of the client's
24 treating mental health professional and the client's past
25 history for recovery and compliance. If at the end of the

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1 guardianship period the treatment guardian believes that the
2 client is still incapable of making the client's own treatment
3 decisions, the treatment guardian shall petition the court for
4 reappointment or for appointment of a new treatment guardian.
5 The petition shall be served on the client, the client's
6 attorney and the previously appointed treatment guardian if
7 filed by another party. The guardianship shall be extended or
8 a new guardian shall be appointed only if the court finds the
9 client is, at the time of the hearing, incapable of
10 understanding and expressing an opinion regarding treatment
11 decisions. The client shall be represented by counsel and
12 shall have the right to be present and present evidence at all
13 such hearings. The department or its designee shall present
14 the state's case. The same procedures shall be followed for a
15 petition on the extent of the treatment guardian's authority as
16 though a new petition on the matter of a petition for
17 appointment of a treatment guardian were being filed with the
18 court.

19 [K-] V. If during a period of a treatment
20 guardian's power, the treatment guardian, the client, the
21 treatment provider, a member of the client's family or the
22 client's attorney or another person believes that the client
23 has regained competence to make the client's own treatment
24 decisions, that person shall petition the court for a
25 termination of the treatment guardianship. The department

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1 shall provide an attorney on the state's behalf to determine
2 whether a hearing is necessary and shall contest the request
3 that the client be relieved of a treatment guardian if the
4 treating mental health professional has indicated a belief that
5 the client is not capable of making treatment decisions. If
6 the court finds the client is capable of making the client's
7 own treatment decisions, it shall terminate the power of the
8 treatment guardian and restore to the client the power to make
9 the client's own treatment decisions.

10 ~~[H.]~~ W. A treatment guardian shall only have those
11 powers enumerated in the code, unless the treatment guardian
12 has also been appointed a guardian under the Uniform Probate
13 Code pursuant to provisions of Section 45-5-303 NMSA 1978. A
14 person carrying out the duties of a treatment guardian as
15 provided in this section shall not be liable in any civil or
16 criminal action so long as the treatment guardian is not acting
17 in bad faith or with malicious purpose.

18 ~~[M.]~~ X. If a licensed physician or a licensed
19 psychologist with prescribing privileges pursuant to the New
20 Mexico Drug, Device and Cosmetic Act believes that the
21 administration of psychotropic medication is necessary to
22 protect the client from serious harm that would occur while the
23 provisions of ~~[Subsection]~~ Subsections B through L, O, P and Q
24 of this section are being satisfied, the licensed physician may
25 administer the medication on an emergency basis. When

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1 medication is administered to a client on an emergency basis,
2 the treating physician shall prepare and place in the client's
3 medical records a report explaining the nature of the emergency
4 and the reason that no treatment less drastic than
5 administration of psychotropic medication without proper
6 consent would have protected the client from serious harm.
7 Upon the sworn application of the treating physician, the court
8 may issue an order permitting the treating physician to
9 continue to administer psychotropic medication until a
10 treatment guardian is appointed, if the requirements of
11 Subsection B of this section for appointment of a treatment
12 guardian are in the process of being satisfied in a timely
13 manner.

14 Y. The department shall create a model petition,
15 notice of hearing, appointment of the client's attorney, ex
16 parte order, petition of noncompliance, forms for appealing
17 proceedings to district court and any other necessary forms for
18 implementing proceedings pursuant to this section. The
19 department shall also create informational materials outlining
20 the processes for clients, petitioners and district courts.
21 The department shall offer an annual training for department
22 attorneys or designees, district court judges and court-
23 appointed attorneys.

24 Z. A mental health professional administering
25 treatment pursuant to this section shall create a treatment

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1 plan for the client within ten days of appointment.

2 AA. If a client fails to comply with a decision of
3 the client's treatment guardian, the treatment guardian may
4 file a request for an order to comply with the decision of the
5 treatment guardian in the county where the client is located or
6 where the client was last treated. A copy of the order
7 appointing the treatment guardian shall be filed with the
8 request for an order to comply with the decision of the
9 treatment guardian.

10 BB. If a treatment guardian is appointed in one
11 county and a treatment facility knows that the client will be
12 leaving the original county for treatment in another county,
13 the treatment facility where the client will receive treatment
14 shall send a copy of the treatment plan created pursuant to
15 Subsection Z of this section and a copy of the order appointing
16 a treatment guardian to the mental health professional who will
17 administer treatment to the client."