CHAPTER 45
Uniform Probate Code

ARTICLE 1
Uniform Probate Code

ANNOTATIONS

Compiler's notes. — The Uniform Probate Code was drafted by the National Conference on Uniform State Laws. New Mexico has enacted many of the 1990 and later revisions of the Uniform Probate Code. An "official comment" note is provided after comparable sections of the Uniform Probate Code.

PART 1
SHORT TITLE, CONSTRUCTION AND GENERAL PROVISIONS

45-1-101. Short title.

Chapter 45 NMSA 1978 may be cited as the "Uniform Probate Code".

History: 1953 Comp., § 32A-1-101, enacted by Laws 1975, ch. 257, § 1-101; 1993, ch. 174, § 2.

ANNOTATIONS

Cross references. — For estate taxes, *see* 7-7-1 to 7-7-12 NMSA 1978.

For disposition of unclaimed property, *see* 7-8A-1 NMSA 1978.

For probate courts, *see* 34-7-1 NMSA 1978 et seq.

For additional record or docket of decedents' estates, *see* 34-7-20 NMSA 1978.

For record of bonds and wills, *see* 34-7-21 NMSA 1978.

For probate court forms, *see* 4B-001 NMRA.

The 1993 amendment, effective July 1, 1993, substituted "Chapter 45 NMSA 1978" for "This act" and inserted "Uniform".

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

For comment, "In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage," see 9 N.M.L. Rev. 113 (1978-79).

For article, "Survey of New Mexico Law, 1979-80: Estates and Trusts," see 11 N.M.L. Rev. 151 (1981).

For annual survey of New Mexico law relating to estates and trusts, see 12 N.M.L. Rev. 363 (1982).

For annual survey of New Mexico law relating to estates and trusts, see 13 N.M.L. Rev. 395 (1983).

For article, "Survey of New Mexico Law, 1982-83: Estates and Trusts," see 14 N.M.L. Rev. 153 (1984).

For annual survey of New Mexico law of estates and trusts, 19 N.M.L. Rev. 669 (1990).

For annual survey of New Mexico Law of Wills and Trusts, see 20 N.M.L. Rev. 439 (1990).

For article, "The New Mexico Uniform Trust Code," see 34 N.M.L. Rev. 1 (2004).

45-1-102. Rule of construction; purposes of act.

A. The Uniform Probate Code shall be liberally construed and applied to promote its underlying purposes and policies.

B. The underlying purposes and policies of the Uniform Probate Code are:

(1) to simplify, clarify and modernize certain laws concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;

(2) to discover and make effective the intent of a decedent in distribution of the decedent's property;

(3) to promote a speedy and efficient system for the settlement and distribution of the estate of the decedent;

(4) to facilitate survivorship and related accounts and similar property interests in New Mexico;

(5) to provide a comprehensive system of methods of disclaiming interests in property;

(6) to facilitate the use and enforcement of governing instruments;

(7) to apportion taxes on estates; and

(8) to make uniform the law among the states.

History: 1953 Comp., § 32A-1-102, enacted by Laws 1975, ch. 257, § 1-102; 2011, ch. 124, § 1.

ANNOTATIONS

The 2011 amendment, effective January 1, 2012, expanded the purpose of the Uniform Probate Code to include the purposes of facilitating survivorship and related property interests, providing methods of disclaiming interests in property, apportioning taxes on estates, and making uniform the law among the states.

Liberal construction. — The Uniform Probate Code should be liberally construed to meet its policies, which include effectuating the intent of the decedent. Nicosia v. Lash (In re Estate of Kerouac), 1998-NMCA-159, 126 N.M. 24, 966 P.2d 191, cert. quashed, 128 N.M. 150, 990 P.2d 824 (1999).

Distribution of estate of protected person. — Where, during the lifetime of the decedent, the conservator of the property and affairs of the decedent discovered an executed inter vivos trust agreement which provided for the distribution of the trust estate after the decedent's death to a cousin and three step-children; the conservator did not discover any assets or property that the decedent transferred to the trust or any documents identifying the trust assets; the conservator also found an unexecuted pour-over will that provided for the transfer of the decedent's probate assets to the trust upon the decedent's death; before the decedent died, the conservator filed a petition for instructions with the district court regarding whether the conservator should transfer the decedent's assets to the trust; before the district court heard the conservator's petition, the decedent died leaving an estate of seven million dollars; one of the decedent's intestate heirs instituted a separate probate proceeding in district court; and the district court in the conservatorship proceedings determined that the probate court should decide the issue of whether to transfer the decedent's assets to the trust and terminated the protective proceeding without deciding the petition for instructions, the proper forum to determine whether to fund the decedent's trust and give effect to the decedent's pour-over will was in the probate court. In re Borland, 2012-NMCA-108, 288 P.3d 912.

45-1-103. Supplementary general principles of law applicable.

The principles of law and equity supplement the [Uniform] Probate Code's provisions, unless specifically displaced by particular provisions of the code.

History: 1953 Comp., § 32A-1-103, enacted by Laws 1975, ch. 257, § 1-103.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Principles of equity. — The district court sitting in probate and the probate courts are not invested with general civil jurisdiction, but they do have the power to apply principles of equity in and of their functions as probate courts unless specifically displaced by provisions of the Uniform Probate Code. Garcia v. Garcia, 105 N.M. 472, 734 P.2d 250 (Ct. App. 1987).

Supplemental award of attorney's fees is authorized for services rendered which confer a benefit upon the estate. Price v. Foster, 102 N.M. 707, 699 P.2d 638 (Ct. App. 1985).

45-1-104. Severability.

If any provision of the Uniform Probate Code or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of that code that can be given effect without the invalid provision or application, and to this end, the provisions of the code are severable.

History: 1953 Comp., § 32A-1-104, enacted by Laws 1975, ch. 257, § 1-104; 2011, ch. 124, § 2.

ANNOTATIONS

The 2011 amendment, effective January 1, 2012, revised the language of this section to clarify the scope of the severability provision.

45-1-105. Construction against implied repeal, amendment or expansion.

The [Uniform] Probate Code is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed, amended or expanded by subsequent legislation.

History: 1953 Comp., § 32A-1-105, enacted by Laws 1975, ch. 257, § 1-105.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

45-1-106. Effect of fraud and evasion.

A. If fraud has been perpetrated in connection with any proceeding or in any statement filed under the [Uniform] Probate Code or if fraud is used to avoid or circumvent the provisions or purposes of the code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud including restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not. Any proceeding must be commenced within two years after the discovery of the fraud. No proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud.

B. Subsection A of this section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

History: 1953 Comp., § 32A-1-106, enacted by Laws 1975, ch. 257, § 1-106.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Nature of fraud. — The "fraud" contemplated by Subsection A is ordinary, common-law fraud. Eoff v. Forrest, 109 N.M. 695, 789 P.2d 1262 (1990).

The "other party" whose reliance is essential for a valid cause of action is the court to which the representation is made. Eoff v. Forrest, 109 N.M. 695, 789 P.2d 1262 (1990) (decided under prior law).

Elements of action based on fraud. — The well-established requirements under New Mexico law for an action based on fraud apply to a claim of fraud asserted under Subsection A: (a) a misrepresentation of fact, (b) known by the maker to be false, (c) made with the intent to deceive and to induce the other party to act in reliance, and (d) actually relied on by the other party to his or her detriment. Eoff v. Forrest, 109 N.M. 695, 789 P.2d 1262 (1990).

Undue influence found. — Where the court found that decedent would not, except for the influence practiced upon him by party, have executed the instrument, nothing more was required for a finding of undue influence. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968) (decided under former law).

Influence between family members. — Where a transfer of property is made by a parent to his child, a husband to his wife, a brother to his sister, etc., it is ordinarily a natural result of the affection which normally is a concomitant of these relationships. It would be unfair under such circumstances to impose a presumption of undue influence upon the transfer. But where, in addition to the usual circumstances, it is shown that the beneficiary of the transfer occupies a dominant position in the relationship, a position which is not the usual circumstance in such relationships, then it is proper to impose a

presumption of undue influence upon the transfer. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968)(decided under former law).

Summary judgment. — District court erred in finding that there was no genuine issue as to one or more of the material facts necessary to give rise to a claim for fraud in connection with the informal probate of a will, where questions raised by the papers filed with the probate court constituted issues of fact and affidavits in support of a motion for summary judgment did not negate them. Eoff v. Forrest, 109 N.M. 695, 789 P.2d 1262 (1990).

Timeliness of action involving fraud. — Because the district court found that a personal representative used fraud to circumvent the provisions of the Uniform Probate Code, petitioners had two years in which to file their claims, and their claims were timely where they were filed within one month of their receipt of the will, whose terms had been misrepresented to them by the personal representative. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 37 Am. Jur. 2d Fraudulent Conveyances § 113; 47 Am. Jur. 2d Judgments § 887; 51 Am. Jur. 2d Limitations of Actions §§ 406, 409; 79 Am. Jur. 2d Wills § 885.

Person taking under probate of forged or fraudulent will as trustee ex maleficio, 52 A.L.R. 779.

Concealment of or failure to disclose existence of person interested in estate as extrinsic fraud which will support attack on judgment in probate proceedings, 113 A.L.R. 1235.

Statute limiting time for probate of will as applicable to will probated in another jurisdiction, 87 A.L.R.2d 721.

What circumstances excuse failure to submit will for probate within time limit set by statute, 17 A.L.R.3d 1361.

37 C.J.S. Fraud § 67; 37 C.J.S. Fraudulent Conveyances § 337; 54 C.J.S. Limitation of Actions §§ 32, 192 to 197.

45-1-107. Evidence of death or status.

In addition to the rules of evidence in courts of general jurisdiction, the following rules relating to a determination of death and status apply:

A. in accordance with Subsection A of Section 12-2-4 NMSA 1978, death occurs when an individual has sustained either:

(1) irreversible cessation of circulatory and respiratory functions; or

(2) irreversible cessation of all functions of the entire brain, including the brain stem.

A determination of death must be made in accordance with accepted medical standards;

B. an authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie evidence of the fact, place, date and time of death and the identity of the decedent;

C. an authenticated copy of a record or report of a governmental agency, domestic or foreign, that an individual is missing, detained, dead or alive is prima facie evidence of the status and of the dates, circumstances and places disclosed by the record or report;

D. in the absence of prima facie evidence of death pursuant to Subsections B or C of this section, the fact of death may be established by clear and convincing evidence, including circumstantial evidence;

E. an individual whose death is not established pursuant to Subsection A, B, C or D of this section who is absent for a continuous period of five years, during which the person has not been heard from and whose absence is not satisfactorily explained after diligent search or inquiry is presumed to be dead. The person's death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier; and

F. in the absence of evidence disputing the time of death stated on a document described in Subsection B or C of this section, a document described in Subsection B or C of this section that states a time of death one hundred twenty hours or more after the time of death of another individual, however the time of death of the other individual is determined, establishes by clear and convincing evidence that the individual survived the other individual by one hundred twenty hours.

History: 1953 Comp., § 32A-1-107, enacted by Laws 1975, ch. 257, § 1-107; repealed and reenacted by Laws 1993, ch. 174, § 3; 2011, ch. 124, § 3.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 174, § 3 repealed former 45-1-107 NMSA 1978, as enacted by Laws 1975, ch. 257, § 1-107, and enacted a new section, effective July 1, 1993.

Cross references. — For the Rules of Evidence, *see* 11-101 NMRA.

The 2011 amendment, effective January 1, 2012, eliminated the need for certified copies of documents to make a determination of death.

Bankruptcy filing on behalf of missing person. — Despite the presumption under New Mexico law that missing persons are alive for five years after their disappearance (45-1-107 NMSA 1978), a conservator for a missing person may not file bankruptcy on behalf of the missing person, since to do so would invite potential abuse of the bankruptcy system and frustrate the primary bankruptcy policy of providing debtors with a fresh start. In re King, 234 B.R. 515 (Bankr. D.N.M. 1999).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Death §§ 462, 546, 551, 553; 29A Am. Jur. 2d Evidence § 1456 et seq.; 39 Am. Jur. 2d Health § 51; 79 Am. Jur. 2d Wills § 128.

Death certificate as evidence, 17 A.L.R. 359, 42 A.L.R. 1454, 96 A.L.R. 324.

25A C.J.S. Death § 6; 46A C.J.S. Insurance §§ 1320, 1321.

45-1-108. Acts by holder of general power.

A. For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, the sole holder or all co-holders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests (as objects, takers in default or otherwise) are subject to the power.

B. As used in Subsection A of this section, the term "general power" is one which enables the power holder to draw absolute ownership to himself. Moreover, the common law concept of general powers is intended rather than special concepts developed for tax purposes.

History: 1953 Comp., § 32A-1-108, enacted by Laws 1975, ch. 257, § 1-108.

ANNOTATIONS

If beneficiaries unidentified, power not created. — The language of the decedent's will was insufficient to create a valid power of appointment, since it failed to identify with reasonable certainty the class of persons or entities from whom the beneficiaries could be selected under a power of appointment, nor did the will give the holder the unrestricted power to select any individuals or entities as beneficiaries. Under these circumstances, the purported power of appointment was too ambiguous to be enforced. Boyer v. Morrison, 117 N.M. 74, 868 P.2d 1299 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62 Am. Jur. 2d Powers of Appointment and Alienation §§ 85 to 234.

Share of beneficiary of trust or of decedent's estate, who is also trustee or executor or administrator, as subject to charge in respect of his liability in his fiduciary capacity, 123 A.L.R. 1320.

Accountability of personal representative for his use of decedent's real estate, 31 A.L.R.2d 243.

Power and standing of personal representative of deceased promisee to enforce a contract made for benefit of a third party, 76 A.L.R.2d 231.

72 C.J.S. Powers §§ 12 to 20.

45-1-109. Security interests not affected.

No provision of the [Uniform] Probate Code alters or affects the right of a secured creditor to enforce his security interest against secured property included in the estate of a decedent.

History: 1953 Comp., § 32A-1-109, enacted by Laws 1975, ch. 257, § 1-109.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Creditors' Bills § 39.

21 C.J.S. Creditor and Debtor § 96.

45-1-110. Time of taking effect; provisions for transition.

Except as provided elsewhere in the Uniform Probate Code, on the effective date of this code or of any amendment to this code:

A. the code or the amendment applies to governing instruments executed by decedents dying thereafter;

B. the code or the amendment applies to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this code or the amendment;

C. every personal representative or other fiduciary holding an appointment under this code on that date continues to hold the appointment but has only the powers conferred by this code or the amendment and is subject to the duties imposed with respect to any act occurring or done thereafter;

D. an act done before the effective date in any proceeding and any accrued right is not impaired by this code or the amendment. If a right is acquired, extinguished or barred upon the expiration of a prescribed period of time that has commenced to run by the provisions of any statute before the effective date, the provisions shall remain in force with respect to that right; and

E. any rule of construction or presumption provided in this code or the amendment applies to governing instruments executed before the effective date unless there is a clear indication of a contrary intent in the governing instrument.

History: 1978 Comp., § 45-1-110, enacted by Laws 1995, ch. 210, § 1; 2011, ch. 124, § 4.

ANNOTATIONS

The 2011 amendment, effective January 1, 2012, in Subsection E, required that the intent not to apply the rules of construction or presumption provided in the Uniform Probate Code to a governing instrument must be indicated in the governing instrument.

PART 2
DEFINITIONS

45-1-201. Definitions.

A. As used in the Uniform Probate Code, except as provided in Subsection B of this section and unless the context otherwise requires:

(1) "agent" includes an attorney-in-fact under a durable or nondurable power of attorney, an individual authorized to make decisions concerning another's health care and an individual authorized to make decisions for another under a natural death act;

(2) "application" means a written request to a court for an order of informal probate or appointment pursuant to Chapter 45, Article 3 NMSA 1978;

(3) "authenticated", with reference to copies, means certified or exemplified;

(4) "beneficiary", as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust; as it relates to a "beneficiary of a beneficiary

designation", refers to a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD) or of a pension, profit-sharing, retirement or similar benefit plan or other nonprobate transfer at death; and, as it relates to a "beneficiary designated in a governing instrument", includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, appointee or taker in default of a power of appointment or a person in whose favor a power of attorney or a power held in any individual, fiduciary or representative capacity is exercised;

(5) "beneficiary designation" refers to a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD) or of a pension, profit-sharing, retirement or similar benefit plan or other nonprobate transfer at death;

(6) "child" includes an individual entitled to take as a child pursuant to the Uniform Probate Code by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild or any more remote descendant;

(7) "claims", in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person, whether arising in contract, in tort or otherwise and liabilities of the estate that arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. "Claims" does not include estate or inheritance taxes or demands or disputes regarding title of a decedent, an incapacitated person or a minor protected person to specific assets alleged to be included in the estate;

(8) "conservator" has the same meaning as set forth in Section 45-5-101 NMSA 1978;

(9) "descendant" of an individual means all of the individual's descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in the Uniform Probate Code;

(10) "devise", when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will;

(11) "devisee" means a person designated in a will to receive a devise. For the purposes of Chapter 45, Article 3 NMSA 1978, in the case of a devise to an existing trust or trustee or to a trustee or trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees;

(12) "distributee" means a person who has received property of a decedent from the decedent's personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment

thereto remaining in the testamentary trustee's hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For the purposes of this paragraph, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets;

(13) "electronic" means relating to technology having electronic, digital, magnetic, wireless, optical, electromagnetic or similar capabilities;

(14) "emancipated minor" means a person sixteen years of age or older who:

(a) has entered into a valid marriage, whether or not the marriage was terminated by dissolution;

(b) is a member of the active or reserve components of the army, navy, air force, marine corps or coast guard of the United States who is on active duty or a member of the national guard who is on activated status; or

(c) has received a declaration of emancipation pursuant to the Emancipation of Minors Act [32A-21-1 through 32A-21-7 NMSA 1978];

(15) "estate" includes the property of the decedent, trust or other person whose affairs are subject to the Uniform Probate Code as the property was originally constituted and as it exists from time to time during administration;

(16) "exempt property" means that property of a decedent's estate that is described in Sections 45-2-402 and 45-2-403 NMSA 1978;

(17) "fiduciary" includes a personal representative, guardian, guardian ad litem, conservator and trustee;

(18) "foreign personal representative" means a personal representative appointed by another jurisdiction;

(19) "formal proceedings" means proceedings conducted before a district judge with notice to interested persons;

(20) "governing instrument" means a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), transfer on death (TOD) deed, pension, profit-sharing, retirement or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney or a dispositive, appointive or nominative instrument of a similar type;

(21) "guardian" means a person who has qualified to provide for the care, custody or control of the person of a minor or incapacitated person pursuant to parental

or court appointment. "Guardian" includes a limited, emergency and temporary guardian but not a guardian ad litem;

(22) "guardian ad litem" means a person appointed by the district court to represent and protect the interests of a minor or an incapacitated person in connection with litigation or any other court proceeding;

(23) "heirs", except as controlled by Section 45-2-711 NMSA 1978, means persons, including the surviving spouse and the state, who are entitled under the statutes of intestate succession to the property of a decedent;

(24) "incapacitated person" means an individual described in Section 45-5-101 NMSA 1978;

(25) "informal proceedings" means those proceedings conducted without notice to interested persons before the court for probate of a will or appointment of a personal representative, except as provided for in Section 45-3-306 NMSA 1978;

(26) "interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, a minor protected person or an incapacitated person. "Interested person" also includes persons having priority for appointment as personal representatives and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, a proceeding;

(27) "issue" of an individual means the individual's descendants;

(28) "lease" includes an oil, gas or other mineral lease;

(29) "letters" includes letters testamentary, letters of guardianship, letters of administration and letters of conservatorship;

(30) "minor" means an unemancipated individual who has not reached eighteen years of age;

(31) "mortgage" means any conveyance, agreement or arrangement in which property is encumbered or used as security;

(32) "nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of death;

(33) "organization" means a corporation, business trust, limited liability company, estate, trust, partnership, joint venture, association, government or governmental subdivision or agency or any other legal or commercial entity;

(34) "parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent pursuant to the Uniform Probate Code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent or grandparent;

(35) "payor" means a trustee, insurer, business entity, employer, government, governmental agency or subdivision or any other person authorized or obligated by law or a governing instrument to make payments;

(36) "person" means an individual or an organization;

(37) "personal representative" includes executor, administrator, successor personal representative, special administrator and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator;

(38) "petition" means a written motion or other request to the district court for an order after notice;

(39) "proceeding" includes action at law and suit in equity;

(40) "property" includes both real and personal property or any right or interest therein and means anything that may be the subject of ownership;

(41) "protected person" has the same meaning as set forth in Section 45-5-101 NMSA 1978;

(42) "protective proceeding" means a conservatorship proceeding pursuant to Section 45-5-401 NMSA 1978;

(43) "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

(44) "security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for or any warrant or right to subscribe to or purchase any of the foregoing;

(45) "settlement", in reference to a decedent's estate, includes the full process of administration, distribution and closing;

(46) "sign" means with present intent to authenticate or adopt a record other than a will:

(a) to execute or adopt a tangible symbol; or

(b) to attach to or logically associate with the record an electronic symbol, sound or process;

(47) "special administrator" means a personal representative as described by Sections 45-3-614 through 45-3-618 NMSA 1978;

(48) "state" means a state of the United States, the District of Columbia, the commonwealth of Puerto Rico or any territory or insular possession subject to the jurisdiction of the United States. "State" also includes any Indian nation, tribe, pueblo or band located within the United States and recognized by federal law or formally acknowledged by a state of the United States;

(49) "successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative;

(50) "successors" means persons, other than creditors, who are entitled to property of a decedent under the decedent's will or the Uniform Probate Code;

(51) "supervised administration" refers to the proceedings described in Article 3, Part 5 of the Uniform Probate Code;

(52) "survive" means that an individual has neither predeceased an event, including the death of another individual, nor is deemed to have predeceased an event pursuant to Section 45-2-104 or 45-2-702 NMSA 1978. "Survive" includes its derivatives, such as "survives", "survived", "survivor" and "surviving";

(53) "testacy proceeding" means a proceeding to establish a will or determine intestacy;

(54) "testator" includes an individual of either gender;

(55) "trust" includes an express trust, private or charitable, with additions thereto, wherever and however created. "Trust" also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts and excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in Article 6 of the Uniform Probate Code, custodial arrangements, including those created under the Uniform Transfers to Minors Act [46-7-11 through 46-7-34 NMSA 1978], business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions or employee benefits of any kind and any arrangement under which a person is nominee or escrowee for another;

(56) "trustee" includes an original, additional or successor trustee, whether or not appointed or confirmed by court; and

(57) "will" includes a codicil and any testamentary instrument that merely appoints a personal representative, revokes or revises another will, nominates a guardian or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession. "Will" does not include a holographic will.

B. The definitions in Subsection A of this section are made subject to additional definitions contained in subsequent articles that are applicable to specific articles, parts or sections.

History: 1953 Comp., § 32A-1-201, enacted by Laws 1975, ch. 257, § 1-201; 1983, ch. 194, § 1; 1989, ch. 252, 2; repealed and reenacted by Laws 1993, ch. 174, § 4; 1995, ch. 210, § 2; 2009, ch. 159, § 20; 2011, ch. 124, § 5.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 174, § 4 repealed former 45-1-201 NMSA 1978, as enacted by Laws 1975, ch. 257, § 1-201, and enacted a new section, effective July 1, 1993.

Cross references. — For definitions of "POD" and "TOD", *see* 45-6-305 NMSA 1978.

For other definitions, *see* 45-2A-2, 45-4-101, 45-6-201, 45-6-301 and 45-7-502 NMSA 1978

The 2011 amendment, effective January 1, 2012, added definitions for "authenticated", "conservator", "electronic", "emancipated minor", "record" and "sign"; included the transfer on death deed to the definition of "governing instrument"; added a limited, emergency and temporary guardian to the definition of "guardian"; required that a minor be an unemancipated individual; added limited liability companies to the definition of "organization"; and included Indian governmental entities to the definition of "state".

The 2009 amendment, effective June 19, 2009, changed "ward" to "protected person"; and deleted Paragraph (52) of Subsection A, which defined "ward".

The 1995 amendment, effective July 1, 1995, deleted "except for the purpose of Chapter 45, Article 6, Part 3 NMSA 1978" following "'survive'" in Subsection A(47).

A wrongful death claim falls within the literal definition of "claim" under the Uniform Probate Code, 45-1-201 NMSA 1978 et seq. Garcia v. Underwriters at Lloyd’s London, 2007-NMCA-042, 141 N.M. 421, 156 P.3d 712, aff'd 2008-NMSC-018, 143 N.M. 732, 182 P.3d 113.

"Devise" and "devisees." — Nothing in the definitions of "devise" or "devisee" suggests that the beneficiaries of a trust are also "devisees" of the trust assets, rather in the case of a devise to an existing trust or trustee or to a trustee or trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees; and these definitions set forth in 45-1-201 NMSA 1978 are for use throughout the Uniform Probate Code, which includes 45-2-301 NMSA 1978. Bell v. Estate of Bell, 2008-NMCA-045, 143 N.M. 716, 181 P.3d 708, cert. quashed 145 N.M. 532.

Meaning of "heirs of the body". — The term "heirs of the body" means issue of the body, offspring, progeny, natural children, physically born and begotten by the person named as parent. The expression "heirs of the body" is a restrictive term, as compared with the term "heirs" generally, or with the term "child or children," and when used in such instruments it must be construed to mean and include only children actually begotten and born of the parents in question. Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963)(decided under former law).

"Issue." — An adopted child who was not entitled to share in the testator's estate, but who would have been entitled to share in the estate if the testator had died intestate, was the "issue" of the testator under the Uniform Probate Code. Coleman v. Offutt, 104 N.M. 192, 718 P.2d 702 (Ct. App. 1986).

Status of adopted children in construction of wills. — Wills must be construed in harmony with the public policy of placing an adopted child on a level with natural children. Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963)(decided under former law).

"Children" does not include grandchildren. — The term "children," as used in a testamentary disposition, does not include the term "grandchildren" unless an intention to give it the extended meaning appears clearly in the will or by necessary implication. Portales Nat'l Bank v. Bellin, 98 N.M. 113, 645 P.2d 986 (Ct. App. 1982).

Predeceased child is not an "heir" within the meaning of the New Mexico Uniform Probate Code. In re Estate of Hilton, 98 N.M. 420, 649 P.2d 488 (Ct. App. 1982).

Guardian in name, conservator in fact. — Although defendant technically was named "guardian" of her mother's estate after the latter's adjudicated incompetence, defendant's selling of property, filing of tax returns, collecting of royalties and actual income, and entering into mineral and grazing leases, established her as conservator of the estate within the meaning of 45-1-201 NMSA 1978, and it followed that this section applied to entitle petitioners to the net price of the contested property. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

"Interested person" is owner of right under Rule 1-017 NMRA. — If one has a property right in the estate of a decedent, he is an "interested person" under Subsection A(19) of this section, and if he qualifies as such, he also would constitute an owner of a

right being enforced under the first prong of Rule 1-017 NMRA. Rienhardt v. Kelly, 1996-NMCA-050, 121 N.M. 694, 917 P.2d 963.

Revocation of will. — A written instrument stating that it was the maker's intent to revoke his prior will was not a will because it was not testamentary in nature as required by 45-1-201 NMSA 1978 since a testamentary instrument is one that operates only upon and by reason of the death of the maker. Sanchez v. Martinez, 1999-NMCA-093, 127 N.M. 650, 985 P.2d 1230.

Will generally. — A will is an ambulatory document which takes effect and passes the property of a person at his death (45-1-201 NMSA 1978). In re Estate of Martinez, 99 N.M. 809, 664 P.2d 1007 (Ct. App. 1983).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Guardian and Ward § 11; 79 Am. Jur. 2d Wills §§ 23, 27, 28, 38, 39, 125, 178 to 182, 191, 841, 842; 80 Am. Jur. 2d Wills §§ 882, 900, 1098 to 1121, 1164, 1192, 1195, 1216 to 1221, 1515, 1536, 1667, 1755.

Electronic tape recording as will, 42 A.L.R.4th 176.

What passes under term "personal property" in will, 31 A.L.R.5th 499.

Adopted child as within class named in deed or inter vivos trust instrument, 37 A.L.R.5th 237.

94 C.J.S. Wills §§ 20, 117, 134, 148; 95 C.J.S. Wills §§ 315, 317, 322, 323, 359, 371, 423, 425, 434, 516, 550, 578, 613, 643 to 691; 96 C.J.S. Wills §§ 692 to 718, 748, 788, 1004 to 1061, 1082, 1088, 1129.

PART 3
SCOPE, JURISDICTION AND COURTS

45-1-301. Application.

A. Except as otherwise provided in the Uniform Probate Code, the code applies to:

(1) the affairs and estates of decedents, missing persons and protected persons domiciled in New Mexico;

(2) the property of nonresidents located in New Mexico or property coming into the control of a fiduciary who is subject to the laws of New Mexico;

(3) incapacitated persons, minors and protected persons in New Mexico;

(4) survivorship and related accounts and similar property interests in New Mexico;

(5) the disclaimer of property interests by persons in New Mexico;

(6) certain kinds of governing instruments that are governed by the laws of New Mexico; and

(7) the apportionment of taxes on estates subject to tax by New Mexico.

B. The Uniform Probate Code does not create, enlarge, modify or diminish parental rights or duties pursuant to the New Mexico Uniform Parentage Act [40-11A-101 through 40-11A-903 NMSA 1978], the Adoption Act [Chapter 32A, Article 5 NMSA 1978], the Children's Code [Chapter 32A NMSA 1978] or other law of New Mexico. The definition or use of terms in the Uniform Probate Code shall not be used to interpret, by analogy or otherwise, the same or other terms in the New Mexico Uniform Parentage Act, the Adoption Act, the Children's Code or other law of New Mexico.

History: 1953 Comp., § 32A-1-301, enacted by Laws 1975, ch. 257, § 1-301; 2011, ch. 124, § 6.

ANNOTATIONS

The 2011 amendment, effective January 1, 2012, provided that the Uniform Probate Code applies to disclaimers of property interests, governing instruments that are governed by the laws of New Mexico, and the apportionment of taxes on estates; added Subsection B to provide that the code does not create or alter parental rights or duties under other New Mexico laws and provided that the definitions of terms in the Uniform Probate Code cannot be used to define the same terms in other New Mexico laws.

Tort of interference with inheritance is an exception to the requirement that probate is the only forum for attacking the validity of a testamentary instrument and exists in a situation where the estate has been depleted so that there is no remedy in probate. Peralta v. Peralta, 2006-NMCA-033, 139 N.M. 231, 131 P.3d 81.

Where there was both an intervivos transfer of all the property of a decedent's estate prior to the decedent's death and a claim of improper influence in the revision of the decedent's will by the execution of a codicil, an attack on the codicil in a probate proceeding would not be an adequate remedy because the estate was devoid of assets. Plaintiff was not required to proceed in probate, but could proceed in a civil tort action of

intentional interference with inheritance to attack the validity of the codicil. Peralta v. Peralta, 2006-NMCA-033, 139 N.M. 231, 131 P.3d 81.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Absentees §§ 1, 3; 1 Banks § 376; 10 Am. Jur. 2d Executors and Administrators §§ 30, 32, 38 to 43; 39 Am. Jur. 2d Guardian and Ward § 26; 41 Am. Jur. 2d Incompetent Persons § 9; 76 Am. Jur. 2d Trusts §§ 326 to 328; 79 Am. Jur. 2d Wills §§ 852 to 858.

1 C.J.S. Absentees §§ 3, 4; 33 C.J.S. Executors and Administrators § 2; 39 C.J.S. Guardian and Ward § 4; 57 C.J.S. Mental Health § 165 et seq.; 90 C.J.S. Trusts §§ 218, 386; 95 C.J.S. Wills §§ 351 to 354, 587.

45-1-302. Subject matter jurisdiction of district and probate courts.

A. The district court has exclusive original jurisdiction over all subject matter relating to:

(1) formal proceedings with respect to the estates of decedents, including determinations of testacy, appointment of personal representatives, constructions of wills, administration and expenditure of funds of estates, determination of heirs and successors of decedents and distribution and closing of estates;

(2) estates of missing and protected persons;

(3) protection of incapacitated persons and minors;

(4) survivorship and related accounts and similar property interests;

(5) disclaimer of interests in property;

(6) apportionment of taxes on estates; and

(7) governing instruments except wills.

B. The district court in formal proceedings shall have jurisdiction to determine title to and value of real or personal property as between the estate and any interested person, including strangers to the estate claiming adversely thereto. The district court has full power to make orders, judgments and decrees and to take all other action necessary and proper to administer justice in matters that come before it.

C. The probate court and the district court have original jurisdiction over informal proceedings for probate of a will or appointment of a personal representative.

History: 1953 Comp., § 32A-1-302, enacted by Laws 1975, ch. 257, § 1-302; 1978, ch. 159, § 2; 2011, ch. 124, § 7.

ANNOTATIONS

Cross references. — For jurisdiction and powers of probate courts, *see* N.M. Const., art. VI, § 23.

For commencement of formal testacy proceedings, *see* 45-3-401 NMSA 1978.

The 2011 amendment, effective January 1, 2012, conferred jurisdiction on the district court over survivorship accounts and similar property interests, disclaimers of interests in property and governing instruments other than wills.

Regulation of jurisdiction by legislature. — The legislature may regulate the jurisdiction of probate and district courts, with reference to the administration of estates. First Nat'l Bank v. Dunbar, 32 N.M. 419, 258 P. 817 (1924).

Nature of proceedings. — Once a district court has jurisdiction, it can shift back and forth between formal and informal probate proceedings. In re Estate of Duncan, 2002-NMCA-069, 132 N.M. 426, 50 P.3d 175, rev'd on other grounds sub nom. Estate of Duncan v. Kinsolving, 2003-NMSC-013, 133 N.M. 821, 70 P.3d 1260.

General civil jurisdiction in formal probate proceedings. — District courts sitting in probate possess general civil jurisdiction in formal probate proceedings; therefore, a trial court had jurisdiction to liquidate a business pursuant to either 45-3-911 or 53-16-16 NMSA 1978. Harrington v. Bannigan, 2000-NMCA-058, 129 N.M. 266, 5 P.3d 1070.

Jurisdiction of district courts in formal probate proceedings. — The legislature intended to confer upon district courts general civil jurisdiction in formal probate proceedings; therefore, a district court had jurisdiction to order the taxation and revenue department to release unclaimed property of decedent to petitioner, as personal representative of decedent's estate, notwithstanding the procedures set forth in 7-8A-15 NMSA 1978 of the Uniform Unclaimed Property Act for acquiring unclaimed property. In re Estate of McElveny, 2015-NMCA-080, cert. granted, 2015-NMCERT-____.

Declaratory judgment jurisdiction. — Since jurisdiction for the construction of wills has been lodged in New Mexico courts of general jurisdiction, a declaratory action construing the terms of a will as a civil suit or controversy is within that court's jurisdiction. Cosby v. Shackelford, 408 F.2d 1144 (10th Cir.1969).

Bankruptcy court jurisdiction. — The bankruptcy court lacked jurisdiction to declare debtor as the personal representative, impose fiduciary duties upon her, seek a determination of what property was in the probate estate, assess penalties against her for any damages resulting from the alleged breaches of fiduciary duty, and to receive payment as if a probate had been filed, since these are matters within the exclusive jurisdiction of the district courts under 45-1-302 NMSA 1978. Morrison Supply Co. v. Dalton, 415 B.R. 838 (2009).

District court had jurisdiction to void incapacitated person's estate plan. — Where the district court appointed a guardian and conservator to protect the person and assets of the incapacitated person who was suffering from Alzheimer's disease; after the conservator was appointed and without notifying the district court, the conservator, or the guardian ad litem, the spouse of the incapacitated person and the spouse's attorney met with the incapacitated person; during the meeting, the incapacitated person executed a new estate plan giving the spouse control of the incapacitated person's estate; and the conservator tried to stop the meeting and the execution of the new estate plan, the district court had general civil jurisdiction over the conservatorship and jurisdiction to void the new estate plan prior to the death of the incapacitated person. Clinesmith v. Temmerman, 2013-NMCA-024, 298 P.3d 458, cert. denied, 2013-NMCERT-001.

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

For article, "Habeas Corpus in New Mexico," see 11 N.M.L. Rev. 291 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 14 et seq.; 46 Am. Jur. 2d Judgments § 50.

Power to punish for contempt, 8 A.L.R. 1551, 54 A.L.R. 322, 73 A.L.R. 1187.

Power of probate court to require attorney to return to estate or trust overpayment on account of fees or services, 70 A.L.R. 478.

Situs of corporate stock for purposes of probate jurisdiction and administration, 72 A.L.R. 179.

Election as to taking under will, jurisdiction to grant relief from, 81 A.L.R. 760, 71 A.L.R.2d 942.

Jurisdiction of probate court to determine title to property which personal representative claims in his own right, 90 A.L.R. 134.

Power to accept resignation of executors and administrators, 91 A.L.R. 713.

Mandamus to compel approval of bond, 92 A.L.R. 1211.

Statute as source of jurisdiction and power of probate court, 104 A.L.R. 348.

Jurisdiction in proceeding for probate of will to adjudicate as to other will not offered for probate, 119 A.L.R. 1099.

Restoration to competency, jurisdiction of court after adjudication of, as regards claims against former incompetent, 128 A.L.R. 1386.

Probate of will and proceedings subsequent thereto as affecting right to probate later codicil of will, and rights and remedies of parties thereunder, 157 A.L.R. 1351.

Probate of joint, mutual and reciprocal wills, 169 A.L.R. 81.

Relative rights to real property as between purchasers from or through decedent's heirs and devisees under will subsequently sought to be established, 22 A.L.R.2d 1107.

Estoppel to contest will or attack its validity, 28 A.L.R.2d 116, 78 A.L.R.4th 90.

Availability of replevin or similar possessory action to one not claim as heir, legatee, or creditor of decedent's estate, against personal representative, 42 A.L.R.2d 418.

Power and responsibility of executor or administrator as to compromise or settlement of action or cause of action for death, 72 A.L.R.2d 285.

Statute limiting time for probate of will as applicable to will probated in another jurisdiction, 87 A.L.R.2d 721.

What circumstances excuse failure to submit will for probate within time limit set by statute, 17 A.L.R.3d 1361.

Probate in state where assets are found, of will of nonresident which has not been admitted to probate in state of domicile, 20 A.L.R.3d 1033.

Adopted child as subject to protection of statute regarding rights of children pretermitted by will, or statute preventing disinheritance of child, 43 A.L.R.4th 947.

Modern status of jurisdiction of federal courts, under 28 USCS § 1332(a), of diversity actions affecting probate or other matters concerning administration of decedents' estates, 61 A.L.R. Fed. 536.

21 C.J.S. Courts §§ 18 to 35; 43 C.J.S. Infants § 124; 90 C.J.S. Trusts §§ 217, 454, 472; 95 C.J.S. Wills § 351; 96 C.J.S. Wills §§ 1074 to 1077.

45-1-302.1. Concurrent jurisdiction.

The district courts have concurrent jurisdiction with the probate courts in each county within their respective judicial district as to all matters concerning informal probate.

History: 1953 Comp., § 32A-1-302.1, enacted by Laws 1977, ch. 121, § 2.

ANNOTATIONS

Cross references. — For jurisdiction and powers of district courts, *see* N.M. Const., art. VI, § 13.

For jurisdiction and powers of probate court, *see* N.M. Const., art. VI, § 23.

For probate courts, *see* 34-7-1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 71.

30A C.J.S. Equity § 60.

45-1-303. Venue; multiple proceedings; transfer.

A. Subject to the provisions of Sections 45-1-302 and 45-3-201 NMSA 1978 and Chapter 45, Article 5 NMSA 1978 and the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act [Chapter 45, Article 5A NMSA 1978], if a proceeding under the Uniform Probate Code could be maintained in more than one place in New Mexico, the court in which the proceeding is first commenced has the exclusive right to proceed.

B. If proceedings concerning the same estate, protected person or trust are commenced in more than one court of New Mexico, the court having jurisdiction in which the proceeding was first commenced shall continue to hear the matter and the other courts shall hold the matter in abeyance until the question of venue is decided. If the ruling court determines that venue is properly in another court having jurisdiction, it shall transfer the proceeding to the other court.

C. If a court finds that in the interest of justice a proceeding or a file should be located in another court of New Mexico having jurisdiction, the court making the finding may transfer the proceeding or file to the other court.

History: 1953 Comp., § 32A-1-303, enacted by Laws 1975, ch. 257, § 1-303; 2009, ch. 159, § 21; 2011, ch. 124, § 8.

ANNOTATIONS

The 2011 amendment, effective January 1, 2012, made the venue of proceedings under the code subject to Section 45-1-302 NMSA 1978, Chapter 45, Article 5 NMSA 1978, and the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

The 2009 amendment, effective June 19, 2009, in Subsection B, after "protected person", deleted "ward".

Transfer of proceeding to another court within trial court's discretion. Ruther v. Ruther, 96 N.M. 462, 631 P.2d 1330 (Ct. App. 1981).

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

For annual survey of New Mexico law relating to estates and trusts, see 13 N.M.L. Rev. 395 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 77 Am. Jur. 2d Venue §§ 25, 56, 75.

92 C.J.S. Venue § 5.

45-1-304. Civil practice.

Unless specifically provided to the contrary in the [Uniform] Probate Code, or unless inconsistent with its provisions, the Rules of Civil Procedure govern formal and informal proceedings under the code.

History: 1953 Comp., § 32A-1-304, enacted by Laws 1975, ch. 257, § 1-304; 1978, ch. 159, § 3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For Rules of Civil Procedure in the District Courts, *see* 1-001 NMRA.

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 80 Am. Jur. 2d Wills § 1024.

95 C.J.S. Wills § 422.

45-1-305. Records and certified copies.

A. The clerk of the district court and the clerk of the probate court shall each keep a record for each decedent, protected person or trust involved in any document that may be filed with the clerk's respective court under the Uniform Probate Code, including petitions and applications, demands for notices or bonds and orders by the respective court, and responses relating thereto, and shall establish and maintain a system for indexing, filing or recording that is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law, the clerk shall issue certified copies of any probated wills, letters issued to personal representatives or any other record or paper filed or recorded. Certificates relating to probated wills shall indicate whether the decedent was domiciled in New Mexico and whether the probate

was formal or informal. Such certificates shall also indicate the names and addresses of any known heirs. Certificates relating to letters shall show the date of appointment.

B. If convenient or desirable for any reason, the presiding district judge for each judicial district shall have the power, at the judge's discretion, to order that the records of informal probate proceedings of a particular county be kept under the supervision of the probate court or clerk of the probate court of that county for such period of time as the district judge may determine.

History: 1953 Comp., § 32A-1-305, enacted by Laws 1975, ch. 257, § 1-305; 1983, ch. 194, § 2; 2009, ch. 159, § 22.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, in Subsection A, after "each decedent" deleted "ward".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills § 730.

71 C.J.S. Pleading § 33.

45-1-306. Jury trial.

If demanded, in the manner provided by the Rules of Civil Procedure, a party is entitled to a trial by jury in a formal testacy proceeding and in any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.

History: 1953 Comp., § 32A-1-306, enacted by Laws 1975, ch. 257, § 1-306.

ANNOTATIONS

Cross references. — For Rules of Civil Procedure in the District Courts, *see* 1-001 NMRA.

For demand for jury trial, *see* 1-038 NMRA.

Will contest generally. — One is entitled to demand a jury trial as of right when contesting a will. Thorp v. Cash, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1981).

Jury trial demand subsequent to start of informal proceedings. — Before the informal testacy proceeding could continue with administration, the validity of decedent’s will had to be determined, which required a hearing before a trier of the fact, and the party who petitioned for formal probate of the will was entitled to the jury trial he demanded. Ruther v. Ruther, 96 N.M. 462, 631 P.2d 1330 (Ct. App. 1981).

Ambiguity in will. — Since there was no ambiguity in joint will executed by decedent and his wife, contestants were not entitled to a jury trial. Naranjo v. Armijo, 2001-NMSC-027, 130 N.M. 714, 31 P.3d 372.

Timeliness of jury demand. — In a probate proceeding, the jury demand may be filed not later than ten days after service of the objections; provided that such date is a reasonable amount of time prior to the date set for hearing and the district court does not find that the jury demand was filed solely for purposes of delay or other improper purpose. Morlock v. Lozoya, 2001-NMCA-030, 130 N.M. 258, 23 P.3d 933.

Untimely jury demand. — A party in a formal testacy proceeding has a right to a jury trial and the court has the discretion to allow a jury trial if the jury demand is not timely. Thorp v. Cash, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1982), cert. quashed, 89 N.M. 51, 644 P.2d 1040 (1982).

Waiver of twelve member jury. — The right to a jury of twelve members is waived if a jury demand is not timely filed. Thorp v. Cash, 97 N.M. 383, 640 P.2d 489 (Ct. App. 1982), cert. quashed, 89 N.M. 51, 644 P.2d 1040 (1982).

Law reviews. — For annual survey of New Mexico law relating to estates and trusts, see 13 N.M.L. Rev. 395 (1983).

For note, "Undue Influence in Wills - Evidence - Testators' Position Changes After In re Will of Ferrill," see 13 N.M.L. Rev. 753 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 80 Am. Jur. 2d Wills § 1026.

50 C.J.S. Juries §§ 13, 56.

45-1-307. Probate court; powers.

If for any reason the probate judge is unable to act, the acts and orders which the [Uniform] Probate Code specifies as performable by the probate court may be performed either by a judge of the district court or by a person designated by the district court by a written order filed and recorded in the office of the clerk of the district court.

History: 1953 Comp., § 32A-1-307, enacted by Laws 1975, ch. 257, § 1-307.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For probate courts, *see* 34-7-1 NMSA 1978.

For probate court forms, *see* 4B-001 NMRA et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 14; 79 Am. Jur. 2d Wills §§ 850 to 859.

16 C.J.S. Constitutional Law § 132.

45-1-308. Appeals from district court.

Appellate review, including the right to appellate review, interlocutory appeal, provisions as to time, manner, notice, appeal bond, stays, scope of review, record on appeal, briefs, arguments and power of the appellate court, is governed by the rules applicable to civil appeals to the court of appeals from the district court.

History: 1953 Comp., § 32A-1-308, enacted by Laws 1975, ch. 257, § 1-308.

ANNOTATIONS

Cross references. — For the Rules of Appellate Procedure, *see* 12-101 NMRA.

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 80 Am. Jur. 2d Wills § 1063.

Appealability of probate orders allowing or disallowing claims against estate, 84 A.L.R.4th 269.

5 C.J.S. Appeal and Error § 707 et seq.

45-1-309. Reserved.

ANNOTATIONS

Compiler's notes. — Laws 1975, ch. 257, § 1-309, contained this section number, but no accompanying text.

45-1-310. Oath or affirmation on filed documents.

Except as otherwise specifically provided in the [Uniform] Probate Code or by rule, every document filed with the court under the code, including applications, petitions and demands for notice, shall be deemed to include an oath, affirmation or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed, and penalties for perjury may follow deliberate falsification therein.

History: 1953 Comp., § 32A-1-310, enacted by Laws 1975, ch. 257, § 1-310.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pleading §§ 2, 26.

2A C.J.S. Affidavits § 20.

PART 4
NOTICE, PARTIES AND REPRESENTATION IN ESTATE LITIGATION AND OTHER MATTERS

45-1-401. Notice; method and time of giving.

A. If notice of a hearing on any petition is required, and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any person having an interest in the subject of the hearing. Notice shall be given:

(1) by mailing a copy thereof at least fourteen days before the time set for the hearing by certified, registered or ordinary first class mail addressed to the person being notified at the post office address given in his demand for notice, if any, or at his office or place of residence, if known; or

(2) by service of a copy thereof upon the person being notified in the manner provided by the Rules of Civil Procedure for service of summons and complaint in civil actions; or

(3) if the address or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing a copy thereof at least once a week for two consecutive weeks, in a newspaper published and having general circulation in the county in which the hearing is to be held or, if there be no newspaper published in such county, then in a newspaper of general circulation in such county, the last publication of which is to be at least ten days before the time set for the hearing.

B. The court for good cause shown may provide for a different method or time of giving notice for any hearings.

C. Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding.

History: 1953 Comp., § 32A-1-401, enacted by Laws 1975, ch. 257, § 1-401.

ANNOTATIONS

Cross references. — For service of summons, *see* 1-004 NMRA.

For summons, *see* 4-206 NMRA.

Effect of Subsection B. — The notice requirement in 45-5-309B NMSA 1978 is subject to Subsection B and where an incapacitated person cannot see or read, service on his attorney would suffice, particularly when the attorney requested the hearing, insured the party's attendance and participation, and vigorously contested the petition. In re Conservatorship & Guardianship of Pulver, 117 N.M. 329, 871 P.2d 985 (Ct. App. 1994).

Notice requirement need not satisfy requirements of Rule 1-004 NMRA. — Probate proceedings are in rem special proceedings. A district court is not required to obtain personal jurisdiction over a custodian of property by service of process pursuant to Rule 1-004 NMRA. All that is required is that a district court have in rem jurisdiction over a decedent's estate property, and the notice requirement pursuant to this section only entitles a custodian of property with an interest in the subject of the hearing to notice of the hearing and an opportunity to be heard. In re Estate of McElveny, 2015-NMCA-080, cert. granted, 2015-NMCERT-____.

Where personal representative of decedent's estate opened an informal probate for his deceased grandfather pursuant to the Uniform Probate Code, and the probate court properly issued an order directing the personal representative to collect the estate's assets so they could be administered through probate, the personal representative was not required to serve process upon the taxation and revenue department (department), as the custodian of decedent's property, pursuant to Rule 1-004 NMRA, because the estate was not suing the department, nor was it attempting to obtain personal jurisdiction over the department for the purpose of stating a claim against the department. The notice requirement pursuant to this section was satisfied when the department was provided with notice of the probate proceeding and a full and fair opportunity to be heard in the district court. In re Estate of McElveny, 2015-NMCA-080, cert. granted, 2015-NMCERT-____.

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Absentees § 1 et seq.; 61A Am. Jur. 2d Pleading § 351.

71 C.J.S. Pleading §§ 4, 98.

45-1-402. Notice; waiver.

A person, including a guardian ad litem, conservator or other fiduciary, may waive notice either by a writing signed by the person and filed in the proceeding or by appearance in the proceeding. A person for whom a guardianship or other protective order is sought or a protected person may not waive notice.

History: 1953 Comp., § 32A-1-402, enacted by Laws 1975, ch. 257, § 1-402; 1995, ch. 210, § 3; 2009, ch. 159, § 23.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Laws official comment to 1-402 UPC.

The 2009 amendment, effective June 19, 2009, after "protective order is sought", deleted "a ward".

The 1995 amendment, effective July 1, 1995, added the second sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pleading § 396.

71 C.J.S. Pleading §§ 507, 564.

45-1-403. Pleadings; when parties bound by others; notice.

In formal proceedings involving trusts, or estates of decedents, minors, protected persons or incapacitated persons, and in judicially supervised settlements, the following rules apply:

A. interests to be affected shall be described in pleadings that give reasonable information to owners by name or class, by reference to the instrument creating the interests or in another appropriate manner;

B. a person is bound by an order binding another in the following cases:

(1) an order binding the sole holder or all co-holders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, binds other persons to the extent their interests as objects, takers in default or otherwise are subject to the power;

(2) to the extent there is no conflict of interest between them or among persons represented:

(a) an order binding a conservator binds the person whose estate the conservator controls;

(b) an order binding a guardian binds the protected person if no conservator of the protected person's estate has been appointed;

(c) an order binding a trustee binds beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a former fiduciary and in proceedings involving creditors or other third parties;

(d) an order binding a personal representative binds persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate; and

(e) an order binding the sole holder or all co-holders of a general testamentary power of appointment binds other persons to the extent their interests as objects, takers in default or otherwise are subject to the power; and

(3) unless otherwise represented, a minor or an incapacitated, unborn or unascertained person is bound by an order to the extent the minor's or the incapacitated, unborn or unascertained person's interest is adequately represented by another party having a substantially identical interest in the proceeding;

C. if no conservator or guardian has been appointed, a parent may represent a minor child;

D. notice is required as follows:

(1) the notice prescribed by Section 45-1-401 NMSA 1978 shall be given to every person having an interest in the subject of the hearing or to one who can bind an interested person as described in Paragraph (1) or (2) of Subsection B of this section. Notice may be given both to an interested person and to another who may bind that person; and

(2) notice is given to unborn or unascertained persons who are not represented under Paragraph (1) or (2) of Subsection B of this section by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons; and

E. at any point in a proceeding, the district court shall appoint a guardian ad litem to represent the interest of a minor; an incapacitated, unborn or unascertained person; or a person whose identity or address is unknown, if the district court determines that representation of the interest would otherwise be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The district court shall state its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

History: 1953 Comp., § 32A-1-403, enacted by Laws 1975, ch. 257, § 1-403; 2009, ch. 159, § 24; 2011, ch. 124, § 9.

ANNOTATIONS

The 2011 amendment, effective January 1, 2012, provided that an order binding the sole holders of a general testamentary power of appointment binds other persons to the extent their interest is subject to the testamentary power and that a minor or an incapacitated person is bound by an order to the extent their interests are represented by another party having the same interest in the proceeding and permits a parent to represent a minor child if no conservator or guardian has been appointed.

The 2009 amendment, effective June 19, 2009, in Subparagraph (b) of Paragraph (2) of Subsection B, after "guardian bind the", deleted "ward" and added "protected person".

Subsection B of 45-1-403 NMSA 1978 is not exclusive and does not prevent others from being bound. In re Protective Proceeding for Strozzi, 112 N.M. 270, 814 P.2d 138 (Ct. App. 1991).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Executors and Administrators §§ 158 to 178; 61A Am. Jur. 2d Pleading §§ 84, 96; 80 Am. Jur. 2d Wills §§ 1035 to 1062.

Administration on estate of one as absentee as affecting one not notified whose relationship to absentee had its inception after his disappearance, 26 A.L.R. 965.

Right of agent or personal representative to make election for legatee or devisee to take under or against will, 83 A.L.R.2d 1077.

Duty and liability of executor with respect to locating and noticing legatees, devisees or heirs, 10 A.L.R.3d 547.

71 C.J.S. Pleading §§ 288, 290; 96 C.J.S. Wills §§ 1062, 1070.

45-1-404. Real property outside county of administration; notice required; contents; effect.

A. If real property is included in an estate and is situate in a county other than the county wherein the estate is being administered, the personal representative shall, or any other interested person may, record with the county clerk of the other county a notice of administration setting forth:

(1) the name of the decedent;

(2) the title and docket number of the administration proceedings;

(3) a description of the type of administration;

(4) the court wherein instituted;

(5) the name, address and title of the personal representative; and

(6) a complete description of the real property situate in such county.

B. The recorded notice shall constitute full and complete notice of all proceedings had, and to be had, in the administration proceedings, and it shall not be necessary to file or record in the county where the real property is located any other instruments or records relating to the administration of the estate.

History: 1953 Comp., § 32A-1-404, enacted by Laws 1975, ch. 257, § 1-404.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Notice § 24; 61A Am. Jur. 2d Pleading §§ 20, 21, 68.

Duty and liability of executor with respect to locating and noticing legatees, devisees or heirs, 10 A.L.R.3d 547.

71 C.J.S. Pleading § 32; 95 C.J.S. Wills §§ 370, 464.

ARTICLE 2
Intestate Succession and Wills

PART 1
INTESTATE SUCCESSION

SUBPART 1. General Provisions

45-2-101. Intestate estate.

A. Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in the Uniform Probate Code, except as modified by the decedent's will.

B. A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his intestate share.

History: 1953 Comp., § 32A-2-101, enacted by Laws 1975, ch. 257, § 2-101; repealed and reenacted by Laws 1993, ch. 174, § 5.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Laws official comment to 2-101 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 5 repealed former 45-2-101 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-101, and enacted a new section, effective July 1, 1993.

Cross references. — For unavailable wills, *see* 45-3-402B NMSA 1978.

For late offered will, *see* 45-3-410, 45-3-412A NMSA 1978.

For final orders conclusive in formal testacy proceedings, *see* 45-3-410, 45-3-412 NMSA 1978.

For partial intestacy, *see* 45-3-411 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Descent and Distribution §§ 1, 59; 79 Am. Jur. 2d Wills § 2.

Eligibility of illegitimate child for survivor's benefits under Social Security Act, pursuant to § 216(h)(2)(A) of act (42 USCS § 416(h)(2)(A)), where state intestacy law denying inheritance right, or application of that state law to § 216(h)(2)(A), may violate child's right to equal protection of laws, 116 A.L.R. Fed. 121.

Constitutionality of statute repealing, modifying or changing course of descent and distribution of property, 103 A.L.R. 223.

Family settlement of intestate estate, 29 A.L.R.3d 174.

Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration, 2 A.L.R.4th 1315.

95 C.J.S. Wills § 615.

45-2-102. Share of the spouse.

The intestate share of the surviving spouse is determined as follows:

A. as to separate property:

(1) if there is no surviving issue of the decedent, the entire intestate estate; or

(2) if there is surviving issue of the decedent, one-fourth of the intestate estate; and

B. as to community property, the one-half of the community property as to which the decedent could have exercised the power of testamentary disposition passes to the surviving spouse.

History: 1953 Comp., § 32A-2-102, enacted by Laws 1975, ch. 257, § 2-102.

ANNOTATIONS

Compiler's notes. — This section includes within its scope some of the functions of former 29-1-8 to 29-1-10, 29-1-13, 1953 Comp.

Cross references. — For share of heirs other than surviving spouse, *see* 45-2-103 NMSA 1978.

Estate's award from September 11th victim compensation fund of 2001. — The $250,000 non-economic losses award for the decedent from the September 11th victim compensation fund of 2001 was the separate property of the decedent and where the decedent was intestate, the award should be distributed one-fourth to the decedent's surviving spouse and three-fourths to the children of the decedent. Marchand v. Marchand, 2007-NMCA-138, 142 NM 795, 171 P.3d 309, aff'd in part and rev'd in part, 2008-NMSC-065, 145 N.M. 378, 199 P.3d 281.

Offsets against estate's award. — The amount of collateral benefits assigned to each beneficiary of a September 11th victim compensation fund of 2001 award should be applied against each beneficiary's share of the $250,000 non-economic loss award to the decedent's estate thereby offsetting each beneficiary's share of the $250,000 in proportion to the collateral benefits that each beneficiary has received. Where the spouse of the intestate decedent received $1,012,321 in collateral benefits and the surviving child of the decedent received $17,500 in collateral benefits, the spouse was entitled to one-quarter of the $250,000 of non-economic losses awarded to the decedent's estate less the collateral benefits received by the spouse, which eliminated the share of the spouse, and the child was entitled to three-quarters of the award less the collateral benefits received by the child, which reduced the child's share to $170,000. Marchand v. Marchand, 2008-NMSC-065, 145 N.M. 378, 199 P.3d 281, reversing, in part, 2007-NMCA-138, 142 N.M. 795, 171 P.3d 309.

Offsets against heirs' awards. — The collateral benefits received by the spouse and children of a decedent from the September 11th victim compensation fund are not applied to offset the $100,000 non-economic losses awarded to the spouse and each dependent of the decedent because the $100,000 awards are to compensate the spouse and each dependent for pain and suffering and loss of consortium resulting from the death of the decedent. Marchand v. Marchand, 2008-NMSC-065, 145 N.M. 378, 199 P.3d 281, rev'g in part, 2007-NMCA-138, 142 N.M. 795, 171 P.3d 309.

Division of estate to wife and two children. — Where a testator has two pretermitted children, and the property is his separate estate, it descends one-fourth to the wife and three-eighths to each of the children, but where it is community property, the wife has a five-eighths interest and each of the children takes three-sixteenths. Dunham v. Stitzberg, 53 N.M. 81, 201 P.2d 1000 (1948), overruled on other grounds, Conley v. Quinn, 58 N.M. 771, 276 P.2d 906 (1954).

Share of omitted spouse. — Where decedent's will omitted his spouse and his only child, who was an adopted son, and disposed of the entire estate to a third person, the surviving spouse was entitled to a one-fourth interest. Coleman v. Offutt, 104 N.M. 192, 718 P.2d 702 (Ct. App. 1986).

Inheritance of widow despite separation contract waiving and releasing rights. — A widow can take property of her intestate husband notwithstanding a contract of separation whereby the wife waives rights to support, maintenance and alimony, and released right, title and interest to all property now owned or hereafter acquired by the husband. Girard v. Girard, 29 N.M. 189, 221 P. 801 (1923).

Disposition of community property upon death of wife. — The interest of the deceased wife in the community estate does not pass to her husband but belongs to him, and is not subject to a federal estate tax. Hernandez v. Becker, 54 F.2d 542 (10th Cir. 1931).

Where sheep acquired after marriage included in community property. — Where deceased husband owns 50 sheep at time of his marriage to appellee and some 500 more are later bought with funds borrowed on the credit of the community, most of such payment being made after the husband's death, evidence is ample that 875 head of sheep at the time of death belong to the community. Stroope v. Potter, 48 N.M. 404, 151 P.2d 748 (1944).

Effect of deed not delivered during lifetime. — Children of decedent did not obtain fee simple title to real estate by deed which was not legally delivered and where it was not grantor's intention to divest grantor of title during grantor's lifetime as evidenced by grantor's retaining complete possession and control over the land until the time of grantor's death, making improvements on the property with community funds or the efforts of grantor and grantor's spouse, the decedent and decedent's spouse paying all taxes assessed against the land from 1930 to 1955. Martinez v. Archuleta, 64 N.M. 196, 326 P.2d 1082 (1958).

Statutes of descent cannot be varied on equitable grounds. Wooley v. Shell Petroleum Corp., 39 N.M. 256, 45 P.2d 927 (1935).

Survivor inherits all where intestate spouse and no children. — When a husband or wife dies leaving no will and no children, the survivor inherits all of the property of the deceased. 1915-16 Op. Att'y Gen. No. 16-1723.

Law reviews. — For comment, "Community Property-Power of Testamentary Disposition - Inequality Between Spouses," see 7 Nat. Resources J. 645 (1967).

For comment, "The Perils of Intestate Succession in New Mexico and Related Will Problems," see 7 Nat. Resources J. 555 (1967). For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For comment, "In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage," see 9 N.M.L. Rev. 113 (1978-79).

For note, "Community Property - Appreciation of Community Interests and Investments in Separate Property in New Mexico: Portillo v. Shappie," see 14 N.M.L. Rev. 227 (1984).

For annual survey of New Mexico law of estates and trusts, see 19 N.M.L. Rev. 669 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Descent and Distribution §§ 115 to 143.

Effect on joint estate, community estate or estate by entireties, of death of both tenants in same disaster, 18 A.L.R. 105.

Treatment of widow's allowance and exemptions in computing share to which she is entitled under Statute of Distribution in case of death of husband intestate or of her election to take against will, 98 A.L.R. 1325.

What passes under provision of will that spouse shall take share of estate allowed or provided by law, or a provision of similar import, 36 A.L.R.2d 147.

Surviving spouse's right to marital share as affected by valid contract to convey by will, 85 A.L.R.4th 418.

26A C.J.S. Descent and Distribution §§ 48 to 60.

41 C.J.S. Husband and Wife § 186.

45-2-103. Share of heirs other than surviving spouse.

A. Any part of the intestate estate not passing to a decedent's surviving spouse pursuant to Section 45-2-102 NMSA 1978, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals who survive the decedent:

(1) to the decedent's descendants by representation;

(2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent if only one survives;

(3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;

(4) if there is no surviving descendant, parent or descendant of a parent, but the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents:

(a) half to the decedent's paternal grandparents equally if both survive, to the surviving paternal grandparent if only one survives, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and

(b) half to the decedent's maternal grandparents equally if both survive, to the surviving maternal grandparent if only one survives, or to the descendants of the decedent's maternal grandparents or either of them if both are deceased, the descendants taking by representation; and

(5) if there is no surviving descendant parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents on the paternal but not the maternal side, or on the maternal but not the paternal side, to the decedent's relatives on the side with one or more surviving members in the manner described in Paragraph (4) of this subsection.

B. If there is no taker under Subsection A of this section, but the decedent has:

(1) one deceased spouse who has one or more descendants who survive the decedent, the estate or part thereof passes to that spouse's descendants by representation; or

(2) more than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate or part thereof passes to each set of descendants by representation.

C. For purposes of Subsection B of this section, the term "deceased spouse" means an individual to whom the decedent was married at the individual's death, and does not include a spouse who was divorced from, or treated pursuant to Section 45-2-802 or Section 45-2-804 NMSA 1978 as divorced from, the decedent at the time of the decedent's death.

History: 1953 Comp., § 32A-2-103, enacted by Laws 1975, ch. 257, § 2-103; 1977, ch. 121, § 3; repealed and reenacted by Laws 1993, ch. 174, § 6; 2011, ch. 124, § 10.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 174, § 6 repealed former 45-2-103 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-103, and enacted a new section, effective July 1, 1993.

The 2011 amendment, effective January 1, 2012, clarified the rules of inheritance by paternal and maternal grandparents and their descendants; provided rules of inheritance by descendants of a deceased spouse if the decedent has no surviving descendants, grandparents, or descendants of grandparents; and defined "deceased spouse".

Estate's award from September 11th victim compensation fund of 2001. — The $250,000 non-economic losses award for the decedent from the September 11th victim compensation fund of 2001 was the separate property of the decedent and where the decedent was intestate, the award should be distributed one-fourth to the decedent's surviving spouse and three-fourths to the children of the decedent. Marchand v. Marchand, 2007-NMCA-138, 142 N.M. 795, 171 P.3d 309, aff'd in part and rev'd in part, 2008-NMSC-065, 145 N.M. 378, 199 P.3d 281.

Offsets against estate's award. — The amount of collateral benefits assigned to each beneficiary of a September 11th victim compensation fund of 2001 award should be applied against each beneficiary's share of the $250,000 non-economic loss award to the decedent's estate thereby offsetting each beneficiary's share of the $250,000 in proportion to the collateral benefits that each beneficiary has received. Therefore, where the spouse of the intestate decedent received $1,012,321 in collateral benefits and the surviving child of the decedent received $17,500 in collateral benefits, the spouse was entitled to one-quarter of the $250,000 of non-economic losses awarded to the decedent's estate less the collateral benefits received by the spouse, which eliminated the share of the spouse, and the child was entitled to three-quarters of the award less the collateral benefits received by the child, which reduced the child's share to $170,000. Marchand v. Marchand, 2008-NMSC-065, 145 N.M. 378, 199 P.3d 281, rev'g, in part, 2007-NMCA-138, 142 N.M. 795, 171 P.3d 309.

Offsets against heirs' awards. — The collateral benefits received by the spouse and children of a decedent from the September 11th victim compensation fund are not applied to offset the $100,000 non-economic losses awarded to the spouse and each dependent of the decedent because the $100,000 awards are to compensate the spouse and each dependent for pain and suffering and loss of consortium resulting from the death of the decedent. Marchand v. Marchand, 2008-NMSC-065, 145 N.M. 378, 199 P.3d 281, rev'g, in part, 2007-NMCA-138, 142 N.M. 795, 171 P.3d 309.

Quiet title action. — The record showed that plaintiffs in quiet title action were the surviving children or grandchildren of the deceased and that title vested in them by intestate succession (45-2-103 NMSA 1978), and evidence supported the trial court's finding that defendants receipt purporting to evidence a sale of the property was a forgery. Martinez v. Martinez, 1997-NMCA-096, 123 N.M. 816, 945 P.2d 1034.

Intestate dying without lineal descendants dies leaving no issue. — An intestate who dies without lineal descendants, however many children may have predeceased him or her, dies "leaving no issue." Garcia v. Ortiz, 38 N.M. 383, 34 P.2d 667 (1934).

Spouse of a deceased child is not considered "issue" within the meaning of this section (former 29-1-13, 1953 Comp.). Garcia v. Ortiz, 38 N.M. 383, 34 P.2d 667 (1934).

Child adopted by stepfather may not inherit from natural paternal grandparent. — Where child was adopted by mother's husband (child's stepfather) after child's natural father's death but before paternal grandmother's death, adopted child could not inherit from her grandmother (her natural father's mother). Commerce Bank & Trust v. Brady, 95 N.M. 412, 622 P.2d 1032 (1981).

Distribution of estate of unmarried decedent without issue. — Former 29-1-13, 1953 Comp., relating to dying without issue or spouse applied to the estate of an unmarried decedent without issue. Harrison v. Harrison, 21 N.M. 372, 155 P. 356 (1916).

Interest of pretermitted child does not pass through executor. — The interest of a pretermitted child descends directly to the child at the instant of the testator's death and does not pass to or through the executor. Dunham v. Stitzberg, 53 N.M. 81, 201 P.2d 1000 (1948), overruled on other grounds, Conley v. Quinn, 58 N.M. 771, 276 P.2d 906 (1954).

Illegitimate children may inherit and be inherited from. — Illegitimate child of illegitimate mother may inherit from his uncle on his mother's side, where the uncle has never married, has no other blood relation and his mother and mother of the illegitimate child have died before the uncle. State v. Chavez, 42 N.M. 569, 82 P.2d 900 (1938).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For annual survey of New Mexico law relating to estates and trusts, see 12 N.M.L. Rev. 363 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Descent and Distribution §§ 13, 18, 49, 53, 64.

Succession to property as affected by death in common disaster in absence of presumption or proof of survivorship, 43 A.L.R. 1348.

Right of one other than grandchild of intestate to take under statute providing that if any child of intestate be dead, the heirs of such child shall inherit his share, 93 A.L.R. 1511.

Particular articles within statute giving to surviving spouse or children certain specific items of personal property of deceased, 158 A.L.R. 313.

Descent and distribution to nieces and nephews as per stirpes or per capita, 19 A.L.R.2d 191.

Family settlement of intestate's estate, 29 A.L.R.3d 174.

Descent and distribution: rights of inheritance as between kindred of whole and half blood, 47 A.L.R.4th 561.

26A C.J.S. Descent and Distribution §§ 1, 21, 30 to 48, 83, 88; 96 C.J.S. Wills § 711.

45-2-104. Requirement of survival by one hundred twenty hours; individual in gestation.

A. For purposes of intestate succession and allowances, and except as otherwise provided in Subsection B of this section, the following rules apply:

(1) an individual born before a decedent's death who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent. If it is not established by clear and convincing evidence that an individual born before the decedent's death survived the decedent by one hundred twenty hours, it is deemed that the individual failed to survive for the required period; and

(2) an individual in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives one hundred twenty hours after birth. If it is not established by clear and convincing evidence that an individual in gestation at the decedent's death lived one hundred twenty hours after birth, it is deemed that the individual failed to survive for the required period.

B. This section does not apply if its application would cause the estate to pass to the state under Section 45-2-105 NMSA 1978.

History: 1953 Comp., § 32A-2-104, enacted by Laws 1975, ch. 257, § 2-104; 1976 (S.S.), ch. 37, § 1; repealed and reenacted by Laws 1993, ch. 174, § 7; 2011, ch. 124, § 11.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Laws official comment to 2-104 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 7 repealed former 45-2-104 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-104, and enacted a new section, effective July 1, 1993.

Cross references. — For definition of "survive", *see* 45-1-201 NMSA 1978.

For evidence standard, *see* 45-2-702 NMSA 1978.

The 2011 amendment, effective January 1, 2012, provided that an individual in gestation at decedent's death is deemed to be living at decedent's death if the individual lives one hundred twenty hours after birth.

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Descent and Distribution § 110.

Decree directing distribution of estate to person who is dead, 25 A.L.R. 1563.

Time interval contemplated by provision of will or of statute of descent and distribution with reference to death of two persons simultaneously or approximately at same time, 173 A.L.R. 1254.

45-2-105. No taker.

If there is no taker under the provisions of Chapter 45, Article 2 NMSA 1978, the intestate estate passes to the state.

History: 1953 Comp., § 32A-2-105, enacted by Laws 1975, ch. 257, § 2-105; 1993, ch. 174, § 8.

ANNOTATIONS

Compiler's notes. — This section is similar to former 29-1-21, 1953 Comp.

Cross references. — For escheat proceeds as constituting part of school fund, *see* N.M. Const., art. XII, § 4.

The 1993 amendment, effective July 1, 1993, substituted "Chapter 45, Article 2 NMSA 1978" for "Sections 2-101 through 2-902 of the Uniform Probate Code".

Title passes automatically to state where escheat proceedings not required. — In absence of statutes requiring escheat proceedings, judicial or otherwise, passage of title by escheat to the state does not depend upon any affirmative action by the state, and passes automatically and immediately to the state upon the death of the person without heirs. Schmitz v. State Tax Comm'n, 55 N.M. 320, 232 P.2d 986 (1951).

Due or delinquent taxes extinguished when title passed by escheat. — At the instant title passes by escheat to the state, any taxes then due or delinquent are abated and extinguished. Schmitz v. State Tax Comm'n, 55 N.M. 320, 232 P.2d 986 (1951).

Proceeds from escheat to go to school fund. — The net proceeds of property that come to the state by escheat go into the current school fund. 1937-38 Op. Att'y Gen. No. 37-1795.

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27A Am. Jur. 2d Escheat §§ 1 et seq., 18, 24, 27.

Necessity of judicial proceeding to vest title to real property in state by escheat, 23 A.L.R. 1237, 79 A.L.R. 1364.

Necessity and sufficiency of notice to support title by escheat to decedent's estate, 48 A.L.R. 1342.

Constitutionality, construction and application of statutes relating to disposition of old bank deposits, 151 A.L.R. 836.

Inheritance from illegitimate, 48 A.L.R.2d 759.

Escheat of personal property of intestate domiciled or resident in another state, 50 A.L.R.2d 1375.

Uniform Disposition of Unclaimed Property Act, 98 A.L.R.2d 304.

30A C.J.S. Escheat §§ 3 to 7.

45-2-106. Representation.

A. As used in this section:

(1) "deceased descendant", "deceased parent" or "deceased grandparent" means a descendant, parent or grandparent who either predeceased the decedent or is deemed to have predeceased the decedent pursuant to Section 45-2-104 NMSA 1978; and

(2) "surviving descendant" means a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent pursuant to Section 45-2-104 NMSA 1978.

B. If, pursuant to Section 45-2-103 NMSA 1978, a decedent's intestate estate or a part thereof passes "by representation" to the decedent's descendants, the estate or part thereof is divided into as many equal shares as there are:

(1) surviving descendants in the generation nearest to the decedent that contains one or more surviving descendants; and

(2) deceased descendants in the same generation who left surviving descendants, if any.

Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

C. If, pursuant to Section 45-2-103 NMSA 1978, a decedent's intestate estate or a part thereof passes "by representation" to the descendants of the decedent's deceased parents or either of them or to the descendants of the decedent's deceased paternal or maternal grandparents or either of them, the estate or part thereof is divided into as many equal shares as there are:

(1) surviving descendants in the generation nearest the deceased parents or either of them or the deceased grandparents or either of them that contains one or more surviving descendants; and

(2) deceased descendants in the same generation who left surviving descendants, if any.

Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

History: 1953 Comp., § 32A-2-106, enacted by Laws 1975, ch. 257, § 2-106; repealed and reenacted by Laws 1993, ch. 174, § 9.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Laws official comment to 2-106 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 9 repealed former 45-2-106 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-106, and enacted a new section, effective July 1, 1993.

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Descent and Distribution §§ 55, 62, 67, 72 to 77.

26A C.J.S. Descent and Distribution §§ 18, 23, 40, 42.

45-2-107. Kindred of half blood.

Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.

History: 1953 Comp., § 32A-2-107, enacted by Laws 1975, ch. 257, § 2-107.

ANNOTATIONS

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Descent and Distribution § 54.

Deceased spouse as ancestor of surviving spouse within statute providing that kindred of the half blood inherit equally with those of the whole blood, unless the inheritance comes to the intestate by descent, devise or gift of some one of his ancestors, 110 A.L.R. 1014.

Descent and distribution: rights of inheritance as between kindred of whole and half blood, 47 A.L.R.4th 561.

26A C.J.S. Descent and Distribution §§ 21, 25, 36, 41.

45-2-108. Repealed.

ANNOTATIONS

Repeals. — Laws 2011, ch. 124, § 97 repealed 45-2-108 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-108, relating to after-born heirs, effective January 1, 2012. For provisions of former section, *see* the 2010 NMSA 1978 on *NMONESOURCE.COM*.

45-2-109. Advancements.

A. If an individual dies intestate as to all or a portion of his estate, property the decedent gave during the decedent's lifetime to an individual who, at the decedent's death, is an heir is treated as an advancement against the heir's intestate share only if:

(1) the decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement; or

(2) the decedent's contemporaneous writing or the heir's written acknowledgment otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate.

B. For purpose of Subsection A of this section, property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent's death, whichever first occurs.

C. If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the division and distribution of the decedent's intestate estate, unless the decedent's contemporaneous writing provides otherwise.

History: 1953 Comp., § 32A-2-109, enacted by Laws 1975, ch. 257, § 2-109; 1976 (S.S.), ch. 37, § 2; repealed and reenacted by Laws 1993, ch. 174, § 11.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Laws official comment to 2-109 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 11 repealed former 45-2-109 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-109, relating to the meaning of child and related terms, and enacted a new section, effective July 1, 1993.

Cross references. — For definition of "heirs", *see* 45-1-201A NMSA 1978.

For judicial determination, *see* 45-3-409 to 45-3-412 NMSA 1978.

"Advancement" construed. — An advancement is a perfect and irrevocable gift, not required by law, made by a parent during his lifetime to his child, with the intention on the part of the donor that such gift shall represent a part or the whole of the donor's estate that the donee would be entitled to on the death of the donor intestate. Martinez v. Anderson, 96 N.M. 619, 633 P.2d 727 (Ct. App. 1981).

Gift to children presumed advancement. — There is a presumption that a parent's substantial gift to one of his children is intended as an advancement. Martinez v. Anderson, 96 N.M. 619, 633 P.2d 727 (Ct. App. 1981).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For annual survey of New Mexico law relating to estates and trusts, see 13 N.M.L. Rev. 395 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3 Am. Jur. 2d Advancements §§ 11 to 15.

Widow's statutory distributive share as affected by advancements to others, or by provisions of will that legatees shall take certain indebtedness owing to testator as part of their share, 76 A.L.R. 1420.

Check as evidencing advancement, 74 A.L.R.5th 491.

26A C.J.S. Descent and Distribution §§ 91 to 115.

45-2-110. Debts to decedent.

A debt owed to a decedent is not charged against the intestate share of any individual except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's descendants.

History: 1953 Comp., § 32A-2-110, enacted by Laws 1975, ch. 257, § 2-110; repealed and reenacted by Laws 1993, ch. 174, § 12.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Laws official comment to 2-110 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 12 repealed former 45-2-110 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-110, relating to advancements, and enacted a new section, effective July 1, 1993.

45-2-111. Alienage.

A. No individual is disqualified to take as an heir because the individual or an individual through whom he claims is or has been an alien.

B. Aliens shall have full power and authority to acquire or hold real property and personal property by deed, will, inheritance or otherwise and to alienate, sell, assign and transfer any property to their heirs or other persons, whether the heirs or other persons are, or are not, citizens of the United States.

C. When an alien having title or interest in any real property dies, the real property shall descend and vest in the same manner as if the alien were a citizen of the United States. The heir of an alien, whether the heir is an alien or not, shall have the same rights and resources and shall, in all respects, be treated on the same footing as a native citizen of the United States with respect to the personal estate of an alien dying intestate, and all persons interested in the estate, under the laws of New Mexico, whether aliens or not.

History: 1953 Comp., § 32A-2-112, enacted by Laws 1975, ch. 257, § 2-112; 1977, ch. 121, § 4; repealed and reenacted by Laws 1993, ch. 174, § 13; 1995, ch. 210, § 4.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Laws official comment to 2-111 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 13 repealed former 45-2-111 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-112, relating to debts to decedents, and enacted a new section, effective July 1, 1993.

Compiler's notes. — This section is similar to former 70-1-24, 1953 Comp.

The 1995 amendment, effective July 1, 1995, designated the former provision as Subsection A and added Subsections B and C.

Acquisition of interest in real estate by alien ineligible for citizenship. — New Mexico Const., art. II, § 22, is broad enough to prohibit the acquisition of any interest in real estate by an alien ineligible for citizenship, and no legislation enacted prior to 1921 can be construed as contemplated by the words "until otherwise provided by law." Code 1929, § 117-116 (70-1-24, 1953 Comp., repealed), enacted in 1871, is modified to that extent. 1929-30 Op. Att'y Gen. No. 30-01 (opinion rendered under former law).

Section suspends constitutional prohibition against alien ownership of realty. — Because this section was enacted subsequent to the 1921 amendment to N.M. Const., art. II, § 22, it operates to suspend the prohibition against ownership of real property in New Mexico by persons other than United States citizens. 1981 Op. Att'y Gen. No. 81-06.

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M. L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3A Am. Jur. 2d Aliens and Citizens §§ 2005, 2019.

Disabilities and property rights of aliens as proper subjects of treaty regulations, 4 A.L.R. 1391, 17 A.L.R. 637, 134 A.L.R. 882.

Necessity of judicial proceedings to vest title to real property in state by escheat, 23 A.L.R. 1237, 79 A.L.R. 1364.

Escheat as affecting contract for sale or lease to alien, 79 A.L.R. 1366.

State regulation of land ownership by alien corporation, 21 A.L.R.4th 1329.

3 C.J.S. Aliens §§ 12, 21, 26.

45-2-112. Dower and curtesy abolished.

The estates of dower and curtesy are abolished.

History: 1953 Comp., § 32A-2-113, enacted by Laws 1975, ch. 257, § 2-113; repealed and reenacted by Laws 1993, ch. 174, § 14.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Laws official comment to 2-112 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 14 repealed former 45-2-112 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-112, relating to aliens, and enacted a new section, effective July 1, 1993.

Compiler's notes. — The language of this section is identical to that of former 29-1-23, 1953 Comp.

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Dower and Curtesy §§ 2, 4, 7.

Constitutionality of statutes in relation to dower, 10 A.L.R.3d 212.

26A C.J.S. Descent and Distribution §§ 6, 48, 60.

45-2-113. Individuals related to decedent through two lines.

An individual who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that would entitle the individual to the larger share.

History: 1953 Comp., § 32A-2-113, enacted by Laws 1975, ch. 257, § 2-113; repealed and reenacted by Laws 1993, ch. 174, § 15.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 174, § 15 repealed former 45-2-113 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-113, relating to the abolition of curtesy and dower, and enacted a new section, effective July 1, 1993.

45-2-114. Parent barred from inheriting in certain circumstances.

A. A parent is barred from inheriting from or through a child of the parent if:

(1) the parent's parental rights were terminated and the parent-child relationship was not judicially reestablished; or

(2) the child died before reaching eighteen years of age and there is clear and convincing evidence that immediately before the child's death the parental rights of the parent could have been terminated under law of New Mexico other than the Uniform Probate Code on the basis of nonsupport, abandonment, abuse, neglect or other actions or inactions of the parent toward the child.

B. For the purpose of intestate succession from or through the deceased child, a parent who is barred from inheriting under this section is treated as if the parent predeceased the child.

History: 1978 Comp., § 45-2-114, enacted by Laws 1993, ch. 174, § 16; 2004, ch. 72, § 1; 2011, ch. 124, § 12.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Laws official comment to 2-114 UPC.

Cross references. — For definition of "child", *see* 45-1-201A NMSA 1978.

The 2011 amendment, effective January 1, 2012, eliminated the former rules that determined the parents of natural and adopted children for purposes of intestate succession and provided rules to determine when a parent is barred from inheriting from or through a child.

The 2004 amendment, effective May 19, 2004, amended Paragraph (2) of Subsection B to change "the other natural parent" to "that nonsevered natural parent".

Relation to wrongful death actions. — The substantive standards of the Uniform Probate Code do not apply to wrongful death actions, so 45-2-114(C) NMSA 1978 has no effect on entitlement to wrongful death benefits by a father whose paternity had been adjudicated. In re Estate of Sumler, 2003-NMCA-030, 133 N.M. 319, 62 P.3d 776.

Child born in wedlock presumed legitimate. Grates v. Garcia, 20 N.M. 158, 148 P. 493 (1915), overruled on other grounds Melvin v. Kazhe, 83 N.M. 356, 492 P.2d 138 (1971).

Sufficiency of recognition. — Where, in an action of ejectment, plaintiff claims that he is the illegitimate son of a deceased owner of such realty, that such owner recognized

him as his son in writing prior to his death, and the evidence is conflicting as to whether such former owner could have begotten the claimant, a verdict against such claimant will not be disturbed upon appeal. Grates v. Garcia, 20 N.M. 158, 148 P. 493 (1915), overruled on other grounds Melvin v. Kazhe, 83 N.M. 356, 492 P.2d 138 (1971).

Authorization to insert name in birth certificate. — Where the putative father authorized the insertion of his name in the birth certificate as the father of the illegitimate child, there was sufficient evidence of general and notorious recognition. Sanchez v. Torres, 35 N.M. 383, 298 P. 408 (1931), on rehearing 38 N.M. 556, 37 P.2d 805 (1934).

Where evidence of impotency insufficient. — In suit to establish paternity and rights of inheritance of illegitimate sons, evidence of deceased's impotency precluding paternity was insufficient where there was evidence of conduct and consent to have his name on birth certificate of the sons as their father. Sanchez v. Torres, 38 N.M. 556, 37 P.2d 805 (1934).

Adopted child is not an heir of his natural parents. Shehady v. Richards, 83 N.M. 311, 491 P.2d 528 (1971).

Paternity established after adoption. — An adoptive child is precluded from inheriting from the estate of his natural father even if the paternity of the father is established after adoption, and even if the child is adopted by his maternal grandparents. Aldridge ex rel. Aldridge v. Mims, 118 N.M. 661, 884 P.2d 817 (Ct. App. 1994).

Adoption severs legal rights and privileges between the adopted child and the natural parents. Commerce Bank & Trust v. Brady, 95 N.M. 412, 622 P.2d 1032 (1981).

Adopted child belongs to adoptive parents as if he or she had been their natural child, with the same rights of a natural child, all to the exclusion of the natural parents. Commerce Bank & Trust v. Brady, 95 N.M. 412, 622 P.2d 1032 (1981).

Child adopted by stepfather may not inherit from paternal grandmother. — Where child was adopted by mother's husband (child's stepfather) after child's natural father's death but before paternal grandmother's death, adopted child could not inherit from her grandmother (her natural father's mother). Commerce Bank & Trust v. Brady, 95 N.M. 412, 622 P.2d 1032 (1981).

Recognized pretermitted illegitimate child to receive intestate share. — An illegitimate child who has been recognized as required by former 29-1-18, 1953 Comp., and is omitted from the father's will, is entitled to receive an intestate share pursuant to 30-1-7, 1953 Comp. (similar to 45-2-302 NMSA 1978). Gallup v. Bailey, 46 N.M. 344, 129 P.2d 56 (1942).

Support and custody by father. — Section 29-1-18, 1953 Comp. (repealed), did not cast upon the putative father of an illegitimate child the duty to support, educate and care for such child during its minority, or change the rights of custody as between the

father and those claiming custody of the child under an attempted adoption. Wallace v. Blanchard, 26 N.M. 181, 190 P. 1020 (1920).

Inheritance of estate of illegitimate child by deceased mother's kindred. — The estate of a dead mother's illegitimate child is inherited by his mother's kindred according to the laws of descent and distribution, as though the child were legitimate. State v. Chavez, 42 N.M. 569, 82 P.2d 900 (1938).

Public policy to treat adopted same as natural children. Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963).

Colorado adoption given credence although contrary to New Mexico law. — An adoption in Colorado, of an unmarried adult by another adult who was only 13 years older than person adopted, should be accepted in New Mexico although contrary to 22-2-13, 1953 Comp. (repealed), requiring adoptor to be 20 or more years older, and the adopted person should be considered the lawful child of the adopting parent under will bequeathing trust funds to trustee for the benefit of adopting parent or his surviving lawful child. Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963).

Evidence sufficient to establish paternity. Sanchez v. Quintana, 97 N.M. 508, 641 P.2d 539 (Ct. App. 1982).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For annual survey of New Mexico law relating to estates and trusts, see 12 N.M.L. Rev. 363 (1982).

For note, "Adoption - Intestate Succession - The Denial of a Stepparent Adoptee's Right to Inherit from an Intestate Natural Grandparent: In re Estate of Holt," see 13 N.M.L. Rev. 221 (1983).

For annual survey of New Mexico law relating to estates and trusts, see 13 N.M.L. Rev. 395 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 10 Am. Jur. 2d Bastards §§ 45 to 59, 150 to 153, 159.

23 Am. Jur. 2d Descent and Distribution §§ 62, 63, 121.

Illegitimate child as a "child" within statute limiting the right or amount of disposition by will by one survived by a child, 23 A.L.R. 400.

Inheritance by, from or through illegitimate, 24 A.L.R. 570, 83 A.L.R. 1330, 48 A.L.R.2d 759, 60 A.L.R.2d 1182.

Denial of, or expression of doubt as to, paternity or other relationship as estoppel to assert right of inheritance by virtue of such relationship, 33 A.L.R. 579.

Right of child legitimated by marriage of parents to take by inheritance from kindred of parents, 64 A.L.R. 1124.

What constitutes a "marriage" within meaning of a statute legitimating issue of all marriages null in law, 84 A.L.R. 499.

Statute regarding status or rights of children born out of wedlock as applicable to children born before it became effective, 140 A.L.R. 1323.

What amounts to recognition within statutes affecting the status or rights of illegitimates, 33 A.L.R.2d 705.

Inheritance from illegitimate, 48 A.L.R.2d 759.

Conflict of laws as to legitimacy or legitimation or as to rights of illegitimates, as affecting descent and distribution of decedent's estate, 87 A.L.R.2d 1274.

Inheritance by illegitimate from or through mother's ancestors or collateral kindred, 97 A.L.R.2d 1101.

Inheritance by illegitimate from mother's other illegitimate children, 7 A.L.R.3d 677.

Right of adopted child to inherit from intestate natural grandparent, 60 A.L.R.3d 631.

Legitimation by marriage to natural father of child born during mother's marriage to another, 80 A.L.R.3d 219.

Right of illegitimate grandchildren to take under testamentary gift to "grandchildren," 17 A.L.R.4th 1292.

Word "child" or "children" in will as including grandchild or grandchildren, 30 A.L.R.4th 319.

Admissibility, weight and sufficiency of Human Leukocyte Antigen (HLA) tissue typing tests in paternity cases, 37 A.L.R.4th 167.

Adoption as precluding testamentary gift under natural relative's will, 71 A.L.R.4th 374.

Adopted child as within class named in deed or inter vivos trust instrument, 37 A.L.R.5th 237.

26A C.J.S. Descent and Distribution §§ 3, 28, 81.

SUBPART 2. Parent-Child Relationship

45-2-115. Definitions.

As used in Subpart 2 of Part 1 of Article 2 of the Uniform Probate Code:

A. "adoptee" means an individual who is adopted;

B. "assisted reproduction" means a method of causing pregnancy other than sexual intercourse;

C. "divorce" includes an annulment, dissolution and declaration of invalidity of a marriage;

D. "functioned as a parent of the child" means behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing and residing with the child in the same household as a regular member of that household;

E. "genetic father" means the man whose sperm fertilized the egg of a child's genetic mother. If the father-child relationship is established under the presumption of paternity pursuant to Paragraph (1), (2) or (3) of Subsection B of Section 40-11A-201 NMSA 1978, the term means only the man for whom that relationship is established;

F. "genetic mother" means the woman whose egg was fertilized by the sperm of a child's genetic father;

G. "genetic parent" means a child's genetic father or genetic mother;

H. "incapacity" means the inability of an individual to function as a parent of a child because of the individual's physical or mental condition; and

I. "relative" means a grandparent or a descendant of a grandparent.

History: 1978 Comp., § 45-2-115, enacted by Laws 2011, ch. 124, § 13.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 13 effective January 1, 2012.

45-2-116. Effect of parent-child relationship.

Except as otherwise provided in Subsections B through E of Section 45-2-119 NMSA 1978, if a parent-child relationship exists or is established pursuant to Subpart 2 of Part 1 of Article 2 of the Uniform Probate Code, the parent is a parent of the child and the child is a child of the parent for the purpose of intestate succession.

History: 1978 Comp., § 45-2-116, enacted by Laws 2011, ch. 124, § 14.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 14 effective January 1, 2012.

Cross references. — For provisions relating to the determination of paternity when death occurs during proceedings for dissolution of marriage, separation, annulment of marriage or paternity, *see* 40-4-20 NMSA 1978.

For the New Mexico Uniform Parentage Act, *see* 40-11A-101 through 40-11A-903 NMSA 1978.

45-2-117. No distinction based on marital status.

Except as otherwise provided in Section 45-2-114, 45-2-119, 45-2-120 or 45-2-121 NMSA 1978, a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status.

History: 1978 Comp., § 45-2-117, enacted by Laws 2011, ch. 124, § 15.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 15 effective January 1, 2012.

45-2-118. Adoptee and adoptee's adoptive parent or parents.

A. A parent-child relationship exists between an adoptee and the adoptee's adoptive parent or parents.

B. For purposes of Subsection A of this section:

(1) an individual who is in the process of being adopted by a married couple when one of the spouses dies is treated as adopted by the deceased spouse if the adoption is subsequently granted to the decedent's surviving spouse; and

(2) a child of a genetic parent who is in the process of being adopted by a genetic parent's spouse when the spouse dies is treated as adopted by the deceased

spouse if the genetic parent survives the deceased spouse by one hundred twenty hours.

C. If, after a parent-child relationship is established between a child of assisted reproduction and a parent pursuant to Section 45-2-120 NMSA 1978 or between a gestational child and a parent pursuant to Section 45-2-121 NMSA 1978, the child is in the process of being adopted by the parent's spouse when that spouse dies, the child is treated as adopted by the deceased spouse for the purpose of Paragraph (2) of Subsection B of this section.

History: 1978 Comp., § 45-2-118, enacted by Laws 2011, ch. 124, § 16.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 16 effective January 1, 2012.

45-2-119. Adoptee and adoptee's genetic parents.

A. Except as otherwise provided in Subsections B through E of this section, a parent-child relationship does not exist between an adoptee and the adoptee's genetic parents.

B. A parent-child relationship exists between an individual who is adopted by the spouse of either genetic parent and:

(1) the genetic parent whose spouse adopted the individual; and

(2) the other genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through the other genetic parent.

C. A parent-child relationship exists between both genetic parents and an individual who is adopted by a relative of a genetic parent or by the spouse or surviving spouse of a relative of a genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through either genetic parent.

D. A parent-child relationship exists between both genetic parents and an individual who is adopted after the death of both genetic parents, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit through either genetic parent.

E. If, after a parent-child relationship is established between a child of assisted reproduction and a parent or parents pursuant to Section 45-2-120 NMSA 1978 or between a gestational child and a parent or parents pursuant to Section 45-2-121 NMSA 1978, the child is adopted by another or others, the child's parent or parents

pursuant to Section 45-2-120 or 45-2-121 NMSA 1978 are treated as the child's genetic parent or parents for the purpose of this section.

History: 1978 Comp., § 45-2-119, enacted by Laws 2011, ch. 124, § 17.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 17 effective January 1, 2012.

45-2-120. Child conceived by assisted reproduction other than child born to gestational carrier.

A. As used in this section:

(1) "birth mother" means a woman, other than a gestational carrier pursuant to Section 45-2-121 NMSA 1978, who gives birth to a child of assisted reproduction. The term is not limited to a woman who is the child's genetic mother;

(2) "child of assisted reproduction" means a child conceived by means of assisted reproduction by a woman other than a gestational carrier pursuant to Section 45-2-121 NMSA 1978; and

(3) "third-party donor" means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:

(a) a husband who provides sperm or a wife who provides eggs that are used for assisted reproduction by the wife;

(b) the birth mother of a child of assisted reproduction; or

(c) an individual who has been determined pursuant to Subsection E or F of this section to have a parent-child relationship with a child of assisted reproduction.

B. A parent-child relationship does not exist between a child of assisted reproduction and a third-party donor.

C. A parent-child relationship exists between a child of assisted reproduction and the child's birth mother.

D. Except as otherwise provided in Subsections I and J of this section, a parent-child relationship exists between a child of assisted reproduction and the husband of the child's birth mother if the husband provided the sperm that the birth mother used during his lifetime for assisted reproduction.

E. A birth certificate identifying an individual other than the birth mother as the other parent of a child of assisted reproduction presumptively establishes a parent-child relationship between the child and that individual.

F. Except as otherwise provided in Subsections G, I and J of this section, and unless a parent-child relationship is established pursuant to Subsection D or E of this section, a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual:

(1) before or after the child's birth, signed a record that, considering all the facts and circumstances, evidences the individual's consent; or

(2) in the absence of a signed record pursuant to Paragraph (1) of this subsection:

(a) functioned as a parent of the child no later than two years after the child's birth;

(b) intended to function as a parent of the child no later than two years after the child's birth but was prevented from carrying out that intent by death, incapacity or other circumstances; or

(c) intended to be treated as a parent of a posthumously conceived child if that intent is established by clear and convincing evidence.

G. For the purpose of Paragraph (1) of Subsection F of this section, neither an individual who signed a record more than two years after the birth of the child nor a relative of that individual who is not also a relative of the birth mother inherits from or through the child unless the individual functioned as a parent of the child before the child reached eighteen years of age.

H. For the purpose of Paragraph (2) of Subsection F of this section, the following rules apply:

(1) if the birth mother is married and no divorce proceeding is pending, in the absence of clear and convincing evidence to the contrary, her spouse satisfies Subparagraph (a) or (b) of Paragraph (2) of Subsection F of this section; and

(2) if the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceeding was pending, in the absence of clear and convincing evidence to the contrary, her deceased spouse satisfies Subparagraph (b) or (c) of Paragraph (2) of Subsection F of this section.

I. If a married couple is divorced before placement of eggs, sperm or embryos, a child resulting from the assisted reproduction is not a child of the birth mother's former spouse, unless the former spouse consented in a record that if assisted reproduction were to occur after divorce, the child would be treated as the former spouse's child.

J. If, in a record, an individual withdraws consent to assisted reproduction before placement of eggs, sperm or embryos, a child resulting from the assisted reproduction is not a child of that individual, unless the individual subsequently satisfies Subsection F of this section.

K. If, pursuant to this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Paragraph (2) of Subsection A of Section 45-2-104 NMSA 1978 if the child is:

(1) in utero not later than thirty-six months after the individual's death; or

(2) born not later than forty-five months after the individual's death.

History: 1978 Comp., § 45-2-120, enacted by Laws 2011, ch. 124, § 18.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 18 effective January 1, 2012.

45-2-121. Child born to gestational carrier.

A. As used in this section:

(1) "gestational agreement" means an enforceable or unenforceable agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent, intended parents or an individual described in Subsection E of this section;

(2) "gestational carrier" means a woman who is not an intended parent who gives birth to a child pursuant to a gestational agreement. The term is not limited to a woman who is the child's genetic mother;

(3) "gestational child" means a child born to a gestational carrier pursuant to a gestational agreement; and

(4) "intended parent" means an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction. The term is not limited to an individual who has a genetic relationship with the child.

B. A parent-child relationship is conclusively established by a court order designating the parent or parents of a gestational child.

C. A parent-child relationship between a gestational child and the child's gestational carrier does not exist unless the gestational carrier is:

(1) designated as a parent of the child in a court order described in Subsection B of this section; or

(2) the child's genetic mother and a parent-child relationship does not exist pursuant to this section with an individual other than the gestational carrier.

D. In the absence of a court order pursuant to Subsection B of this section, a parent-child relationship exists between a gestational child and an intended parent who:

(1) functioned as a parent of the child no later than two years after the child's birth; or

(2) died while the gestational carrier was pregnant if:

(a) there were two intended parents and the other intended parent functioned as a parent of the child no later than two years after the child's birth;

(b) there were two intended parents, the other intended parent also died while the gestational carrier was pregnant and a relative of either deceased intended parent or the spouse or surviving spouse of a relative of either deceased intended parent functioned as a parent of the child no later than two years after the child's birth; or

(c) there was no other intended parent and a relative of or the spouse or surviving spouse of a relative of the deceased intended parent functioned as a parent of the child no later than two years after the child's birth.

E. In the absence of a court order pursuant to Subsection B of this section, a parent-child relationship exists between a gestational child and an individual whose sperm or eggs were used after the individual's death or incapacity to conceive a child pursuant to a gestational agreement entered into after the individual's death or incapacity if the individual intended to be treated as the parent of the child. The individual's intent may be shown by:

(1) a record signed by the individual that, considering all the facts and circumstances, evidences the individual's intent; or

(2) other facts and circumstances establishing the individual's intent by clear and convincing evidence.

F. Except as otherwise provided in Subsection G of this section, and unless there is clear and convincing evidence of a contrary intent, an individual is deemed to have intended to be treated as the parent of a gestational child for purposes of Paragraph (2) of Subsection E of this section if:

(1) the individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child;

(2) when the individual deposited the sperm or eggs, the individual was married and no divorce proceeding was pending; and

(3) the individual's spouse or surviving spouse functioned as a parent of the child no later than two years after the child's birth.

G. The presumption pursuant to Subsection F of this section does not apply if there is:

(1) a court order pursuant to Subsection B of this section; or

(2) a signed record that satisfies Paragraph (1) of Subsection E of this section.

H. If, pursuant to this section, an individual is a parent of a gestational child who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Paragraph (2) of Subsection A of Section 45-2-104 NMSA 1978 if the child is:

(1) in utero not later than thirty-six months after the individual's death; or

(2) born not later than forty-five months after the individual's death.

I. This section shall apply only for the purposes of determining inheritance rights and does not affect any law of New Mexico other than the Uniform Probate Code regarding the enforceability or validity of a gestational agreement.

J. Subject to Subsection I of this section, the Uniform Probate Code does not authorize or prohibit a gestational agreement.

History: 1978 Comp., § 45-2-121, enacted by Laws 2011, ch. 124, § 19.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 19 effective January 1, 2012.

45-2-122. Equitable adoption.

Subpart 2 of Part 1 of Article 2 of the Uniform Probate Code does not affect the doctrine of equitable adoption.

History: 1978 Comp., § 45-2-122, enacted by Laws 2011, ch. 124, § 20.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 20 effective January 1, 2012.

PART 2
Reserved

45-2-201 to 45-2-207. Reserved.

ANNOTATIONS

Compiler's notes. — Laws 1975, ch. 257, §§ 2-201 to 2-207, contained these section numbers, but no accompanying text.

PART 3
SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

45-2-301. Entitlement of spouse; premarital will.

A. If a testator's surviving spouse married the testator after the testator executed his will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate he would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised to a descendant of such a child or passes pursuant to Section 45-2-603 or 45-2-604 NMSA 1978 to such a child or to a descendant of such a child, unless:

(1) it appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;

(2) the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or

(3) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

B. In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift pursuant to Section 45-2-603 or 45-2-604 NMSA 1978 to a descendant of such a child, abate as provided in Section 45-3-902 NMSA 1978.

History: 1953 Comp., § 32A-2-301, enacted by Laws 1975, ch. 257, § 2-301; 1977, ch. 121, § 5; repealed and reenacted by Laws 1993, ch. 174, § 17; 1995, ch. 210, § 5.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 174, § 17 repealed former 45-2-301 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-301, relating to omitted spouses, and enacted a new section, effective July 1, 1993.

The 1995 amendment, effective July 1, 1995, inserted "to a descendant of such a child" and "such a child or to" near the end of the introductory paragraph in Subsection A.

Beneficiaries under a trust are not devisees. — Where the decedent devised his estate to the trustees of a revocable trust to be distributed to the decedent’s children, the children were not devisees within the meaning of this section. Bell v. Estate of Bell, 2008-NMCA-045, 143 N.M. 716, 181 P.3d 708, cert. quashed, 145 N.M. 532.

Trust assets. — The assets of an inter vivos revocable trust funded by the decedent before his or her death are not part of the probate estate and cannot be used to calculate or satisfy the intestate share of an omitted spouse. Bell v. Estate of Bell, 2008-NMCA-045, 143 N.M. 716, 181 P.3d 708, cert. quashed, 145 N.M. 532.

The intestate share of an omitted spouse is not a statutory allowance as contemplated by 46A-5-505(A)(3) NMSA 1978. Bell v. Estate of Bell, 2008-NMCA-045, 143 N.M. 716, 181 P.3d 708, cert. quashed, 145 N.M. 532.

Share of omitted spouse. — Where decedent's will omitted his spouse and his only child, who was an adopted son, and disposed of the entire estate to a third person, the surviving spouse was entitled to a one-fourth interest. Coleman v. Offutt, 104 N.M. 192, 718 P.2d 702 (Ct. App. 1986).

Effect of remarriage. — Under former 30-1-7.1 A, 1953 Comp., a will executed in 1965 while testator was married was revoked as to his wife in 1969 when he remarried her after an intervening divorce. Testator died intestate as to his wife, a surviving spouse,

who inherited the entire estate. Chavez v. Montoya, 89 N.M. 667, 556 P.2d 353 (1976) (decided under former law).

Evidence sufficient to support decedent's intent to provide for wife outside will. — Evidence of transfers of funds to joint checking and savings accounts and transfer of a retirement account to a wife was sufficient to support the jury's determination of the decedent's intent to provide for his wife in the form of transfers outside of the will in lieu of a testamentary provision. Cunningham v. Taggart, 95 N.M. 117, 619 P.2d 562 (Ct. App. 1980).

Section applies where postmarriage will procured by spouse's undue influence. — The proper area of inquiry is whether the decedent was competent to enter into a valid marriage. If so, even if the wife exercised undue influence so as to invalidate a later testamentary disposition, the statutory provision granting an intestate share to an omitted spouse still controls. Rutland v. Scanlan, 99 N.M. 229, 656 P.2d 892 (Ct. App. 1982).

Marriage revokes antenuptial will. — The marriage of a testator, whether or not it is followed by the birth of a child, revokes an antenuptial will. Teopfers v. Kaeufer, 12 N.M. 372, 78 P. 53 (1904)(decided under former law).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For comment, "In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage," see 9 N.M.L. Rev. 113 (1978-79).

For annual survey of New Mexico law relating to estates and trusts, see 12 N.M.L. Rev. 363 (1982).

For article, "Survey of New Mexico Law, 1982-83: Estates and Trusts," see 14 N.M.L. Rev. 153 (1984).

For annual survey of New Mexico law of estates and trusts, see 19 N.M.L. Rev. 669 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 68, 69, 316, 578, 643, 652, 653.

What constitutes transfer outside the will precluding surviving spouse from electing statutory share under Uniform Probate Code, § 2-301, 11 A.L.R.4th 1213.

Construction, application, and effect of statutes which deny or qualify surviving spouse's right to elect against deceased spouse's will, 48 A.L.R.4th 972.

94 C.J.S. Wills §§ 95, 97; 95 C.J.S. Wills §§ 595, 597.

45-2-302. Omitted children.

A. Except as provided in Subsection B of this section, if a testator fails to provide in his will for any of his children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate as follows:

(1) if the testator had no child living when he executed the will, an omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all of the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will; or

(2) if the testator had one or more children living when he executed the will and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:

(a) the portion of the testator's estate in which the omitted after-born or after-adopted child is entitled to share is limited to devises made to the testator's then-living children under the will;

(b) the omitted after-born or after-adopted child is entitled to receive the share of the testator's estate, as limited in Subparagraph (a) of Paragraph (2) of Subsection A of this section, that the child would have received had the testator included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child;

(c) to the extent feasible, the interest granted an omitted after-born or after-adopted child under this section must be of the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children under the will; and

(d) in satisfying a share provided by Paragraph (2) of Subsection A of this section, devises to the testator's children who were living when the will was executed abate ratably. In abating the devices of the then-living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator.

B. Subsection A of this section does not apply if:

(1) it appears from the will that the omission was intentional; or

(2) the testator provided for the omitted after-born or after-adopted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

C. If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child.

D. In satisfying a share provided by Paragraph (1) of Subsection A of this section, devises made by the will abate pursuant to Section 45-3-902 NMSA 1978.

History: 1953 Comp., § 32A-2-302, enacted by Laws 1975, ch. 257, § 2-302; 1977, ch. 121, § 6; repealed and reenacted by Laws 1993, ch. 174, § 18; 1995, ch. 210, § 6.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Laws official comment to 2-302 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 18 repealed former 45-2-302 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-302, and enacted a new section, effective July 1, 1993.

Compiler's notes. — This section is similar to former 30-1-7, 1953 Comp.

Cross references. — For omitted spouse, *see* 45-2-301 NMSA 1978.

The 1995 amendment, effective July 1, 1995, substituted "Subsection A of this section does not apply" for "Neither Subsection A or C of this section applies" at the beginning of Subsection B and deleted "Except as provided in Subsection B of this section" at the beginning of Subsection C.

Legislative purpose. — The purpose of 30-1-7, 1953 Comp. (repealed), is to deal with those situations where a descendant is unintentionally omitted or is unknown to the testator when the will is executed and the section is not applicable where the child is mentioned without a legacy or other provision being made for him. Mares v. Martinez, 54 N.M. 1, 212 P.2d 772 (1949) (decided under former law).

Scope covers child who would inherit from intestate parent. — Former 30-1-7, 1953 Comp., relating to children omitted from will, covered any child who would inherit from an intestate parent. Gallup v. Bailey, 46 N.M. 344, 129 P.2d 56 (1942) (decided under former law).

Testator deemed intestate as to pretermitted child. — A testator who omits his child from his will is deemed to have died intestate as to such child or its descendants. Hagerman v. Gustafson, 85 N.M. 420, 512 P.2d 1256 (1973) (decided under former law); Price v. Johnson, 78 N.M. 123, 428 P.2d 978 (1967), appeal following remand, Price v. Atlantic Ref. Co., 79 N.M. 629, 447 P.2d 509 (1968) (decided under former law).

Portion of estate to be intestate share. — A pretermitted child takes the portion of the testator's estate he would have taken if the parent had died intestate. Dunham v. Stitzberg, 53 N.M. 81, 201 P.2d 1000 (1948), overruled on other grounds, Conley v. Quinn, 58 N.M. 771, 276 P.2d 906 (1954) (decided under former law).

Probate cannot be contested where rights arise independent of will. — Where rights of pretermitted child arise outside of and independent of the will, probate of the will cannot be contested. Dunham v. Stitzberg, 53 N.M. 81, 201 P.2d 1000 (1948), overruled on other grounds, Conley v. Quinn, 58 N.M. 771, 276 P.2d 906 (1954) (decided under former law).

Uniform Probate Code provision distinguished. — The difference in wording between § 2-302 of the Uniform Probate Code and Subsection A of this section negates the Uniform Code's presumption that if a child or the child's issue born before execution of a will is not mentioned in the will of a testator, it is presumed that the testator intended to disinherit the child or issue. New Mexico requires the testator to satisfy one of the statutory requirements in order to disinherit even children born or adopted before the execution of the will. In re Estate of Hilton, 98 N.M. 420, 649 P.2d 488 (Ct. App. 1982) (decided under former law).

Affirmative indication of disinheritance required. — To disinherit a child, an affirmative, not negative, indication of intention must appear on the face of the will. Sanchez v. Quintana, 97 N.M. 508, 641 P.2d 539 (Ct. App. 1982) (decided under former law).

Disinheriting possible if mentioning by name or clearly excluding as a class. — Since an omitted child or heir does not assert his rights by contesting the will but by claiming an intestate share of the decedent's estate, for the language of a will to meet the requirements of Subsection A(1), the clause must either mention the claimant by name or fairly and clearly express an intention on the part of the testator to exclude the claimant as a group or class. In re Estate of Hilton, 98 N.M. 420, 649 P.2d 488 (Ct. App. 1982) (decided under former law).

Clause held sufficient to disinherit. — A clause in a will leaving a nominal sum to anyone who claims to be an heir or contests the will is sufficient to disinherit the issue of one's child under the New Mexico Uniform Probate Code. In re Estate of Hilton, 98 N.M. 420, 649 P.2d 488 (Ct. App. 1982) (decided under former law).

Clause held insufficient to disinherit. — A declaration of a testator that "I have no children whom I have omitted to name or provide for herein" is not an intentional omission. Sanchez v. Quintana, 97 N.M. 508, 641 P.2d 539 (Ct. App. 1982) (decided under former law).

Remembrance of person is not statement of relationship required. — Former 30-1-7, 1953 Comp., required only that a person bearing the relationship of child, children or descendants of a child or children be remembered in the will and not that such

relationship be stated in the will. Mares v. Martinez, 54 N.M. 1, 212 P.2d 772 (1949) (decided under former law).

Determination of intentional omission. — Under 30-1-7, 1953 Comp. (now repealed), the question of whether or not a child was intentionally omitted from the testator's will could only be answered with reference to the will itself, and not through recourse to extrinsic evidence. Padilla v. Padilla, 91 N.M. 160, 571 P.2d 817 (1977) (decided under former law).

Scope of inquiry. — "It appears from the will," in Subsection A(1), means that a court is bound by the contents of the will. Extrinsic evidence of the decedent's intention falls on the wayside. Sanchez v. Quintana, 97 N.M. 508, 641 P.2d 539 (Ct. App. 1982) (decided under former law).

Extrinsic evidence to show awareness of child's existence. — The trial court can properly receive extrinsic evidence to show the testator's awareness of a child's existence at the time he executed his will - since this goes to the issue of whether he had otherwise provided for him during his lifetime. In re Estate of Hilton, 98 N.M. 420, 649 P.2d 488 (Ct. App. 1982) (decided under former law).

Child can be disinherited without being mentioned in a will, unless it appears that the omission to mention such child occurred because of mistake or inadvertence. In re Estate of McMillen, 12 N.M. 31, 71 P. 1083 (1903) (decided under former law).

New Mexico pretermitted child law applies despite Texas will execution. — Section 30-1-7, 1953 Comp. (repealed), governed rights of pretermitted child to New Mexico property even though the will was executed in Texas. Price v. Johnson, 78 N.M. 123, 428 P.2d 978 (1967), appeal following remand, Price v. Atlantic Ref. Co., 79 N.M. 629, 447 P.2d 509 (1968) (decided under former law).

Inheritance by daughter of pretermitted son. — A daughter of a deceased son, of whom no mention was made in the will, was entitled to a specified interest in the property which testator left. Rhodes v. Yater, 27 N.M. 489, 202 P. 698 (1921) (decided under former law).

Paternity of illegitimate sons established despite evidence of impotency. — Paternity and rights of inheritance of illegitimate sons was established where evidence of impotency was insufficient as against evidence of conduct and consent to have name on birth certificate of the sons as father. Sanchez v. Torres, 38 N.M. 556, 37 P.2d 805 (1934) (decided under former law).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For comment, "In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage," see 9 N.M.L. Rev. 113 (1978-79).

For annual survey of New Mexico law relating to estates and trusts, see 13 N.M.L. Rev. 395 (1983).

For article, "Survey of New Mexico Law, 1982-83: Estates and Trusts," see 14 N.M.L. Rev. 153 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 642 to 659.

Intention of testator as regards child not provided for by will as affecting applicability of statutes to prevent disinheritance of children, 65 A.L.R. 472.

Nature of, and remedies for enforcement of, the interest which a pretermitted child takes by virtue of statute where parent leaves will, 123 A.L.R. 1073.

Illegitimate child as within contemplation of statute regarding rights of child pretermitted by will, or statute preventing disinheritance of child, 142 A.L.R. 1447.

Disinheritance provision or mere nominal bequest as affecting application of statute for benefit of pretermitted children, 152 A.L.R. 723.

What, other than express disinheritance or bequest, avoids application of statute for benefit of pretermitted or afterborn children, 170 A.L.R. 1317.

Adoption of child as revoking will, 24 A.L.R.2d 1085.

Statutory revocation of will by subsequent birth or adoption of child, 97 A.L.R.2d 1044.

Conflict of laws as to pretermission of heirs, 99 A.L.R.3d 724.

Right of illegitimate grandchildren to take under testamentary gift to "grandchildren," 17 A.L.R.4th 1292.

Pretermitted heir statutes: what constitutes sufficient testamentary reference to, or evidence of contemplation of, heir to render statute inapplicable, 83 A.L.R.4th 779.

Adopted child as within class named in testamentary gift, 36 A.L.R.5th 395.

95 C.J.S. Wills § 317; 96 C.J.S. Wills §§ 1159, 1166.

PART 4
EXEMPT PROPERTY AND ALLOWANCES

45-2-401. Applicable law.

Chapter 45, Article 2, Part 4 NMSA 1978 applies to the estate of a decedent who dies domiciled in this state. Rights to family allowance and personal property allowance for a decedent who dies not domiciled in this state are governed by the laws of the decedent's domicile at death.

History: 1953 Comp., § 32A-2-401, enacted by Laws 1975, ch. 257, § 2-401; repealed and reenacted by Laws 1993, ch. 174, § 19.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Laws official comment to 2-401 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 19 repealed former 45-2-401 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-401, relating to family allowances and enacted a new section, effective July 1, 1993.

45-2-402. Family allowance.

A decedent's surviving spouse is entitled to a family allowance of thirty thousand dollars ($30,000). If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a family allowance amounting to thirty thousand dollars ($30,000) divided by the number of minor and dependent children of the decedent. The family allowance is exempt from and has priority over all claims against the estate. Family allowance is in addition to any share passing to the surviving spouse or minor or dependent children by intestate succession or by the decedent's will, unless otherwise provided by the decedent in the will or other governing instrument.

History: 1953 Comp., § 32A-2-402, enacted by Laws 1975, ch. 257, § 2-402; repealed and reenacted by Laws 1993, ch. 174, § 20; 1995, ch. 210, § 7.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Laws official comment to 2-402 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 20 repealed former 45-2-402 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-402, relating to personal property allowances, and enacted a new section, effective July 1, 1993.

Compiler's notes. — This section includes within its scope some of the functions of former 31-4-1, 1953 Comp.

Cross references. — For allowance of claims by court, after petition or proceedings, *see* 45-3-806 and 45-3-807 NMSA 1978.

For rules governing garnishment and writs of execution in the district, magistrate and metropolitan courts, *see* 1-065.1, 2-801 and 3-801 NMRA, respectively.

For form for claim of exemptions on executions, *see* 4-803 NMRA.

For form for order on claim of exemption and order to pay in execution proceedings, *see* 4-804 NMRA.

For form for application for writ of garnishment and affidavit, *see* 4-805 NMRA.

For form for notice of right to claim exemptions from execution, *see* 4-808A NMRA.

For form for claim of exemption from garnishment, *see* 4-809 NMRA.

The 1995 amendment, effective July 1, 1995, substituted "thirty thousand dollars ($30,000)" for "fifteen thousand dollars ($15,000)" in the first and second sentences and, in the last sentence, inserted "by intestate succession or" and substituted "by the descendant in the will or other governing instrument" for "or by intestate succession" at the end.

Death of surviving spouse prior to distribution of statutory allowances. — The legislature did not intend that statutory allowances, which are not claimed prior to the death of the surviving spouse, be transferred from the decedent's estate to the estate and heirs of the surviving spouse. Duran v. Vigil, 2012-NMCA-121, 296 P.3d 1209, cert. denied, 2012-NMCERT-011.

Transfers outside of a will cannot offset or preclude the statutory allowances. Bell v. Estate of Bell, 2008-NMCA-045, 143 N.M. 716, 181 P.3d 708, cert. quashed, 2008-NMCERT-004, 144 N.M. 47, 183 P.3d 932.

Policy against waiver. — The policy behind the statutory allowance of family allowance argues against finding a waiver in the absence of clear explicit language. Salopek v. Hoffman, 2005-NMCA-016, 137 N.M. 47, 107 P.3d 1, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Where terms of post-nuptial agreement are too general and too ambiguous, the agreement will not support a finding of waiver of the family allowance. Salopek v. Hoffman, 2005-NMCA-016, 137 N.M. 47, 107 P.3d 1, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Entitlement to allowances. — The surviving spouse is entitled to the allowances provided under this section and 45-2-403 NMSA 1978 notwithstanding contrary intentions expressed in the deceased spouse's will. Brito v. Jewell, 2001-NMCA-008, 130 N.M 93, 18 P.3d 334.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 97 C.J.S. Wills §§ 1262, 1280, 1287.

45-2-403. Personal property allowance.

In addition to the family allowance, the decedent's surviving spouse is entitled from the estate to a value, not exceeding fifteen thousand dollars ($15,000) in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, the decedent's children who are devisees under the will, who are entitled to a share of the estate pursuant to Section 45-2-302 NMSA 1978 or, if there is no will, who are intestate heirs are entitled jointly to the same value. If encumbered chattels are selected and the value in excess of security interests plus that of other exempt property is less than fifteen thousand dollars ($15,000) or if there is not fifteen thousand dollars ($15,000) worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the fifteen thousand dollar ($15,000) value. Rights to specific property for the personal property allowance and assets needed to make up a deficiency in the property have priority over all claims against the estate, but the right to any assets to make up a deficiency of exempt property abates as necessary to permit earlier payment of the family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by intestate succession or by the decedent's will, unless otherwise provided by the decedent in the will or other governing instrument.

History: 1978 Comp., § 45-2-403, enacted by Laws 1993, ch. 174, § 21; 1995, ch. 210, § 8; 1997, ch. 95, § 1; 1999, ch. 79, § 1; 2011, ch. 124, § 21.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Laws official comment to 2-403 UPC.

Cross references. — For rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, *see* 1-065.1, 2-801 and 3-801 NMRA, respectively.

For form for claim of exemptions on executions, *see* 4-803 NMRA.

For form for order on claim of exemption and order to pay in execution proceedings, *see* 4-804 NMRA.

For form for application for writ of garnishment and affidavit, *see* 4-805 NMRA.

For form for notice of right to claim exemptions from execution, *see* 4-808A NMRA.

For form for claim of exemption from garnishment, *see* 4-809 NMRA.

The 2011 amendment, effective January 1, 2012, provided that rights to specific property for the personal property allowance needed to make up a deficiency in the property have priority over all claims against the estate.

The 1999 amendment, effective June 18, 1999, in the second sentence, inserted the language beginning "who are" and ending "intestate heirs".

The 1997 amendment, effective April 8, 1997, substituted "fifteen thousand dollars ($15,000)" for "ten thousand dollars ($10,000)" throughout the section and deleted "who is a devisee under the will" following "spouse" in the first sentence.

The 1995 amendment, effective July 1, 1995, inserted "who is a devisee under the will" in the first sentence; inserted "who are devisees under the will or, if there is no will, who are intestate heirs" in the second sentence; and, in the last sentence, inserted "by intestate succession or" and substituted "by the descendant in the will or other governing instrument" for "or by intestate succession" at the end.

Transfers outside of a will cannot offset or preclude the statutory allowances. Bell v. Estate of Bell, 2008-NMCA-045, 143 N.M. 716, 181 P.3d 708, cert. quashed, 2008-NMCERT-004, 144 N.M. 47, 183 P.3d 932.

Death of surviving spouse prior to distribution of statutory allowances. — The legislature did not intend that statutory allowances, which are not claimed prior to the death of the surviving spouse, be transferred from the decedent's estate to the estate and heirs of the surviving spouse. Duran v. Vigil, 2012-NMCA-121, 296 P.3d 1209, cert. denied, 2012-NMCERT-011.

Policy against waiver. — The policy behind the statutory allowance personal property allowance argues against finding a waiver in the absence of clear explicit language. Salopek v. Hoffman, 2005-NMCA-016, 137 N.M. 47, 107 P.3d 1, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Where terms of post-nuptial agreement are too general and too ambiguous, the agreement will not support a finding of waiver of the personal property allowance. Salopek v. Hoffman, 2005-NMCA-016, 137 N.M. 47, 107 P.3d 1, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Entitlement to allowances. — The surviving spouse is entitled to the allowances provided under this section and 45-2-402 NMSA 1978 notwithstanding contrary intentions expressed in the deceased spouse's will. Brito v. Jewell, 2001-NMCA-008, 130 N.M 93, 18 P.3d 334.

Law reviews. — For comment, "In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage," see 9 N.M.L. Rev. 113 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 94 C.J.S. Wills § 167; 97 C.J.S. Wills §§ 1287, 1288.

45-2-404. Reserved.

ANNOTATIONS

Repeals. — Laws 1993, ch. 174, § 22 repealed 45-2-404 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-404, relating to the source and determination of property to satisfy family allowances, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMONESOURCE.COM*.

45-2-405. Source, determination and documentation.

If the estate is otherwise sufficient, property specifically devised may not be used to satisfy rights to family allowance or personal property allowance. Subject to this restriction, the surviving spouse, guardians of minor children or children who are adults may select property of the estate as family allowance and personal property allowance. The personal representative may make those selections if the surviving spouse, the children or the guardians of the minor children are unable or fail to do so within a reasonable time or there is no guardian of a minor child. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as family allowance or personal property allowance. The personal representative or an interested person aggrieved by any selection, determination, payment, proposed payment or failure to act under this section may petition the court for appropriate relief, which may include a family allowance or personal property allowance other than that which the personal representative determined or could have determined.

History: 1953 Comp., § 32A-2-405, enacted by Laws 1975, ch. 257, § 2-405; repealed and reenacted by Laws 1993, ch. 174, § 23.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 174, § 23 repealed former 45-2-405 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-405, relating to the modification of exemptions, and enacted a new section, effective July 1, 1993.

45-2-406. Modification of exemptions.

With respect to the estate of a decedent, the allowances granted pursuant to Sections 45-2-402 and 45-2-403 NMSA 1978 are in lieu of the exemptions provided in Sections 42-10-1, 42-10-2, 42-10-9 and 42-10-10 NMSA 1978.

History: 1978 Comp., § 45-2-406, enacted by Laws 1993, ch. 174, § 24; 1995, ch. 210, § 9.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, substituted "Sections 42-10-1, 42-10-2, 42-10-9 and 42-10-10 NMSA 1978" for "Sections 42-10-1 through 42-10-12 NMSA 1978".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 96 C.J.S. Wills § 760; 97 C.J.S. Wills § 1262.

45-2-407. Waiver of rights.

A. The rights of the surviving spouse to family allowance and personal property allowance, or either of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the surviving spouse.

B. A surviving spouse's waiver is not enforceable if the surviving spouse proves that:

(1) the surviving spouse did not execute the waiver voluntarily; or

(2) the waiver was unconscionable when it was executed and, before execution of the waiver, the surviving spouse:

(a) was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;

(b) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and

(c) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.

C. An issue of unconscionability or voluntariness of a waiver is for decision by the court as a matter of law.

D. Unless it provides to the contrary, a waiver of "all rights", or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of family allowance and personal property allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to each from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

History: 1978 Comp., § 45-2-407, enacted by Laws 1995, ch. 210, § 10.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the act effective July 1, 1995.

Policy against waiver. — The policy behind the statutory allowances of family allowance and personal property allowance argues against finding a waiver in the absence of clear explicit language. Salopek v. Hoffman, 2005-NMCA-016, 137 N.M. 47, 107 P.3d 1, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

No retroactive application. — This section, which became effective July 1, 1995, cannot be applied retroactively to a postnuptial agreement entered into by the parties in 1980. Salopek v. Hoffman, 2005-NMCA-016, 137 N.M. 47, 107 P.3d 1, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Where terms of postnuptial agreement are too general and too ambiguous, the agreement will not support a finding of waiver of the family and personal property allowances. Salopek v. Hoffman, 2005-NMCA-016, 137 N.M. 47, 107 P.3d 1, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

PART 5
WILLS

45-2-501. Who may make will.

An individual eighteen or more years of age who is of sound mind or an emancipated minor who is of sound mind may make a will.

History: 1953 Comp., § 32A-2-501, enacted by Laws 1975, ch. 257, § 2-501; repealed and reenacted by Laws 1993, ch. 174, § 25; 2011, ch. 124, § 22.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 174, § 25 repealed former 45-2-501 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-501, and enacted a new section, effective July 1, 1993.

Compiler's notes. — This section is similar to former 30-1-1, 1953 Comp.

Cross references. — For age of majority, *see* 12-2A-3 and 28-6-1 NMSA 1978.

The 2011 amendment, effective January 1, 2012, permitted an emancipated minor of sound mind to make a will.

Person under conservatorship. — Substantial evidence supported the district court's finding that a 93-year-old testator under conservatorship had sufficient testamentary

capacity to execute a will; the Uniform Probate Code distinguishes a conservatorship from a guardianship and contains no prohibition on executing a new will merely because a conservator of the person's property has been appointed. Lucero v. Lucero (In re Estate of Lucero), 118 N.M. 636, 884 P.2d 527 (Ct. App. 1994), superseded by statute, Chapman v. Varela, 2009-NMSC-041, 146 N.M. 680, 213 P.3d 1109.

Sufficient evidence of testamentary capacity. — There was substantial evidence to support the trial court's finding that the decedent had testamentary capacity to make the will in question, including the testimony of the two attesting witnesses to the will, both lawyers, the lawyer who drew the will in question, and two doctors, that decedent was competent to make the will, notwithstanding evidence that decedent had been adjudicated incompetent and had a guardian appointed to manage decedent's property a week later. Hummer v. Betenbough, 75 N.M. 274, 404 P.2d 110 (1965).

Evidence supported finding that 72-year-old testator, who married testator's former housekeeper after entering hospital as a patient and who executed will following the marriage, leaving testator's property to testator's spouse, had testamentary capacity sufficient to execute will, and was not under undue influence even though testator's earlier will had named testator's sibling to receive testator's property and even though testator's spouse had only taken care of and waited on testator as his housekeeper for two years prior to his death. McElhinney v Kelly, 67 N.M. 399, 56 P.2d 113 (1960).

Evidence of lack of testamentary intent. — The jury had no substantial evidence from which it could conclude that testator was lacking the mental capacity to make a will since all of the testimony reflected a perfectly natural deterioration of decedent in decedent's later years, including physical weakness, mental weakness, loss of some memory and some power of decision, but there not a single word of testimony addressed to the three controlling elements of testamentary capacity, namely: (1) knowledge of the meaning of the act of making a will, (2) knowledge of the character and extent of the estate and (3) knowledge of the natural objects of testator's bounty. Calloway v. Miller, 58 N.M. 124, 266 P.2d 365 (S. Ct. 1954).

Presumption of incapacity. — Adjudication of testator as insane a few months before testator executed purported will raised a presumption of lack of testamentary capacity that was not overcome by decedent's siblings' evidence. Hubbell v. First Nat'l Bank, 57 N.M. 649, 261 P.2d 833 (1953).

Right to dispose of estate by will given. — This section (30-1-1, 1953 Comp., repealed) gives every person 21 years old (now age of majority) and of sound mind the right to dispose by will of his separate estate without restriction. In re Estate of McMillen, 12 N.M. 31, 71 P. 1083 (1903) (decided under prior law).

Law reviews. — For article, "Mental Incompetency to Make a Will," see 7 Nat. Resources J. 89 (1967).

For comment, "Community Property - Power of Testamentary Disposition - Inequality Between Spouses," see 7 Nat. Resources J. 645 (1967).

For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For annual survey of New Mexico Law of Wills and Trusts, see 20 N.M.L. Rev. 439 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 56, 70 to 101.

Epilepsy as affecting testamentary capacity, 16 A.L.R. 1418.

Admissibility of evidence other than testimony of subscribing witnesses to prove due execution of will or testamentary capacity, 63 A.L.R. 1195.

Admissibility of evidence of reputation on issue of mental condition, or testamentary or contractual capacity or incapacity, 105 A.L.R. 1443.

Illustrations of instructions or requested instructions as to effect of unnaturalness or unreasonableness of provisions of will on question of testamentary capacity or undue influence, 137 A.L.R. 989.

Admissibility and probative force, on issue of competency to execute an instrument, of evidence of incompetency at other times, 168 A.L.R. 969.

Insane delusion as invalidating a will, 175 A.L.R. 882.

Admissibility, on issue of testamentary capacity, of previously executed wills, 89 A.L.R.2d 177.

Effect of guardianship of adult on testamentary capacity, 89 A.L.R.2d 1120.

Testamentary capacity as affected by use of intoxicating liquor or drugs, 9 A.L.R.3d 15.

May parts of will be upheld notwithstanding failure of other parts for lack of testamentary capacity or undue influence, 64 A.L.R.3d 261.

Sufficiency of evidence that will was not accessible to testator for destruction, in proceeding to establish lost will, 86 A.L.R.3d 980.

Base for determining amount of bequest of a specific percent or proportion of estate or property, 87 A.L.R.3d 605.

Condition that devisee or legatee shall renounce, embrace, or adhere to specified religious faith, 89 A.L.R.3d 984.

Alzheimer's disease as affecting testamentary capacity, 47 A.L.R.5th 523.

94 C.J.S. Wills § 150; 95 C.J.S. Wills § 462.

45-2-502. Execution; witnessed wills.

Except as provided in Sections 45-2-506 and 45-2-513 NMSA 1978, a will must be:

A. in writing;

B. signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and

C. signed by at least two individuals, each of whom signed in the presence of the testator and of each other after each witnessed the signing of the will as described in Subsection B of this section.

History: 1953 Comp., § 32A-2-502, enacted by Laws 1975, ch. 257, § 2-502; repealed and reenacted by Laws 1993, ch. 174, § 26; 1995, ch. 210, § 11.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 174, § 26 repealed former 45-2-502 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-502, and enacted a new section, effective July 1, 1993.

Compiler's notes. — This section is similar to former 30-1-4, 1953 Comp.

Cross references. — For who may witness, *see* 45-2-505 NMSA 1978.

For general rule of competency of witnesses, *see* 11-601 NMRA.

The 1995 amendment, effective July 1, 1995, rewrote the section to such an extent that a detailed comparison would be impracticable.

Intent of decedent. — The totality of the circumstances did not support contestant's claim of undue influence by beneficiary upon the testator; without such a showing, the court cannot speculate upon facts underlying the will without jeopardizing the principle of testamentary freedom. Gersbach v. Warren, 1998-NMSC-013, 125 N.M. 269, 960 P.2d 811.

Witness’s undue influence questioned. — A devisee’s signature as a third witness was unnecessary to prove due execution of a contested will (45-2-502(A) NMSA 1978), so it could not be said that devisee participated in procuring the will by securing its execution. Martinez v. Cantu, 108 N.M. 583, 775 P.2d 1300 (Ct. App. 1988).

A complete attestation clause above the signature of the witnesses to a will raises a presumption of the due execution of the will, if the signatures of the testator and witnesses are proved to be genuine. In re Akin's Estate, 41 N.M. 566, 72 P.2d 21 (1937); Sanchez v. Quintana, 97 N.M. 508, 641 P.2d 539 (Ct. App. 1982).

Presumption of due execution is not sufficient to create a prima facie case for the proponents of a will. New Mexico is now guided by Rule 301, N.M.R. Evid. Sanchez v. Quintana, 97 N.M. 508, 641 P.2d 539 (Ct. App. 1982).

In the absence of an attestation clause, if the will is subscribed by the genuine signature of the testator with the genuine signatures of two persons under the word "witnesses" below the signature of the testator, the presumption of due execution applies if the subscribing witnesses are dead or cannot recall with certainty any of the details of the transaction. In re Akin's Estate, 41 N.M. 566, 72 P.2d 21 (1937).

Same number of witnesses for codicil and will. — A codicil must be attested by the same number of witnesses as is required for the original will. Garcia y Perea v. Barela, 5 N.M. 458, 23 P. 766 (1890), rehearing denied Garcia y Perea v. Barela, 6 N.M. 239, 27 P. 507 (1891).

Where oral declarations by testator of change of will admissible. — Declarations of the testator in a probate proceeding tending to corroborate existing physical evidence showing that a will made and executed by testator had been later changed by him were admissible as an exception to the hearsay rule. In re Roeder's Estate, 44 N.M. 429, 103 P.2d 631, later appeal, 44 N.M. 578, 106 P.2d 847 (1940).

Essential hallmarks of will. — Revocability during a testator's lifetime, and an intent that the disposition take effect only after the death of the testator, are essential hallmarks of a will. Mills v. Kelly, 99 N.M. 482, 660 P.2d 124 (Ct. App. 1983).

Testator must manifest that will signed for him "at his request". — When a testator directs that an individual sign a will for him on his behalf, Subsection B of 45-2-502 NMSA 1978 requires publication or some manifestation by the testator that the instrument is being signed "at his request as and for his last will and testament." Mills v. Kelly, 99 N.M. 482, 660 P.2d 124 (Ct. App. 1983).

Testator must indicate to witnesses that instrument signed is his will. Mills v. Kelly, 99 N.M. 482, 660 P.2d 124 (Ct. App. 1983).

Someone other than testator may declare instrument witnessed to be testator's will. — A declaration that the instrument to be witnessed is the will of testator may be made by one other than the testator if the testator indicates his agreement thereto. Mills v. Kelly, 99 N.M. 482, 660 P.2d 124 (Ct. App. 1983).

Nontestamentary document insufficient. — A document purporting to revoke a prior valid will that did not contain testamentary provisions and that was witnessed only by

notary public did not satisfy the requirements of 45-2-507 NMSA 1978 or this section. Sanchez v. Martinez, 1999-NMCA-093, 127 N.M. 650, 985 P.2d 1230.

Notary public as witness. — Where a notary public drafted a will for a decedent, saw the decedent sign the document, signed the document in the presence of the decedent and the other witness, and identified himself in the document as a notary public, he signed the will as a witness. Martinez v. Martinez, 99 N.M. 809, 664 P.2d 1007 (Ct. App. 1983).

Evidence sufficient to establish prima facie proof of due execution. McKay v. Kimble, 117 N.M. 258, 871 P.2d 22 (Ct. App. 1994).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For article, "Survey of New Mexico Law, 1982-83: Estates and Trusts," see 14 N.M.L. Rev. 153 (1984).

For comment, "Effectuating the Intent of the Testator: New Mexico Boys Ranch, Inc. v. Hanvey," see 14 N.M.L. Rev. 419 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 23 to 36, 254, 271, 329.

Manner of signing as affecting sufficiency of signature of testator, 31 A.L.R. 682, 42 A.L.R. 954, 114 A.L.R. 1110.

Effect of illegibility of signature of testator or witness to will, 64 A.L.R. 208.

Acknowledgment of signature by testator or witness to will as satisfying statutory requirement that testator or witness sign in the presence of each other, 115 A.L.R. 689.

Admissibility of testator's declarations upon the issue of the genuineness or due execution of purported will, 62 A.L.R.2d 855.

Will or instrument in form of will as sufficient memorandum of contract to devise or bequeath, 94 A.L.R.2d 921.

Necessity that attesting witness realize instrument was intended as will, 71 A.L.R.3d 877.

Requirement that holographic will, or its material provisions, be entirely in testator's handwriting as affected by appearance of some printed or written matter not in testator's handwriting, 37 A.L.R.4th 528.

Payable-on-death savings account or certificate of deposit as will, 50 A.L.R.4th 272.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings, 53 A.L.R.4th 561.

Proper execution of self-proving affidavit as validating or otherwise curing defect in execution of will itself, 1 A.L.R.5th 965.

94 C.J.S. Wills §§ 152, 177, 182, 183.

45-2-503. Reserved.

ANNOTATIONS

Compiler's notes. — Laws 1975, ch. 257, § 2-503, contained this section number, but no accompanying text.

Section 2-503 UPC provides a harmless error provision for failure to comply with the provisions of 2-502 UPC relating to the execution of wills.

45-2-504. Self-proved will.

A. A will may be simultaneously executed, attested and made self-proved by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:

"I, _____, the testator, sign my name to this instrument this _____ day of _____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind and under no constraint or undue influence.

_____

Testator

We, _____, _____, the witnesses, sign our names to this instrument, and being first duly sworn, do hereby declare to the undersigned authority that the testator signs and executes this instrument as his will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence of the testator, and in the presence of each other hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind and under no constraint or undue influence.

_____

Witness

_____

Witness

The State of _____

County of _____

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____.

(Seal)

Signed _____

_____

(Official capacity of officer".

B. An attested will may be made self-proved at any time after its execution by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgment occurs and evidenced by the officer's certificate, under official seal, attached or annexed to the will in substantially the following form:

"The State of _____

County of _____

We, _____, _____ and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that he signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence of the testator, and in the presence of each other signed the will as witness, and that to the best of our knowledge the testator was at that time eighteen years of age or older, of sound mind and under no constraint or undue influence.

_____

Testator

_____

Witness

_____

Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ of _____.

(Seal)

Signed _____

_____

(Official capacity of officer".

C. A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will if necessary to prove the will's due execution.

History: 1953 Comp., § 32A-2-504, enacted by Laws 1975, ch. 257, § 2-504; repealed and reenacted by Laws 1993, ch. 174, § 27; 1995, ch. 210, § 12.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-504 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 27 repealed former 45-2-504 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-504, and enacted a new section, effective July 1, 1993.

Compiler's notes. — This section is similar to former 30-2-8.2, 1953 Comp.

Cross references. — For age of majority, *see* 12-2A-3 and 28-6-1 NMSA 1978.

The 1995 amendment, effective July 1, 1995, substituted "best of our knowledge" for "best of his knowledge" near the end of the form in Subsection A and made minor stylistic changes.

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 23 to 36, 70 to 101, 254, 271.

Testator's name in body of instrument as sufficient signature where statute does not require will to be signed at end, 29 A.L.R. 891.

Fingerprints as signature, 72 A.L.R.2d 1267.

Validity of wills signed by mark, stamp or symbol or partial or abbreviated signature, 98 A.L.R.2d 841.

Sufficiency of testator's acknowledgment of signature from his conduct and the surrounding circumstances, 7 A.L.R.3d 317.

Place of signature of attesting witness, 17 A.L.R.3d 705, 1 A.L.R.5th 965.

Testator's illiteracy or lack of knowledge of language in which will is written as affecting its validity, 37 A.L.R.3d 889.

When is will signed at "end" or "foot" as required by statute, 44 A.L.R.3d 701.

94 C.J.S. Wills §§ 152, 177, 179, 182, 183.

45-2-505. Who may witness.

A. An individual generally competent to be a witness may act as a witness to a will.

B. The signing of a will by an interested witness does not invalidate the will or any provision of it.

History: 1953 Comp., § 32A-2-505, enacted by Laws 1975, ch. 257, § 2-505; repealed and reenacted by Laws 1993, ch. 174, § 28.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-505 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 28 repealed former 45-2-505 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-505, and enacted a new section, effective July 1, 1993.

Compiler's notes. — This section is different from former 30-1-5, 1953 Comp., relating to disqualifications of witnesses.

Interested party as witness. — Under the Probate Code (45-2-505 NMSA 1978), a will is not invalid because it was signed by an interested witness. Martinez v. Cantu, 108 N.M. 583, 775 P.2d 1300 (Ct. App. 1988).

Notary public as witness. — Where a notary public drafted a will for a decedent, saw the decedent sign the document, signed the document in the presence of the decedent and the other witness, and identified himself in the document as a notary public, he signed the will as a witness. Martinez v. Martinez, 99 N.M. 809, 664 P.2d 1007 (Ct. App. 1983) (decided under former law).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M. L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 283 to 312.

Competency, as witness attesting will, of attorney named therein as executor's attorney, 30 A.L.R.3d 1361.

94 C.J.S. Wills §§ 182, 183; 95 C.J.S. Wills § 274.

45-2-506. Choice of law as to execution.

A written will is valid if executed in compliance with Section 45-2-502 NMSA 1978 or if its execution complies with the law at the time of execution of the place where the will is executed or of the law of the place where at the time of execution or at the time of death the testator is domiciled or is a national.

History: 1953 Comp., § 32A-2-506, enacted by Laws 1975, ch. 257, § 2-506; repealed and reenacted by Laws 1993, ch. 174, § 29.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-506 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 29 repealed former 45-2-506 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-506, and enacted a new section, effective July 1, 1993.

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 80 Am. Jur. 2d Wills § 1122.

Retrospective application of statute concerning execution of wills, 111 A.L.R. 910.

Construction of reference in will to statute where pertinent provisions of statute are subsequently changed by amendment or repeal, 63 A.L.R.3d 603.

94 C.J.S. Wills § 15.

45-2-507. Revocation by writing or by act.

A. A will or any part thereof is revoked:

(1) by executing a subsequent will that revokes the previous will or part expressly or by inconsistency;

(2) by executing another subsequent document in the manner provided for in Section 45-2-502 or 45-2-504 NMSA 1978, or both, that expressly revokes the previous will or part thereof; or

(3) by performing a revocatory act on the will if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this paragraph, "revocatory act on the will" includes burning, tearing, canceling, obliterating or destroying the will or any part of it. A burning, tearing or canceling is a "revocatory act on the will", whether or not the burn, tear or cancellation touched any of the words on the will.

B. If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will.

C. The testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked; only the subsequent will is operative on the testator's death.

D. The testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will only to the extent that the subsequent will is inconsistent with the previous will; each will is fully operative on the testator's death to the extent that the wills are not inconsistent.

History: 1953 Comp., § 32A-2-507, enacted by Laws 1975, ch. 257, § 2-507; repealed and reenacted by Laws 1993, ch. 174, § 30; 2011, ch. 124, § 23.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-507 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 30 repealed former 45-2-507 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-507, and enacted a new section, effective July 1, 1993.

Compiler's notes. — Subsections A and B of this section are similar to former 30-1-8, 1953 Comp. Subsection C is similar to former 30-1-8.1, 1953 Comp.

Cross references. — For execution of will, *see* 45-2-502 NMSA 1978.

The 2011 amendment, effective January 1, 2012, provided that a will is revoked by the execution of another subsequent witnessed will or self-proved will that expressly revokes the previous will.

I. GENERAL CONSIDERATION.

Scope of prior section regulating revocation. — This section (30-1-8, 1953 Comp., repealed) addresses itself only to revocation by subsequent written instrument. It does not preempt a revocation by operation of law or revocation by physical act performed on the face of the will. Boddy v. Boddy, 77 N.M. 149, 420 P.2d 301 (1966) (decided under former law).

After statute of limitations has run, validity cannot be contested by an heir on the ground that property settlement and divorce have revoked it. Stitt v. Cox, 52 N.M. 24, 190 P.2d 434 (1948) (decided under former law).

Will may be revoked by operation of law. In re Roeder's Estate, 44 N.M. 578, 106 P.2d 847 (1940); Brown v. Heller, 30 N.M. 1, 227 P. 594 (1924) (decided under former law); Teopfer v. Kaeufer, 12 N.M. 372, 78 P. 53 (1904) (decided under former law).

Generally, as to statutes regulating revocation. — Statutes regulating revocation of wills are generally held to be mandatory and controlling, and a will may be revoked only in the manner described by the statute. Albuquerque Nat'l Bank v. Johnson, 74 N.M. 69, 390 P.2d 657 (1964) (decided under former law).

Section is mandatory only in that it governs the manner by which a will may be revoked by a subsequent written instrument. Boddy v. Boddy, 77 N.M. 149, 420 P.2d 301 (1966) (decided under former law).

Burden of proof. — Party claiming revocation has the burden of establishing that the testator revoked the earlier will. Albuquerque Nat'l Bank v. Johnson, 74 N.M. 69, 390 P.2d 657 (1964) (decided under former law).

Mere intention alone, no matter how unequivocal, is not sufficient to effect the revocation of a will. Perschbacher v. Moseley, 75 N.M. 252, 403 P.2d 693 (1965) (decided under former law).

Isolated surviving paragraph not given effect. — Where almost all the dispositive provisions of a will have been cancelled or where a material portion of the will is cancelled so as to indicate a definite intent that the will be cancelled in its entirety, an isolated paragraph surviving the cancellation will not be given effect. Boddy v. Boddy, 77 N.M. 149, 420 P.2d 301 (1966) (decided under former law).

II. BY WRITING.

Document revoking will was not effective. — A document titled "Revocation of Missing Will" that was signed by the decedent and two witnesses and notarized was ineffective, as a subsequent will, to revoke the decedent's missing will where the document expressly stated that the decedent intended to revoke any and all wills and codicils without making a subsequent will. Gushwa v. Hunt, 2008-NMSC-064, 145 N.M. 286, 197 P.3d 1.

Decedent's act of writing "revoked" across the pages of a photocopy of his will was not effective to revoke the will. Gushwa v. Hunt, 2008-NMSC-064, 145 N.M. 286, 197 P.3d 1.

Intention insufficient. — A declared intention to make a will does not operate as a revocation of an existing one. In re Will of Williams, 71 N.M. 39, 376 P.2d 3 (1962) (decided under former law).

Effect of subsequent testamentary instrument on prior will. — The mere fact of the making of a subsequent testamentary instrument does not work a total revocation of a prior will. A subsequent testamentary instrument which is partially inconsistent with an earlier one revokes the former only as to those parts that are inconsistent. Albuquerque Nat'l Bank v. Johnson, 74 N.M. 69, 390 P.2d 657 (1964) (decided under former law).

Effect of words "cancelled," "void," etc. — Writing the word "cancelled," "void" or some similar word across the dispositive provisions or other material parts of the will operates as a revocation by cancellation of the will, not by a subsequent testamentary instrument. Boddy v. Boddy, 77 N.M. 149, 420 P.2d 301 (1966) (decided under former law).

Nontestamentary document insufficient. — A document purporting to revoke a prior valid will that did not contain testamentary provisions and that was witnessed only by notary public did not satisfy the requirements of this section or 45-2-502 NMSA 1978. Sanchez v. Martinez, 1999-NMCA-093, 127 N.M. 650, 985 P.2d 1230.

Writing "void" and signing name. — Where testator printed the word "void" in letters varying from one to three inches in height, in three places across the first page and

again across the second page of the two-page instrument, and wrote "By Ben B. Boddy, March 9, 1964" once on each page following the word "void," revocation was effected by cancellation of the will and not by a subsequent testamentary instrument. Boddy v. Boddy, 77 N.M. 149, 420 P.2d 301 (1966) (decided under former law).

III. BY ACT.

Joint tenancy's effect. — Placing the spouses' property in joint tenancy is in no way inconsistent with an agreement that the surviving spouse shall distribute at death all property (including property that the surviving spouse acquired through joint tenancy) in a particular manner, and the trial court erred in concluding that doing so impliedly revoked the spouses' mutual wills. Placing property in joint tenancy is a common method by which spouses transfer property upon death for the sole purpose of avoiding costs of probate. Bailey v. Caldwell, 1996-NMCA-063, 121 N.M. 854, 918 P.2d 1354.

Effect of subsequent conveyance of property willed. — If a testator, after executing a will specifically devising certain property, subsequently voluntarily conveys all or a part of the property so willed, there is an implied revocation of the will insofar as the property conveyed is concerned, and the property is adeemed from the operation of the will. Gregg v. Gardner, 73 N.M. 347, 388 P.2d 68 (1963) (decided under former law).

Concurrence of intent and act required. — There must be concurrence of intent and act to effect a revocation. Albuquerque Nat'l Bank v. Johnson, 74 N.M. 69, 390 P.2d 657 (1964) (decided under former law).

Determination of intent. — Whether a will has been burned, torn, canceled, obliterated or destroyed with the intent to revoke it is a matter of fact to be determined in each particular case. Rueckhaus v. Catron, 92 N.M. 561, 591 P.2d 1158 (1979) (decided under former law).

Destruction of unopened letter insufficient to revoke will. — Where testatrix after viewing special delivery envelope, but without opening it or examining its contents, states that it is her will, that she does not want it, and directs her nurse to tear it up, and the nurse in compliance with instructions of testatrix destroys the unopened envelope and its contents, there is no revocation of the will as there is no direct evidence that the will was contained in the envelope. Perschbacher v. Moseley, 75 N.M. 252, 403 P.2d 693 (1965) (decided under former law).

Where testator substitutes new first page to original will and destroys the original first page, he has shown an intention to change the will but not to revoke it. In re Roeder's Estate, 44 N.M. 578, 106 P.2d 847 (1940) (decided under former law).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For article, "Survey of New Mexico Law, 1979-80: Estates and Trusts," see 11 N.M.L. Rev. 151 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 510 to 540, 542, 548.

Necessity that later will refer to earlier will in order to effect revocation under statutes providing that a will may be revoked by a subsequent will declaring the revocation, 28 A.L.R. 691.

Implied revocation of will by later will, 51 A.L.R. 652, 59 A.L.R.2d 11.

Validity, construction and effect of provisions of will relating to its modification or revocation, 72 A.L.R. 871.

Revocation by ratification or adoption of physical destruction or mutilation of will without testator's knowledge or consent in first instance, 99 A.L.R. 524.

Necessity that physical destruction or mutilation of will be done in testator's presence in order to effect revocation, 100 A.L.R. 1520.

Possibility of avoiding or limiting effect of clause in later will purporting to revoke all former wills, 125 A.L.R. 936.

Destruction or cancellation, actual or presumed, of one copy of will of executed in duplicate, as revocation of other copy, 17 A.L.R.2d 805.

Effect of testator's attempted physical alteration of will after execution, 24 A.L.R.2d 514.

Revocation as affected by invalidity of some or all of the dispositive provisions of later will, 28 A.L.R.2d 526.

Revocation of will by nontestamentary writing, 22 A.L.R.3d 1346.

Admissibility of testator's declarations on issue of revocation of will, in his possession at time of his death, by mutilation, alteration or cancellation, 28 A.L.R.3d 994.

Revocation of witnessed will by holographic will or codicil, where statute requires revocation by instrument of equal formality as will, 49 A.L.R.3d 1223.

Testator's failure to make new will, following loss of original will by fire, theft or similar casualty, as constituting revocation of original will, 61 A.L.R.3d 958.

Establishment and effect, after death of one of the makers of joint, mutual, or reciprocal will, of agreement not to revoke will, 17 A.L.R.4th 167.

Revocation of prior will by revocation clause in lost will or other lost instrument, 31 A.L.R.4th 306.

Sufficiency of evidence of nonrevocation of lost will not shown to have been inaccessible to testator - modern cases, 70 A.L.R.4th 323.

Ademption or revocation of specific devise or bequest by guardian, committee, conservator, or trustee of mentally or physically incompetent testator, 84 A.L.R.4th 462.

Sufficiency of evidence of nonrevocation of lost will where codicil survives, 84 A.L.R.4th 531.

95 C.J.S. Wills §§ 271, 274, 296, 297.

45-2-508. Revocation by change of circumstances.

Except as provided in Sections 45-2-803 and 45-2-804 NMSA 1978, a change of circumstances does not revoke a will or any part of it.

History: 1953 Comp., § 32A-2-508, enacted by Laws 1975, ch. 257, § 2-508; repealed and reenacted by Laws 1993, ch. 174, § 31.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 174, § 31 repealed former 45-2-508 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-508, and enacted a new section, effective July 1, 1993.

Compiler's notes. — This section includes within its scope some of the functions of former 30-1-7.1, 1953 Comp.

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For article, "Survey of New Mexico Law, 1979-80: Estates and Trusts," see 11 N.M.L. Rev. 151 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 586 to 588, 685, 766.

Illegitimacy of child as affecting revocation of will by subsequent birth of child, 18 A.L.R. 91, 38 A.L.R. 1344.

Divorce or separation as affecting person entitled to devise or bequest to "husband," "wife" or "widow," 75 A.L.R.2d 1413.

Statutory revocation of will by subsequent birth or adoption of child, 97 A.L.R.2d 1044.

Divorce as affecting will previously executed by husband or wife, 71 A.L.R.3d 1297.

Devolution of gift over upon spouse predeceasing testator where gift to spouse fails because of divorce, 74 A.L.R.3d 1108.

Validity of statutes or rule providing that marriage or remarriage of woman operates as revocation of will previously executed by her, 99 A.L.R.3d 1020.

95 C.J.S. Wills § 293.

45-2-509. Revival of revoked will.

A. If a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act pursuant to Paragraph (2) of Subsection A of Section 45-2-507 NMSA 1978, the previous will remains revoked unless it is revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent written declarations that the testator intended the previous will to take effect as executed.

B. If a subsequent will that partly revoked a previous will is thereafter revoked by a revocatory act pursuant to Paragraph (2) of Subsection A of Section 45-2-507 NMSA 1978, a revoked part of the previous will is revived unless it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent written declarations that the testator did not intend the revoked part to take effect as executed.

C. If a subsequent will that revoked a previous will in whole or in part is thereafter revoked by another, later, will, the previous will remains revoked in whole or in part unless it or its revoked part is revived. The previous will or its revoked part is revived to the extent it appears from the terms of the later will that the testator intended the previous will to take effect.

History: 1953 Comp., § 32A-2-509, enacted by Laws 1975, ch. 257, § 2-509; repealed and reenacted by Laws 1993, ch. 174, § 32.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 174, § 32 repealed former 45-2-509 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-509, and enacted a new section, effective July 1, 1993.

Compiler's notes. — This section is similar to former 30-1-9, 1953 Comp.

Cross references. — For revocation by writing or act, *see* 45-2-507 NMSA 1978.

Revival of revoked will by affirmation. — Where a provision in a 1975 will revoked a 1972 will, but an affirmation executed in 1976 acknowledged the validity of the 1972 will, the 1975 will was revoked and the 1972 will was revived under this section. Rueckhaus v. Catron, 92 N.M. 561, 591 P.2d 1158 (1979) (decided under former law).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For article, "Survey of New Mexico Law, 1979-80: Estates and Trusts," see 11 N.M.L. Rev. 151 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 684 to 701.

Revocation of later will as reviving earlier will, 28 A.L.R. 911, 162 A.L.R. 1072.

95 C.J.S. Wills §§ 299 to 301.

45-2-510. Incorporation by reference.

A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

History: 1953 Comp., § 32A-2-510, enacted by Laws 1975, ch. 257, § 2-510; 1993, ch. 174, § 33.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, substituted "A writing" for "Any writing" at the beginning of this section.

Oral testimony cannot remedy will's defects. — Since it is undisputed that the decedent failed in his will to leave written, signed instructions identifying his intended beneficiaries, extrinsic, oral testimony was not admissible to rectify defects in the will itself or to overcome the decedent's failure to leave other proper written instructions concerning his beneficiaries. Boyer v. Morrison, 117 N.M. 74, 868 P.2d 1299 (Ct. App. 1994).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 199 to 209.

Letter as a will or codicil, 54 A.L.R. 917, 40 A.L.R.2d 698.

Notation on note or securities as a will or codicil, 62 A.L.R. 292.

94 C.J.S. Wills §§ 161, 163.

45-2-511. Testamentary additions to trust.

A. A will may validly devise property to the trustee of a trust established or to be established:

(1) during the testator's lifetime by the testator, by the testator and some other person or by some other person, including a funded or unfunded life insurance trust, although the settlor has reserved any or all rights of ownership of the insurance contracts; or

(2) at the testator's death by the testator's devise to the trustee if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before, concurrently with or after the execution of the testator's will or in another individual's will if that other individual has predeceased the testator regardless of the existence, size or character of the corpus of the trust.

The devise is not invalid because the trust is amendable or revocable or because the trust was amended after the execution of the will or the testator's death.

B. Unless the testator's will provides otherwise, property devised to a trust described in Subsection A of this section is not held under a testamentary trust of the testator, but it becomes a part of the trust to which it is devised and must be administered and disposed of in accordance with the provisions of the governing instrument setting forth the terms of the trust, including any amendments thereto made before or after the testator's death.

C. Unless the testator's will provides otherwise, a revocation or termination of the trust before the testator's death causes the devise to lapse.

History: 1953 Comp., § 32A-2-511, enacted by Laws 1975, ch. 257, § 2-511; repealed and reenacted by Laws 1993, ch. 174, § 34.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-511 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 34 repealed former 45-2-511 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-511, and enacted a new section, effective July 1, 1993.

45-2-512. Events of independent significance.

A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of another individual's will is such an event.

History: 1953 Comp., § 32A-2-512, enacted by Laws 1975, ch. 257, § 2-512; 1993, ch. 174, § 35.

ANNOTATIONS

Cross references. — For execution of will, *see* 45-2-502 NMSA 1978.

For revocation by writing or act, *see* 45-2-507 NMSA 1978.

For revocation by change of circumstances, *see* 45-2-508 NMSA 1978.

The 1993 amendment, effective July 1, 1993, made minor stylistic changes throughout the section.

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 744 to 752.

Excuse for delay in complying with condition of bequest or devise, beyond time allowed by will, 26 A.L.R. 929.

Effect of prevention, by colegatee or codevisee or a third person, of a legatee or devisee from performing the condition upon which the gift rests, 76 A.L.R. 1342.

Right of legatee or devisee and duty of executor in respect of legacy or devise, payment of which is by the terms of will conditional upon performance of some act or course of conduct by legatee or upon some future event, 110 A.L.R. 1354.

Validity of provision of will that makes devise or legacy dependent upon some future act by testator, 152 A.L.R. 1238.

Absence of limitation over in event of nonperformance of condition as to conduct or obligation of devisee, legatee or grantee, as affecting operation of condition, 163 A.L.R. 1152.

Testamentary gift to one named as executor or trustee as conditioned upon his qualifying or serving as such, 61 A.L.R.2d 1380.

Construction of will provision for gift over if first taker dies without issue and if some other contingency occurs, where there is death without issue but the other contingency does not occur, 73 A.L.R.2d 466.

Determination of absolute or conditional nature of will, 1 A.L.R.3d 1048.

Validity of condition of gift depending on divorce or separation, 14 A.L.R.3d 1219.

Validity of testamentary provision making gift to person or persons meeting specified qualification and authorizing another to determine who qualifies, 74 A.L.R.3d 1073.

Wills: condition that devisee or legatee shall renounce, embrace, or adhere to specified religious faith, 89 A.L.R.3d 984.

96 C.J.S. Wills §§ 974 to 1003.

45-2-513. Separate writing identifying devise of certain types of tangible personal property.

A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. To be admissible under this section as evidence of the intended disposition, the writing must be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be:

A. referred to as one to be in existence at the time of the testator's death;

B. prepared before or after the execution of the will;

C. altered by the testator after its preparation; or

D. a writing that has no significance apart from its effect on the dispositions made by the will.

History: 1953 Comp., § 32A-2-513, enacted by Laws 1975, ch. 257, § 2-513; repealed and reenacted by Laws 1993, ch. 174, § 36.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-513 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 36 repealed 45-2-513 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-513, and enacted a new section, effective July 1, 1993.

Cross references. — For contracts to alter distribution, *see* 45-3-912 NMSA 1978.

Exhibits created no conflict with dispositive provisions of will. — Where a list of exhibits introduced included a promissory note, a handwritten draft from an attorney's file relating to a bequest, and several handwritten lists of property which were to be embodied in affidavits that had not been completed at the time of the testator's death, such exhibits are admissible as documents contemplated by this section and they do not create a conflict with the dispositive provisions of the will. Shadden v. Shadden, 93 N.M. 274, 599 P.2d 1071 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979), overruled on other grounds, Huntington Nat'l Bank v. Sproul, 116 N.M. 254, 861 P.2d 935 (1993) (decided under former law).

Oral testimony cannot remedy will's defects. — Since it is undisputed that the decedent failed in his will to leave written, signed instructions identifying his intended beneficiaries, extrinsic, oral testimony was not admissible to rectify defects in the will itself or to overcome the decedent's failure to leave other proper written instructions concerning his beneficiaries. Boyer v. Morrison, 117 N.M. 74, 868 P.2d 1299 (Ct. App. 1994).

Devise of "personal property". — Absent language in the will indicating an intent to the contrary, the term "personal property" includes both tangible and intangible personal property. Cook-Gibbons v. Lee, 119 N.M. 43, 888 P.2d 489 (Ct. App. 1994).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 179 to 182, 185, 194.

Testamentary character of memorandum or other informal writing not testamentary on its face regarding ownership or disposition of specific personal property, 117 A.L.R. 1327.

Validity of will written on disconnected sheets, 38 A.L.R.2d 477.

Validity, construction and effect of bequest or devise to a person's estate, or to the person or his estate, 10 A.L.R.3d 483.

94 C.J.S. Wills §§ 87, 161; 96 C.J.S. Wills §§ 1165, 1178.

45-2-514. Contracts concerning succession.

A. A contract to make a will or devise or not to revoke a will or devise or to die intestate, if executed after the effective date of this article, may be established only by:

(1) provisions of a will stating material provisions of the contract;

(2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or

(3) a writing signed by the decedent evidencing the contract.

B. The execution of a joint will or of mutual wills does not create a presumption of a contract not to revoke the will or wills.

History: 1978 Comp., § 45-2-514, enacted by Laws 1993, ch. 174, § 37.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-514 UPC.

Standard of proof of contract to make a will. — Contestants are bound to establish the existence of a contract to make a will by clear and convincing evidence. Naranjo v. Armijo, 2001-NMSC-027, 130 N.M. 714, 31 P.3d 372.

Applicability of Uniform Probate Code. — Since the testators' wills were drafted in 1973, three years before the effective date of the Uniform Probate Code, any contractual provisions of the wills were not subject to the provisions of this section. Bailey v. Caldwell, 1996-NMCA-063, 121 N.M. 854, 918 P.2d 1354.

Evidence of oral contract to devise family farm. — Letters between decedent and decedent's sibling were sufficient to satisfy the statute of frauds and constituted evidence of an oral contract between the siblings to devise the family farm to the survivor. Varoz v. Varoz, 2008-NMSC-027, 144 N.M. 7, 183 P.3d 151.

Evidence of contractual wills. — Invalid will may provide sufficient evidence to establish contract if it also establishes the existence of the agreement, the essential terms of the agreement, and is signed by the party to be charged. In re Estate of Vincioni, 102 N.M. 576, 698 P.2d 446 (Ct. App. 1985), cert. denied 102 N.M. 613, 698 P.2d 886 (N.M. 1985).

Contractual will established. — Evidence that plaintiff gave of plaintiff's time and effort to clean and repair house so as to make it easier to keep in exchange for a promise to transfer the house at the time of decedent's death, decedent's statement in decedent's letter to plaintiff that the will that decedent had shown plaintiff was "good as gold if [you] help[ed] me get the house in shape so it [would] be easy to keep clean," which was done and settled, established a contract. Aragon v. Boyd, 80 N.M. 14, 450 P.2d 614 (1969).

Contractual will not established. — Use of the words "we," "us," and "our" throughout the contested will did not establish a contract to make a will but were merely expressions which would be used in any joint will, nor did paragraph stating that parties

agreed that the will's provisions should not be changed except by our mutual consent establish a contract not to revoke a will, since neither that paragraph nor any other section of the will evidenced a promise between either testator and a third party, and the provision bequeathing the decedent's property to the surviving spouse "absolutely" bore this out as the plain meaning of the document. Naranjo v. Armijo, 2001-NMSC-027, 130 N.M. 714, 31 P.3d 372

A joint will between the decedent and decedent's first spouse did not meet the statutory criteria for establishing a contractual and irrevocable will, since none of the statutory provisions for doing so were met and, while there was no question of its being a joint and contemporaneously executed will, neither of these facts created a presumption of a contract not to revoke. Heeter v. Heeter, 113 N.M. 691, 831 P.2d 990 (1992), cert. denied 113 N.M. 690, 831 P.2d 989 (1992).

Effect of contractual will.— A contractual will is binding on a survivor once that survivor accepts the benefits from the first deceased's will. Foulds v. First Nat'l Bank, 103 N.M. 361, 707 P.2d 1171 (1985).

Where estate of surviving spouse who remarries disposed of. — Joint and mutual last will and testament of spouses that was made irrevocable and provided for a life estate in the survivor and that all the estate upon the death of the survivor should go to the nieces and nephews of both testators disposed of entire estate of surviving spouse, even where the surviving spouse had remarried and was also beneficiary of predeceased second spouse's estate. Frock v. Giant, 81 N.M. 562, 469 P.2d 711 (1970).

45-2-515. Deposit of will with court in testator's lifetime.

A will may be deposited by the testator or his agent with the clerk of any district court in New Mexico for safekeeping pursuant to rules of that court. The will shall be kept confidential. During the testator's lifetime, a deposited will shall be delivered only to him or to a person authorized in writing signed by him to receive the will. A conservator may be allowed to examine a deposited will of a protected testator under district court procedures designed to maintain the confidential character of the document to the extent possible and to assure that it will be resealed and left on deposit after the examination. Upon being informed of the testator's death, the district court clerk shall notify any person designated to receive the will and deliver it to him on request, or the court clerk may deliver the will to the appropriate court.

History: 1978 Comp., § 45-2-515, enacted by Laws 1993, ch. 174, § 38.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-515 UPC.

45-2-516. Duty of custodian of will; liability.

A. Any person having custody of a will shall, as soon as he is informed of the death of the testator, deliver the will to a person able to secure its probate or, if none is known, to an appropriate court.

B. If any person having the custody of a will fails to produce the will as provided for in Subsection A of this section, after receiving a reasonable notice to do so, he is liable to any person aggrieved for the damages that may be sustained by the failure.

C. Any person who refuses or fails to deliver a will after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of court.

History: 1978 Comp., § 45-2-516, enacted by Laws 1993, ch. 174, § 39.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-516 UPC.

45-2-517. Penalty clause for contest.

A provision in a governing instrument purporting to penalize an interested person for contesting a governing instrument or instituting other proceedings relating to a governing instrument or an estate is unenforceable if probable cause exists for instituting proceedings.

History: 1978 Comp., § 45-2-517, enacted by Laws 1995, ch. 210, § 13.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the act effective July 1, 1995.

Application of section. — This section contemplates, for its application, the institution of a proceeding relating to a will. Redman-Tafoya v. Armijo, 2006-NMCA-011, 138 N.M. 836, 126 P.3d 1200.

Construction of no-contest clauses. — No-contest clauses in wills are, generally, strictly construed. Redman-Tafoya v. Armijo, 2006-NMCA-011, 138 N.M. 836, 126 P.3d 1200.

PART 6
RULES OF CONSTRUCTION FOR WILLS

45-2-601. Scope.

In the absence of a finding of a contrary intention, the rules of construction in Chapter 45, Article 2, Part 6 NMSA 1978 control the construction of a will.

History: 1953 Comp., § 32A-2-601, enacted by Laws 1975, ch. 257, § 2-601; 1976 (S.S.), ch. 37, § 3; repealed and reenacted by Laws 1993, ch. 174, § 40.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-601 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 40 repealed former 45-2-601 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-601, relating to the requirement that the devisee survive the testator by one hundred twenty hours, and enacted a new section, effective July 1, 1993.

45-2-602. Will may pass all property and after-acquired property.

A will may provide for the passage of all property the testator owns at death and all property acquired by the estate after the testator's death, subject to the provisions of Section 45-2-101 NMSA 1978.

History: 1978 Comp., § 45-2-602, enacted by Laws 1993, ch. 174, § 41.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-602 UPC.

45-2-603. Antilapse; deceased devisee; class gifts.

A. As used in this section:

(1) "alternative devise" means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause;

(2) "class member" includes an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had the class member survived the testator;

(3) "descendant of a grandparent", as used in Subsection B of this section, means an individual who qualifies as a descendant of a grandparent of the testator or of the donor of a power of appointment pursuant to:

(a) rules of construction applicable to a class gift created in the testator's will if the devise or exercise of the power is in the form of a class gift; or

(b) rules for intestate succession if the devise or exercise of the power is not in the form of a class gift;

(4) "descendants", as used in the phrase "surviving descendants" of a deceased devisee or class member in Paragraphs (1) and (2) of Subsection B of this section, means the descendants of a deceased devisee or class member who would take under a class gift created in the testator's will;

(5) "devise" includes an alternative devise, a devise in the form of a class gift and an exercise of a power of appointment;

(6) "devisee" includes:

(a) a class member if the devise is in the form of a class gift;

(b) an individual or class member who was deceased at the time the testator executed the testator's will as well as an individual or class member who was then living but who failed to survive the testator; and

(c) an appointee under a power of appointment exercised by the testator's will;

(7) "stepchild" means a child of the surviving, deceased or former spouse of the testator or of the donor of a power of appointment and not of the testator or donor;

(8) "surviving", as used in the phrase "surviving devisees" or "surviving descendants", means devisees or descendants who neither predeceased the testator nor are deemed to have predeceased the testator pursuant to the provisions of Section 45-2-702 NMSA 1978; and

(9) "testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

B. If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent or a stepchild of either the testator or the donor of a power of appointment exercised by the testator's will, the following apply:

(1) except as provided in Paragraph (4) of this subsection, if the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants. They take by representation the property to which the devisee would have been entitled had the devisee survived the testator;

(2) except as provided in Paragraph (4) of this subsection, if the devise is in the form of a class gift, other than a devise to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives" or "family" or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which the surviving devisee would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take by representation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this paragraph, "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants;

(3) for the purposes of Section 45-2-601 NMSA 1978, words of survivorship, such as in a devise to an individual "if he survives me" or in a devise to "my surviving children" are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section;

(4) if the will creates an alternative devise with respect to a devise for which a substitute gift is created by Paragraph (1) or (2) of this subsection, the substitute gift is superseded by the alternative devise if:

(a) the alternative devise is in the form of a class gift and one or more members of the class is entitled to take under the will; or

(b) the alternative devise is not in the form of a class gift and the expressly designated devisee of the alternative devise is entitled to take under the will; and

(5) unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee pursuant to the provisions of this section whether or not the descendant is an object of the power.

C. If, pursuant to the provisions of Subsection B of this section, substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) except as provided in Paragraph (2) of this subsection, the devised property passes under the primary substitute gift;

(2) if there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift; and

(3) as used in this subsection:

(a) "primary devise" means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator;

(b) "primary substitute gift" means the substitute gift created with respect to the primary devise;

(c) "younger-generation devise" means a devise that: 1) is to a descendant of a devisee of the primary devise; 2) is an alternative devise with respect to the primary devise; 3) is a devise for which a substitute gift is created; and 4) would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise; and

(d) "younger-generation substitute gift" means the substitute gift created with respect to the younger-generation devise.

History: 1953 Comp., § 32A-2-603, enacted by Laws 1975, ch. 257, § 2-603; repealed and reenacted by Laws 1993, ch. 174, § 42; 1995, ch. 210, § 14; 2011, ch. 124, § 24.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-603 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 42 repealed 45-2-603 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-603, relating to rules of construction and intention, and enacted a new section, effective July 1, 1993.

The 2011 amendment, effective January 1, 2012, defined "descendant of a grandparent", "descendants", and "surviving", and in Subsection B(4), provided the conditions under which a substitute gift is superseded by an alternative devise.

The 1995 amendment, effective July 1, 1995, substituted "surviving descendants of any deceased devisee" for "deceased devisee or devisee's surviving descendants" at the end of the first sentence in Paragraph B(2).

Section inapplicable where bank is devisee. — Where a bank is the devisee and named siblings of the decedent are trust beneficiaries, the anti-lapse provisions of this section are inapplicable to the decedent's testamentary dispositions. Portales Nat'l Bank v. Bellin, 98 N.M. 113, 645 P.2d 986 (Ct. App. 1982) (decided under former law).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 80 Am. Jur. 2d Wills §§ 1671, 1679, 1681.

Time of ascertainment of membership with respect to devise or bequest to class which takes effect at testator's death, 6 A.L.R.2d 1342.

Validity and construction of limitation over to another in event that original beneficiary should die before payment or receipt of devise or legacy, 59 A.L.R.3d 1043.

96 C.J.S. Wills §§ 719, 729, 737, 921, 946, 1197.

45-2-604. Failure of testamentary provision.

A. Except as provided in Section 45-2-603 NMSA 1978, a devise, other than a residuary devise, that fails for any reason becomes a part of the residue.

B. Except as provided in Section 45-2-603 NMSA 1978, if the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee or to other residuary devisees in proportion to the interest of each in the remaining part of the residue.

History: 1953 Comp., § 32A-2-604, enacted by Laws 1975, ch. 257, § 2-604; repealed and reenacted by Laws 1993, ch. 174, § 43.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-604 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 43 repealed former 45-2-604 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-604, relating to the construction of a will, and enacted a new section, effective July 1, 1993.

Cross references. — For definition of "property", *see* 45-1-201 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 80 Am. Jur. 2d Wills §§ 1671, 1688, 1695.

Validity, construction and effect of express provisions in will for severance of good from bad in event of partial invalidity, 80 A.L.R. 1210.

Effect of residuary clause to pass property acquired by testator's estate after his death, 39 A.L.R.3d 1390.

May parts of will be upheld notwithstanding failure of other parts for lack of testamentary mental capacity or undue influence, 64 A.L.R.3d 261.

96 C.J.S. Wills § 1223.

45-2-605. Increase in securities; accessions.

A. If a testator executes a will that devises securities and the testator then owned securities that meet the description in the will, the devise includes additional securities owned by the testator at death to the extent the additional securities were acquired by the testator after the will was executed as a result of the testator's ownership of the described securities and are securities of any of the following types:

(1) securities of the same organization acquired by reason of action initiated by the organization or any successor, related or acquiring organization, excluding any acquired by exercise of purchase options;

(2) securities of another organization acquired as a result of merger, consolidation, reorganization or other distribution by the organization or any successor, related or acquiring organization; or

(3) securities of the same organization acquired as a result of a plan of reinvestment.

B. Distributions in cash before death with respect to a described security are not part of the devise.

History: 1953 Comp., § 32A-2-605, enacted by Laws 1975, ch. 257, § 2-605; 1976 (S.S.), ch. 37, § 4; repealed and reenacted by Laws 1993, ch. 174, § 44.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-605 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 44 repealed former 45-2-605 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-605, relating to anti-lapse and deceased devisee, and enacted a new section, effective July 1, 1993.

45-2-606. Nonademption of specific devises; unpaid proceeds of sale, condemnation or insurance; sale by conservator or agent.

A. A specific devisee has a right to specifically devised property in the testator's estate at the testator's death and:

(1) any balance of the purchase price, together with any security agreement, owed by a purchaser at the testator's death by reason of sale of the property;

(2) any amount of a condemnation award for the taking of the property unpaid at death;

(3) any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property;

(4) any property owned by the testator at death and acquired as a result of foreclosure or obtained in lieu of foreclosure of the security interest for specifically devised obligation;

(5) any real property or tangible personal property owned by the testator at death that the testator acquired as a replacement for specifically devised real property or tangible personal property; and

(6) if not covered by Paragraphs (1) through (5) of this subsection, a pecuniary devise equal to the value as of its date of disposition of other specifically devised property disposed of during the testator's lifetime but only to the extent it is established that ademption would be inconsistent with the testator's manifested plan of distribution or that at the time the will was made, the date of disposition or otherwise, the testator did not intend ademption of the devise.

B. If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated person or if a condemnation award, insurance proceeds or recovery for injury to the property is paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated person, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds or the recovery.

C. The right of a specific devisee pursuant to Subsection B of this section is reduced by any right the devisee has pursuant to Subsection A of this section.

D. Subsection B of this section does not apply if, after the sale, mortgage, condemnation, casualty or recovery, it is adjudicated that the testator's incapacity has ceased and the testator survives the adjudication for at least one year.

E. For the purposes of the references in Subsection B of this section to an agent acting within the authority of a durable power of attorney for an incapacitated person:

(1) no adjudication of incapacity before death is necessary; and

(2) the acts of an agent within the authority of a durable power of attorney are presumed to be for the incapacitated person.

History: 1953 Comp., § 32A-2-606, enacted by Laws 1975, ch. 257, § 2-606; repealed and reenacted by Laws 1993, ch. 174, § 45; 2011, ch. 124, § 25.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-606 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 45 repealed former 45-2-606 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-606, relating to the failure of testamentary provisions, and enacted a new section, effective July 1, 1993.

The 2011 amendment, effective January 1, 2012, provided that a specific devisee has a right to a pecuniary devise equal to the value of specifically devised property that was disposed of during the testator’s lifetime if ademption would be inconsistent with the testator’s plan of distribution.

45-2-607. Nonexoneration.

A specific devise passes subject to any mortgage interest existing at the date of death without right of exoneration regardless of a general directive in the will to pay debts.

History: 1953 Comp., § 32A-2-607, enacted by Laws 1975, ch. 257, § 2-607; repealed and reenacted by Laws 1993, ch. 174, § 46.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-607 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 46 repealed former 45-2-607 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-607, relating to changes in

securities, accessions, and nonademption, and enacted a new section, effective July 1, 1993.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 80 Am. Jur. 2d Wills §§ 1762, 1765.

Validity of provisions of instrument creating legal estate attempting to exempt it from claims of creditors, 80 A.L.R. 1007.

Direction in will for payment of debts and expenses as subjecting exempt homestead to their payment, 103 A.L.R. 257.

Direction in will for payment of debts of testator, or for payment of specified debt, as affecting debts or debt barred by limitation, 109 A.L.R. 1441.

Conclusiveness of testator's statement as to amount of debt or advancement to be charged against legacy or devise, 98 A.L.R.2d 273.

Right of heir or devisee to have realty exonerated from lien thereon at expense of personal estate, 4 A.L.R.3d 1023.

33 C.J.S. Executors and Administrators § 201; 34 C.J.S. Executors and Administrators §§ 468, 470.

45-2-608. Exercise of power of appointment.

In the absence of a requirement that a power of appointment be exercised by a reference or by an express or specific reference to the power, a general residuary clause in a will or a will making general disposition of all of the testator's property expresses an intention to exercise a power of appointment held by the testator only if:

A. the power is a general power and the creating instrument does not contain a gift if the power is not exercised; or

B. the testator's will manifests an intention to include the property subject to the power.

History: 1953 Comp., § 32A-2-608, enacted by Laws 1976 (S.S.), ch. 37, § 5; repealed and reenacted by Laws 1993, ch. 174, § 47.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-608 UPC.

Repeals and reenactments. — Laws 1976 (S.S.), ch. 37, § 5, repealed 32A-2-608, 1953 Comp., relating to nonademption of specific devises in certain cases, sale by

conservator, unpaid proceeds of sale and condemnation of insurance, and enacted a new section.

Laws 1993, ch. 174, § 47 repealed 45-2-608 NMSA 1978, as enacted by Laws 1976 (SS), ch. 37, § 5, relating to nonademption of specific devises in certain cases, and enacted a new section, effective July 1, 1993.

Cross references. — For distribution in kind, *see* 45-3-906 NMSA 1978.

For sale of specifically devised or bequeathed property to pay proportionate amount of estate taxes, *see* 7-7-11 NMSA 1978.

Guardian in name, conservator in fact. — Although defendant technically was named "guardian" of her mother's estate after the latter's adjudicated incompetence, defendant's selling of property, filing of tax returns, collecting of royalties and actual income, and entering into mineral and grazing leases, established her as conservator of the estate within the meaning of 45-1-201 NMSA 1978, and it followed that this section applied to entitled petitioners to the net price of the contested property. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992) (decided under former law).

45-2-609. Ademption by satisfaction.

A. Property a testator gave in his lifetime to a person is treated as a satisfaction of a devise in whole or in part only if:

(1) the will provides for deduction of the gift;

(2) the testator declared in a contemporaneous writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise; or

(3) the devisee acknowledged in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.

B. For purposes of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or at the testator's death, whichever occurs first.

C. If the devisee fails to survive the testator, the gift is treated as a full or partial satisfaction of the devise, as appropriate, in applying Sections 45-2-603 and 45-2-604 NMSA 1978, unless the testator's contemporaneous writing provides otherwise.

History: 1953 Comp., § 32A-2-609, enacted by Laws 1975, ch. 257, § 2-609; repealed and reenacted by Laws 1993, ch. 174, § 48.

ANNOTATIONS

Repeals and reenactments. — Laws 1993, ch. 174, § 48 repealed former 45-2-609 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-609, relating to nonexoneration, and enacted a new section, effective July 1, 1993.

Ademption's effect on will. — A deed, which is executed pursuant to the exercise of improper and undue influence, cannot serve to adeem such property from the effect of such a will nor to revoke a will previously made devising such property. Brown v. Heller, 30 N.M. 1, 227 P. 594 (1924) (decided under former law).

Evidence of ademption. — Uncontradicted evidence disclosed that the gifts to the spouses and children of decedent's nieces and nephews showed an intent upon the part of the testator to adeem the legacies in testator's will by all payments made to the nieces and nephews, their spouses and children. Gray v. Estate of Williams, 71 N.M. 39, 376 P.2d 3 (1962) (decided under former law).

45-2-610 to 45-2-612. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 174, § 84 repealed 45-2-610 to 45-2-612 NMSA 1978, as enacted by Laws 1975, ch. 257, §§ 2-610 to 2-612, relating to the exercise of the power of appointment, the construction of generic terms to accord with relationships as defined for intestate succession, and ademption by satisfaction, effective July 1, 1993. For provisions of former sections, *see* the 1992 NMSA 1978 on *NMONESOURCE.COM*.

PART 7
RULES OF CONSTRUCTION FOR GOVERNING INSTRUMENTS

45-2-701. Scope.

In the absence of a finding of a contrary intention, the rules of construction in Chapter 45, Article 2, Part 7 NMSA 1978 control the construction of a governing instrument. The rules of construction in Chapter 45, Article 2, Part 7 NMSA 1978 apply to a governing instrument of any type, except as the application of a particular section is limited by its terms to a specific type or types of provision or governing instrument.

History: 1953 Comp., § 32A-2-701, enacted by Laws 1975, ch. 257, § 2-701; repealed and reenacted by Laws 1993, ch. 174, § 49.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-701 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 49 repealed former 45-2-701 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-701, relating to contracts concerning succession, and enacted a new section, effective July 1, 1993.

Cross references. — For definition of "survive", *see* 45-1-201 NMSA 1978.

For requirement that heir survive decedent for 120 hours, *see* 45-2-104 NMSA 1978.

Testator's intent controls. — Where a dispute exists as to the meaning of a provision in a will, the intention of the testator as expressed in testator's will controls the legal effect of testator's dispositions. Mills v. Kelly, 99 N.M. 482, 660 P.2d 124 (Ct. App. 1983).

Considerations in determining intent. — Intent must be gathered from a consideration of: (a) all the language contained in the four corners of his will, (b) his scheme of distribution, (c) the circumstances surrounding him at the time he made his will, and (d) the existing facts. Gregg v. Gardner, 73 N.M. 347, 388 P.2d 68 (1963); Frock v. Giant, 81 N.M. 562, 469 P.2d 711 (1970); New Mexico Boys Ranch, Inc. v. Hanvey, 97 N.M. 771, 643 P.2d 857 (1982).

Consider whole will. — The intent of the testators must be determined from the will itself when considered as a whole. In re Will of McDowell, 81 N.M. 562, 469 P.2d 711 (1970); New Mexico Boys Ranch, Inc. v. Hanvey, 97 N.M. 771, 643 P.2d 857 (1982).

Duty of court to ascertain testator's desire. Shadden v. Shadden, 93 N.M. 274, 599 P.2d 1071 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979), overruled on other grounds, Huntington Nat'l Bank v. Sproul, 116 N.M. 254, 861 P.2d 935 (1993).

Strict construction of no-contest provision. — Since the function of the court is to effect the testator's intent to the greatest extent possible within the bounds of the law, to strictly construe no-contest provisions in the face of obvious indications of unresolved legal questions could result in the complete destruction of a testator's intent. Seymour v. Davis, 93 N.M. 328, 600 P.2d 274 (1979).

Ascertainment of intention from what words do express. — In determining the testator's intention, the purpose of the inquiry is to ascertain not what he meant to express, apart from the language used, but what the words he has used do express; not to add words to those in the will to contradict its language, or to take words away from those in the will, even though the court may believe that the actual disposition of the testator's property which results through changing circumstances, was not contemplated by him. Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963).

Extrinsic evidence inadmissible if words in will not disputed. — Where there is no dispute as to what words are written in the will, extrinsic evidence cannot be received to show that the testator intended something outside of and independent of such written

words to add words to those in the will, to contradict his language or to take words away from those in the will. Lamphear v. Alch, 58 N.M. 796, 277 P.2d 299 (1954).

Use of technical rules or canons of construction. — Technical rules or canons of construction should be resorted to only if the language of the will is ambiguous, conflicting or the testator's intent is for any reason uncertain. Gregg v. Gardner, 73 N.M. 347, 388 P.2d 68 (1963); Vigil v. Bowles, 107 N.M. 733, 764 P.2d 510 (Ct. App. 1988).

When no-contest provisions ineffective to disinherit beneficiary. — No-contest provisions in wills are valid and enforceable in this state, but they are not effective to disinherit a beneficiary who has contested a will in good faith and with probable cause to believe that the will was invalid. Seymour v. Davis, 93 N.M. 328, 600 P.2d 274 (1979).

Donor's intention when giving determines whether gifts constitute ademption. — Whether or not gifts constitute an ademption of the legacy depends upon the donor's intention at the time the gifts were made. Gray v. Estate of Williams, 71 N.M. 39, 376 P.2d 3 (1962).

Where presumption of undue influence imposed. — Where the beneficiary of the transfer occupies a dominant position in the relationship, a position which is not the usual circumstance in such relationships, a presumption of undue influence may be imposed upon the transfer. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968).

Gift by implication will be implied to effectuate testator's intent. Frock v. Giant, 81 N.M. 562, 469 P.2d 711 (1970).

Wills must be construed in harmony with public policy, including placing an adopted child on a level with natural children. Delaney v. First Nat'l Bank, 73 N.M. 192, 386 P.2d 711 (1963).

Declared intention to make will does not revoke existing one. Gray v. Estate of Williams, 71 N.M. 39, 376 P.2d 3 (1962).

Residuary clause limitation to property described not to be defeated. — Where a will has been executed, there is a presumption that the testator intended to dispose of all his estate. Nevertheless, where the residuary clause by the plain language used demonstrates a purpose to limit its operations to the property therein described, the presumption will not be permitted to operate to defeat the intention of the testator as expressed. Gregg v. Gardner, 73 N.M. 347, 388 P.2d 68 (1963) (decided under former law).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For annual survey of New Mexico law of estates and trusts, see 19 N.M.L. Rev. 669 (1990).

For comment, "Effectuating the Intent of the Testator: New Mexico Boys Ranch, Inc. v. Hanvey," see 14 N.M.L. Rev. 419 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 63, 64, 327, 384, 385, 387, 501, 762, 805, 807.

80 Am. Jur. 2d Wills §§ 1128, 1140, 1357, 1358.

Right of beneficiary to enforce contract between third persons to provide for him by will, 2 A.L.R. 1193, 33 A.L.R. 739, 73 A.L.R. 1395.

Remedies for breach of decedent's agreement to devise, bequeath, or leave property as compensation for services, 69 A.L.R. 14, 106 A.L.R. 742.

Admissibility of extrinsic evidence upon issue of testamentary intent, 21 A.L.R.2d 319.

Construction of contract not to make a will, 32 A.L.R.2d 370.

Remedies during promisor's lifetime for breach of agreement to give property at death, 8 A.L.R.3d 930.

Measure of damages for breach of contract to will property, 65 A.L.R.3d 632.

Wills: gift to persons individually named but also described in terms of relationship to testator or another as class gift, 13 A.L.R.4th 978.

Establishment and effect, after death of one of the makers of joint, mutual, or reciprocal will, of agreement not to revoke will, 17 A.L.R.4th 167.

What passes under terms "furniture" or "furnishings" in will, 21 A.L.R.4th 383.

Testamentary direction to devisee to pay stated sum of money to third party as creating charge or condition or as imposing personal liability on devisee for nonpayment, 54 A.L.R.4th 1098.

Wills: effect of gift or specified percentage or share of estate (or residuary estate) to include specific property found to be of a greater value than share bequeathed, 63 A.L.R.4th 1186.

What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary, 3 A.L.R.5th 590.

94 C.J.S. Wills § 111.

95 C.J.S. Wills §§ 587, 615, 672.

96 C.J.S. Wills §§ 756, 821.

45-2-702. Requirement of survival by one hundred twenty hours.

A. For the purposes of the Uniform Probate Code, except as provided in Subsection D of this section, an individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by one hundred twenty hours is deemed to have predeceased the event.

B. Except as provided in Subsection D of this section, for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by one hundred twenty hours is deemed to have predeceased the event.

C. Except as provided in Subsection D of this section:

(1) if it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by one hundred twenty hours, one-half of the property passes as if one had survived by one hundred twenty hours and one-half as if the other had survived by one hundred twenty hours; and

(2) if there are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the others by one hundred twenty hours, the property passes in the proportion that one bears to the whole number of co-owners.

For the purposes of this subsection, "co-owners with right of survivorship" includes joint tenants and other co-owners of property or accounts held under circumstances that entitles one or more to the whole of the property or account on the death of the other or others.

D. Survival by one hundred twenty hours is not required if:

(1) the governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case;

(2) the governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event by a specified period, but survival of the event or specified period must be established by clear and convincing evidence;

(3) the imposition of a one-hundred-twenty-hour requirement of survival would cause a nonvested property interest or a power of appointment to fail to qualify for validity pursuant to the provisions of Paragraph (1) of Subsection A, Paragraph (1) of Subsection B or Paragraph (1) of Subsection C of Section 45-2-901 NMSA 1978 or to become invalid pursuant to the provisions of Paragraph (2) of Subsection A, Paragraph (2) of Subsection B or Paragraph (2) of Subsection C of Section 45-2-901 NMSA 1978, but survival must be established by clear and convincing evidence; or

(4) the application of a one-hundred-twenty-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition, but survival must be established by clear and convincing evidence.

E. A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument who, under this section, is not entitled to the payment or item of property or for having taken any other action in good faith reliance on the beneficiary's apparent entitlement under the terms of the governing instrument before the payor or other third party received written notice of a claimed lack of entitlement under this section. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed lack of entitlement under this section.

Written notice of a claimed lack of entitlement pursuant to the provisions of this subsection must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement under this section, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. Payments, transfers or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

F. A person who purchases property for value and without notice or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation is neither obligated under this section to return the payment, item of property or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property or benefit or is personally liable for the amount of the payment or the value of the item of property or benefit to the person who is entitled to it under this section.

G. If this section or any part of this section is pre-empted by federal law with respect to a payment, an item of property or any other benefit covered by this section, a person who, not for value, receives the payment, item of property or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property or benefit or is personally liable for the amount of the payment or the value of the item of property or benefit to the person who would have been entitled to it were this section or part of this section not pre-empted.

History: 1978 Comp., § 45-2-702, enacted by Laws 1993, ch. 174, § 50; 1995, ch. 210, § 15.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, deleted "except for purposes of Chapter 45, Article 6, Part 3 NMSA 1978 and" following "Uniform Probate Code" in Subsection A; deleted "and except for a security registered in beneficiary form (TOD) pursuant to the provisions of Chapter 45, Article 6, Part 3 NMSA 1978" following "this section" near the beginning of Subsection B; and, in Subsection D, substituted "Survival by one hundred twenty hours is not required" for "This section does not apply" at the beginning, added the language beginning "but survival" at the end of Paragraphs (2), (3) and (4), and substituted "a one-hundred-twenty-hour requirement of survival" for "this section" in Paragraph (4).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 80 Am. Jur. 2d Wills § 1699.

Decree directing distribution of estate to person who is dead, 25 A.L.R. 1563.

Time interval contemplated by provision of will or of statute of descent and distribution with reference to death of two persons simultaneously or approximately at same time, 173 A.L.R. 1254.

Validity, construction, and application of statutory requirement that will beneficiary survive testator for specified time, 88 A.L.R.3d 1339.

Relinquishment of interest by life beneficiary in possession as accelerating remainder of which there is substitutional gift in case primary remainderman does not survive life beneficiary, 7 A.L.R.4th 1084.

96 C.J.S. Wills § 719.

45-2-703. Choice of law as to meaning and effect of governing instrument.

The meaning and legal effect of a governing instrument is determined by the local law of the state selected in the governing instrument unless the application of that law is contrary to the provisions relating to allowances described in Chapter 45, Article 2, Part 4 NMSA 1978 or any other public policy of this state otherwise applicable to the disposition.

History: 1978 Comp., § 45-2-703, enacted by Laws 1993, ch. 174, § 51; 1995, ch. 210, § 16.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-703 UPC.

The 1995 amendment, effective July 1, 1995, deleted "by the transferor" following "state selected" near the beginning of the section.

45-2-704. Power of appointment; meaning of specific reference requirement.

If a governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference or a specific reference to the power or its source, it is presumed that the donor's intention, in requiring that the donee exercise the power by making reference to the particular power or to the creating instrument, was to prevent an inadvertent exercise of the power.

History: 1978 Comp., § 45-2-704, enacted by Laws 1993, ch. 174, § 52.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-704 UPC.

45-2-705. Class gifts construed to accord with intestate succession; exceptions.

A. As used in this section:

(1) "adoptee" has the meaning set forth in Section 45-2-115 NMSA 1978;

(2) "child of assisted reproduction" has the meaning set forth in Section 45-2-120 NMSA 1978;

(3) "distribution date" means the date when an immediate or postponed class gift takes effect in possession or enjoyment;

(4) "functioned as a parent of the adoptee" has the meaning set forth in Section 45-2-115 NMSA 1978, substituting "adoptee" for "child" in that definition;

(5) "functioned as a parent of the child" has the meaning set forth in Section 45-2-115 NMSA 1978;

(6) "genetic parent" has the meaning set forth in Section 45-2-115 NMSA 1978;

(7) "gestational child" has the meaning set forth in Section 45-2-121 NMSA 1978; and

(8) "relative" has the meaning set forth in Section 45-2-115 NMSA 1978.

B. A class gift that uses a term of relationship to identify the class members includes a child of assisted reproduction, a gestational child and, except as otherwise provided in Subsections E and F of this section, an adoptee and a child born to parents who are not married to each other and their respective descendants if appropriate to the class in accordance with the rules for intestate succession regarding parent-child relationships. For the purpose of determining whether a contrary intent exists pursuant to Section 45-2-701 NMSA 1978, a provision in a governing instrument that relates to the inclusion or exclusion in a class gift of a child born to parents who are not married to each other but that does not specifically refer to a child of assisted reproduction or a gestational child does not apply to a child of assisted reproduction or a gestational child.

C. Terms of relationship in a governing instrument that do not differentiate relationships by blood from those by marriage, such as uncles, aunts, nieces or nephews, are construed to exclude relatives by marriage, unless:

(1) when the governing instrument was executed, the class was then and foreseeably would be empty; or

(2) the language or circumstances otherwise establish that relatives by marriage were intended to be included.

D. Terms of relationship in a governing instrument that do not differentiate relationships by the half blood from those by the whole blood, such as brothers, sisters, nieces or nephews, are construed to include both types of relationships.

E. In construing a dispositive provision of a transferor who is not the genetic parent, a child of a genetic parent is not considered the child of the genetic parent unless the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of the genetic parent or of a relative of the genetic parent functioned as a parent of the child before the child reached eighteen years of age.

F. In construing a dispositive provision of a transferor who is not the adoptive parent, an adoptee is not considered the child of the adoptive parent unless:

(1) the adoption took place before the adoptee reached eighteen years of age;

(2) the adoptive parent was the adoptee's stepparent or foster parent; or

(3) the adoptive parent functioned as a parent of the adoptee before the adoptee reached eighteen years of age.

G. The following rules apply for purposes of the class-closing rules:

(1) a child in utero at a particular time is treated as living at that time if the child lives one hundred twenty hours after birth;

(2) if a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date is the deceased parent's death, the child is treated as living on the distribution date if the child lives one hundred twenty hours after birth and was in utero not later than thirty-six months after the deceased parent's death or born not later than forty-five months after the deceased parent's death; and

(3) an individual who is in the process of being adopted when the class closes is treated as adopted when the class closes if the adoption is subsequently granted.

History: 1978 Comp., § 45-2-705, enacted by Laws 1993, ch. 174, § 53; 2011, ch. 124, § 26.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-705 UPC.

The 2011 amendment, effective January 1, 2012, rewrote this section to provide rules for determining class members, for construing dispositive provisions, and for closing the class.

45-2-706. Life insurance; retirement plan; account with pod designation; transfer-on-death registration; deceased beneficiary.

A. As used in this section:

(1) "alternative beneficiary designation" means a beneficiary designation that is expressly created by the governing instrument and, under the terms of the governing instrument, can take effect instead of another beneficiary designation on the happening of one or more events, including a person's survival of the decedent or failure to survive

the decedent, whether an event is expressed in condition-precedent, condition-subsequent or any other form;

(2) "beneficiary" means the beneficiary of a beneficiary designation under which the beneficiary must survive the decedent and includes:

(a) a class member if the beneficiary designation is in the form of a class gift; and

(b) an individual or class member who was deceased at the time the beneficiary designation was executed as well as an individual or class member who was then living but who failed to survive the decedent, but excludes a joint tenant of a joint tenancy with the right of survivorship and a party to a joint and survivorship account;

(3) "beneficiary designation" includes an alternative beneficiary designation and a beneficiary designation in the form of a class gift;

(4) "class member" includes an individual who fails to survive the decedent but who would have taken under a beneficiary designation in the form of a class gift had the individual survived the decedent;

(5) "descendant of a grandparent", as used in Subsection B of this section, means an individual who qualifies as a descendant of a grandparent of the decedent pursuant to:

(a) rules of construction applicable to a class gift created in the decedent's beneficiary designation if the beneficiary designation is in the form of a class gift; or

(b) rules for intestate succession if the beneficiary designation is not in the form of a class gift;

(6) "descendants", as used in the phrase "surviving descendants" of a deceased beneficiary or class member in Paragraphs (1) and (2) of Subsection B of this section, means the descendants of a deceased beneficiary or class member who would take under a class gift created in the beneficiary designation;

(7) "stepchild" means a child of the decedent's surviving, deceased or former spouse and not of the decedent; and

(8) "surviving", as used in the phrase "surviving beneficiaries" or "surviving descendants", means beneficiaries or descendants who neither predeceased the decedent nor are deemed to have predeceased the decedent pursuant to the provisions of Section 45-2-702 NMSA 1978.

B. If a beneficiary fails to survive the decedent and is a grandparent, a descendant of a grandparent or a stepchild of the decedent, the following apply:

(1) except as provided in Paragraph (4) of this subsection, if the beneficiary designation is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the decedent;

(2) except as provided in Paragraph (4) of this subsection, if the beneficiary designation is in the form of a class gift, other than a beneficiary designation to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives" or "family" or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled had all of them survived the decedent passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the decedent. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the decedent. For the purposes of this paragraph, "deceased beneficiary" means a class member who failed to survive the decedent and left one or more surviving descendants;

(3) for the purposes of Section 45-2-701 NMSA 1978, words of survivorship, such as in a beneficiary designation to an individual "if he survives me" or in a beneficiary designation to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section; and

(4) if a governing instrument creates an alternative beneficiary designation with respect to a beneficiary designation for which a substitute gift is created by Paragraph (1) or (2) of this subsection, the substitute gift is superseded by the alternative beneficiary designation if:

(a) the alternative beneficiary designation is in the form of a class gift and one or more members of the class is entitled to take; or

(b) the alternative beneficiary designation is not in the form of a class gift and the expressly designated beneficiary of the alternative beneficiary designation is entitled to take.

C. If, pursuant to the provisions of Subsection B of this section, substitute gifts are created and not superseded with respect to more than one beneficiary designation and the beneficiary designations are alternative beneficiary designations, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) except as provided in Paragraph (2) of this subsection, the property passes under the primary substitute gift;

(2) if there is a younger-generation beneficiary designation, the property passes under the younger-generation substitute gift and not under the primary substitute gift; and

(3) as used in this subsection:

(a) "primary beneficiary designation" means the beneficiary designation that would have taken effect had all the deceased beneficiaries of the alternative beneficiary designations who left surviving descendants survived the decedent;

(b) "primary substitute gift" means the substitute gift created with respect to the primary beneficiary designation;

(c) "younger-generation beneficiary designation" means as a beneficiary designation that: 1) is to a descendant of a beneficiary of the primary beneficiary designation; 2) is an alternative beneficiary designation with respect to the primary beneficiary designation; 3) is a beneficiary designation for which a substitute gift is created; and 4) would have taken effect had all the deceased beneficiaries who left surviving descendants survived the decedent except the deceased beneficiary or beneficiaries of the primary beneficiary designation; and

(d) "younger-generation substitute gift" means the substitute gift created with respect to the younger-generation beneficiary designation.

D. A payor is protected from liability in making payments under the terms of the beneficiary designation until the payor has received written notice of a claim to a substitute gift under this section. Payment made before the receipt of written notice of a claim to a substitute gift under this section discharges the payor, but not the recipient, from all claims for the amounts paid. A payor is liable for a payment made after the payor has received written notice of the claim. A recipient is liable for a payment received whether or not written notice of the claim is given.

The written notice of the claim shall be mailed to the payor's main office or home by registered or certified mail, return receipt requested, or served upon the payor in the same manner as a summons in a civil action. Upon receipt of written notice of the claim, a payor may pay any amount owed by it to the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds and, upon its determination under this section, shall order disbursement in accordance with the determination. Payment made to the court discharges the payor from all claims for the amounts paid.

E. A person who purchases property for value and without notice or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation is neither obligated pursuant to the provisions of this section to return the

payment, item of property or benefit nor liable pursuant to the provisions of this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property or any other benefit to which the person is not entitled pursuant to the provisions of this section is obligated to return the payment, item of property or benefit or is personally liable for the amount of the payment or the value of the item of property or benefit to the person who is entitled to it pursuant to the provisions of this section.

F. If this section or any part of this section is preempted by federal law with respect to a payment, an item of property or any other benefit covered by this section, a person who, not for value, receives the payment, item of property or any other benefit to which the person is not entitled pursuant to the provisions of this section is obligated to return the payment, item of property or benefit or is personally liable for the amount of the payment or the value of the item of property or benefit to the person who would have been entitled to it were this section or part of this section not preempted.

History: 1978 Comp., § 45-2-706, enacted by Laws 1993, ch. 174, § 54; 1995, ch. 210, § 17; 2011, ch. 124, § 27.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-706 UPC.

Cross references. — For definitions of "POD" and "TOD", *see* 45-6-305 NMSA 1978.

The 2011 amendment, effective January 1, 2012, defined "descendant of a grandparent", "descendants", and "surviving"; and in Subsection B(4), provided the conditions under which a substitute gift is superseded by an alternative beneficiary designation.

The 1995 amendment, effective July 1, 1995, in Subsection A, inserted "under which the beneficiary must survive the descendant" in the introductory phrase of Paragraph (2) and added the language beginning "but excludes" at the end in Subparagraph (2)(b); and, in Subsection B, substituted "surviving descendants of any deceased beneficiary" for "deceased beneficiary or beneficiaries' surviving descendants" at the end of the first sentence in Paragraph (2).

45-2-707. Survivorship with respect to future interests under terms of trust; substitute takers.

A. As used in this section:

(1) "alternative future interest" means an expressly created future interest that can take effect in possession or enjoyment instead of another future interest on the happening of one or more events, including survival of an event or failure to survive an

event, whether an event is expressed in condition-precedent, condition-subsequent or any other form. A residuary clause in a will does not create an alternative future interest with respect to a future interest created in a nonresiduary devise in the will, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause;

(2) "beneficiary" means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift;

(3) "class member" includes an individual who fails to survive the distribution date but who would have taken under a future interest in the form of a class gift had the individual survived the distribution date;

(4) "descendants", as used in the phrase "surviving descendants" of a deceased beneficiary or class member in Paragraphs (1) and (2) of Subsection B of this section, means the descendants of a deceased beneficiary or class member who would take under a class gift created in the trust;

(5) "distribution date", with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day;

(6) "future interest" includes an alternative future interest and a future interest in the form of a class gift;

(7) "future interest under the terms of a trust" means a future interest that was created by a transfer creating a trust or to an existing trust or by an exercise of a power of appointment to an existing trust, directing the continuance of an existing trust, designating a beneficiary of an existing trust or creating a trust; and

(8) "surviving", as used in the phrase "surviving beneficiaries" or "surviving descendants", means beneficiaries or descendants who neither predeceased the distribution date nor are deemed to have predeceased the distribution date pursuant to the provisions of Section 45-2-702 NMSA 1978.

B. A future interest under the terms of a trust is contingent on the beneficiary's surviving the distribution date. If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:

(1) except as provided in Paragraph (4) of this subsection, if the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date;

(2) except as provided in Paragraph (4) of this subsection, if the future interest is in the form of a class gift, other than a future interest to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives" or "family" or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled had all of them survived the distribution date passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the distribution date. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date. For the purposes of this paragraph, "deceased beneficiary" means a class member who failed to survive the distribution date and left one or more surviving descendants;

(3) for the purposes of Section 45-2-701 NMSA 1978, words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. Words of survivorship include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed in condition-precedent, condition-subsequent or any other form; and

(4) if a governing instrument creates an alternative future interest with respect to a future interest for which a substitute gift is created by Paragraph (1) or (2) of this subsection, the substitute gift is superseded by the alternative future interest if:

(a) the alternative future interest is in the form of a class gift and one or more members of the class is entitled to take in possession or enjoyment; or

(b) the alternative future interest is not in the form of a class gift and the expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment.

C. If, pursuant to the provisions of Subsection B of this section, substitute gifts are created and not superseded with respect to more than one future interest and the future interests are alternative future interests, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

(1) except as provided in Paragraph (2) of this subsection, the property passes under the primary substitute gift;

(2) if there is a younger-generation future interest, the property passes under the younger-generation substitute gift and not under the primary substitute gift; and

(3) as used in this subsection:

(a) "primary future interest" means the future interest that would have taken effect had all the deceased beneficiaries of the alternative future interests who left surviving descendants survived the distribution date;

(b) "primary substitute gift" means the substitute gift created with respect to the primary future interest;

(c) "younger-generation future interest" means a future interest that: 1) is to a descendant of a beneficiary of the primary future interest; 2) is an alternative future interest with respect to the primary future interest; 3) is a future interest for which a substitute gift is created; and 4) would have taken effect had all the deceased beneficiaries who left surviving descendants survived the distribution date except the deceased beneficiary or beneficiaries of the primary future interest; and

(d) "younger-generation substitute gift" means the substitute gift created with respect to the younger-generation future interest.

D. Except as provided in Subsection E of this section, if after the application of Subsections B and C of this section there is no surviving taker, the property passes in the following order:

(1) if the trust was created in a nonresiduary devise in the transferor's will or in a codicil to the transferor's will, the property passes under the residuary clause in the transferor's will; for purposes of this section, the residuary clause is treated as creating a future interest under the terms of a trust; and

(2) if no taker is produced by the application of Paragraph (1) of this subsection, the property passes to the transferor's heirs pursuant to the provisions of Section 45-2-711 NMSA 1978.

E. If, after the application of Subsections B and C of this section, there is no surviving taker and if the future interest was created by the exercise of a power of appointment:

(1) the property passes under the donor's gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust; and

(2) if no taker is produced by the application of Paragraph (1) of this subsection, the property passes as provided in Subsection D of this section. For purposes of Subsection D of this section, "transferor" means the donor if the power was a nongeneral power and means the donee if the power was a general power.

History: 1978 Comp., § 45-2-707, enacted by Laws 1993, ch. 174, § 55; 1995, ch. 210, § 18; 2011, ch. 124, § 28.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-707 UPC.

The 2011 amendment, effective January 1, 2012, defined "descendants" and "surviving", and in Subsection B(4), provided the conditions under which a substitute gift is superseded by an alternative future interest.

The 1995 amendment, effective July 1, 1995, substituted "surviving descendants of any deceased beneficiary" for "deceased beneficiary or beneficiaries' surviving descendants" at the end of the first sentence of Paragraph B(2); redesignated former Subsection D as Paragraph C(3) and substituted "As used in this subsection" for "As used in Subsections C and D of this section" at the beginning; redesignated former Subsection E as Subsection D and added "Except as provided in Subsection E of this section" at the beginning; deleted former subsection designation F; and added present Subsection E.

45-2-708. Class gifts to descendants, issue or heirs of the body; form of distribution if none specified.

If a class gift in favor of "descendants", "issue" or "heirs of the body" does not specify the manner in which the property is to be distributed among the class members, the property is distributed among the class members who are living when the interest is to take effect in possession or enjoyment in such shares as they would receive pursuant to the applicable law of intestate succession if the designated ancestor had then died intestate owning the subject matter of the class gift.

History: 1978 Comp., § 45-2-708, enacted by Laws 1993, ch. 174, § 56.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-708 UPC.

45-2-709. Representation; per capita at each generation; per stirpes.

A. As used in this section:

(1) "deceased child" or "deceased descendant" means a child or a descendant who either predeceased the distribution date or is deemed to have predeceased the distribution date pursuant to the provisions of Section 45-2-702 NMSA 1978;

(2) "distribution date", with respect to an interest, means the time when the interest is to take effect in possession or enjoyment. The distribution date need not

occur at the beginning or end of a calendar day, but can occur at a time during the course of a day; and

(3) "surviving ancestor", "surviving child" or "surviving descendant" means an ancestor, a child or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date pursuant to the provisions of Section 45-2-702 NMSA 1978.

B. If an applicable statute or a governing instrument calls for property to be distributed "by representation" or "per capita at each generation", the property is divided into as many equal shares as there are:

(1) surviving descendants in the generation nearest to the designated ancestor that contains one or more surviving descendants; and

(2) deceased descendants in the same generation who left surviving descendants, if any.

Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the distribution date.

C. If a governing instrument calls for property to be distributed "per stirpes", the property is divided into as many equal shares as there are:

(1) surviving children of the designated ancestor; and

(2) deceased children who left surviving descendants.

Each surviving child, if any, is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.

D. For the purposes of Subsections B and C of this section, an individual who is deceased and left no surviving descendant is disregarded and an individual who leaves a surviving ancestor who is a descendant of the designated ancestor is not entitled to a share.

History: 1978 Comp., § 45-2-709, enacted by Laws 1993, ch. 174, § 57; 1995, ch. 210, § 19; 2011, ch. 124, § 29.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-709 UPC.

The 2011 amendment, effective January 1, 2012, in Subsection C, provided that each surviving child, if any, is allocated one share.

The 1995 amendment, effective July 1, 1995, inserted "if any" following "deceased child" in the second paragraph of Subsection C.

45-2-710. Worthier-title doctrine abolished.

The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's "heirs", "heirs at law", "next of kin", "distributees", "relatives" or "family" or language of similar import does not create or presumptively create a reversionary interest in the transferor.

History: 1978 Comp., § 45-2-710, enacted by Laws 1993, ch. 174, § 58.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-710 UPC.

45-2-711. Future interests in heirs and like.

If an applicable statute or a governing instrument calls for a present or future distribution to or creates a present or future interest in a designated individual's "heirs", "heirs at law", "next of kin", "relatives" or "family" or language of similar import, the property passes to those persons, including the state, and in such shares as would succeed to the designated individual's intestate estate under the intestate succession law of the designated individual's domicile if the designated individual died when the disposition is to take effect in possession or enjoyment. If the designated individual's surviving spouse is living but is remarried at the time the disposition is to take effect in possession or enjoyment, the surviving spouse is not an heir of the designated individual.

History: 1978 Comp., § 45-2-711, enacted by Laws 1993, ch. 174, § 59; 1995, ch. 210, § 20.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-711 UPC.

The 1995 amendment, effective July 1, 1995, in the first sentence, inserted "present or" in two places near the beginning and deleted "pursuant to the provisions of Section 45-2-105 NMSA 1978" following "including the state" near the middle.

PART 8
GENERAL PROVISIONS

45-2-801. Repealed.

ANNOTATIONS

Repeals. — Laws 2001, ch. 290, § 18, repealed 45-2-801 NMSA 1978, as amended by Laws 1995, ch. 210, § 21, relating to a disclaimer of property interests, effective July 1, 2001. For provisions of former section, *see* the 2000 NMSA 1978 on *NMONESOURCE.COM*. For present comparable provisions, *see* 45-2-1101 NMSA 1978.

45-2-802. Effect of divorce, annulment and decree of separation.

A. An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he is married to the decedent at the time of death. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

B. For purposes of Chapter 45, Article 2, Parts 1 through 4 and Section 45-3-203 NMSA 1978, a surviving spouse does not include:

(1) an individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless subsequently they participate in a marriage ceremony purporting to marry each to the other or live together as husband and wife;

(2) an individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual; or

(3) an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights, including a property division judgment entered pursuant to the provisions of Section 40-4-20 NMSA 1978.

History: 1953 Comp., § 32A-2-802, enacted by Laws 1975, ch. 257, § 2-802; repealed and reenacted by Laws 1993, ch. 174, § 61; 1995, ch. 210, § 22.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-802 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 61 repealed former 45-2-802 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-802, and enacted a new section, effective July 1, 1993.

Cross references. — For annulment of prohibited marriages, restrictions, *see* 40-1-9 NMSA 1978.

For extent of alteration of legal relations by separation decree, *see* 40-2-8 NMSA 1978.

For failure to divide property on divorce, property unaffected, subsequent division, *see* 40-4-20 NMSA 1978.

The 1995 amendment, effective July 1, 1995, added the language beginning "including a property" at the end of Paragraph B(3).

Spouse not surviving spouse. — Where the decedent's spouse was a party to the final decree dividing marital property entered pursuant to 40-4-20 NMSA 1978, and decedent died before a final decree of divorce was entered, the spouse was not a "surviving spouse" for purposes of the distribution of the decedent's estate, because 45-2-802B(3) NMSA 1978 of the Uniform Probate Code specifically excludes from the definition of "surviving spouse" such an individual. Karpien v. Karpien 2009-NMCA-043, 146 N.M. 188, 207 P.3d 1165.

Pending divorce proceeding at time of death. — Since there was a pending divorce proceeding between decedent and decedent's spouse at the time of decedent's death, the district court erred by prematurely adjudicating the validity of the will and trust and by prematurely admitting the will to probate prior to the completion of the pending divorce proceedings since, under 45-2-802B(3) NMSA 1978, the decedent's spouse would be precluded as a surviving spouse in the event of a judgment or decree terminating all marital property rights pursuant to 40-4-20B NMSA 1978 and such a judgment or decree would serve to revoke all governing instruments pursuant to 45-2-804B(1)(a) NMSA 1978, so that decedent's spouse would have no interest in decedent's estate as a surviving spouse. Oldham v. Oldham, 2009-NMCA-126, 147 N.M. 329, 222 P.3d 701, aff'd in part, rev'd in part, 2011-NMSC-007, 149 N.M. 215, 247 P.3d 736.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Property rights arising from relationship of couple cohabiting without marriage, 69 A.L.R.5th 219.

Divorce or separation as affecting person entitled to devise or bequest to husband, wife or widow, 75 A.L.R.2d 1413.

Devolution of gift over upon spouse predeceasing testator where gift to spouse fails because of divorce, 74 A.L.R.3d 1108.

Husband's death as affecting periodic payment provision of separation agreement, 5 A.L.R.4th 1153.

Prior institution of annulment proceedings or other attack on validity of one's marriage as barring or estopping one from entitlement to property rights as surviving spouse, 31 A.L.R.4th 1190.

95 C.J.S. Wills §§ 293, 564.

45-2-803. Effect of homicide on intestate succession, wills, trusts, joint assets, life insurance and beneficiary designations.

A. As used in this section:

(1) "disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument; and

(2) "revocable", with respect to a disposition, appointment, provision or nomination, means one under which the decedent, at the time of or immediately before death, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the killer, whether or not the decedent was then empowered to designate the decedent's own self in place of the decedent's killer and the decedent then had capacity to exercise the power.

B. An individual who feloniously and intentionally kills the decedent forfeits all benefits pursuant to the provisions of Chapter 45, Article 2 NMSA 1978 with respect to the decedent's estate, including an intestate share, an omitted spouse's or child's share, a family allowance and a personal property allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed the killer's intestate share.

C. The felonious and intentional killing of the decedent:

(1) revokes any revocable:

(a) disposition or appointment of property made by the decedent to the killer in a governing instrument;

(b) provision in a governing instrument executed by the decedent conferring a general or nongeneral power of appointment on the killer; and

(c) nomination of the killer in a governing instrument executed by the decedent, nominating or appointing the killer to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee or agent; and

(2) severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship, transforming the interests of the decedent and killer into equal tenancies in common.

D. A severance pursuant to the provisions of Paragraph (2) of Subsection C of this section does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the killer unless a writing declaring the severance has been noted, registered, filed or recorded in records appropriate to the kind and location of the property that are relied upon in the ordinary course of transactions involving such property as evidence of ownership.

E. Provisions of a governing instrument executed by the decedent are given effect as if the killer disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent.

F. An acquisition of property or interest by a killer not covered by this section shall be treated in accordance with the principle that a killer cannot profit from the killer's wrong.

G. After all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. In the absence of a conviction, the court upon the petition of an interested person shall determine whether under the preponderance of evidence standard the individual would be found criminally accountable for the felonious and intentional killing of the decedent. If the court determines that under that standard the individual would be found criminally accountable for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent's killer for purposes of this section.

H. A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument executed by the decedent affected by an intentional and felonious killing or for having taken any other action in good faith reliance on the validity of the governing instrument executed by the decedent upon request and satisfactory proof of the decedent's death before the payor or other third party received written notice of a claimed forfeiture or revocation under this section. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section.

Written notice of a claimed forfeiture or revocation pursuant to the provisions of this section shall be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed forfeiture or revocation pursuant to the provisions of this section, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination pursuant to the provisions of this section, shall order disbursement in accordance with the determination. Payments, transfers or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

I. A person who purchases property for value and without notice or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation is neither obligated pursuant to the provisions of this section to return the payment, item of property or benefit nor liable pursuant to the provisions of this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property or any other benefit to which the person is not entitled pursuant to the provisions of this section is obligated to return the payment, item of property or benefit or is personally liable for the amount of the payment or the value of the item of property or benefit to the person who is entitled to it pursuant to the provisions of this section.

J. If this section or any part of this section is preempted by federal law with respect to a payment, an item of property or any other benefit covered by this section, a person who, not for value, receives the payment, item of property or any other benefit to which the person is not entitled pursuant to the provisions of this section is obligated to return the payment, item of property or benefit or is personally liable for the amount of the payment or the value of the item of property or benefit to the person who would have been entitled to it were this section or part of this section not preempted.

History: 1953 Comp., § 32A-2-803, enacted by Laws 1975, ch. 257, § 2-803; repealed and reenacted by Laws 1993, ch. 174, § 62; 1995, ch. 210, § 23; 2011, ch. 124, § 30.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-803 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 62 repealed former 45-2-803 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-803, and enacted a new section, effective July 1, 1993.

Cross references. — For murderer not to profit from wrongdoing, *see* 30-2-9 NMSA 1978.

The 2011 amendment, effective January 1, 2012, in Subsection C, provided that the killing transforms the interest of the killer and the decedent in jointly held property into equal tenancies in common.

The 1995 amendment, effective July 1, 1995, in Subsection E, deleted "that are not revoked by this section" following "executed by the decedent" and substituted "provisions revoked by this section" for "revoked provisions".

Applicability. — This section is limited to benefits that pass under the Uniform Probate Code and did not apply to forfeit of any rights under the Wrongful Death Act (41-2-1 NMSA 1978). Aranda v. Camacho, 1997-NMCA-010, 122 N.M. 763, 931 P.2d 757.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Homicide as precluding taking under will or by intestacy, 25 A.L.R.4th 787.

26A C.J.S. Descent and Distribution § 47; 46A C.J.S. Insurance §§ 1576, 1584; 48A C.J.S. Joint Tenancy §§ 3, 17; 94 C.J.S. Wills § 104.

45-2-804. Revocation of probate and nonprobate transfers by divorce; no revocation by other changes of circumstances.

A. As used in this section:

(1) "disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a revocable trust or other governing instrument;

(2) "divorce or annulment" means a divorce or annulment, a dissolution or declaration of invalidity of a marriage that would exclude the spouse as a surviving spouse within the meaning of Section 45-2-802 NMSA 1978 or the commencement of a valid proceeding concluded either before or after an individual's death by an order purporting to terminate all marital property rights, including a property division judgment entered pursuant to the provisions of Section 40-4-20 NMSA 1978. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section;

(3) "divorced individual" includes an individual whose marriage has been annulled;

(4) "governing instrument" means a governing instrument executed by the divorced individual before the divorce or annulment of the divorced individual's marriage to the former spouse;

(5) "relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption or affinity; and

(6) "revocable", with respect to a disposition, appointment, provision or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered by law or under the governing instrument to cancel the designation in favor of the former spouse or former spouse's relative whether or not the divorced individual was then empowered to designate the divorced individual's own self in place of the former spouse or in place of the former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

B. Except as provided by the express terms of a governing instrument, a court order or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce or annulment, the divorce or annulment of a marriage:

(1) revokes any revocable:

(a) disposition or appointment of property made by a divorced individual to the former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse;

(b) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse; and

(c) nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent or guardian; and

(2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship, transforming the interests of the former spouses into equal tenancies in common.

C. A severance pursuant to the provisions of Paragraph (2) of Subsection B of this section does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed or recorded in records appropriate to the kind and location of the property that are relied upon in the ordinary course of transactions involving such property as evidence of ownership.

D. Provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section or, in the

case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

E. Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

F. No change of circumstances other than as described in this section and in Section 45-2-803 NMSA 1978 effects a revocation.

G. A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment or remarriage or for having taken any other action in good faith reliance on the validity of the governing instrument before the payor or other third party received written notice of the divorce, annulment or remarriage. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation pursuant to the provisions of this section.

Written notice of the divorce, annulment or remarriage pursuant to the provisions of this section shall be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of the written notice of the divorce, annulment or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination pursuant to the provisions of this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

H. A person who purchases property from a former spouse, relative of a former spouse or any other person for value and without notice or who receives from a former spouse, relative of a former spouse or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation is neither obligated pursuant to the provisions of this section to return the payment, item of property or benefit nor is liable pursuant to the provisions of this section for the amount of the payment or the value of the item of property or benefit. But a former spouse, relative of a former spouse or other person who, not for value, received a payment, item of property or any other benefit to which that person is not entitled pursuant to the provisions of this section is obligated to return the payment, item of property or benefit or is personally liable for the amount of the payment or the value of the item of property or benefit to the person who is entitled to it pursuant to the provisions of this section.

I. If this section or any part of this section is preempted by federal law with respect to a payment, an item of property or any other benefit covered by this section, a former spouse, relative of the former spouse or any other person who, not for value, received a payment, item of property or any other benefit to which that person is not entitled pursuant to the provisions of this section is obligated to return that payment, item of property or benefit or is personally liable for the amount of the payment or the value of the item of property or benefit to the person who would have been entitled to it were this section or part of this section not preempted.

History: 1978 Comp., § 45-2-804, enacted by Laws 1993, ch. 174, § 63; 1995, ch. 210, § 24; 2011, ch. 124, § 31.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-804 UPC.

Recompilations. — Laws 1993, ch. 174, § 64 recompiled former 45-2-804 NMSA 1978, relating to death of a spouse, as 45-2-805 NMSA 1978, effective July 1, 1993.

The 2011 amendment, effective January 1, 2012, included a revocable trust in the definition of "disposition or appointment of property" and included the commencement of proceedings to terminate all marital property rights in the definition of "divorce or annulment".

The 1995 amendment, effective July 1, 1995, in Subsection D, deleted "that are not revoked by this section" following "governing instrument" and substituted "all provisions revoked by this section" for "the revoked provisions".

Meaning of divorce. — A judgment or decree terminating all property rights pursuant to 40-4-20B NMSA 1978 meets the definition of a divorce pursuant to 45-2-804A(2) NMSA 1978 and is sufficient to revoke governing estate planning documents pursuant to 45-2-804B(1)(a) NMSA 1978. Oldham v. Oldham, 2009-NMCA-126, 147 N.M. 329, 222 P.3d 701, aff'd in part, rev'd in part, 2011-NMSC-007, 149 N.M. 215, 247 P.3d 736.

Admitting will to probate during pendency of divorce proceeding. — Where decedent executed a will designating decedent’s spouse as the personal representative and beneficiary of decedent’s estate; decedent subsequently filed a petition for divorce; and decedent died while the divorce proceeding was pending, the court acted prematurely in adjudicating the validity of the will and admitting the will to probate prior to the completion of the pending divorce proceeding. Oldham v. Oldham, 2009-NMCA-126, 147 N.M. 329, 222 P.3d 701, aff'd in part, rev'd in part, 2011-NMSC-007, 149 N.M. 215, 247 P.3d 736.

Construction of unrevoked provisions. — The Uniform Probate Code’s provision for revocation of a will in the event of divorce controls the effect of divorce on the

construction of the unrevoked portions of the will. Seymour v. Davis, 93 N.M. 328, 600 P.2d 274 (1979).

45-2-805. Reformation to correct mistakes.

The district court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence what the transferor's intention was and that the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.

History: 1978 Comp., § 45-2-805, enacted by Laws 2011, ch. 124, § 32.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 32 recompiled former 45-2-805 NMSA 1978 as 45-2-807 NMSA 1978 and enacted a new section as 45-2-805 NMSA 1978, effective January 1, 2012.

45-2-806. Modification to achieve transferor's tax objectives.

To achieve the transferor's tax objectives, the district court may modify the terms of a governing instrument in a manner that is not contrary to the transferor's probable intention. The district court may provide that the modification has retroactive effect.

History: 1978 Comp., § 45-2-806, enacted by Laws 2011, ch. 124, § 33.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 33 recompiled former 45-2-806 NMSA 1978 as 45-2-808 NMSA 1978 and enacted new section as 45-2-806 NMSA 1978, effective January 1, 2012.

45-2-807. Death of spouse; community property.

A. Upon the death of either spouse, one-half of the community property belongs to the surviving spouse, and the other half is subject to the testamentary disposition of the decedent, except that community property that is joint tenancy property under Subsection B of Section 40-3-8 NMSA 1978 shall not be subject to the testamentary disposition of the decedent.

B. Upon the death of either spouse, the entire community property is subject to the payment of community debts. The deceased spouse's separate debts and funeral expenses and the charge and expenses of administration are to be satisfied first from his separate property, excluding property held in joint tenancy. Should such property be

insufficient, then the deceased spouse's undivided one-half interest in the community property shall be liable.

C. The provisions of the 1984 amendments to this section shall not affect the right of any creditor, which right accrued prior to the effective date of those amendments.

History: 1953 Comp., § 32A-2-804, enacted by Laws 1975, ch. 257, § 2-804; 1984, ch. 122, § 2; 1978 Comp., § 45-2-804, recompiled as 1978 Comp., § 45-2-805 by Laws 1993, ch. 174, § 64; recompiled as 1978 Comp., § 45-2-807 by Laws 2011, ch. 124, § 32.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 32 recompiled former 45-2-805 NMSA 1978 as 45-2-807 NMSA 1978 and enacted a new 45-2-805 NMSA 1978, effective January 1, 2012.

Compiler's notes. — This section includes within its scope some of the functions of former 29-1-8 and 29-1-9, 1953 Comp.

Cross references. — For status of missing persons and death presumed by absence, *see* 45-1-107 NMSA 1978.

For intestate survivorship requirements, *see* 45-2-104 NMSA 1978.

The 1984 amendment, effective March 6, 1984, referred to in Subsection C are those effected by Laws 1984, ch. 122, § 2 that added the exception at the end of Subsection A and added Subsection C.

Federal tax liability. — One-half of the community property owned by husband and wife at the date of the death of the husband, who died intestate, was includible in his gross estate for federal estate tax purposes. Hurley v. Hartley, 255 F. Supp. 459 (D.N.M. 1966), aff'd, 379 F.2d 205 (10th Cir. 1967).

Transfer of assets rendered estate insolvent. — Since assets received by a widow under a will, which transfer rendered the estate insolvent, could be reached in the hands of the transferee by deceased's creditors under former 29-1-9, 1953 Comp., they could be reached by the federal government for the purpose of subjecting them to the tax liability of the transferor. United States v. Floersch, 276 F.2d 714 (10th Cir. 1960), cert. denied, 364 U.S. 816, 81 S. Ct. 46, 5 L. Ed. 2d 47 (1960).

Purpose of Subsection B of 45-2-805 NMSA 1978, subjecting the entire community to payment of community debts, is intended to protect third parties who have dealt in good faith with the community during its existence against dissipation of the estate by the survivor before outstanding debts were taken care of. Shadden v. Shadden, 93 N.M. 274, 599 P.2d 1071 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979),

overruled on other grounds, Huntington Nat'l Bank v. Sproul, 116 N.M. 254, 861 P.2d 935 (1993).

Community member's promissory note refers to community's personal property. — When a member of a community takes a promissory note from himself as a member of the community, he is charged with the knowledge that any document purporting to pledge the credit of the community can only refer to the community's personal property. Shadden v. Shadden, 93 N.M. 274, 599 P.2d 1071 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979), overruled on other grounds, Huntington Nat'l Bank v. Sproul, 116 N.M. 254, 861 P.2d 935 (1993).

Joinder of wife as administratrix proper. — Where husband financed his purchase of a jeep, took out creditor life insurance and later sold jeep to third parties for $100 plus assumption of debt to finance company and upon death proceeds of policy were paid to finance company, it was not reversible error to allow widow, who sued purchasers for damages or rescission of sale, to make post-trial joinder of herself as administratrix of husband's estate. Smith v. Castleman, 81 N.M. 1, 462 P.2d 135 (1969).

Community property is not liable for antenuptial debt of spouse. Wiggins v. Rush, 83 N.M. 133, 489 P.2d 641 (1971).

Disposal of community property by will. — A husband may dispose of his interest in the community property by will. United States v. Floersch, 276 F.2d 714 (10th Cir. 1960), cert. denied, 364 U.S. 816, 81 S. Ct. 46, 5 L. Ed. 2d 47 (1960).

Law reviews. — For comment, "In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage," see 9 N.M.L. Rev. 113 (1978-79).

For article, "Survey of New Mexico Law, 1979-80: Estates and Trusts," see 11 N.M.L. Rev. 151 (1981).

For note, "Community Property - Transmutation of Community Property: A Preference for Joint Tenancy in New Mexico?" see 11 N.M.L. Rev. 421 (1981).

For note, "Community Property - Spouse's Future Federal Civil Service Disability Benefits are Community Property to the Extent the Community Contributed to the Civil Service Fund During Marriage: Hughes v. Hughes," see 13 N.M.L. Rev. 193 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Community Property §§ 105, 106.

Husband's death as affecting periodic payment provision of separation agreement, 5 A.L.R.4th 1153.

94 C.J.S. Wills § 88; 97 C.J.S. Wills § 1312.

45-2-808. Validity and effect of will executed by a wife prior to July 1, 1973.

If a wife has executed a will prior to July 1, 1973, which remains unrevoked or unamended and in which she has not exercised a power of testamentary disposition over her one-half interest in the community property by specific reference thereto and affirmative disposition thereof, her interest in the community property goes to her surviving husband. The wife's will shall be valid in disposing of any other property over which she has testamentary disposition notwithstanding her legal disability under prior law to exercise a power of testamentary disposition of her interest in the community property.

History: 1953 Comp., § 29-1-32, enacted by Laws 1973, ch. 276, § 8; 1978 Comp., § 45-8-9, recompiled as 1978 Comp., § 45-2-806 by Laws 1993, ch. 174, § 65; recompiled as 1978 Comp., § 45-2-808 by Laws 2011, ch. 124, § 33.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 33 recompiled former 45-2-806 NMSA 1978 as 45-2-808 NMSA 1978 and enacted a new 45-2-806 NMSA 1978, effective January 1, 2012.

Cross references. — For intestate share of spouse in separate and community properties, *see* 45-2-102 NMSA 1978.

For the general disposition of community property upon the death of one spouse, *see* 45-2-804 NMSA 1978.

For definition of community property, *see* 40-3-8 NMSA 1978.

For presumption of separate property where acquisition by wife in her own name prior to July 1, 1973, *see* 40-3-12 NMSA 1978.

For transfer and management of community real property, *see* 40-3-13 NMSA 1978.

For transfer and management of community personal property, *see* 40-3-14 NMSA 1978.

PART 9
UNIFORM STATUTORY RULE AGAINST PERPETUITIES; HONORARY TRUSTS; TRUSTS FOR PETS; TIME LIMITS ON OPTIONS IN GROSS AND CERTAIN OTHER INTERESTS IN REAL PROPERTY

SUBPART 1. Uniform Statutory Rule AgainstPerpetuities

45-2-901. Statutory rule against perpetuities.

A. A nonvested property interest is invalid unless:

(1) when the interest is created, it is certain to vest or terminate no later than twenty-one years after the death of an individual then alive; or

(2) the interest either vests or terminates within ninety years after its creation.

B. A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

(1) when the power is created, the condition precedent is certain to be satisfied or to become impossible to satisfy no later than twenty-one years after the death of an individual then alive; or

(2) the condition precedent either is satisfied or becomes impossible to satisfy within ninety years after its creation.

C. A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

(1) when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than twenty-one years after the death of an individual then alive; or

(2) the power is irrevocably exercised or otherwise terminates within ninety years after its creation.

D. In determining whether a nonvested property interest or a power of appointment is valid under each Paragraph (1) of Subsections A, B and C of this section, the possibility that a child will be born to an individual after the individual's death shall be disregarded.

E. If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until or (iii) seeks to operate in effect in any similar fashion upon, the later of (1) the expiration of a period of time not exceeding twenty-one years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or (2) the expiration of a period of time that exceeds or might exceed twenty-one years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the

extent it produces a period of time that exceeds twenty-one years after the death of the survivor of the specified lives.

History: 1978 Comp., § 45-2-1001, enacted by Laws 1992, ch. 66, § 1; recompiled as 1978 Comp., § 45-2-901 by Laws 1993, ch. 174, § 66; 2011, ch. 124, § 34.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-901 UPC.

Repeals. — Laws 1993, ch. 174, § 84 repealed former 45-2-901 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-901, relating to the deposit of a will with the court in the testator's lifetime, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMONESOURCE.COM*.

The 2011 amendment, effective January 1, 2012, in Subsection E, rewrote the rule for determining when the language of a trust or other property arrangement is inoperative because it prevents the vesting or termination of an interest beyond twenty-one years after the death of the survivor of the lives specified in the trust or other property arrangement.

Rule of perpetuities relates only to future interest in property. Price v. Atlantic Ref. Co., 79 N.M. 629, 447 P.2d 509 (1968).

Rule of perpetuities not violated by present interest. — Where the royalty retained is real property, a present interest in the minerals in and under the land, the rule against perpetuities was not violated. Price v. Atlantic Ref. Co., 79 N.M. 629, 447 P.2d 509 (1968).

Warranty deed not in violation of rule against perpetuities. Gartley v. Ricketts, 107 N.M. 451, 760 P.2d 143 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Perpetuities and Restraints on Alienation §§ 2, 6 et seq.

Perpetual lease or covenant to renew lease perpetually as violation of rule against perpetuities or the suspension of the power of alienation, 3 A.L.R. 498, 162 A.L.R. 1147.

Cemetery lot, devise or bequest for upkeep of as a violation of rule against perpetuities, 4 A.L.R. 1124, 14 A.L.R. 118.

Postponing distribution until payment of debts or settlement of estate, as violating rule against perpetuities, 13 A.L.R. 1033.

Rule against perpetuities as affecting limitation over to charity after a gift of indefinite duration to another charity, 30 A.L.R. 594.

Business trust as affected by rule against perpetuities, 58 A.L.R. 521, 156 A.L.R. 22.

Lease for term of years, or contract therefor, as violating rule against perpetuities, 66 A.L.R. 733.

Doctrine as to possibility of issue extinct as affecting rule against perpetuities, 67 A.L.R. 546, 98 A.L.R.2d 1285.

Reverter or breach of condition subsequent, applicability of rule against perpetuities to, 70 A.L.R. 1196, 133 A.L.R. 1476.

Violation of rule against perpetuities, or unlawful restraint of alienation or suspension of ownership, by postponement of vesting or alienation of ownership until exercise of discretion as to sale or disposal, 89 A.L.R. 1036.

Provision which suspends vesting of estate or interest for fixed period upon condition or with qualification that period shall not be longer than lifetime of person or persons in being at death of testator as violation of rule against perpetuities, 91 A.L.R. 771.

Validity of appointment under power with reference to rule against perpetuities, 101 A.L.R. 1282, 104 A.L.R. 1352.

Distinction as regards rule against perpetuities between time of vesting of future estate and time fixed for enjoyment of possession, 110 A.L.R. 1450.

Gifts to class conditional upon specified age being attained, 155 A.L.R. 698.

Validity of Massachusetts trusts as affected by rule against perpetuities, 156 A.L.R. 22.

Restraint upon voluntary alienation of legal life estate, 160 A.L.R. 639.

Prior estate as affected by remainder void for remoteness, 168 A.L.R. 321.

Gifts to charity as affected by conjoined noncharitable gift invalid under rule or statute against perpetuities or rule against accumulations, 170 A.L.R. 760.

Rule limiting duration of restraints on alienation as applicable to covenant in deed restricting use of property, 10 A.L.R.2d 824.

Validity, as for a charitable purpose, of trust for dissemination or preservation of material of historical or other educational interest or value, 12 A.L.R.2d 849, 34 A.L.R.4th 419.

Validity, under rule against perpetuities, of gift in remainder to creator's great grandchildren, following successive life estates to children and grandchildren, 18 A.L.R.2d 671.

Validity of provision of will or conveyance limiting alienation to certain individuals or those of a limited class, 36 A.L.R.2d 1437.

Validity of restraint on alienation, of an estate in fee, ending not later than expiration of a life or lives in being, 42 A.L.R.2d 1243.

Option created by will to purchase real estate, 44 A.L.R.2d 1214, 13 A.L.R.4th 947.

Application of rule against perpetuities to limitation over on discontinuance of use for which premises are given or granted, or the commencement of a prohibited use, 45 A.L.R.2d 1154.

Postponement of enjoyment of interest as affecting validity of perpetual nonparticipating royalty interest in oil and gas under rule against perpetuities, 46 A.L.R.2d 1268.

Separability for purpose of rule against perpetuities of gifts to several persons by one description, 56 A.L.R.2d 450.

Rule against perpetuities where estate is limited on alternative contingencies, one within and one beyond the period allowed by vesting of estates, 98 A.L.R.2d 807.

Option to purchase as violation of rule against perpetuities, 66 A.L.R.3d 1294.

Radio or television aerials, antennas, towers, or satellite dishes or discs as within terms of covenant restricting use, erection, or maintenance of such structures upon residential property, 76 A.L.R.4th 498.

70 C.J.S. Perpetuities §§ 12 to 14.

45-2-902. Nonvested property interest or power of appointment created.

A. Except as provided in Subsections B and C of this section and except as provided in Subsection A of Section 45-2-905 NMSA 1978, the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

B. Under Sections 45-2-901 through 45-2-905 NMSA 1978, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified owner of either a nonvested property interest or a property interest subject to a power of appointment as described in Subsection B or C of Section 45-2-901 NMSA 1978, the nonvested property interest or power of appointment is created when

the power to become the unqualified beneficial owner terminates. Under Sections 45-2-901 through 45-2-905 NMSA 1978, a joint power with respect to community property or to marital property under the Uniform Marital Property Act held by individuals married to each other is a power exercisable by one person alone.

C. Under Sections 45-2-901 through 45-2-905 NMSA 1978, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

History: 1978 Comp., § 45-2-1002, enacted by Laws 1992, ch. 66, § 2; recompiled as 1978 Comp., § 45-2-902 by Laws 1993, ch. 174, § 66; 1995, ch. 210, § 25.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-902 UPC.

Repeals. — Laws 1993, ch. 174, § 84 repealed former 45-2-902 NMSA 1978, as enacted by Laws 1975, ch. 257, § 2-902, relating to the duty and liability of the custodian of a will, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMONESOURCE.COM*.

The 1995 amendment, effective July 1, 1995, substituted "Section 45-2-905 NMSA 1978" for "Section 45-2-1005 NMSA 1978" in Subsection A; substituted "Section 45-2-901 NMSA 1978" for "Section 45-2-1001 NMSA 1978" in the first sentence of Subsection B; and substituted "Sections 45-2-901 through 45-2-905 NMSA 1978" for "Sections 45-2-1001 through 45-2-1005 NMSA 1978" in two places in Subsection B and in Subsection C.

45-2-903. Reformation.

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the ninety years allowed by each Paragraph (2) of Subsections A, B or C of Section 45-2-901 NMSA 1978 if:

A. a nonvested property interest or a power of appointment becomes invalid under Section 45-2-901 NMSA 1978;

B. a class gift is not but might become invalid under Section 45-2-901 NMSA 1978 and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

C. a nonvested property interest that is not validated by Paragraph (1) of Subsection A of Section 45-2-901 NMSA 1978 can vest but not within ninety years after its creation.

History: 1978 Comp., § 45-2-1003, enacted by Laws 1992, ch. 66, § 3; recompiled as 1978 Comp., § 45-2-903 by Laws 1993, ch. 174, § 66; 1995, ch. 210, § 26.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-903 UPC.

The 1995 amendment, effective July 1, 1995, substituted "Section 45-2-901 NMSA 1978" for "Section 45-2-1001 NMSA 1978" in four places throughout the section.

45-2-904. Exclusions.

Section 45-2-901 NMSA 1978 does not apply to:

A. a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of:

(1) a premarital or postmarital agreement;

(2) a separation or divorce settlement;

(3) a spouse's election;

(4) a similar arrangement arising out of a prospective, existing or previous marital relationship between the parties;

(5) a contract to make or not to revoke a will or trust;

(6) a contract to exercise or not to exercise a power of appointment;

(7) a transfer in satisfaction of a duty of support; or

(8) a reciprocal transfer;

B. a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease or mortgage property and the power of a fiduciary to determine principal and income;

C. a power to appoint a fiduciary;

D. a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

E. a nonvested property interest held by a charity, government or governmental agency or subdivision if the nonvested property interest is preceded by an interest held by another charity, government or governmental agency or subdivision;

F. a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral or other current or deferred benefit plan for one or more employees, independent contractors or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse;

G. a property interest, power of appointment or arrangement that was not subject to the common-law rule against perpetuities or that is excluded by another statute of New Mexico; or

H. a property interest or arrangement subject to a time limit under the provisions of Section 45-2-907 NMSA 1978.

History: 1978 Comp., § 45-2-1004, enacted by Laws 1992, ch. 66, § 4; recompiled as 1978 Comp., § 45-2-904 by Laws 1993, ch. 174, § 66; 1995, ch. 210, § 27.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-904 UPC.

The 1995 amendment, effective July 1, 1995, substituted "Section 45-2-901 NMSA 1978" for "Section 45-2-1001 NMSA 1978" in the introductory paragraph and added Subsection H.

45-2-905. Prospective application.

A. Except as extended by Subsection B of this section, Sections 45-2-901 through 45-2-905 NMSA 1978 apply to a nonvested property interest or a power of appointment that is created on or after July 1, 1992. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

B. If a nonvested property interest or a power of appointment was created before July 1, 1992 and is determined in a judicial proceeding, commenced on or after July 1, 1992, to violate the New Mexico rule against perpetuities as that rule existed before July 1, 1992, a court, upon the petition of an interested person, may reform the disposition in the manner that most closely approximates the transferor's manifested plan of

distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.

History: 1978 Comp., § 45-2-1005, enacted by Laws 1992, ch. 66, § 5; recompiled as 1978 Comp., § 45-2-905 by Laws 1993, ch. 174, § 66; 1995, ch. 210, § 28.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-905 UPC.

The 1995 amendment, effective July 1, 1995, substituted "Sections 45-2-901 through 45-2-905 NMSA 1978" for "Sections 45-2-1001 through 45-2-1005 NMSA 1978" in the first sentence in Subsection A.

45-2-906. Supersession.

Sections 45-2-901 through 45-2-905 NMSA 1978 supersede the rule of the common law known as the rule against perpetuities.

History: 1978 Comp., § 45-2-1006, enacted by Laws 1992, ch. 66, § 6; recompiled as 1978 Comp., § 45-2-906 by Laws 1993, ch. 174, § 66; 1995, ch. 210, § 29.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, substituted "Sections 45-2-901 through 45-2-905 NMSA 1978" for "Sections 45-2-1001 through 45-2-1005 NMSA 1978".

SUBPART 2. Honorary Trusts; Trusts ForPets

45-2-907. Honorary trusts; trusts for pets.

A. Subject to Subsection C of this section, if (i) a trust is for a specific lawful noncharitable purpose or for lawful noncharitable purposes to be selected by the trustee and (ii) there is no definite or definitely ascertainable beneficiary designated, the trust may be performed by the trustee for twenty-one years but no longer, whether or not the terms of the trust contemplate a longer duration.

B. Subject to this subsection and Subsection C of this section, a trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument shall be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.

C. In addition to the provisions of Subsection A or B of this section, a trust covered by either of those subsections is subject to the following provisions:

(1) except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the trust's purposes or for the benefit of a covered animal;

(2) upon termination, the trustee shall transfer the unexpended trust property in the following order:

(a) as directed in the trust instrument;

(b) if the trust was created in a nonresiduary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will; and

(c) if no taker is produced by the application of Subparagraph (a) or (b), to the transferor's heirs under the provisions of Section 45-2-711 NMSA 1978;

(3) for the purposes of Section 45-2-707 NMSA 1978, the residuary clause is treated as creating a future interest under the terms of a trust;

(4) the intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual;

(5) except as ordered by the court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment or fee is required by reason of the existence of the fiduciary relationship of the trustee;

(6) a court may reduce the amount of the property transferred, if it determines that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under the provisions of Paragraph (2) of Subsection C of this section; and

(7) if no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.

History: 1978 Comp., § 45-2-907, enacted by Laws 1995, ch. 210, § 30.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-907 UPC.

Effective dates. — Laws 1995, ch. 210, § 94 made this section effective July 1, 1995.

SUBPART 3. Time Limits On Options In GrossAnd Certain Other Interests In Real Property

45-2-908. Definitions.

As used in Sections 45-2-909 through 45-2-914 NMSA 1978:

A. "nonvested easement in gross" means a nonvested easement that is not created to benefit or that does not benefit the possessor of any real property in the possessor's use of it as the possessor;

B. "option in gross with respect to an interest in real property" means an option in which the holder of the option does not own any leasehold or other interest in the real property that is the subject of the option; and

C. "preemptive right in the nature of a right of first refusal in gross with respect to an interest in real property" means a preemptive right in which the holder of the preemptive right does not own any leasehold or other interest in the real property that is the subject of the preemptive right.

History: 1978 Comp., § 45-2-908, enacted by Laws 2011, ch. 124, § 35.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 35 effective January 1, 2012.

45-2-909. Interest in real property.

An option in gross with respect to an interest in real property or a preemptive right in the nature of a right of first refusal in gross with respect to an interest in real property becomes invalid if it is not actually exercised within thirty years after its creation.

History: 1978 Comp., § 45-2-909, enacted by Laws 2011, ch. 124, § 36.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 36 effective January 1, 2012.

45-2-910. Lease to commence in the future.

A lease of real property to commence at a time certain or upon the occurrence or nonoccurrence of a future event becomes invalid if its term does not actually commence in possession within thirty years after its execution.

History: 1978 Comp., § 45-2-910, enacted by Laws 2011, ch. 124, § 37.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 37 effective January 1, 2012.

45-2-911. Nonvested easement.

A nonvested easement in gross becomes invalid if it does not actually vest within thirty years after its creation.

History: 1978 Comp., § 45-2-911, enacted by Laws 2011, ch. 124, § 38.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 38 effective January 1, 2012.

45-2-912. Possibility of reverter, right of entry, executory interest.

A possibility of reverter preceded by a fee simple determinable, a right of entry preceded by a fee simple subject to a condition subsequent or an executory interest preceded by either a fee simple determinable or a fee simple subject to an executory limitation becomes invalid, and the preceding fee simple becomes a fee simple absolute, if the right to vest in possession of the possibility of reverter, right of entry or executory interest depends on an event or events affecting the use of real property and if the possibility of reverter, right of entry or executory interest does not actually vest in possession within thirty years after its creation.

History: 1978 Comp., § 45-2-911, enacted by Laws 2011, ch. 124, § 39.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 39 effective January 1, 2012.

45-2-913. Exclusions.

A. Section 45-2-912 NMSA 1978 does not apply to a possibility of reverter, right of entry or executory interest that is held by a charity, a government or governmental agency or subdivision excluded from the provisions of Section 45-2-901 NMSA 1978 by Subsection E of Section 45-2-904 NMSA 1978.

B. Sections 45-2-909 and 45-2-910 NMSA 1978 do not apply to an option, a preemptive right in the nature of a right of first refusal or a lease that relates solely to an interest in oil, gas or other minerals.

History: 1978 Comp., § 45-2-911, enacted by Laws 2011, ch. 124, § 40.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 40 effective January 1, 2012.

45-2-914. Application.

Sections 45-2-908 through 45-2-913 NMSA 1978 apply only to a property interest or arrangement affecting real property that is created on or after January 1, 2012.

History: 1978 Comp., § 45-2-911, enacted by Laws 2011, ch. 124, § 41.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 104 made Laws 2011, ch. 124, § 41 effective January 1, 2012.

PART 10
INTERNATIONAL WILLS

45-2-1001. Definitions.

As used in Sections 45-2-1101 through 45-2-1110 NMSA 1978 [45-2-1001 to 45-2-1010 NMSA 1978]:

A. "international will" means a will executed in conformity with Sections 45-2-1102 through 45-2-1105 NMSA 1978 [45-2-1002 to 45-2-1005 NMSA 1978]; and

B. "authorized person" or "person authorized to act in connection with international wills" means a person who, by Section 45-2-1109 NMSA 1978 [45-2-1009 NMSA 1978] or by the laws of the United States, including members of the diplomatic and consular service of the United States designated by foreign service regulations, is empowered to supervise the execution of international wills.

History: 1978 Comp., § 45-2-1101, enacted by Laws 1992, ch. 66, § 7; recompiled as 1978 Comp., § 45-2-1001 by Laws 1993, ch. 174, § 67.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-1001 UPC.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. The bracketed translations were inserted in light of the 1993 recompilation of this part.

Recompilations. — Laws 1993, ch. 174, § 66 recompiled former 45-2-1001 NMSA 1978, as enacted by Laws 1992, ch. 66, § 1, relating to the statutory rule against perpetuities, as 45-2-901 NMSA 1978, effective July 1, 1993.

45-2-1002. International will; validity.

A. A will is valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the requirements of Sections 45-2-1101 through 45-2-1110 NMSA 1978 [45-2-1001 to 45-2-1010 NMSA 1978].

B. The invalidity of the will as an international will does not affect its formal validity as a will of another kind.

C. Sections 45-2-1101 through 45-2-1110 NMSA 1978 [45-2-1001 to 45-2-1010 NMSA 1978] do not apply to the form of testamentary dispositions made by two or more persons in one instrument.

History: 1978 Comp., § 45-2-1102, enacted by Laws 1992, ch. 66, § 8; recompiled as 1978 Comp., § 45-2-1002 by Laws 1993, ch. 174, § 67.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-1002 UPC.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. The bracketed translations were inserted in light of the 1993 recompilation of this part.

Recompilations. — Laws 1993, ch. 174, § 66 recompiled former 45-2-1002 NMSA 1978, as enacted by Laws 1992, ch. 66, § 2, relating to the statutory rule against perpetuities, as 45-2-902 NMSA 1978, effective July 1, 1993.

45-2-1003. International will; requirements.

A. The will must be made in writing. It need not be written by the testator himself. It may be written in any language, by hand or by any other means.

B. The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

C. In the presence of the witnesses, and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

D. If the testator is unable to sign, the absence of his signature does not affect the validity of the international will if the testator indicates the reason for his inability to sign and the authorized person makes note thereof on the will. In that case, it is permissible for any other person present, including the authorized person or one of the witnesses, at the direction of the testator, to sign the testator's name for him if the authorized person makes note of this on the will, but it is not required that any person sign the testator's name for him.

E. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

History: 1978 Comp., § 45-2-1103, enacted by Laws 1992, ch. 66, § 9; recompiled as 1978 Comp., § 45-2-1003 by Laws 1993, ch. 174, § 67.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-1003 UPC.

Recompilations. — Laws 1993, ch. 174, § 66 recompiled former 45-2-1003 NMSA 1978, as enacted by Laws 1992, ch. 66, § 3, relating to the statutory rule against perpetuities, as 45-2-903 NMSA 1978, effective July 1, 1993.

45-2-1004. International will; other points of form.

A. The signatures shall be placed at the end of the will. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

B. The date of the will shall be the date of its signature by the authorized person. That date shall be noted at the end of the will by the authorized person.

C. The authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator, the place where he intends to have his will kept shall be mentioned in the certificate provided for in Section 45-2-1105 NMSA 1978 [45-2-1005 NMSA 1978].

D. A will executed in compliance with Section 45-2-1103 NMSA 1978 is not invalid merely because it does not comply with this section.

History: 1978 Comp., § 45-2-1104, enacted by Laws 1992, ch. 66, § 10; recompiled as 1978 Comp., § 45-2-1004 by Laws 1993, ch. 174, § 67.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-1004 UPC.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. The bracketed translations were inserted in light of the 1993 recompilation of this part.

Recompilations. — Laws 1993, ch. 174, § 66 recompiled former 45-2-1004 NMSA 1978, as enacted by Laws 1992, ch. 66, § 4, relating to the statutory rule against perpetuities as 45-2-904 NMSA 1978, effective July 1, 1993.

45-2-1005. International will; certificate.

The authorized person shall attach to the will a certificate to be signed by him establishing that the requirements of Sections 45-2-1101 through 45-2-1110 NMSA 1978 [45-2-1001 to 45-2-1010 NMSA 1978] for valid execution of an international will have been fulfilled. The authorized person shall keep a copy of the certificate and deliver another to the testator. The certificate must be substantially in the following form:

CERTIFICATE

1. I, _____ (name, address, and capacity), a person authorized to act in connection with international wills,

2. certify that on _____ (date) at _____ (place)

3. (testator) ____ (name, address, date and place of birth) in my presence and that of the witnesses

4. (a) _____ (name, address, date and place of birth)

(b) _____ (name, address, date and place of birth) has declared that the attached document is his will and that he knows the contents thereof.

5. I furthermore certify that:

6. (a) in my presence and in that of the witnesses

(1) the testator has signed the will or has acknowledged his signature previously affixed;

*(2) following a declaration of the testator stating that he was unable to sign his will for the following reason _____, I have mentioned this declaration on the will,

*and the signature has been affixed by _____ (name and address);

7. (b) the witnesses and I have signed the will;

8. *(c) each page of the will has been signed by _____ and numbered;

9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;

10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;

11. *(f) the testator has requested me to include the following statement concerning the safekeeping of his will:

_____
_____

12. PLACE OF EXECUTION

13. DATE

14. SIGNATURE and, if necessary, SEAL

*to be completed if appropriate.

History: 1978 Comp., § 45-2-1105, enacted by Laws 1992, ch. 66, § 11; recompiled as 1978 Comp., § 45-2-1005 by Laws 1993, ch. 174, § 67.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-1005 UPC.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. The bracketed translations were inserted in light of the 1993 recompilation of this part.

Recompilations. — Laws 1993, ch. 174, § 66 recompiled former 45-2-1005 NMSA 1978, as enacted by Laws 1992, ch. 66, § 5, relating to the statutory rule against perpetuities, as 45-2-905 NMSA 1978, effective July 1, 1993.

45-2-1006. International will; effect of certificate.

In the absence of evidence to the contrary, the certificate of the authorized person is conclusive of the formal validity of the instrument as a will under Sections 45-2-1101 through 45-2-1110 NMSA 1978 [45-2-1001 to 45-2-1010 NMSA 1978]. The absence or irregularity of a certificate does not affect the formal validity of a will under Sections 45-2-1101 through 45-2-1110 NMSA 1978.

History: 1978 Comp., § 45-2-1106, enacted by Laws 1992, ch. 66, § 12; recompiled as 1978 Comp., § 45-2-1006 by Laws 1993, ch. 174, § 67.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-1006 UPC.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. The bracketed translations were inserted in light of the 1993 recompilation of this part.

Recompilations. — Laws 1993, ch. 174, § 66 recompiled former 45-2-1006 NMSA 1978, as enacted by Laws 1992, ch. 66, § 6, relating to the statutory rule against perpetuities, as 45-2-906 NMSA 1978, effective July 1, 1993.

45-2-1007. International will; revocation.

An international will is subject to the ordinary rules of revocation of wills.

History: 1978 Comp., § 45-2-1107, enacted by Laws 1992, ch. 66, § 13; recompiled as 1978 Comp., § 45-2-1007 by Laws 1993, ch. 174, § 67.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-1007 UPC.

45-2-1008. Source and construction.

Sections 45-2-1101 through 45-2-1107 NMSA 1978 [45-2-1001 to 45-2-1007 NMSA 1978] derive from annex to convention of October 26, 1973, providing a uniform law on the form of an international will. In interpreting and applying Sections 45-2-1101 through 45-2-1110 NMSA 1978 [45-2-1001 to 45-2-1010 NMSA 1978], regard shall be had to its international origin and to the need for uniformity in its interpretation.

History: 1978 Comp., § 45-2-1108, enacted by Laws 1992, ch. 66, § 14; recompiled as 1978 Comp., § 45-2-1008 by Laws 1993, ch. 174, § 67.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-10081 UPC.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. The bracketed translations were inserted in light of the 1993 recompilation of this part.

45-2-1009. Persons authorized to act in relation to international will; eligibility; recognition by authorizing agency.

Individuals who have been admitted to practice law before the courts of this state and are currently licensed so to do are authorized persons in relation to international wills.

History: 1978 Comp., § 45-2-1109, enacted by Laws 1992, ch. 66, § 15; recompiled as 1978 Comp., § 45-2-1009 by Laws 1993, ch. 174, § 67.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 2-1009 UPC.

45-2-1010. International will; information registration.

The secretary of state shall establish a registry system by which authorized persons may register, in a central information center, information regarding the execution of international wills, keeping that information in strictest confidence until the death of the maker and then making it available to any person desiring information about any will who presents a death certificate or other satisfactory evidence of the testator's death to the center. Information that may be received, preserved in confidence until death and reported as indicated is limited to the name, social security or any other individual identifying number established by law, address and date and place of birth of the testator, and the intended place of deposit or safekeeping of the instrument pending the death of the maker. The secretary of state, at the request of the authorized person, may cause the information it receives about execution of any international will to be

transmitted to the registry system of another jurisdiction as identified by the testator, if that other system adheres to rules protecting the confidentiality of the information similar to those established in this state.

History: 1978 Comp., § 45-2-1110, enacted by Laws 1992, ch. 66, § 16; recompiled as 1978 Comp., § 45-2-1010 by Laws 1993, ch. 174, § 67.

PART 11
PROPERTY INTERESTS

45-2-1101. Short title.

Chapter 45, Article 2, Part 11 NMSA 1978 [45-2-1101 to 45-2-1116 NMSA 1978] may be cited as the "Uniform Disclaimer of Property Interests Act".

History: Laws 2001, ch. 290, § 1; 1978 Comp., § 46-10-1 recompiled and amended as § 45-2-1101 NMSA 1978 by Laws 2011, ch. 124, § 89.

ANNOTATIONS

Recompilations. — Laws 1993, ch. 174, § 67 recompiled former sections 45-2-1101 to 45-2-1110 NMSA 1978, as enacted by Laws 1992, ch. 66, §§ 7 to 16, relating to international wills, as 45-2-1001 to 45-2-1010 NMSA 1978, effective July 1, 1993.

Laws 2011, ch. 124, § 89 recompiled and amended former 46-10-1 NMSA 1978 as 45-2-1101 NMSA 1978, effective January 1, 2012.

The 2011 amendment, effective January 1, 2012, changed the statutory reference to the act.

COMMENT

Part 11 [**45-2-1101 to 45-2-1116** NMSA 1978] incorporates into the Code the Uniform Disclaimer of Property Interests Act (UDIPA or Act). The UDPIA replaces the Code's former disclaimer provision (Section 2-801). It also replaces three Uniform Acts promulgated in 1978 (Uniform Disclaimer of Property Interests Act, Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, and Uniform Disclaimer of Transfers under Nontestatmentary Instruments Act). The new Act is the most comprehensive disclaimer statute ever written. It is designed to allow every sort of disclaimer, including those that are useful for tax planning purposes. It does not, however, include a specific time limit on the making of any disclaimer. Because a disclaimer is a refusal to accept, the only bar to a disclaimer should be acceptance of the offer. In addition, in almost all jurisdictions disclaimers can be used for more than tax planning. A proper disclaimer will often keep the disclaimed property from the disclaimant's creditors. In short, the new Act is an enabling statute which prescribes all the rules for refusing a proffered interest in or

power over property and the effect of that refusal on the power or interest while leaving the effect of the refusal itself to other law. Section 2-1113(e) [45-2-1113 NMSA 1978] explicitly states that a disclaimer may be barred or limited by law other than the Act.

The decision not to include a specific time limit -- to "decouple" the disclaimer statute from the time requirement applicable to a "qualified disclaimer" under IRC §2518 -- is also designed to reduce confusion. The older Uniform Acts and almost all the current state statutes (many of which are based on those Acts) were drafted in the wake of the passage of IRC §2518 in 1976. That provision replaced the "reasonable time" requirement of prior law with a requirement that a disclaimer must be made within nine months of the creation of the interest disclaimed if the disclaimer is to be a "qualified disclaimer" which is not regarded as transfer by the disclaimant. The statutes that were written in response to this new provision of tax law reflected the nine month time limit. Under most of these statutes (including the older Uniform Acts and former Section 2-801) a disclaimer must be made within nine months of the creation of a present interest (for example, as disclaimer of an outright gift under a will must be made within nine months of the decedent's death), which corresponds to the requirement of IRC §2518. A future interest, however, may be disclaimed within nine months of the time the interest vests in possession or enjoyment (for example, a remainder whether or not contingent on surviving the holder of the life income interest must be disclaimed within nine months of the death of the life income beneficiary). The time limit for future interests does not correspond to IRC §2518 which generally requires that a qualified disclaimer of a future interest be made within nine months of the interest's creation, no matter how contingent it may then be. The nine-month time limit of the existing statutes really is a trap. While it superficially conforms to IRC §2518, its application to the disclaimer of future interests does not. The removal of all mention of time limits will clearly signal the practitioner that the requirements for a tax qualified disclaimer are set by different law.

The elimination of the time limit is not the only change from current statutes. The Act abandons the concept of "relates back" as a proxy for when a disclaimer becomes effective. Instead, by stating specifically when a disclaimer becomes effective and explicitly stating in Section 2-1105(f) that a disclaimer "is not a transfer, assignment, or release," the Act makes clear the results of refusing property or powers through a disclaimer. Second, UDPIA creates rules for several types of disclaimers that have not been explicitly addressed in previous statutes. The Act provides detailed rules for the disclaimer of interests in jointly held property (Section 2-1107). Such disclaimers have important uses especially in tax planning, but their status under current law is not clear. Furthermore, although current statutes mention the disclaimer of jointly held property, they provide no details. Recent developments in the law of qualified disclaimers of jointly held property make fuller treatment of such disclaimers necessary. Section 2-1108 [45-2-1108 NMSA 1978] addresses the disclaimer by trustees of property that would otherwise become part of the trust. The disclaimer of powers of appointment and other powers not held in a fiduciary capacity is treated in Section 2-1109 [45-2-1109 NMSA 1978] and disclaimers by appointees, objects, and takers in default of exercise of a power of appointment is the subject of Section 2-1110 [45-2-1110 NMSA 1978].

Finally, Section 2-1111 provides rules for the disclaimer of powers held in a fiduciary capacity.

45-2-1102. Definitions.

As used in the Uniform Disclaimer of Property Interests Act:

A. "disclaimant" means the person to whom a disclaimed interest or power would have passed had the disclaimer not been made;

B. "disclaimed interest" means the interest that would have passed to the disclaimant had the disclaimer not been made;

C. "disclaimer" means the refusal to accept an interest in or power over property;

D. "fiduciary" means a personal representative, trustee, agent acting under a power of attorney or other person authorized to act as a fiduciary with respect to the property of another person;

E. "jointly held property" means property held in the name of two or more persons under an arrangement in which all holders have concurrent interests and under which the last surviving holder is entitled to the whole of the property; and

F. "trust" means:

(1) an express trust, charitable or noncharitable, with additions thereto, whenever and however created; and

(2) a trust created pursuant to a statute, judgment or decree that requires the trust to be administered in the manner of an express trust.

History: Laws 2001, ch. 290, § 2; 1978 Comp., § 46-10-2 recompiled and amended as § 45-2-1102 NMSA 1978 by Laws 2011, ch. 124, § 90.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 90 recompiled and amended former 46-10-2 NMSA 1978 as 45-2-1102 NMSA 1978, effective January 1, 2012.

The 2011 amendment, effective January 1, 2012, eliminated the definitions of "person" and "state".

45-2-1103. Scope.

The Uniform Disclaimer of Property Interests Act applies to disclaimers of any interest in or power over property, whenever created.

History: Laws 2001, ch. 290, § 3; 1978 Comp., § 46-10-3 recompiled as § 45-2-1103 by Laws 2011, ch. 124, § 101.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 101 recompiled former 46-10-3 NMSA 1978 as 45-2-1103 NMSA 1978, effective January 1, 2012.

45-2-1104. Uniform Disclaimer of Property Interests Act supplemented by other law.

A. Unless displaced by a provision of the Uniform Disclaimer of Property Interests Act, the principles of law and equity supplement that act.

B. The Uniform Disclaimer of Property Interests Act does not limit any right of a person to waive, release, disclaim or renounce an interest in or power over property under a law other than that act.

History: Laws 2001, ch. 290, § 4; 1978 Comp., § 46-10-4 recompiled as § 45-2-1104 by Laws 2011, ch. 124, § 101.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 101 recompiled former 46-10-4 NMSA 1978 as 45-2-1104 NMSA 1978, effective January 1, 2012.

45-2-1105. Power to disclaim; general requirements; when irrevocable.

A. A person may disclaim, in whole or part, any interest in or power over property, including a power of appointment. A person may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim.

B. Except to the extent a fiduciary's right to disclaim is expressly restricted or limited by another statute of this state or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment, whether acting in a personal or representative capacity. A fiduciary may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim, or an instrument other than the instrument that created the fiduciary relationship imposed a restriction or limitation on the right to disclaim.

C. To be effective, a disclaimer must be in a writing or other record, declare the disclaimer, describe the interest or power disclaimed, be signed by the person making

the disclaimer, and be delivered or filed in the manner provided in Section 12 [45-2-1112 NMSA 1978] of the Uniform Disclaimer of Property Interests Act. As used in this subsection, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

D. A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power or any other interest or estate in the property.

E. A disclaimer becomes irrevocable when it is delivered or filed pursuant to Section 12 of the Uniform Disclaimer of Property Interests Act or when it becomes effective as provided in Sections 6 through 11 of that act [45-2-1106 through 45-2-1111 NMSA 1978], whichever occurs later.

F. A disclaimer made under the Uniform Disclaimer of Property Interests Act is not a transfer, assignment or release.

History: Laws 2001, ch. 290, § 5; 1978 Comp., § 46-10-5 recompiled as § 45-2-1105 by Laws 2011, ch. 124, § 101.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 101 recompiled former 46-10-5 NMSA 1978 as 45-2-1105 NMSA 1978, effective January 1, 2012.

COMMENT

Subsections (a) and (b) give both persons (as defined in Section 2-1102(6)) [45-2-1102 NMSA 1978] and fiduciaries (as defined in Section 2-1102(4)) and other persons a broad power to disclaim both interests in and powers over property. In both instances, the ability to disclaim interests is comprehensive; it does not matter whether the disclaimed interest is vested, either in interest or in possession. For example, Father's will creates a testamentary trust which is to pay income to his descendants and after the running of the traditional perpetuities period is to terminate and be distributed to his descendants then living by representation. If at any time there are no descendants, the trust is to terminate and be distributed to collateral relatives. At the time of Father's death he has many descendants and the possibility of his line dying out and the collateral relatives taking under the trust is remote in the extreme. Nevertheless, under the Act the collateral relatives may disclaim their contingent remainders. In order to make a qualified disclaimer for tax purposes, however, they must disclaim them within 9 months of Father's death.) Every sort of power may also be disclaimed.

Subsection (a) continues the provisions of current law by making ineffective any attempt to limit the right to disclaim which the creator of an interest or non-fiduciary power seeks to impose on a person. This provision follows from the principle behind all disclaimers --

no one can be forced to accept property – and extends that principle to powers over property.

This Act also gives fiduciaries broad powers to disclaim both interests and powers. A fiduciary who may also be a beneficiary of the fiduciary arrangement may disclaim in either capacity. For example, a trustee who is also one of several beneficiaries of a trust may have the power to invade trust principal for the beneficiaries. The trustee may disclaim the power as trustee under Section 2-1111 [45-2-1111 NMSA 1978] or may disclaim as a holder of a power of appointment under Section 2-1109 [45-2-1109 NMSA 1978]. Subsection (b) also gives fiduciaries the right to disclaim in spite of spendthrift or similar restrictions given, but subjects that right to a restriction applicable only to fiduciaries. As a policy matter, the creator of a trust or other arrangement creating a fiduciary relationship should be able to prevent a fiduciary accepting office under the arrangement from altering the parameters of the relationship. This reasoning also applies to fiduciary relationships created by statute such as those governing conservatorships and guardianships. Subsection (b) therefore does not override express restrictions on disclaimers contained in the instrument creating the fiduciary relationship or in other statutes of the State.

Subsection (c) sets forth the formal requirements for a disclaimer. The definitions of "record" and "signed" in this subsection are derived from the Uniform Electronic Transactions Act §102. The definitions recognize that a disclaimer may be prepared in forms other than typewritten pages with a signature in pen. Because of the novelty of a disclaimer executed in electronic form and the ease with which the term "record" can be confused with recording of documents, the Act does not use the term "record" in isolation but refers to "writing or other record." The delivery requirement is set forth in Section 2-1112.

Subsection (d) specifically allows a partial disclaimer of an interest in property or of a power over property, and gives the disclaimant wide latitude in describing the portion disclaimed. For example, a residuary beneficiary of an estate may disclaim a fraction or percentage of the residue or may disclaim specific property included in the residue (all the shares of X corporation or a specific number of shares). A devisee or donee may disclaim specific acreage or an undivided fraction or carve out a life estate or remainder from a larger interest in real or personal property. (It must be noted, however, that a disclaimer by a devisee or donee which seeks to "carve out" a remainder or life estate is not a "qualified disclaimer" for tax purposes, Treas. Reg. §25.2518-3(b).)

Subsection (e) makes the disclaimer irrevocable on the later to occur of (i) delivery or filing or (ii) its becoming effective under the section governing the disclaimer of the particular power or interest. A disclaimer must be "irrevocable" in order to be a qualified disclaimer for tax purposes. Since a disclaimer under this Act becomes effective at the time significant for tax purposes, a disclaimer under this Act will always meet the irrevocability requirement for tax qualification. The interaction of the Act and the requirements for a tax qualified disclaimer can be illustrated by analyzing a disclaimer of an interest in a revocable lifetime trust.

Example 1. G creates a revocable lifetime trust which will terminate on G's death and distribute the trust property to G's surviving descendants by representation. G's son, S, determines that he would prefer his share of G's estate to pass to his descendants and executes a disclaimer of his interest in the revocable trust. The disclaimer is then delivered to G (see Section 2-1112(e)(3)) [45-2-1112 NMSA 1978]. The disclaimer is not irrevocable at that time, however, because it will not become effective until G's death when the trust becomes irrevocable (see Section 2-1106(b)(1)). Because the disclaimer will not become irrevocable until it becomes effective at G's death, S may recall the disclaimer before G's death and, if he does so, the disclaimer will have no effect.

Subsection (f) restates the long standing rule that a disclaimer is a true refusal to accept and not an act by which the disclaimant transfers, assigns, or releases the disclaimed interest. This subsection states the effect and meaning of the traditional "relation back" doctrine of prior Acts. It also makes it clear that the disclaimed interest passes without direction by the disclaimant, a requirement of tax qualification.

45-2-1106. Disclaimer of interest in property.

A. As used in this section:

(1) "future interest" means an interest that takes effect in possession or enjoyment, if at all, later than the time of its creation; and

(2) "time of distribution" means the time when a disclaimed interest would have taken effect in possession or enjoyment.

B. Except for a disclaimer governed by Section 45-2-1107 or 45-2-1108 NMSA 1978, the following rules apply to a disclaimer of an interest in property:

(1) The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as of the time of the intestate's death.

(2) The disclaimed interest passes according to any provision in the instrument creating the interest providing for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general.

(3) If the instrument does not contain a provision described in Paragraph (2) of this subsection, the following rules apply:

(a) If the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist.

(b) If the disclaimant is an individual, except as otherwise provided in Subparagraphs (c) and (d) of this paragraph, the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution.

(c) If, by law or under the instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution.

(d) If the disclaimed interest would pass to the disclaimant's estate had the disclaimant died before the time of distribution, the disclaimed interest instead passes by representation to the descendants of the disclaimant who survive the time of distribution. If no descendant of the disclaimant survives the time of distribution, the disclaimed interest passes to those persons, including the state but excluding the disclaimant, and in such shares as would succeed to the transferor's intestate estate under the intestate succession law of the transferor's domicile had the transferor died at the time of distribution. However, if the transferor's surviving spouse is living but is remarried at the time of distribution, the transferor is deemed to have died unmarried at the time of distribution.

(4) Upon the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment.

History: Laws 2001, ch. 290, § 6; 1978 Comp., § 46-10-6 recompiled and amended as § 45-2-1106 NMSA 1978 by Laws 2011, ch. 124, § 91.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 91 recompiled and amended former 46-10-6 NMSA 1978 as 45-2-1106 NMSA 1978, effective January 1, 2012.

The 2011 amendment, effective January 1, 2012, in Subsection B(3)(a), provided for the passing of a disclaimed interest when the interest would have passed to the disclaimant’s estate had the disclaimant died before the time of distribution.

COMMENT

Subsection (a) defines two terms that are used only in Section 2-1106 [45-2-1106 NMSA 1978]. The first, "future interest," is used in Section 2-1106(b)(4) in connection with the acceleration rule.

The second defined term, "time of distribution," is used in determining to whom the disclaimed interest passes (see below). Possession or enjoyment is a term of art and means that time at which it is certain to whom the property belongs. It does not mean

that the person actually has the property in hand. For example, the time of distribution of present interests created by will and all interests arising under the law of intestate succession is the death of the decedent. At that moment the heir or devisee is entitled to his or her devise or share, and it is irrelevant that time will pass before the will is admitted to probate and that actual receipt of the gift may not occur until the administration of the estate is complete. The time of distribution of present interests created by non-testamentary instruments generally depends on when the instrument becomes irrevocable. Because the recipient of a present interest is entitled to the property as soon as the gift is made, the time of distribution occurs when the creator of the interest can no longer take it back. The time of distribution of a future interest is the time when it comes into possession and the owner of the future interest becomes the owner of a present interest. For example, if B is the owner of the remainder interest in a trust which is to pay income to A for life, the time of distribution of B's remainder is A's death. At that time the trust terminated and B's ownership of the remainder becomes outright ownership of the trust property.

Section 2-1106(b)(1) makes a disclaimer of an interest in property effective as of the time the instrument creating the interest becomes irrevocable or at the decedent's death if the interest is created by intestate succession. A will and a revocable trust are irrevocable at the testator's or settlor's death. Inter vivos trusts may also be irrevocable at their creation or may become irrevocable before the settlor's death. A beneficiary designation is also irrevocable at death, unless it is made irrevocable at an earlier time. This provision continues the provision of Uniform Acts on this subject, but with different wording. Previous Acts have stated that the disclaimer "relates back" to some time before the disclaimed interest was created. The relation back doctrine gives effect to the special nature of the disclaimer as a refusal to accept. Because the disclaimer "relates back," the disclaimant is regarded as never having had an interest in the disclaimed property. A disclaimer by a devisee against whom there is an outstanding judgment will prevent the creditor from reaching the property the debtor would otherwise inherit. This Act continues the effect of the relation back doctrine, not by using the specific words, but by directly stating what the relation back doctrine has been interpreted to mean. Sections 2-1102(3) [45-2-1102 NMSA 1978] and 2-1105(f) [45-2-1105 NMSA 1978] taken together define a disclaimer as a refusal to accept which is not a transfer or release, and subsection (b)(1) of this section makes the disclaimer effective as of the time the creator cannot revoke the interest. Nothing in the statute, however, prevents the legislatures or the courts from limiting the effect of the disclaimer as refusal doctrine in specific situations or generally. See the Comments to Section 2-1113 [45-2-1113 NMSA 1978] below.

Section 2-1106(b)(2) [45-2-1106 NMSA 1978] allows the creator of the instrument to control the disposition of the disclaimed interest by express provision in the instrument. The provision may apply to a particular interest. "I give to my cousin A the sum of ten thousand dollars ($10,000) and should he disclaim any part of this gift, I give the part disclaimed to my cousin B." The provision may also apply to all disclaimed interests. A residuary clause beginning "I give my residuary estate, including all disclaimed interests to.... " is such a provision.

Sections 2-1106(b)(3)(B), (C), and (D) apply if Section 2-1106(b)(2) does not and if the disclaimant is an individual. Because "disclaimant" is defined as the person to whom the disclaimed interest would have passed had the disclaimer not been made (Section 2-1102(1)), these paragraphs would apply to disclaimers by fiduciaries on behalf of individuals. The general rule is that the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution defined in Section 2-1106(a)(2). The application of this general rule to present interests given to named individuals is illustrated by the following examples:

Example 1(a). T's will devised "ten thousand dollars ($10,000) to my brother, B." B disclaims the entire devise. B is deemed to have predeceased T, and, therefore B's gift has lapsed. If the State's antilapse statute applies, it will direct the passing of the disclaimed interest. Under Section 2-603(b)(1) [45-2-603 NMSA 1978], for example, B's descendants who survive T by 120 hours will take the devise by representation.

Example 1(b). T's will devised "ten thousand dollars ($10,000) to my friend, F." F disclaims the entire devise. F is deemed to predecease T and the gift has lapsed. Few antilapse statutes apply to devises to non-family members. Under Section 2-603(b), which saves from lapse only gifts made to certain relatives, the devise would lapse and pass through the residuary clause of the will.

Example 1(c). T's will devised "ten thousand dollars ($10,000) to my brother, B, but if B does not survive me, to my children." If B disclaims the devise, he will be deemed to have predeceased T and the alternative gift to T's children will dispose of the devise. Present interests are also given to the surviving members of a class or group of persons. Perhaps the most common example of this gift is a devise of the testator's residuary estate "to my descendants who survive me by representation." Under the system of distribution among multi-generational classes used in Section 2-709 [45-2-709 NMSA 1978], division of the property to be distributed begins in the eldest generation in which there are living people. The following example illustrates a problem that can arise.

Example 2(a). T's will devised "the residue of my estate to my descendants who survive me by representation." T is survived by son S and daughter D. Son has two living children and D has one. S disclaims his interest. The disclaimed interest is one-half of the residuary estate, the interest S would have received had he not disclaimed. Section 2-1106(b)(3)(B) [45-2-1106 NMSA 1978] provides that the disclaimed interest passes as if S had predeceased T. If Section 2-1106(b)(3) stopped there, S's children would take one-half of the disclaimed interest and D would take the other half under Section 2-709 [45-2-709 NMSA 1978]. S's disclaimer should not have that effect, however, but should pass what he would have taken to his children. Section 2-1106(b)(3)(C) solves the problem. It provides that the entire disclaimed interest passes only to S's descendants because they would share in the interest had S truly predeceased T.

The provision also solves a problem that exists when the disclaimant is the only representative of an older generation.

Example 2(b). Assume the same facts as Example 2(a), but D has predeceased T. T is survived, therefore, by S, S's two children, and D's child. S disclaims. Again, the disclaimed interest is one-half of the residuary estate and it passes as if S had predeceased T. Had S actually predeceased T, the three grandchildren of S would have shared equally in T's residuary estate because they are all in the same generation. Were the three grandchildren to share equally in the disclaimed interest, S's two children would each receive one-third of the one-half while D's child would receive one-third of the one-half in addition to the one-half of the residuary estate received as the representative of his or her late parent. Section 2-1106(b)(3)(C) again applies to insure that S's children receive one-half of the residue, exactly the interest S would have received but for the disclaimer.

The disclaimer of future interests created by will leads to a different problem. The effective date of the disclaimer of the future interest, the testator's death, is earlier in time than the distribution date. This in turn leads to a possible anomaly illustrated by the following example.

Example 3. Father's will creates a testamentary trust for Mother who is to receive all the income for life. At her death, the trust is to be distributed to Father and Mother's surviving descendants by representation. Mother is survived by son S and daughter D. Son has two living children and D has one. Son decides that he would prefer his share of the trust to pass to his children and disclaims. The disclaimer must be made within nine months of Father's death if it is to be a qualified disclaimer for tax purposes. Under prior Acts and former Section 2-801, the interest would have passed as if Son had predeceased Father. A problem could arise if, at Mother's death, one or more of S's children living at that time were born after Father's death. It would be possible to argue that had S predeceased Father the afterborn children would not exist and that D and S's two children living at the time of Father's death are entitled to all of the trust property.

The problem illustrated in Example 3 is solved by Section 2-1106(b)(3)(B) [45-2-1106 NMSA 1978]. The disclaimed interest would have taken effect in possession or enjoyment, that is, Son would be entitled to receive one-half of the trust property, at Mother's death. Under paragraph (3)(B) Son is deemed to have died immediately before Mother's death even though under Section 2-1106(b)(1) the disclaimer is effective as of Father's death. There is no doubt, therefore, that S's children living at the distribution date, whenever born, are entitled to the share of the trust property S would have received and, as Examples 2(a) and 2(b) show, they will take exactly what S would have received but for the disclaimer. Had S actually died before Mother, he would have received nothing at Mother's death whether or not the disclaimer had been made. There is nothing to pass to S's children and they take as representatives of S under the representational scheme in effect.

Future interests may or may not be conditioned on survivorship. The following examples illustrate disclaimers of future interests not expressly conditioned on survival.

Example 4(a). G's revocable trust directs the trustee to pay "ten thousand dollars ($10,000) to the grantor's brother, B" at the termination of the trust on G's death. B disclaims the entire gift immediately after G's death. B is deemed to have predeceased G because it is at G's death that the interest given B will come into possession and enjoyment. Had B not disclaimed he would have received $10,000 at that time. The recipient of the disclaimed interest will be determined by the law that applies to gifts of future interests to persons who die before the interest comes into possession and enjoyment. Traditional analysis would regard the gift to B as a vested interest subject to divestment by G's power to revoke the trust. So long as G has not revoked the gift, the interest would pass through B's estate to B's successors in interest. Yet If B's successors in interest are selected by B's will, the disclaimer cannot be a qualified disclaimer for tax purposes. This problem does not arise in a jurisdiction with Section 2-707 (b), because the interest passes not through B's estate but rather to B's descendants who survive G by 120 hours by representation. Because the antilapse mechanism of Section 2-707 [45-2-707 NMSA 1978] is not limited to gifts to relatives, a disclaimer by a friend rather than a brother would have the same result. For jurisdictions without Section 2-707, however, Section 2-1106(b)(3)(D) [45-2-1106 NMSA 1978] provides an equivalent solution: a disclaimed interest that would otherwise pass through B's estate instead passes to B's descendants who survive G by representation.

Example 4(b). G's revocable trust directed that on his death the trust property is to be distributed to his three children, A, B, and C. A disclaims immediately after G's death and is deemed to predecease the distribution date, which is G's death. The traditional analysis applies exactly as it does in Example 4 (a). The only condition on A's gift would be G's not revoking the trust. A is not explicitly required to survive G. (See First National Bank of Bar Harbor v. Anthony, 557 A.2d 957 (Me. 1989).) The interest would pass to A's successors in interest. If those successors are selected by A's will, the disclaimer cannot be a qualified disclaimer for tax purposes. Section 2-707(b) provides that A's interest passes by representation to A's descendants who survive G by 120 hours. For jurisdictions without Section 2-707, Section 2-1106(b)(3)(D) [46-10-6 NMSA 1978] reaches the same result.

Example 4(c). G conveys land "to A for life, remainder to B." B disclaims immediately after the conveyance. Traditional analysis regards B's remainder as vested; it is not contingent on surviving A. This classification is unaffected by whether or not the jurisdiction has adopted Section 2-707 [45-2-707 NMSA 1978], because that section only applies to future interests in trust; it does not apply to future interests not in trust, such as the one in this example created directly in land. To the extent that B's remainder is transmissible through B's estate, B's disclaimer cannot be a qualified disclaimer for tax purposes. Section 2-1106(b)(3)(D) [45-2-1106 NMSA 1978] resolves the problem: a disclaimed interest that would otherwise pass through B's estate instead passes as if it were controlled by Sections 2-707 [45-2-707 NMSA 1978] and 2-711 [45-2-711 NMSA 1978]. Because Section 2-707 only applies to future interests in trust, jurisdictions enacting Section 2-1106 should enact Section 2-1106(b)(3)(D) whether or not they have enacted Section 2-707.

Section 2-1106(b)(3)(A) provides a rule for the passing of property interests disclaimed by persons other than individuals. Because Section 2-1108 [45-2-1108 NMSA 1978] applies to disclaimers by trustees of property that would otherwise pass to the trust, Section 2-1106(b)(3)(A) principally applies to disclaimers by corporations, partnerships, and the other entities listed in the definition of "person" in Section 2-1102(6). A charity, for example, might wish to disclaim property the acceptance of which would be incompatible with its purposes.

Section 2-1106(b)(4) continues the provision of prior Uniform Acts and former Section 2-801 on this subject providing for the acceleration of future interests on the making of the disclaimer, except that future interests in the disclaimant do not accelerate. The workings of Section 2-1106(b)(4) are illustrated by the following examples.

Example 5(a). Father's will creates a testamentary trust to pay income to his son S for his life, and on his death to pay the remainder to S's descendants then living, by representation. If S disclaims his life income interest in the trust, he will be deemed to have died immediately before Father's death. The disclaimed interest, S's income interest, came into possession and enjoyment at Father's death as would any present interest created by will (see Examples 1(a), (b), and (c)), and, therefore, the time of distribution is Father's death. If at the income beneficiary of a testamentary trust does not survive the testator, the income interest is not created and the next interest in the trust takes effect. Since the next interest in Father's trust is the remainder in S's descendants, the trust property will pass to S's descendants who survive Father by representation. It is immaterial under the statute that the actual situation at the S's death might be different with different descendants entitled to the remainder.

Example 5(b). Mother's will creates a testamentary trust to pay the income to her daughter D until she reaches age 35 at which time the trust is to terminate and the trust property distributed in equal shares to D and her three siblings. D disclaims her income interest. The remainder interests in her three siblings accelerate and they each receive one-fourth of the trust property. D's remainder interest does not accelerate, however, and she must wait until she is 35 to receive her fourth of the trust property.

45-2-1107. Disclaimer of rights of survivorship in jointly held property.

A. Upon the death of a holder of jointly held property, a surviving holder may disclaim, in whole or part, the greater of:

(1) a fractional share of the property determined by dividing the number one by the number of joint holders alive immediately before the death of the holder to whose death the disclaimer relates; or

(2) all of the property except that part of the value of the entire interest attributable to the contribution furnished by the disclaimant.

B. A disclaimer under Subsection (a) [A] takes effect as of the death of the holder of jointly held property to whose death the disclaimer relates.

C. An interest in jointly held property disclaimed by a surviving holder of the property passes as if the disclaimant predeceased the holder to whose death the disclaimer relates.

History: Laws 2001, ch. 290, § 7; 1978 Comp., § 46-10-7 recompiled as § 45-2-1107 by Laws 2011, ch. 124, § 101.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 101 recompiled former 46-10-7 NMSA 1978 as 45-2-1107 NMSA 1978, effective January 1, 2012.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

COMMENT

The various forms of ownership in which "joint property," as defined in Section 2-1102(5), can be held include common law joint tenancies and any statutory variation that preserves the right of survivorship. The common law was unsettled whether a surviving joint tenant had any right to renounce his interest in jointly-owned property and if so to what extent. See Casner, Estate Planning, 5th ed. §10.7. Specifically, if A and B owned real estate or securities as joint tenants with right of survivorship and A died, the problem was whether B might disclaim what was given to him originally upon creation of the estate, or, if not, whether he could nevertheless reject the incremental portion derived through the right of survivorship. There was also a question of whether a joint bank account should be treated differently from jointly-owned securities or real estate for the purpose of disclaimer.

This common law of disclaimers of jointly held property must be set against the rapid developments in the law of tax qualified disclaimers of jointly held property. Since the previous Uniform Acts were drafted, the law regarding tax qualified disclaimers of joint property interests has been clarified. Courts have repeatedly held that a surviving joint tenant may disclaim that portion of the jointly held property to which the survivor succeeds by operation of law on the death of the other joint tenant so long as the joint tenancy was severable during the life of the joint tenants (Kennedy v. Commissioner, 804 F.2d 1332 (7th Cir. 1986), McDonald v. Commissioner, 853 F.2d 1494 (9th Cir. 1988), Dancy v. Commissioner, 872 F.2d 84 (4th Cir. 1989).) On December 30, 1997 the Service published T.D. 8744 making final proposed amendments of the Regulations under IRC §2518 to reflect the decisions regarding disclaimers of joint property interests.

The amended final Regulations, §25.2518-2(c)(4)(i) allow a surviving joint tenant or tenant by the entireties to disclaim that portion of the tenancy to which he or she succeeds upon the death of the first joint tenant (1/2 where there are two joint tenants) whether or not the tenancy could have been unilaterally severed under local law and regardless of the proportion of consideration furnished by the disclaimant. The Regulations also create a special rule for joint tenancies between spouses created after July 14, 1988 where the spouse of the donor is not a United States citizen. In that case, the donee spouse may disclaim any portion of the joint tenancy includible in the donor spouse's gross estate under IRC §2040, which creates a contribution rule. Thus the surviving non-citizen spouse may disclaim all of the joint tenancy property if the deceased spouse provided all the consideration for the tenancy's creation.

The amended final Regulations, §25.2518-2(c) (4) (iii) also recognize the unique features of joint bank accounts, and allow the disclaimer by a survivor of that part of the account contributed by the decedent, so long as the decedent could have regained that portion during life by unilateral action, bar the disclaimer of that part of the account attributable to the survivor's contributions, and explicitly extend the rule governing joint bank accounts to brokerage and other investment accounts, such as mutual fund accounts, held in joint name.

These developments in the tax law of disclaimers are reflected in subsection (a). The subsection allows a surviving holder of jointly held property to disclaim the greater of the accretive share, the part of the jointly held property which augments the survivor's interest in the property, and all of the property that it not attributable to the disclaimant's contribution to the jointly held property. In the usual joint tenancy or tenancy by the entireties between husband and wife, the survivor will always be able to disclaim one-half the property. If the disclaimer conforms to the requirements of IRC §2518, it will be a qualified disclaimer. In addition the surviving spouse can disclaim all of the property attributable to the decedent's contribution, a provision which will allow the non-citizen spouse to take advantage of the contribution rule of the final Regulations. The contribution rule of subsection (a)(2) will also allow surviving holders of joint property arrangements other than joint tenancies to make a tax qualified disclaimer under the rules applicable to those joint arrangements. For example, if A contributes 60% and B contributes 40% to a joint bank account and they allow the interest on the funds to accumulate, on B's death A can disclaim 40% of the account; on A's death B can disclaim 60% of the account. (Note that under subsection (a)(1) A can disclaim up to 50% of the account on B's death because there are two joint account holders, but the disclaimer would not be fully tax qualified. As previously noted, a tax qualified disclaimer is limited to 40% of the account.) If the account belonged to the parties during their joint lives in proportion to their contributions, the disclaimers in this example can be tax qualified disclaimers if all the requirements of IRC §2518 are met.

Subsection (b) provides that the disclaimer is effective as of the death of the joint holder which triggers the survivorship feature of the joint property arrangement. The disclaimant, therefore, has no interest in and has not transferred the disclaimed interest.

Subsection (c) provides that the disclaimed interest passes as if the disclaimant had predeceased the holder to whose death the disclaimer relates. Where there are two joint holders, a disclaimer by the survivor results in the disclaimed property passing as part of the deceased joint holder's estate because under this subsection, the deceased joint holder is the survivor as to the portion disclaimed. If a married couple owns the family home in joint tenancy, therefore, a disclaimer by the survivor under subsection (a)(1) results in one-half the home passing through the decedent's estate. The surviving spouse and whoever receives the interest through the decedent's estate are tenants in common in the house. In the proper circumstances, the disclaimed one-half could help to use up the decedent's unified credit. Without the disclaimer, the interest would automatically qualify for the marital deduction, perhaps wasting part of the decedent's applicable exclusion amount.

In a multiple holder joint property arrangement, the disclaimed interest will belong to the other joint holder or holders.

Example 1. A, B, and C make equal contributions to the purchase of Blackacre, to which they take title as joint tenants with right of survivorship. On partition each would receive 1/3 of Blackacre and any of them could convert his or her interest to a 1/3 tenancy in common by unilateral severance (which, of course, would have to be accomplished in accordance with state law). On A's death, B and C may each, if they wish, disclaim up to 1/3 of the property under section (a) (1). Should one of them disclaim the full 1/3, the disclaimant will be deemed to predecease A.

Assume that B so disclaims. With respect to the 1/3 undivided interest that now no longer belongs to A the only surviving joint holder is C. C therefore owns that 1/3 as tenant in common with the joint tenancy. Should C predecease B, the 1/3 tenancy in common interest will pass through C's estate and B will be the sole owner of an undivided 2/3 interest in Blackacre as the survivor of the joint tenancy. Should B predecease C, C will be the sole owner of Blackacre in fee simple absolute.

Alternatively, assume that both B and C make valid disclaimers after A's death. They are both deemed to predeceased A, A is the sole survivor of the joint tenancy and Blackacre passes through A's estate.

Finally, assume that A provided all the consideration for the purchase of Blackacre. On A's death, B and C can each disclaim the entire property under subsection (a)(2). If they both do so, Blackacre will pass through A's estate. If only one of B or C disclaims the entire property, the one who does not will be the sole owner of Blackacre as the only surviving joint tenant. Such a disclaimer would not be completely tax qualified, however. The Regulations limit a tax qualified disclaimer to no more than 1/3 of the property. If, however, B or C were the first to die, A could still disclaim the 1/3 interest that no longer belongs to the decedent under subsection (a) (1), the disclaimer would be a qualified disclaimer for tax purposes under the Regulations, and the result is that the other surviving joint tenant owns 1/3 of Blackacre as tenant in common with the joint tenancy.

45-2-1108. Disclaimer of interest by trustee.

If a trustee disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property.

History: Laws 2001, ch. 290, § 8; 1978 Comp., § 46-10-8 recompiled as § 45-2-1108 by Laws 2011, ch. 124, § 101.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 101 recompiled former 46-10-8 NMSA 1978 as 45-2-1108 NMSA 1978, effective January 1, 2012.

COMMENT

This section deals with disclaimer of a right to receive property into a trust, and thus applies only to trustees. (A disclaimer of a right to receive property by a fiduciary acting on behalf of an individual, such as a personal representative, conservator, guardian, or agent is governed by the section of the statute applicable to the type of interest being disclaimed.) The instrument under which the right to receive the property was created may govern the disposition of the property in the event of a disclaimer by providing for a disposition when the trust does not exist. When the instrument does not make such a provision, the doctrine of resulting trust will carry the property back to the donor. The effect of the actions of co-trustees will depend on the state law governing the action of multiple trustees. Every disclaimer by a trustee must be compatible with the trustee's fiduciary obligations.

45-2-1109. Disclaimer of power of appointment or other power not held in fiduciary capacity.

If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, the following rules apply:

A. If the holder has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

B. If the holder has exercised the power and the disclaimer is of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power.

C. The instrument creating the power is construed as if the power expired when the disclaimer became effective.

History: Laws 2001, ch. 290, § 9; 1978 Comp., § 46-10-9 recompiled as § 45-2-1109 by Laws 2011, ch. 124, § 101.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 101 recompiled former 46-10-9 NMSA 1978 as 45-2-1109 NMSA 1978, effective January 1, 2012.

COMMENT

Section 2-1105(a) [45-2-1105 NMSA 1978] authorizes a person to disclaim an interest in or power over property. Section 2-1109 [45-2-1109 NMSA 1978] provides rules for disclaimers of powers which are not held in a fiduciary capacity. The most common non-fiduciary power is a power of appointment. Section 2-1105(a) also authorizes the partial disclaimer of a power as well as of an interest. For example, the disclaimer could be of a portion of the power to appoint one's self, while retaining the right to appoint to others. The effect of a disclaimer of a power under Section 2-1109 depends on whether or not the holder has exercised the power and on what sort of power is held. If a holder disclaims a power before exercising it, the power expires and can never be exercised. If the power has been exercised, the power is construed as having expired immediately after its last exercise by the holder. The disclaimer affects only the holder of the power and will not affect other aspects of the power.

Example 1. T creates a testamentary trust to pay the income to A for life, remainder as A shall appoint by will among her descendants living at A's death and four named charities. If A does not exercise her power, the remainder passes to her descendants living at her death by representation. A disclaims the power. The power can no longer be exercised and on A's death the remainder will pass to the takers in default.

45-2-1110. Disclaimer by appointee, object or taker in default of exercise of power of appointment.

A. A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable.

B. A disclaimer of an interest in property by an object or taker in default of an exercise of a power of appointment takes effect as of the time the instrument creating the power becomes irrevocable.

History: Laws 2001, ch. 290, § 10; 1978 Comp., § 46-10-10 recompiled as § 45-2-1110 by Laws 2011, ch. 124, § 101.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 101 recompiled former 46-10-10 NMSA 1978 as 45-2-1110 NMSA 1978, effective January 1, 2012.

COMMENT

This section governs disclaimers by those who may or do receive an interest in property through the exercise of a power of appointment. At the time of the creation of a power of appointment, the creator of the power, besides giving the power to the holder of the power, can also limit the objects of the power (the permissible appointees of the property subject to the power) and also name those who are to take if the power is not exercised, persons referred to as takers in default.

This section provides rules for disclaimers by all of these persons: subsection (a) is concerned with a disclaimer by a person who actually receives an interest in property through the exercise of a power of appointment, and subsection (b) recognizes a disclaimer by a taker in default or permissible appointee before the power is exercised. These two situations are quite different. An appointee is in the same position as any devisee or beneficiary of a trust. He or she may receive a present or future interest depending on how the holder of the power exercises it. Subsection (a) therefore, makes the disclaimer effective as of the time the instrument exercising the power-giving the interest to the disclaimant-becomes irrevocable. If the holder of the power created an interest in the appointee, the effect of the disclaimer is governed by Section 2-1106. If the holder created another power in the appointee, the effect of the disclaimer is governed by Section 2-1109 [45-2-1109 NMSA 1978].

Example 1. Mother's will creates a testamentary trust for daughter D. The trustees are to pay all income to D for her life and have discretion to invade principal for D's maintenance. On D's death she may appoint the trust property by will among her then living descendants. In default of appointment the property is to be distributed by representation to D's descendants who survive her. D is the donee, her descendants are the permissible appointees and the takers in default. D exercises her power by appointing the trust property in three equal shares to her children A, B, and C. The three children are the appointees. A disclaims. Under subsection (a) A's disclaimer is effective as of D's death (the time at which the will exercising the power became irrevocable). Because A disclaimed an interest in property, the effect of the disclaimer is governed by Section 2-1106(b) [45-2-1106 NMSA 1978]. If D's will makes no provisions for the disposition of the interest should it be disclaimed or of disclaimed interests in general (Section 2-1106(b)(2)), the interest passes as if A predeceased the time of distribution which is D's death. An appointment to a person who is dead at the time of the appointment is ineffective except as provided by an antilapse statute. See Restatement, Second, Property (Donative Transfers) §18.5. The Restatement, Second, Property (Donative Transfers), §18.6 suggests that any requirement of the antilapse statute that the deceased devisee be related in some way to the testator be applied as if the appointive property were owned either by the donor or the holder of the power. (See also Restatement, Third, Property (Wills and Other Donative Transfers) §5.5, Comment l.) That is the position taken by Section 2-603. Since antilapse statutes usually apply to devises to children and grandchildren, the disclaimed interest would pass to A's descendants by representation.

A taker in default or a permissible object of appointment is traditionally regarded as having a type of future interest. See Restatement, Second, Property (Donative

Transfers) §11.2, Comments c and d. The future interest will come into possession and enjoyment when the question of whether or not the power is to be exercised is resolved. For testamentary powers that time is the death of the holder.

Subsection (b) provides that a disclaimer by an object or taker in default takes effect as of the time the instrument creating the power becomes effective. Because the disclaimant is disclaiming an interest in property, albeit a future interest, the effect of the disclaimer is governed by Section 2-1106. The effect of these rules is illustrated by the following examples.

Example 2(a). The facts are the same as Example 1, except A disclaims before D's death and D's will does not exercise the power. Under subsection (b) A's disclaimer is effective as of Mother's death which is the time when the instrument creating the power, Mother's will, became irrevocable. Because A disclaimed an interest in property, the effect of the disclaimer is governed by Section 2-1106(b) [45-2-1106 NMSA 1978]. If Mother's will makes no provision for the disposition of the interest should it be disclaimed or of disclaimed interests in general (Section 2-1106(b) (2)), the interest passes and under Section 2-1106(b) (3) as if the disclaimant had died immediately before the time of distribution. Thus, A is deemed to have died immediately before D's death which is the time of distribution. If A actually survives D, the disclaimed interest is one-third of the trust property; it will pass as if A predeceased D, and the result is the same as in Example 1. If A does predecease D he would have received nothing and there is no disclaimed interest. The disclaimer has no effect on the passing of the trust property.

Example 2 (b). The facts are the same as in Example 2 (a) except D does exercise her power of appointment to give one-third of the trust property to each of her three children, A, B, and C. A's disclaimer means the disclaimed interest will pass as if he predeceased D and the result is the same as in Example 1.

In addition, if all the objects and takers in default disclaim before the power is exercised the power of appointment is destroyed. See Restatement, Second, Property (Donative Transfers) §12.1, Comment g.

45-2-1111. Disclaimer of power held in fiduciary capacity.

A. If a fiduciary disclaims a power held in a fiduciary capacity that has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

B. If a fiduciary disclaims a power held in a fiduciary capacity that has been exercised, the disclaimer takes effect immediately after the last exercise of the power.

C. A disclaimer under this section is effective as to another fiduciary if the disclaimer so provides and the fiduciary disclaiming has the authority to bind the estate, trust or other person for whom the fiduciary is acting.

History: Laws 2001, ch. 290, § 11; 1978 Comp., § 46-10-11 recompiled as § 45-2-1111 by Laws 2011, ch. 124, § 101.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 101 recompiled former 46-10-11 NMSA 1978 as 45-2-1111 NMSA 1978, effective January 1, 2012.

COMMENT

This section governs disclaimers by fiduciaries of powers held in their fiduciary capacity. Examples include a right to remove and replace a trustee or a trustee's power to make distributions of income or principal. Such disclaimers have not been specifically dealt with in prior Uniform Acts although they could prove useful in several situations. A trustee who is also a beneficiary may want to disclaim a power to invade principal for himself for tax purposes. A trustee of a trust for the benefit for a surviving spouse who also has the power to invade principal for the decedent's descendants may wish to disclaim the power in order to qualify the trust for the marital deduction. (The use of a disclaimer in just that situation was approved in Cleaveland v. U.S., 62 A.F.T.R.2d 88-5992, 88-1 USTC ¶13,766 (C. D. Ill. 1988).)

The section refers to fiduciary in the singular. It is possible, of course, for a trust to have two or more co-trustees and an estate to have two or more co-personal representatives. This Act leaves the effect of actions of multiple fiduciaries to the general rules in effect in each State relating to multiple fiduciaries. For example, if the general rule is that a majority of trustees can make binding decisions, a disclaimer by two of three co-trustees of a power is effective. A dissenting co-trustee could follow whatever procedure state law prescribes for disassociating him or herself from the action of the majority. A sole trustee burdened with a power to invade principal for a group of beneficiaries including him or herself who wishes to disclaim the power but yet preserve the possibility of another trustee exercising the power would seek the appointment of a disinterested co-trustee to exercise the power and then disclaim the power for him or herself. The subsection thus makes the disclaimer effective only as to the disclaiming fiduciary unless the disclaimer states otherwise. If the disclaimer does attempt to bind other fiduciaries, be they co-fiduciaries or successor fiduciaries, the effect of the disclaimer will depend on local law.

As with any action by a fiduciary, a disclaimer of fiduciary powers must be compatible with the fiduciary's duties.

45-2-1112. Delivery or filing.

A. As used in this section, "beneficiary designation" means an instrument, other than an instrument creating a trust, naming the beneficiary of:

(1) an annuity or insurance policy;

(2) an account with a designation for payment on death;

(3) a security registered in beneficiary form;

(4) a pension, profit-sharing, retirement or other employment-related benefit plan; or

(5) any other nonprobate transfer at death.

B. Subject to Subsections C through L of this section, delivery of a disclaimer may be effected by personal delivery, first-class mail or any other method likely to result in its receipt.

C. In the case of an interest created under the law of intestate succession or an interest created by will, other than an interest in a testamentary trust:

(1) a disclaimer must be delivered to the personal representative of the decedent's estate; or

(2) if no personal representative is then serving, it must be filed with a court having jurisdiction to appoint the personal representative.

D. In the case of an interest in a testamentary trust:

(1) a disclaimer must be delivered to the trustee then serving or, if no trustee is then serving, to the personal representative of the decedent's estate; or

(2) if no personal representative is then serving, it must be filed with a court having jurisdiction to enforce the trust.

E. In the case of an interest in an inter vivos trust:

(1) a disclaimer must be delivered to the trustee then serving;

(2) if no trustee is then serving, it must be filed with a court having jurisdiction to enforce the trust; or

(3) if the disclaimer is made before the time the instrument creating the trust becomes irrevocable, it must be delivered to the settlor of a revocable trust or the transferor of the interest.

F. In the case of an interest, created by a beneficiary designation, that is disclaimed before the designation becomes irrevocable, the disclaimer must be delivered to the person making the beneficiary designation.

G. In the case of an interest, created by a beneficiary designation, that is disclaimed after the designation becomes irrevocable:

(1) the disclaimer of an interest in personal property must be delivered to the person obligated to distribute the interest; and

(2) the disclaimer of an interest in real property must be recorded in the office of the county clerk of each county where the real property that is the subject of the disclaimer is located.

H. In the case of a disclaimer by a surviving holder of jointly held property, the disclaimer must be delivered to the person to whom the disclaimed interest passes.

I. In the case of a disclaimer by an object or taker in default of exercise of a power of appointment at any time after the power was created:

(1) the disclaimer must be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or

(2) if no fiduciary is then serving, it must be filed with a court having authority to appoint the fiduciary.

J. In the case of a disclaimer by an appointee of a nonfiduciary power of appointment:

(1) the disclaimer must be delivered to the holder, the personal representative of the holder's estate or to the fiduciary under the instrument that created the power; or

(2) if no fiduciary is then serving, it must be filed with a court having authority to appoint the fiduciary.

K. In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer must be delivered as provided in Subsection C, D or E of this section, as if the power disclaimed were an interest in property.

L. In the case of a disclaimer of a power by an agent, the disclaimer must be delivered to the principal or the principal's representative.

History: Laws 2001, ch. 290, § 12; 1978 Comp., § 46-10-12 recompiled and amended as § 45-2-1112 NMSA 1978 by Laws 2011, ch. 124, § 92.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 92 recompiled and amended former 46-10-12 NMSA 1978 as 45-2-1112 NMSA 1978, effective January 1, 2012.

The 2011 amendment, effective January 1, 2012, in Subsection F, required that a disclaimer that is made before a beneficiary designation becomes irrevocable be delivered to the person making the designation; and in Subsection G, required that a disclaimer of an interest in personal property that is made after a beneficiary designation becomes irrevocable be delivered to the person obligated to distribute the interest and that a disclaimer in real property that is made after a beneficiary designation becomes irrevocable be recorded in the office of the county clerk.

COMMENT

The rules set forth in this section are designed to provide notice of the disclaimer. For example, a disclaimer of an interest in a decedent's estate must be delivered to the personal representative of the estate. A disclaimer is required to be filed in court only in very limited circumstances. (Amended in 2010.)

45-2-1113. When disclaimer barred or limited.

A. A disclaimer is barred by a written waiver of the right to disclaim.

B. A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective:

(1) the disclaimant accepts the interest sought to be disclaimed;

(2) the disclaimant voluntarily assigns, conveys, encumbers, pledges or transfers the interest sought to be disclaimed or contracts to do so; or

(3) a judicial sale of the interest sought to be disclaimed occurs.

C. A disclaimer, in whole or part, of the future exercise of a power held in a fiduciary capacity is not barred by its previous exercise.

D. A disclaimer, in whole or part, of the future exercise of a power not held in a fiduciary capacity is not barred by its previous exercise unless the power is exercisable in favor of the disclaimant.

E. A disclaimer is barred or limited if so provided by law other than the Uniform Disclaimer of Property Interests Act.

F. A disclaimer of a power over property that is barred by this section is ineffective. A disclaimer of an interest in property that is barred by this section takes effect as a transfer of the interest disclaimed to the persons who would have taken the interest under the Uniform Disclaimer of Property Interests Act had the disclaimer not been barred.

History: Laws 2001, ch. 290, § 13; 1978 Comp., § 46-10-13 recompiled as § 45-2-1113 by Laws 2011, ch. 124, § 101.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 101 recompiled former 46-10-13 NMSA 1978 as 45-2-1113 NMSA 1978, effective January 1, 2012.

COMMENT

The 1978 Act required that an effective disclaimer be made within nine months of the event giving rise to the right to disclaim (e.g., nine months from the death of the decedent or donee of a power or the vesting of a future interest). The nine month period corresponded in some situations with the Internal Revenue Code provisions governing qualified tax disclaimers. Under the common law an effective disclaimer had to be made only within a "reasonable" time.

This Act specifically rejects a time requirement for making a disclaimer. Recognizing that disclaimers are used for purposes other than tax planning, a disclaimer can be made effectively under the Act so long as the disclaimant is not barred from disclaiming the property or interest or has not waived the right to disclaim. Persons seeking to make tax qualified disclaimers will continue to have to conform to the requirements of the Internal Revenue Code.

The events resulting in a bar to the right to disclaim set forth in this section are similar to those found in the 1978 Acts and former Section 2-801. Subsection (a) provides that a written waiver of the right to disclaim is effective to bar a disclaimer. Such a waiver might be sought, for example, by a creditor who wishes to make sure that property acquired in the future will be available to satisfy the debt.

Whether particular actions by the disclaimant amount to accepting the interest sought to be disclaimed within the meaning of subsection (b)(1) will necessarily be determined by the courts based upon the particular facts. (See Leipham v. Adams, 77 Wash. App. 827, 894 P.2d 576 (1995); Matter of Will of Hall, 318 S.C. 188, 456 S.E.2d 439 (Ct. App. 1995); Jordan v. Trower, 208 Ga. App. 552, 431 S.E.2d 160 (1993); Matter of Gates, 189 A.D.2d 427, 595 N.Y.S.2d 194 (3d Dept. 1993); "What Constitutes or Establishes Beneficiary's Acceptance or Renunciation of Devise or Bequest," 93 ALR2d 8).

The addition in this Act of the word "voluntary" to the list of actions barring a disclaimer which also appears in the earlier Acts reflects the numerous cases holding that only actions by the disclaimant taken after the right to disclaim has arisen will act as a bar. (See Troy v. Hart, 116 Md. App. 468, 697 A.2d 113 (1997), Estate of Opatz, 554 N.W.2d 813 (N.D. 1996), Frances Slocum Bank v. Martin, 666 N.E.2d 411 (Ind. App. 1996), Brown v. Momar, Inc., 201 Ga. App. 542, 411 S.E.2d 718 (1991), Tompkins State Bank v. Niles, 127 Ill.2d 209, 130 Ill. Dec. 207, 537 N.E.2d 274 (1989).) An existing lien, therefore, will not prevent a disclaimer, although the disclaimant's actions

before the right to disclaim arises may work an estoppel. See Hale v. Bardouh, 975 S.W.2d 419 (Tex. Ct. App. 1998). With regard to joint property, the event giving rise to the right to disclaim is the death of a joint holder, not the creation of the joint interest and any benefit received during the deceased joint tenant's life is ignored.

The reference to judicial sale in subsection (b) (3) continues a provision from the earlier Acts and ensures that title gained from a judicial sale by a personal representative will not be clouded by a possible disclaimer.

Subsection (c) rephrases the rules of Section 2-1111 [45-2-1111 NMSA 1978] governing the effect of disclaimers of powers.

Subsection (d) is applicable to powers which can be disclaimed under Section 2-1109 [45-2-1109 NMSA 1978]. It bars the disclaimer of a general power of appointment once it has been exercised. A general power of appointment allows the holder to take the property subject to the power for him or herself, whether outright or by using it to pay his or her creditors (for estate and gift tax purposes, a general power is one that allows the holder to appoint to himself, his estate, his creditors, or the creditors of his estate). The power is presently exercisable if the holder need not wait to some time or for some event to occur before exercising the power. If the holder has exercised such a power, it can no longer be disclaimed.

Subsection (e), unlike the 1978 Act, specifies that "other law" may bar the right to disclaim. Some States, including Minnesota (M.S.A. § 525.532 (c) (6)), Massachusetts (Mass. Gen. Law c. 191A, §8), and Florida (Fla. Stat. §732.801(6)), bar a disclaimer by an insolvent disclaimant. In others a disclaimer by an insolvent debtor is treated as a fraudulent "transfer". See Stein v. Brown, 18 Ohio St. 3d 305 (1985); Pennington v. Bigham, 512 So.2d 1344 (Ala. 1987). A number of States refuse to recognize a disclaimer used to qualify the disclaimant for Medicaid or other public assistance. These decisions often rely on the definition of "transfer" in the federal Medical Assistance Handbook which includes a "waiver" of the right to receive an inheritance (see 42 U.S.C.A. §1396p(e) (1)). See Hinschberger v. Griggs County Social Services, 499 N.W.2d 876 (N.D. 1993); Department of Income Maintenance v. Watts, 211 Conn. 323 (1989), Matter of Keuning, 190 A.D.2d 1033, 593 N.Y.S.2d 653 (4th Dept. 1993), and Matter of Molloy, 214 A.D.2d 171, 631 N.Y.S.2d 910 (2nd Dept. 1995), Troy v. Hart, 116 Md. App. 468, 697 A.2d 113 (1997), Tannler v. Wisconsin Dept. of Health & Social Services, 211 Wis. 2d 179, 564 N.W.2d 735 (1997); but see, Estate of Kirk, 591 N.W.2d 630 (Iowa, 1999) (valid disclaimer by executor of surviving spouse who was Medicaid beneficiary prevents recovery by Medicaid authorities). It is also likely that state policies will begin to address the question of disclaimers of real property on which an environmental hazard is located in order to avoid saddling the State, as title holder of last resort, with the resulting liability, although the need for fiduciaries to disclaim property subject to environmental liability has probably been diminished by the 1996 amendments to CERCLA by the Asset Conservation Act of 1996 (PL 104-208). These larger policy issues are not addressed in this Act and must, therefore, continue to be addressed by the various States. On the federal level, the United States Supreme Court

has held that valid disclaimer does not defeat a federal tax lien levied under IRC §6321, Dyre, Jr. v. United States, 528 U.S. 49, 120 S. Ct. 474 (1999).

Subsection (f) provides a rule stating what happens if an attempt is made to disclaim a power or property interest whose disclaimer is barred by this section. A disclaimer of a power is ineffective, but the attempted disclaimer of the property interest, although invalid as a disclaimer, will operate as a transfer of the disclaimed property interest to the person or persons who would have taken the interest had the disclaimer not been barred. This provision removes the ambiguity that would otherwise be caused by an ineffective refusal to accept property. Whoever has control of the property will know to whom to deliver it and the person attempting the disclaimer will bear any transfer tax consequences.

45-2-1114. Tax qualified disclaimer.

Notwithstanding any other provision of the Uniform Disclaimer of Property Interests Act, if as a result of a disclaimer or transfer, the disclaimed or transferred interest is treated pursuant to the provisions of Title 26 of the United States Code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the disclaimant, then the disclaimer or transfer is effective as a disclaimer under the Uniform Disclaimer of Property Interests Act.

History: Laws 2001, ch. 290, § 14; 1978 Comp., § 46-10-14 recompiled as § 45-2-1114 by Laws 2011, ch. 124, § 101.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 101 recompiled former 46-10-14 NMSA 1978 as 45-2-1114 NMSA 1978, effective January 1, 2012.

COMMENT

This section coordinates the Act with the requirements of a qualified disclaimer for transfer tax purposes under IRC §2518. Any disclaimer which is qualified for estate and gift tax purposes is a valid disclaimer under this Act even if its does not otherwise meet the Act's more specific requirements.

45-2-1115. Recording of disclaimer.

If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by law to be filed, recorded or registered, the disclaimer may be so filed, recorded or registered. Except as otherwise provided in Paragraph (2) of Subsection G of Section 45-2-1112 NMSA 1978, failure to file, record or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.

History: Laws 2001, ch. 290, § 15; 1978 Comp., § 46-10-15 recompiled and amended as § 45-2-1115 NMSA 1978 by Laws 2011, ch. 124, § 93.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 93 recompiled and amended former 46-10-15 NMSA 1978 as 45-2-1115 NMSA 1978, effective January 1, 2012.

The 2011 amendment, effective January 1, 2012, made the failure to file, record or register a disclaimer subject to Paragraph (2) of Subsection G of Section 45-1-1112 NMSA 1978.

COMMENT

This section permits the recordation of a disclaimer of an interest in property ownership of or title to which is the subject of a recording system. This section expands on the corresponding provision of previous Uniform Acts which only referred to permissive recording of a disclaimer of an interest in real property. While local practice may vary, disclaimants should realize that in order to establish the chain of title to real property, and to ward off creditors and bona fide purchasers, the disclaimer may have to be recorded. This section does not change the law of the state governing notice. The reference to Section 2-1112(g)(2) concerns the disclaimer of an interest in real property created by a "beneficiary designation" as that term is defined in §2-1112(a). Such a disclaimer must be recorded. (Amended in 2010.)

45-2-1116. Application to existing relationships.

Except as otherwise provided in Section 13 [45-2-1113 NMSA 1978] of the Uniform Disclaimer of Property Interests Act, an interest in or power over property existing on the effective date of that act as to which the time for delivering or filing a disclaimer under law superseded by that act has not expired may be disclaimed after the effective date of that act.

History: Laws 2001, ch. 290, § 16; 1978 Comp., § 46-10-16 recompiled as § 45-2-1116 by Laws 2011, ch. 124, § 101.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 101 recompiled former 46-10-16 NMSA 1978 as 45-2-1116 NMSA 1978, effective January 1, 2012.

COMMENT

This section deals with the application of the Act to existing interests and powers. It insures that disclaimers barred by the running of a time period under prior law will not be revived by the Act. For example, assume prior law, like the prior Acts and former

Section 2-801, allows the disclaimer of present interests within nine months of their creation and the disclaimer of future interests nine months after they are indefeasibly vested. Under T's will, X receives an outright devise of a sum of money and also has a contingent remainder in a trust created under the will. The Act is effective in the jurisdiction governing the administration of T's estate ten months after T's death. X cannot disclaim the general devise, irrespective of the application of Section 2-1113 [45-2-1113 NMSA 1978], because the nine months allowed under prior law have run. The contingent remainder, however, may be disclaimed so long as it is not barred under Section 2-1113 without regard to the nine month period of prior law.

ARTICLE 2A
Uniform Statutory Will Act

45-2A-1. Short title.

This act [45-2A-1 through 45-2A-17 NMSA 1978] may be cited as the "Uniform Statutory Will Act".

History: Laws 1991, ch. 173, § 1.

45-2A-2. Definitions.

As used in the Uniform Statutory Will Act:

A. "child" means, except as modified by this subsection, a child of a natural parent whose relationship is involved; an adopted individual is the child of the adopting parents and not of the natural parents, but an individual adopted by the spouse of a natural parent is also the child of either natural parent; an individual born out of wedlock is not the child of the father unless the individual is openly and notoriously so treated by the father; the term does not include an individual who is a stepchild, a foster child, a grandchild or a more remote descendant;

B. "issue" of an individual means all lineal descendants of all generations, with the status of a child at each generation being determined by the definition of child in Subsection A of this section;

C. "personal representative" includes executor, administrator, successor personal representative, special administrator and a person who performs substantially the same functions relating to the estate of a decedent under the law governing their status;

D. "property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property;

E. "representation" means the estate is divided into as many equal shares as there are surviving issue in the nearest degree of kinship and deceased individuals in the

same degree who left issue surviving the decedent, each surviving issue in the nearest degree receiving one share and the share of each deceased individual in the same degree being divided among issue of that individual in the same manner;

F. "statutory-will estate" means the entire testamentary estate, except as otherwise provided in the will;

G. "surviving spouse" means the individual to whom the testator was married at the time of death except a spouse from whom the testator was then separated under a decree of separation, whether or not final, or written separation agreement signed by both parties; an individual separated from the testator whose marriage to the testator continues in effect under the law of this state solely because a judgment of divorce or annulment of the marriage is not recognized as valid in this state is not the testator's surviving spouse; an individual whose marriage to the testator at the time of death is not recognized in this state solely because a judgment of divorce or annulment of a previous marriage of either or both of them is not recognized as valid in this state is the testator's surviving spouse;

H. "testamentary estate" includes every interest in property subject to disposition or appointed by a will of the decedent;

I. "testator's residence" means one or more properties normally used at the time of the testator's death by the testator or the surviving spouse as a residence for any part of the year; if the property used as a residence is a unit in a cooperative or other entity, it includes all rights and interests relating to that unit; if the property is used in part for a commercial, agricultural or other business purpose, the testator's residence is an area not exceeding three acres, which includes the structure used in whole or in part as a residence and structures normally used by the testator in connection with the dwelling and excludes structures and areas outside the dwelling used primarily for a commercial, agricultural or other business purpose; and

J. "trustee" includes an original, additional or successor trustee, whether or not appointed or confirmed by the court.

History: Laws 1991, ch. 173, § 2.

45-2A-3. Making statutory will.

An individual having capacity to make a will under the laws of this state may make a statutory will under the Uniform Statutory Will Act. The will must be executed in a manner recognized as valid under the laws of this state.

History: Laws 1991, ch. 173, § 3.

ANNOTATIONS

Cross references. — For execution of wills, *see* 45-2-502 NMSA 1978.

45-2A-4. Incorporation by reference.

A. A will may incorporate by reference the provisions of the Uniform Statutory Will Act in whole or in part and with any modifications and additions the will provides. To the extent an express provision of a will conflicts with that act, the will governs.

B. A provision that all or part of the testator's testamentary estate is to be disposed of in accordance with the Uniform Statutory Will Act incorporates by reference provisions of that act in effect on the date the will is executed.

C. An incorporation by reference of provisions of the Uniform Statutory Will Act may be in the following or a substantially similar form:

"Except as otherwise provided in this will, I direct that my testamentary estate be disposed of in accordance with the New Mexico's Uniform Statutory Will Act."

History: Laws 1991, ch. 173, § 4.

45-2A-5. Shares under statutory will.

The statutory-will estate passes as provided in Sections 6 through 10 [45-2A-6 through 45-2A-10 NMSA 1978] of the Uniform Statutory Will Act.

History: Laws 1991, ch. 173, § 5.

45-2A-6. Share of spouse.

A. The share of the surviving spouse is:

(1) if there is no surviving issue, the entire statutory-will estate; or

(2) if there is a surviving issue:

(a) subject to any lien or encumbrance, the testator's residence and tangible personal property, except personal property held primarily for investment or for a commercial, agricultural or other business purpose;

(b) the greater of one hundred fifty thousand dollars ($150,000) or one-half of the balance of the statutory-will estate; and

(c) subject to Subsection B of this section, an interest in the remaining portion of the statutory-will estate, including any property that would pass under Subparagraph (a) of this paragraph but disclaimed by the surviving spouse, in a trust upon the terms set forth in Section 7 [45-2A-7 NMSA 1978] of the Uniform Statutory Will Act.

B. If the personal representative, other than the surviving spouse, determines that the trust under Section 7 of the Uniform Statutory Will Act would be uneconomical, the entire statutory-will estate passes to the surviving spouse.

History: Laws 1991, ch. 173, § 6.

45-2A-7. Trust for spouse and issue.

A. Property held in trust under Subparagraph (c) of Paragraph (2) of Subsection A of Section 6 [45-2A-6 NMSA 1978] is held upon the terms of Subsections B through D of this section.

B. During the life of the surviving spouse, the entire net income must be paid to or for the benefit of the surviving spouse in quarterly or more frequent installments; net income accrued or undistributed on the death of the surviving spouse must be paid to the estate of the spouse; if unproductive property is held in the trust, the surviving spouse at any time by written instrument delivered to the trustee may compel conversion of the unproductive property to productive property.

C. During the life of the surviving spouse, the trustee at any time may pay to or for the benefit of the surviving spouse and issue of the testator amounts of the principal the trustee deems advisable, giving reasonable consideration to other resources available to the distributee, for the individual's needs for health, education, support or maintenance; for the purpose of making those discretionary payments, the principal must be administered as two separate shares, which at the inception of the trust must be equal; one share is the surviving spouse's share of the principal; during the life of the surviving spouse, payments may not be made from the surviving spouse's share to anyone other than the surviving spouse; primary consideration must be given to the needs of the surviving spouse and the children of the testator who are under the age of twenty-three years or under disability. The trustee may rely in good faith on a written statement furnished by a beneficiary. The discretion to pay principal to or for the benefit of any individual includes the discretion after that individual's death to pay expenses incurred before the individual's death and to pay funeral and burial expenses. If the trustee, other than the surviving spouse, determines that continuation of the trust is uneconomical, the trustee may terminate the trust by distribution of principal to the surviving spouse. Principal that in the exercise of the trustee's discretion is paid to or for the benefit of any issue may be charged against any share of income or principal thereafter existing for that issue or for any ancestor or descendant of that issue if the trustee upon equitable considerations so determines. If the surviving spouse or any issue is serving as trustee, the trustee's discretion pursuant to this subsection is not exercisable in favor of that trustee except as necessary for the trustee's needs for health, education, support or maintenance, nor is the trustee's discretion exercisable in favor of the trustee's estate, the trustee's creditors or creditors of the trustee's estate.

D. On the death of the surviving spouse, the principal, unless retained in trust under Section 9 or 10 [45-2A-9 or 45-2A-10 NMSA 1978] of the Uniform Statutory Will Act,

must be paid, subject to any charges made by the trustee under Subsection C of this section, to the children of the testator in equal shares if all of the children are then living, otherwise to the then living issue of the testator by representation or, if no issue of the testator is then living, to the individuals who would be entitled to receive the estate as if the property were located in this state and the testator had then died intestate domiciled in this state in proportions determined under the law then existing.

History: Laws 1991, ch. 173, § 7.

45-2A-8. Shares of heirs when no surviving spouse.

A. If there is no surviving spouse, the statutory-will estate passes, subject to Sections 9 and 10 [45-2A-9 and 45-2A-10 NMSA 1978], as follows:

(1) if there is surviving issue, in equal shares to the children of the testator if all of them survive, otherwise to the surviving issue of the testator by representation; or

(2) if there is no surviving issue, to the individuals entitled to receive the estate as if the property were located in this state and the testator had died intestate domiciled in this state in the proportions so determined.

B. Unless the personal representative determines that a trust would be uneconomical, property to which Section 9 or 10 applies must be distributed to the trustee. If the personal representative determines that a trust would be uneconomical, the property passes under Subsection A of this section free of trust. The discretion provided in this subsection to the personal representative is not exercisable by any of the testator's issue serving as personal representative.

History: Laws 1991, ch. 173, § 8.

45-2A-9. Trust if child under specified age.

A. If property is distributable under Section 8 [45-2A-8 NMSA 1978] or Subsection D of Section 7 [45-2A-7 NMSA 1978] of the Uniform Statutory Will Act to a child of the testator who is under the age specified in the will or, if the will does not specify an age, under the age of twenty-three years, all shares distributable to issue of the testator must be held in a trust under this section. In exercising powers under Subsections B and C of this section, primary consideration must be given to the needs of children of the testator who are under the age of twenty-three years or under disability.

B. Until no living child of the testator is under the age determined under Subsection A of this section, the trustee shall pay the income and principal of the trust to or for the benefit or account of one or more of the issue of the testator in amounts the trustee deems advisable for their needs for health, education, support or maintenance. Income not so paid may be added to principal.

C. The trustee at any time in its discretion may distribute to a beneficiary the share, in whole or in part, of the trust to which the distributee would be entitled if the trust then terminated. If the whole of a share has been distributed under this subsection, the trustee thereafter must not make any further distribution of income or principal to that distributee or issue of that distributee.

D. The trust terminates when no living child of the testator is under the age determined under Subsection A of this section or the trustee determines that continuation of the trust is uneconomical.

E. Subject to section 10 [45-2A-10 NMSA 1978] of the Uniform Statutory Will Act and Subsection C of this section, the property in the trust must be distributed upon termination to the issue of the testator in proportion to the shares determined at the death of the surviving spouse under Subsection D of Section 7 of the Uniform Statutory Will Act, or at the death of the testator under Section 8 of that act if there is no surviving spouse. In determining the amount to be distributed to any distributee, the trustee shall charge the share of that distributee with any partial distribution made under Subsection C of this section and may charge, in its discretion, the share of that distributee with distributions under Subsection B of this section to or for the benefit or account of the distributee, or issue or ancestor of the distributee. If any issue whose share is held in trust under this section dies before the complete distribution of the share, the property to which the issue would have been entitled if living must be distributed to the assignees, or, if none, to the estate of the deceased issue.

F. If an issue is serving as trustee, the discretion of the trustee under this section is not exercisable, except as necessary for that individual's needs for health, education, support or maintenance, in favor of that individual, that individual's estate, that individual's creditors or the creditors of that individual's estate.

History: Laws 1991, ch. 173, § 9.

45-2A-10. Effect of disability at distribution.

A. If property becomes distributable by a personal representative or trustee to an individual under the age specified in the will or, if the will does not specify an age, under the age of twenty-three years, or to an individual who the personal representative or trustee determines cannot effectively manage or apply the property by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause:

(1) the personal representative or trustee, as to principal or income, may distribute part or all of the property to the distributee directly, by deposit or investment in the distributee's name or for the distributee's account, or to a guardian or conservator for the distributee;

(2) the personal representative may distribute to the trustee in trust under Paragraph (3); or

(3) the trustee may retain all or any of the property in trust for the distributee and thereafter at any time the trustee may distribute or apply part or all of the principal or income to or for the benefit or account of the distributee.

B. Unless terminated earlier, a trust under Paragraph (3) of Subsection A of this section terminates upon the attainment of the required age, removal of the disability or death of the distributee. Upon termination, the trustee shall distribute the remaining trust property to the distributee or personal representative of the distributee's estate.

C. This section does not apply to distributions to a surviving spouse of the testator.

History: Laws 1991, ch. 173, § 10.

45-2A-11. Powers of appointment.

A. A will incorporating by reference the terms of the Uniform Statutory Will Act does not exercise a power of appointment unless:

(1) the will complies with any conditions imposed on the exercise of the power;

(2) the appointment is within the scope of the power; and

(3) the will expressly refers to the power or expresses an intent to exercise any power of appointment held by the testator.

B. If a power of appointment is exercised as provided in Subsection A of this section, the appointed property passes as part of the statutory-will estate unless the will provides otherwise.

History: Laws 1991, ch. 173, § 11.

45-2A-12. Survival.

An individual who does not survive the testator by thirty days or more is treated as if the individual predeceased the testator.

History: Laws 1991, ch. 173, § 12.

45-2A-13. Appointment of personal representative and trustee.

A. The person named in the will as personal representative or trustee is entitled to serve, if qualified, as personal representative or trustee.

B. If a qualified person is not named in the will as personal representative, or the named person is incapacitated, unwilling to serve or dead, and a qualified alternate is not named in the will, priority for appointment as personal representative is determined by the law of the state of decedent's domicile at death.

C. If a qualified person is not named in the will as trustee, or the named person is incapacitated, unwilling to serve or dead, and a qualified alternate is not named in the will, the personal representative may appoint, without court approval, a qualified person, including a person serving as personal representative, to serve as trustee.

D. If a personal representative or trustee resigns, is removed, becomes incapacitated or dies, the surviving spouse, or if there is no surviving spouse or the surviving spouse is unable or unwilling to act, a majority of the adult children of the testator may appoint a qualified successor personal representative or trustee.

E. In all other cases, personal representatives and trustees must be appointed by the court.

History: Laws 1991, ch. 173, § 13.

45-2A-14. Powers.

A. Subject to Subsection C of this section and except as expressly provided by will, a trustee, in addition to any other powers conferred by law, without prior approval of any court may:

(1) retain property in the form in which it is received, including assets in which the trustee is personally interested;

(2) make ordinary or extraordinary repairs, store, insure or otherwise care for any tangible personal property and pay shipping or other expense relating to the property as the trustee considers advisable;

(3) abandon property the trustee determines to be worthless;

(4) invest principal and income in any property the trustee determines and, without limiting the generality of the foregoing, invest in shares of an investment company or in shares or undivided portions of any common trust fund established by the trustee;

(5) sell, exchange or otherwise dispose of property at public or private sale on terms the trustee determines, no purchaser being bound to see to the application of any proceeds;

(6) lease property on terms the trustee determines even if the term extends beyond the time the property becomes distributable;

(7) allocate items of income or expense to income or principal, as provided by law;

(8) keep registered securities in the name of a nominee;

(9) pay, compromise or contest claims or controversies, including claims for estate or inheritance taxes, in any manner the trustee determines;

(10) participate in any manner the trustee determines in any reorganization, merger or consolidation of any entity whose securities constitute part of the property held;

(11) deposit securities with a voting trustee or committee of security holders even if under the terms of deposit the securities may remain deposited beyond the time they become distributable;

(12) vote any security in person or by special, limited or general proxy, with or without power of substitution, and otherwise exercise all the rights that may be exercised by any security holder in an individual capacity;

(13) borrow any amount the trustee considers advisable to obtain cash for any purpose of the trust, and in connection therewith, mortgage or otherwise encumber any property on any conditions the trustee determines even if the term of the loan may extend beyond the term of the trust;

(14) allot in or towards satisfaction of any payment, distribution or division, in any manner the trustee determines, any property held at the then current fair market value;

(15) hold trusts and shares undivided or at any time hold them or any of them set apart one from another;

(16) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(17) sell or exercise stock subscription or conversion rights;

(18) employ persons, including attorneys, auditors, investment advisers or agents, even if associated with the trustee, to advise or assist the trustee in the performance of duties, act without independent investigation upon their recommendations and, instead of acting personally, employ agents to perform any act of administration, whether or not discretionary;

(19) continue any unincorporated business or venture in which the decedent was engaged at the time of death;

(20) incorporate any business or venture in which the decedent was engaged at the time of death;

(21) distribute property distributable to the estate of an individual directly to the devisees or heirs of the individual; and

(22) perform any other act necessary or appropriate to administer the trust.

B. Except as expressly provided in the will, the personal representative, in the administration of the estate, has all of the powers of a personal representative under the [Uniform] Probate Code and all of the powers of a trustee conferred under Subsection A of this section. In addition, the personal representative has the power to satisfy written charitable pledges of the decedent, irrespective of whether the pledges constitute binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges satisfied under the circumstances.

C. Except as expressly provided in the will, the personal representative or trustee shall observe the standards in dealing with the estate which would be observed by a prudent person dealing with the property of another. If the personal representative or trustee has special skills or is named personal representative or trustee on the basis or representation of special skills or expertise, the person is under a duty to use those skills. Except to the extent qualified property is not available, only property that qualifies for the estate tax marital deduction under the Internal Revenue Code, as amended, may be allocated to the surviving spouse under Section 6 [45-2A-6 NMSA 1978] of the Uniform Statutory Will Act or to the surviving spouse's share of principal in a trust established under Section 7 [45-2A-7 NMSA 1978] of that act.

History: Laws 1991, ch. 173, § 14.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For the Internal Revenue Code, *see* 26 U.S.C. § 1 et seq.

45-2A-15. Bond or surety.

A personal representative or trustee under the Uniform Statutory Will Act shall serve without giving bond or surety unless the testator by will, or the court upon the application of any person interested in the estate, provides otherwise.

History: Laws 1991, ch. 173, § 15.

45-2A-16. Uniformity of application and construction.

The Uniform Statutory Will Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of that act among states enacting it.

History: Laws 1991, ch. 173, § 16.

45-2A-17. Form of statutory will.

I, _____, of the City of _____, County of _____, and State of _____, declare this to be my Last Will and hereby revoke all of my prior wills and codicils.

1. I direct that my testamentary estate be disposed of in accordance with the Uniform Statutory Will Act, as in effect on the date of execution of this will.

2. I appoint _____ as personal representative of my estate under this will. If a trust becomes applicable under the provision of the Act, I appoint _____ as trustee hereunder. If either of them does not serve, or at any time ceases to serve, in either capacity, I appoint _____ to serve in the vacant capacity or capacities. I appoint _____ as guardian and conservator of my minor children. I, _____, the testator, sign my name to this instrument this _____ day of _____, 19 ____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my Last Will and that I (sign it willingly) (willingly direct another to sign for me) (cross out the one of these two alternatives that is inapplicable), that I execute one of these two alternatives that is inapplicable [sic], that I execute it as my free and voluntary act for the purpose therein expressed, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

_____ Testator

We, _____ and _____ the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as (his) (her) Last Will and that (he) (she) (signs it willingly) (willingly directs another to sign) (her) (him) (cross out the inapplicable word or phrase in each of these instances), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.

_____ Witness

_____ Witness

State of _____

County of _____

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____, 19 ____.

(Seal)

(Signed) _____

_____

(official capacity of officer)

History: Laws 1991, ch. 173, § 17.

ANNOTATIONS

Bracketed material. — The bracketed material was not inserted by the compiler and it is not part of the law.

ARTICLE 3
Probate of Wills and Administration

PART 1
GENERAL PROVISIONS

45-3-101. Devolution of estate at death; administration on deaths of husband and wife.

A. The power of a person to leave property by will and the rights of creditors, devisees and heirs to the person's property are subject to the restrictions and limitations contained in Chapter 45, Article 3 NMSA 1978 to facilitate the prompt settlement of estates.

B. Upon the death of a person, the person's separate property and the person's share of community property devolves:

(1) to the persons to whom the property is devised by the person's last will;

(2) to those indicated as substitutes for them in cases involving revocation, lapse, disclaimer or other circumstances pursuant to Chapter 45, Article 2 NMSA 1978 affecting the devolution of testate estates; or

(3) in the absence of testamentary disposition, to the person's heirs or to those indicated as substitutes for them in cases involving revocation, lapse, disclaimer

or other circumstances pursuant to Chapter 45, Article 2, Parts 3, 4, 10 and 11 NMSA 1978 affecting the devolution of intestate estates.

C. The devolution of separate property and the decedent's share of community property is subject to rights to the family allowance and personal property allowance, to rights of creditors and to administration as provided in Chapter 45, Article 3 NMSA 1978. The surviving spouse's share of the community property is subject to administration until the time for presentation of claims has expired, and thereafter only to the extent necessary to pay community claims.

History: 1953 Comp., § 32A-3-101, enacted by Laws 1975, ch. 257, § 3-101; 2011, ch. 124, § 42.

ANNOTATIONS

Cross references. — For notice to creditors, *see* 45-3-801 NMSA 1978.

For statutes of limitations, *see* 45-3-802 NMSA 1978.

For distribution to person under disability, *see* 45-3-915 NMSA 1978.

The 2011 amendment, effective January 1, 2012, in Subsection A, changed the statutory reference to Chapter 45, Article 3 NMSA 1978; in Subsection B, changed the statutory reference to Chapter 45, Article 2 NMSA 1978; and in Subsection C, changed the statutory reference to Chapter 45, Article 3 NMSA 1978.

Construction of will. — Statutory language providing that the devolution of separate property and decedent's share of community property are subject to rights to the family allowance and personal property allowance appears to place the statutory allowances on a level that supersedes testator intent. Brito v. Jewell, 2001-NMCA-008, 130 N.M 93, 18 P.3d 334.

Proceedings for (now informal) probate of a will are in rem. De Baca v. Baca, 73 N.M. 387, 388 P.2d 392 (1964).

Passage of real and personal property distinguished. — Real estate of a decedent passes directly to the heirs or devisees and does not pass to the executor or administrator. With personal property the rule is otherwise, and before title passes there must be due administration followed by a determination of heirship and an order of distribution. Clovis Nat'l Bank v. Callaway, 69 N.M. 119, 364 P.2d 748 (1961)(decided under prior law).

Equitable interest in real estate resulting from sale may be devised by will and in case of intestacy passes to his heirs and not to his administrator. Gregg v. Gardner, 73 N.M. 347, 388 P.2d 68 (1963).

Testamentary transfers involuntary and direct. — Since the stock restriction on the testator's stock in a closely-held corporation related to voluntary transfers by the stockholder and not to involuntary transfers by law such as testamentary transfers, the stock restriction did not prohibit the direct transfer of stock to the beneficiary according to the stockholder's will. Kerr v. Porvenir Corp., 119 N.M. 262, 889 P.2d 870 (Ct. App. 1995), cert. denied, 119 N.M. 168, 889 P.2d 203.

Realty passes directly to the heir or devisee and the administrator does not take the same into his possession unless there is no heir or devisee present to care for it and collect the rentals. Conley v. Wikle, 66 N.M. 366, 348 P.2d 485 (1960).

Executory contract for land. — It is settled in New Mexico that real estate owned by a decedent descends upon his death to his heirs and not to his administrators; and it is further settled that the purchaser under a real estate contract has acquired a property interest in land of such a character that it descends to his heirs and not to his administrators, the trial court therefore erred in allowing the administrator of the purchaser's estate a credit against the purchase price as damages for failure of the vendor to deliver possession of the property, since it was the heirs who had the right to possession at the moment the decedent died. Keirsey v. Hirsch, 58 N.M. 18, 265 P.2d 346 (1953), superseded by statute, Sims v. Sims, 1996 NMSC 78, 122 N.M. 618, 930 P.2d 153.

Law reviews. — For article, "The Use of Revocable Inter Vivos Trusts in Estate Planning," see 1 N.M.L. Rev. 143 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills § 827.

Liability for administration expenses of spouse electing against will, 89 A.L.R.3d 315.

Testamentary direction to devisee to pay stated sum of money to third party as creating charge or condition or as imposing personal liability on devisee for nonpayment, 54 A.L.R.4th 1098.

41 C.J.S. Husband and Wife § 184 et seq.; 94 C.J.S. Wills § 3.

45-3-102. Necessity of order of probate for will.

Except as provided in Sections 45-3-1201, 45-3-1205 and 45-3-1301 NMSA 1978, to be effective to prove the transfer of any property or to nominate a personal representative, a will must be declared to be valid by an order of informal probate by the probate court or an adjudication of probate by the district court.

History: 1953 Comp., § 32A-3-102, enacted by Laws 1975, ch. 257, § 3-102; 1995, ch. 210, § 31; 2005, ch. 143, § 1.

ANNOTATIONS

Cross references. — For execution and formalities of attested wills, *see* 45-2-502 NMSA 1978.

For self-proved wills, *see* 45-2-504 NMSA 1978.

The 2005 amendment, effective July 1, 2005, expanded the exception to include Sections 45-3-1205 and 45-3-1301 NMSA 1978.

The 1995 amendment, effective July 1, 1995, substituted "Section 45-3-1201 NMSA 1978" for "Section 3-1201" and deleted the former second sentence, relating to admission as evidence of a devise of a duly executed and unrevoked will which has not been probated.

Passage of real and personal property distinguished. — Real estate of a decedent passes directly to the heirs or devisees and does not pass to the executor or administrator. With personal property the rule is otherwise, and before title passes there must be due administration followed by a determination of heirship and an order of distribution. Clovis Nat'l Bank v. Callaway, 69 N.M. 119, 364 P.2d 748 (1961)(decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills § 227.

Relation back of probate of will in support of title or rights of persons claiming under or through devisee, 48 A.L.R. 1035.

Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration, 2 A.L.R.4th 1315.

95 C.J.S. Wills § 310.

45-3-103. Necessity of appointment for administration.

Except as otherwise provided in Sections 4-101 through 4-401 [45-4-101 through 45-4-401 NMSA 1978], to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the district court or probate court, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters.

History: 1953 Comp., § 32A-3-103, enacted by Laws 1975, ch. 257, § 3-103.

ANNOTATIONS

Compiler's notes. — This section is similar to former 31-1-2, 1953 Comp.

Cross references. — For informal probate or appointment proceedings, *see* 45-3-301 NMSA 1978.

For formal proceedings concerning appointment of personal representative, *see* 45-3-414 NMSA 1978.

Effect of mistake as to character of letters. — A mistake as to the character of letters issued does not render them and all acts performed by the executor or administrator void. Amberson v. Candler, 17 N.M. 455, 130 P. 255 (1913)(decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Relation back of letters testamentary or of administration, effect of doctrine of, on suits and actions growing out of previous acts, 26 A.L.R. 1369.

Adverse interest or position as disqualification for appointment of administrator, executor, or other personal representative, 11 A.L.R.4th 638.

33 C.J.S. Executors and Administrators § 63.

45-3-104. Claims against decedent; necessity of administration.

A. No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by Sections 3-101 through 3-1204 [45-3-101 through 45-3-1204 NMSA 1978]. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in Section 3-1004 [45-3-1004 NMSA 1978] or from a personal representative individually liable as provided in Section 3-1005 [45-3-1005 NMSA 1978].

B. Subsection A of this section shall have no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.

History: 1953 Comp., § 32A-3-104, enacted by Laws 1975, ch. 257, § 3-104.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-104 UPC.

Cross references. — For informal probate or appointment proceedings, *see* 45-3-301 NMSA 1978.

For formal proceedings concerning appointment of personal representative, *see* 45-3-414 NMSA 1978.

For appointment of administrator on application of revenue division of department of taxation and revenue, and to waiver of administration after payment of estate tax, *see* 7-7-9 NMSA 1978.

This section was not an obstacle to mere filing of complaint where, in order to escape the bar of the statute of limitations, the plaintiff brought an action before the appointment of a personal representative by naming the prospective personal representative as "John Doe" and then diligently pursued the appointment of the personal representative. Macias v. Jaramillo, 2000-NMCA-086, 129 N.M. 578, 11 P.3d 153.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Legacy charged upon land devised, right of legatee to enforce payment of, as against personal representative of devisee, 116 A.L.R. 27, 134 A.L.R. 361.

Creditor's right to maintain action in interest of decedent's estate, 158 A.L.R. 729.

Running of statute of limitations as affected by doctrine of relation back of appointment of administrator, 3 A.L.R.3d 1234.

Amount of claim filed against decedent's estate as limiting amount recoverable in action against estate, 25 A.L.R.3d 1356.

Effect of delay in appointing administrator or other representative on cause of action accruing at or after death of person in whose favor it would have accrued, 28 A.L.R.3d 1141.

26A C.J.S. Descent and Distribution § 116; 33 C.J.S. Executors and Administrators § 192; 34 C.J.S. Executors and Administrators § 694.

45-3-105. Proceedings affecting devolution and administration.

Persons interested in decedents' estates may apply to the probate court for determination in the informal proceedings provided in Sections 3-101 through 3-1204 [45-3-101 through 45-3-1204 NMSA 1978], and may petition the district court for orders in formal proceedings within its jurisdiction.

History: 1953 Comp., § 32A-3-105, enacted by Laws 1975, ch. 257, § 3-105.

ANNOTATIONS

Cross references. — For interested person's demand for notice in decedent's estate proceedings, *see* 45-3-204 NMSA 1978.

For interested person's right to demand bond for personal representative, *see* 45-3-605 NMSA 1978.

For protective proceedings, *see* 45-5-406 NMSA 1978.

For bond for conservator, *see* 45-5-416 NMSA 1978.

Effect of request for formal proceeding. — Where a distributee has requested, and the personal representative has agreed to, adjudication of the distributee's share of estate assets in a formal proceeding, and neither the parties nor the district court have agreed to or ordered any change in the nature of the proceeding, procedures provided by Subsection C of 45-3-906 NMSA 1978, relating to proposals for distribution in informal proceedings, are inapplicable. Estates of Brown v. Dickinson, 2000-NMCA-030, 128 N.M. 825, 999 P.2d 1057.

45-3-105.1. Repealed.

ANNOTATIONS

Repeals. — Laws 1978, ch. 159, § 15, repealed 32A-3-105.1, 1953 Comp. (45-3-105.1 NMSA 1978), as enacted by Laws 1977, ch. 121, § 1 relating to probate filing, effective March 6, 1978.

45-3-106. Proceedings before district court; service; jurisdiction over persons.

In proceedings before the district court where notice is required by the Uniform Probate Code or by rule, and in proceedings to construe probated wills or determine heirs which concern estates that have not been and cannot now be opened for administration, interested persons may be bound by the orders of the district court in respect to property in or subject to the laws of New Mexico by notice in conformity with Section 45-1-401 NMSA 1978. An order is binding as to all who are given notice of the proceeding though less than all interested persons are notified.

History: 1953 Comp., § 32A-3-106, enacted by Laws 1975, ch. 257, § 3-106; 1995, ch. 210, § 32.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, in the first sentence, inserted "Uniform", inserted "and in proceedings to construe probated wills or determine heirs which concern estates that have not been and cannot now be open for administration" and substituted "Section 45-1-401 NMSA 1978" for "Section 1-401".

Am. Jur. 2d, A.L.R. and C.J.S. references. — Decree of court of domicile respecting validity or construction of will, or admitting it or denying its admission to probate, as conclusive as regards real estate in another state devised by will, 131 A.L.R. 1023.

21 C.J.S. Courts §§ 39 to 49.

45-3-107. Scope of proceedings; proceedings independent; exception.

Unless supervised administration as described in Sections 3-501 through 3-505 [45-3-501 through 45-3-505 NMSA 1978] is involved, each proceeding before the district court or probate court is independent of any other proceeding involving the same estate. Petitions for orders of the district court may combine various requests for relief in a single proceeding. Except as required for proceedings which are particularly described in Sections 3-101 through 3-1204 [45-3-101 through 45-3-1204 NMSA 1978], no petition is defective because it fails to embrace all matters which might then be the subject of a final order. Proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives. A proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.

History: 1953 Comp., § 32A-3-107, enacted by Laws 1975, ch. 257, § 3-107.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-107 UPC.

Each petition considered final, appealable order. — Each petition in a probate file should ordinarily be considered as initiating an independent proceeding, so that an order disposing of the matters raised in the petition should be considered a final, appealable order. When the subject matter of two petitions overlap, it would generally be appropriate to consider both petitions as belonging to the same proceeding. In re Estate of Newalla, 114 N.M. 290, 837 P.2d 1373 (Ct. App. 1992); Wilson v. Fritschy, 2002-NMCA-105, 132 N.M. 785, 55 P.3d 997.

Where the district court appointed a temporary guardian and conservator to protect the person and assets of the incapacitated person who was suffering from Alzheimer's disease; after the conservator was appointed, the spouse of the incapacitated person and the spouse's attorney met with the incapacitated person to induce the incapacitated person to execute a new estate plan giving the spouse control of the incapacitated person's estate; the conservator filed a motion to prevent the spouse from interfering with its duties as conservator and guardian; the district court voided the new estate plan by an order entered on August 29, 2005; the district court appointed the conservator as permanent guardian and conservator by an order entered on October 7, 2005, which resolved all pending matters related to the petition for appointment of a guardian and conservator; the spouse filed a notice of appeal on November 4, 2005, but voluntarily dismissed the appeal on February 2, 2006; the incapacitated person died and the district court approved the conservator's report on March 4, 2011; and on April 4, 2011, the spouse appealed the district court's October 7, 2005 order, which voided the new estate plan, the October 7, 2005 order was final and appealable and the spouse's

appeal on April 4, 2011 was untimely. Clinesmith v. Temmerman, 2013-NMCA-024, 298 P.3d 458, cert. denied, 2013-NMCERT-001.

Tort of intentional interference with expected inheritance will not lie when probate proceedings are available to address the just distribution of disputed assets and can otherwise provide adequate relief; 45-3-107 NMSA 1978 does not authorize an independent tort action where testator's testamentary plan replaced an earlier trust and pour-over will that deprived plaintiffs of a share of the testator's estate; in response to plaintiffs' challenge to the revised testamentary plan, the personal representative and trustee of the testamentary plan filed an interpleader action in district court; the settlement of the interpleader action was approved by the probate court; plaintiffs then sued defendants for tortious interference with plaintiffs' inheritance on the ground that defendants, who were testator's accountants, influenced testator to adopt the revised testamentary plan; and defendants were not beneficiaries under the revised testamentary plan or parties to the probate action, plaintiffs' tort action for intentional interference will not lie because probate proceedings were available to address the just distribution of the disputed assets and could have provided adequate relief. Wilson v. Fritschy, 2002-NMCA-105, 132 N.M. 785, 55 P.3d 997.

Order compelling blood test not appealable. — When the plaintiffs initiated a proceeding to determine whether a minor was an heir, a subsequent motion to compel a blood test did not institute a new proceeding as the dispute concerning the test was part and parcel of the proceeding to determine heirship, and an order thereunder was not appealable. Abalos v. Pino, 115 N.M. 759, 858 P.2d 426 (Ct. App. 1993).

Judgment invalidating will and removing representative appealable. — A judgment which effectively invalidated the provisions of a will disposing of a decedent's estate and removing a personal representative of the estate was a final, appealable order, even though the judgment reserved jurisdiction to determine how the estate should be distributed. Boyer v. Morrison, 117 N.M. 74, 868 P.2d 1299 (Ct. App. 1994).

45-3-108. Probate, testacy and appointment proceedings; ultimate time limit.

A. No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile or appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, except:

(1) if a previous proceeding was dismissed because of doubt about the fact of the decedent's death, then appropriate probate, appointment or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred before the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding;

(2) appropriate probate, appointment or testacy proceedings may be maintained in relation to the estate of an absent, disappeared or missing person for whose estate a conservator has been appointed at any time within three years after the conservator becomes able to establish the death of the protected person;

(3) a proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful may be commenced within the later of twelve months from the informal probate or three years from the decedent's death;

(4) an informal appointment in an intestate proceeding or a formal testacy or appointment proceeding may be commenced thereafter if no proceedings concerning the succession or estate administration has occurred within the three-year period after the decedent's death, but the personal representative has no right to possess estate assets as provided in Section 45-3-709 NMSA 1978 beyond that necessary to confirm title thereto in the successors to the estate and claims other than expenses of administration may not be presented against the estate; and

(5) a formal testacy proceeding may be commenced at any time after three years from the decedent's death for the purpose of establishing an instrument to direct or control the ownership of property passing or distributable after the decedent's death from one other than the decedent when the property is to be appointed by the terms of the decedent's will or is to pass or be distributed as a part of the decedent's estate or its transfer is otherwise to be controlled by the terms of the decedent's will.

B. The limitations set out in Subsection A of this section do not apply to proceedings to construe probated wills or determine heirs of an intestate.

C. In cases pursuant to the provisions of Paragraph (1) or (2) of Subsection A of this section, the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitation provisions of the Uniform Probate Code that relate to the date of death.

History: 1953 Comp., § 32A-3-108, enacted by Laws 1975, ch. 257, § 3-108; 1993, ch. 174, § 68; 1995, ch. 210, § 33; 2011, ch. 124, § 43.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-108 UPC.

Compiler's notes. — This section includes within its scope some of the functions of former 31-8-3 and 31-8-4, 1953 Comp.

Cross references. — For waiver and suspension of statute of limitations, *see* 45-3-802 NMSA 1978.

The 2011 amendment, effective January 1, 2012, in Subsection A(4), excepted an informal appointment in an intestate proceeding from the three-year time limit.

The 1995 amendment, effective July 1, 1995, in Subsection A, deleted former Paragraph (4), relating to commencement of a formal testacy proceeding if no proceeding concerning the succession or administration of the estate has occurred within three years after descendant's death, and added Paragraph (4) and Paragraph (5).

The 1993 amendment, effective July 1, 1993, added Paragraph (4) of Subsection A; substituted "pursuant to the provisions of Paragraph (1) or (2)" for "under Paragraphs (1) or (2)" in Subsection B; and made minor stylistic changes.

Nonclaim statutes do not operate against state or subdivisions. — Ordinary nonclaim statute barring recovery on a claim not presented and acted upon by a personal representative within a time fixed by statute does not operate against the state or its legal subdivisions and agencies. In re Will of Bogert, 64 N.M. 438, 329 P.2d 1023 (1958)(decided under former law).

Claim barred by limitations provision. — In a proceeding for an adjudication of intestacy and appointment of a personal representative filed more than six years after decedent passed away, a petitioner's claim seeking approval of a claim affecting property passing to decedent's heirs, or alternatively for money damages, was barred by Subsection A(4) of this section. Chavez v. Baca, 1999-NMCA-082, 127 N.M. 535, 984 P.2d 782.

Formal testacy proceeding takes precedence. — A will contestant's petition for a formal testacy proceeding filed pursuant to 45-3-401 NMSA 1978 and within the three-year limit of this section took precedence over a personal representative's petition for settlement and distribution of the estate filed pursuant to 45-3-1001 NMSA 1978. Vieira v. Estate of Cantu, 1997-NMCA-042, 123 N.M. 342, 940 P.2d 190.

Extra judicial limitations on scope of proceedings was improper. — Where the decedent’s will made devises of personal property to persons other than the decedent’s spouse and devised the remainder of the decedent’s estate to a trust; pursuant to 45-3-108(A)(4) NMSA 1978, the decedent’s spouse filed a petition to probate the decedent’s will and appoint a personal administrator more than four years after the decedent’s death for the limited purpose of confirming title to the assets of the estate in the successors to the estate; when the petition was filed, there were no assets in the estate to which title could be confirmed because the decedent’s assets had been transferred to the trust upon the decedent’s death; the spouse claimed that there had never been a determination of the what assets had belonged to the decedent as separate property or as the decedent’s share of community property and it was unclear whether decedent had improperly disposed of the spouse’s share of community property; and the district court restricted the personal representative’s investigation of the estate’s assets to the assets that had not previously been transferred to the trust, the district court erroneously

concluded that Subparagraph (4) prevented the personal representative from investigating what assets were owned by the decedent at the time of the decedent's death, regardless of who was in possession of the assets at that time, and precluded the personal representative from investigating the propriety of the transfer of estate assets into the trust. Puri v. Khalsa, 2013-NMCA-104, cert. denied, 2013-NMCERT-010.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Amendment of claim against decedent's estate after expiration of time for filing claims, 56 A.L.R.2d 627.

Appealability of order of court possessing probate jurisdiction allowing or denying tardy presentation of claim to personal representative, 66 A.L.R.2d 659.

Fraud as extending statutory limitations period for contesting will or its probate, 48 A.L.R.4th 1094.

33 C.J.S. Executors and Administrators §§ 33, 52; 95 C.J.S. Wills § 354.

45-3-109. Statutes of limitation on decedent's claim for relief.

No statute of limitation running on a claim for relief belonging to a decedent which had not been barred as of the date of his death, shall apply to bar a claim for relief surviving the decedent's death sooner than four months after death. A claim for relief belonging to a decedent which, but for this section, would have been barred less than four months after death, is barred after four months unless the statute of limitation is otherwise tolled.

History: 1953 Comp., § 32A-3-109, enacted by Laws 1975, ch. 257, § 3-109.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 54 C.J.S. Limitations of Actions § 118.

PART 2
VENUE FOR PROBATE AND ADMINISTRATION; PRIORITY TO ADMINISTER; DEMAND FOR NOTICE

45-3-201. Venue for first and subsequent estate proceedings; location of property.

A. Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:

(1) in the county where the decedent had his domicile at the time of his death; or

(2) if the decedent was not domiciled in New Mexico, in any county where property of the decedent was located at the time of his death.

B. Venue for all subsequent proceedings is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in Section 1-303 [45-1-303 NMSA 1978] or Subsection C of this section.

C. If the first proceeding was informal, on petition of an interested person and after notice to the proponent in the first proceeding, the district court in the place where the initial proceeding occurred, upon finding that venue is improper, may transfer the proceeding and the file to a court where venue is proper.

D. For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving non-domiciliaries, a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a non-domiciliary, is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.

History: 1953 Comp., § 32A-3-201, enacted by Laws 1975, ch. 257, § 3-201.

ANNOTATIONS

Compiler's notes. — This section is similar to former 31-1-3 and 31-5-1, 1953 Comp.

Cross references. — For venue for multiple proceedings, *see* 45-1-303 NMSA 1978.

For venue for guardianship of minors, *see* 45-5-205 NMSA 1978.

For venue for guardianship of incapacitated persons, *see* 45-5-302, 45-5-313 NMSA 1978.

For venue for protective proceedings, *see* 45-5-403 NMSA 1978.

Factors determining domicile. — In determining the domicile of decedent at the time of his death, the court must look to the testator's intent at the time of the making of the will, together with his acts, conduct and the surrounding circumstances. Viramontes v. Viramontes, 75 N.M. 411, 405 P.2d 413 (1965).

Order withdrawing will from probate proper where change of domicile. — Order of district court authorizing withdrawal of will from probate on the ground that decedent was a resident of and domiciled in Texas was proper where evidence showed that decedent had changed his domicile prior to his death to Texas where he had resided for more than 10 years, divorced his New Mexico wife, conducted farming operations, was buried and where three months prior to his death he had applied for and been issued a

Texas liquor license under a Texas statute limiting such licenses to citizens of Texas. Viramontes v. Viramontes, 75 N.M. 411, 405 P.2d 413 (1965).

Right of indemnity sufficient to support appointment of administrator. — Under former 31-1-3, 1953 Comp., a right of indemnity under a liability insurance policy issued to nonresident decedent by company authorized to do business in New Mexico and subject to process in this state was sufficient to support appointment of administrator for the estate in county in which he died following automobile collision, although no judgment had been recovered against decedent's estate making the right of indemnity a debt. Miller v. Stiff, 62 N.M. 383, 310 P.2d 1039 (1957).

Venue where indemnity under automobile insurance policy only asset. — Where nonresident is injured in an automobile accident in Otero county, New Mexico, dies out of state, and whose only asset in New Mexico is a right to indemnity under an automobile liability insurance policy, Santa Fe county has venue, under 31-1-3, 1953 Comp. (repealed), to issue letters of administration, as 59-5-6 NMSA 1978 (*see* 59A-5-32 and 59A-5-33 NMSA 1978) requires all insurance companies to appoint the state superintendent of insurance, located in Santa Fe, as their attorney for service of process. Sierra v. Torres, 89 N.M. 420, 553 P.2d 700 (1976).

Right of indemnity under automobile liability policy issued to nonresident motorist who was involved in an accident in Torrance county, New Mexico, but who died in Illinois, was an asset of his estate sufficient to support appointment of resident administrator in Santa Fe county which was place in which insurer's statutory agent had his office and residence. Kimbell v. Smith, 64 N.M. 374, 328 P.2d 942 (1958).

Nonresident airplane pilot who crashes in state. — Probate court of Bernalillo county had jurisdiction to appoint an administrator for the estate of a nonresident airplane pilot who died in a crash in the same county while piloting for a common carrier, although the decedent had no real or personal property in New Mexico, where the pilot was covered by a casualty insurance policy, purchased by the carrier, indemnifying him for any judgment rendered against him resulting from the negligent operation of the airplane. Walker v. Matteucci, 63 N.M. 352, 319 P.2d 1069 (1957).

Out-of-state car crash, decedent, estate and administrator. — The New Mexico courts did not have jurisdiction and the Texas administrator, in the status of an administrator, was not subject to suit in New Mexico where plaintiff, who was injured in car crash in Colorado, in which decedent was killed, sued the administrator of decedent's estate, which was wholly within Texas, while the administrator was traveling through New Mexico. There had been no attempt to institute any administrative proceedings in New Mexico and the court held that the Texas administrator's status did not extend beyond the territorial limits of that state. State ex rel. Scott v. Zinn, 74 N.M. 224, 392 P.2d 417 (1964).

Where escrow contract for sale of farm on file. — County wherein decedent's escrow contract for the sale of his farm, where the obligation of $8,000 due estate was

on file, was proper county for bringing probate proceedings, though decedent had no place of abode or mansion within the state. Anderson v. Minton, 52 N.M. 393, 200 P.2d 361 (1948).

Effect where lack of jurisdiction not affirmatively asserted. — Where the claim that probate court lacked jurisdiction did not affirmatively appear in record of district court on collateral attack, the probate court had authority to grant letters of administration in county where personal estate was located even though the only estate asserted was a cause of action for wrongful death of nonresident occurring out of state, and there was no proof as to whether the tort-feasors were or were not subject to suit in the county where the probate court was located. McKenzie v. K.S.N. Co., 79 N.M. 314, 442 P.2d 804 (Ct. App. 1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Executors and Administrators § 104; 79 Am. Jur. 2d Wills §§ 850 to 858.

33 C.J.S. Executors and Administrators § 13; 95 C.J.S. Wills § 355.

45-3-202. Appointment or testacy proceedings; conflicting claim of domicile in another state.

If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in New Mexico, and in a testacy or appointment proceeding after notice pending at the same time in another state, the district court of New Mexico must stay, dismiss or permit suitable amendment in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in New Mexico.

History: 1953 Comp., § 32A-3-202, enacted by Laws 1975, ch. 257, § 3-202.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 C.J.S. Abatement and Revival § 16; 95 C.J.S. Wills §§ 321, 332.

45-3-203. Priority among persons seeking appointment as personal representative.

A. Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

(1) the person with priority as determined by a probated will, including a person nominated by a power conferred in a will;

(2) the surviving spouse of the decedent who is a devisee of the decedent;

(3) other devisees of the decedent;

(4) the surviving spouse of the decedent;

(5) other heirs of the decedent; and

(6) on application or petition of an interested person other than a spouse, devisee or heir, any qualified person.

B. An objection to an appointment may be made only in formal proceedings. In case of objection, the priorities stated in Subsection A of this section apply except that:

(1) if the estate appears to be more than adequate to meet allowances and costs of administration but inadequate to discharge anticipated unsecured claims, the court, on petition of creditors, may appoint any qualified person; and

(2) in case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value of the estate or, in default of this accord, any suitable person.

C. A person entitled to letters under Paragraphs (2) through (5) of Subsection A of this section or a person who has not reached the age of majority and who might be entitled to letters but for the person's age may nominate a qualified person to act as personal representative by an appropriate writing filed with the court and thereby confer the person's relative priority for appointment on the person's nominee. Any person who has reached the age of majority may renounce the right to nominate or to an appointment by an appropriate writing filed with the court. When two or more persons entitled to letters under Paragraphs (2) through (5) of Subsection A of this section share a priority, all those who do not renounce shall concur in nominating another to act for them or in applying for appointment by an appropriate writing filed with the court. The person so nominated shall have the same priority as those who nominated the person. A nomination or renunciation shall be signed by each person making it, the person's attorney or the person's representative authorized by Subsection D of this section.

D. Conservators of the estates of protected persons or, if there is no conservator, any guardian except a guardian ad litem of a minor or incapacitated person may exercise the same right to nominate, to object to another's appointment or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person would have if qualified for appointment.

E. Appointment of one who does not have highest priority, including highest priority resulting from renunciation or nomination determined pursuant to this section, may be made only in formal proceedings. Before appointing one without highest priority, the court shall determine that those having highest priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment and that administration is necessary.

F. No person is qualified to serve as a personal representative who is:

(1) under the age of majority;

(2) a person whom the court finds unsuitable in formal proceedings; or

(3) a creditor of the decedent unless the appointment is to be made after forty-five days have elapsed from the death of the decedent.

G. A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representatives in New Mexico and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

H. This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator.

History: 1953 Comp., § 32A-3-203, enacted by Laws 1975, ch. 257, § 3-203; 2009, ch. 159, § 25; 2011, ch. 124, § 44.

ANNOTATIONS

Cross references. — For priority for appointment as a special administrator, *see* 45-3-615 NMSA 1978.

For appointment of administrator on application of revenue division of department of taxation and revenue, *see* 7-7-9 NMSA 1978.

For age of majority, *see* 12-2A-3 and 28-6-1 NMSA 1978.

The 2011 amendment, effective January 1, 2012, in Subsection C, required that the nomination of a personal representative be in writing and filed with the court; provided that the person nominated has the same priority as those who nominated the person; and required that a nomination or renunciation be signed by each person making it and by their attorney or representative.

The 2009 amendment, effective June 19, 2009, in Subsection D, after "devisees that the protected person", deleted "ward".

De facto spouse under Australian law was not a marriage. — Where an Australian court determined that petitioner was the de facto spouse of the decedent under the Australian property relationships law based on the facts that petitioner and decedent had a twenty-year relationship, lived together openly and publicly, and were involved in each other's business and economic affairs; the Australian property relationships law conferred the same succession rights on de facto spouses as it conferred on spouses in marriage; the Australian court expressly stated that the Australian property relationships law did not create a marriage; petitioner and the decedent were not married to each other; and the de facto spouse status conferred by the Australian property relations law was distinct from the status of marriage under both the Australian marriage law and the Australian family law; and the de facto relationship was not a common-law marriage, the de facto spouse relationship under the Australian property relationships law was not a marital relationship under New Mexico law. Dion v. Rieser, 2012-NMCA-071, 283 P.3d 871, cert. denied, 2012-NMCERT-006.

Surviving spouse's preference. — In adjudicating a petition for formal appointment of the decedent's child as personal representative, the trial court correctly appointed the decedent's spouse, who had been appointed informally, as personal representative because the spouse had priority as surviving spouse of the decedent under 45-3-203A(4) NMSA 1978. Trujillo v. Lopez, 106 N.M. 157, 740 P.2d 707 (Ct. App. 1987).

Sole surviving parent. — The father of a child, as the child's sole surviving parent, was entitled to priority in appointment as the personal representative of the child's estate, where his paternity had been adjudicated, his attempts to have a paternal relationship with the child were thwarted by the natural mother, and the other applicants were the deceased mother's half-brother and mother. In re Estate of Sumler, 2003-NMCA-030, 133 N.M. 319, 62 P.3d 776.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Executors and Administrators §§ 162 to 194.

Selection of administrator from among members of class equally entitled, 1 A.L.R. 1245.

Status and acts of one appointed executor or administrator who was ineligible, 14 A.L.R. 619.

Separation agreement as affecting right of husband or wife to administer deceased spouse's estate, 35 A.L.R. 1511, 34 A.L.R.2d 1020.

Deferred class of next of kin named in statute, but not beneficially interested in particular estate, preference respecting appointment in favor of person in, 70 A.L.R. 1466.

Stranger, right to pass over eligible person interested in estate and appoint, 80 A.L.R. 824.

Power of court to refuse letters testamentary to one named in will as executor in absence of specific statutory disqualification, 95 A.L.R. 828.

Consul's right to appointment as administrator, 100 A.L.R. 1527.

Statute authorizing appointment of trust company as administrator, upon application or consent of one acting as such (or executor), or one entitled to appointment as such, 105 A.L.R. 1190.

Time and manner of taking advantage in action commenced or continued by foreign executor or administrator of his failure to qualify in state, 108 A.L.R. 1282.

Choice in appointment of administrator as between nominee of one in higher order of statutory preference and one in lower order of preference, 113 A.L.R. 780.

Premature granting of letters testamentary or of administration as affecting acts or proceedings thereunder, 113 A.L.R. 1398.

Grantees of, or successors to, interest of one eligible because of specified relationship to deceased, who are within statute making such persons eligible to appointment, 114 A.L.R. 275.

Appointment as administrator of one not a member, nor nominee of a member, of the class of persons designated by statute as eligible to appointment, where no one in better right has applied, 119 A.L.R. 143.

Contract in consideration of renunciation of one's status, or right to appointment, as guardian, executor, administrator, trustee or other fiduciary, as contrary to public policy, 121 A.L.R. 677.

Creditor's or debtor's right to attack issuance of letters of administration, 123 A.L.R. 1225.

Brevity of period after death of decedent as affecting propriety of grant of letters testamentary or of administration, 133 A.L.R. 1483.

Guardian of infant or incompetent, right to appointment as executor or administrator as representative or substitute for infant or incompetent, 135 A.L.R. 585.

Special or temporary administrator, person to be appointed as, pending will contest, 136 A.L.R. 604.

Administration of estate of one the fact of whose death rests upon presumption or circumstantial evidence, 140 A.L.R. 1403.

Waiver on renunciation of right to administer decedent's estate, scope and effect, 153 A.L.R. 220.

Executor de son tort, propriety of appointment as executor or administrator, 157 A.L.R. 237.

Right of minor next of kin to apply through next friend for appointment of administrator, 161 A.L.R. 1389.

Construction and application of statutes relating specifically to preferences in appointment as administrator with the will annexed, 164 A.L.R. 844.

Governing law as to existence or character of offense for which one has been convicted in a federal court or court of another state, as bearing upon disqualification as executor or administrator, 175 A.L.R. 806.

Effect of divorce, separation, desertion, unfaithfulness and the like, upon right to name appointee for administration of estate of spouse, 34 A.L.R.2d 876.

Right of appeal from order on application for removal of personal representative, guardian or trustee, 37 A.L.R.2d 751.

Delay in presenting will for probate or in seeking letters testamentary, loss of right to be appointed executor by, 45 A.L.R.2d 916.

Powers and duties of a public administrator, 56 A.L.R.2d 1183.

Right of surviving spouse, personally incompetent to serve as administrator because of being younger than age specified, to nominate administrator, 64 A.L.R.2d 1152.

Construction and effect of statutory provision that no person is competent to act as executor or administrator whom court finds incompetent by reason of want of integrity, 73 A.L.R.2d 458.

Public administrators and others, priority, as regards right to appointment, as between, 99 A.L.R.2d 1063.

Capacity of infant to act as executor or administrator, and effect of improper appointment, 8 A.L.R.3d 590.

Foreign corporation, eligibility to appointment as executor, administrator or testamentary trustee, 26 A.L.R.3d 1019.

Physical condition as affecting competency to act as executor or administrator, 71 A.L.R.3d 675.

Who is resident within meaning of statute prohibiting appointment of nonresident executor or administrator, 9 A.L.R.4th 1223.

33 C.J.S. Executors and Administrators §§ 31, 33.

45-3-204. Demand for notice of order or filing concerning decedent's estate.

Any interested person desiring notice of any order or filing pertaining to a decedent's estate may at any time after the death of the decedent file a demand for notice with the clerk of the court in which the proceedings for the decedent's estate are being conducted or in the district court of the county where they would be pending if commenced. A person commencing a proceeding for a decedent's estate in probate court shall inquire of the clerk of the district court for that county whether any demand for notice has been filed prior to commencing a proceeding in the probate court. The demand for notice shall state the name of the decedent, the nature of the demandant's interest in the estate and the demandant's address or that of his attorney. The clerk shall mail a copy of the demand to the personal representative if one has been appointed. After filing of a demand, no order or filing to which the demand relates shall be made or accepted without notice as prescribed in Section 45-1-401 NMSA 1978 to the demandant or his attorney. The validity of an order which is issued, or filing which is accepted, without compliance with this requirement shall not be affected by the error, but the applicant or petitioner receiving the order or the person making the filing may be liable for any damage caused by the absence of notice. The requirement of notice arising from a demand under this provision may be waived in writing by the demandant and shall cease upon the termination of his interest in the estate.

History: 1953 Comp., § 32A-3-204, enacted by Laws 1975, ch. 257, § 3-204; 1983, ch. 194, § 4.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-204 UPC.

Compiler's notes. — This section is similar to former 31-5-2, 1953 Comp.

Cross references. — For method of giving notice, *see* 45-1-401 NMSA 1978.

For waiver of notice, *see* 45-1-402 NMSA 1978.

For notice to represented interests, *see* 45-1-403 NMSA 1978.

For informal probate, *see* 45-3-306 NMSA 1978.

For formal testacy proceedings, *see* 45-3-403 NMSA 1978.

For formal appointment of personal representative, *see* 45-3-414 NMSA 1978.

For notice to creditors, *see* 45-3-801 NMSA 1978.

For demand for notice of protective proceedings, *see* 45-5-406 NMSA 1978.

Notice of holders of contingent equitable interests. — Holders of contingent equitable interests in an estate are not required to be given notice without request of hearing upon final accounting and report of the executors because: (1) a probate proceeding is a special statutory proceeding, (2) there is no ambiguity in the statute governing who shall receive notice, (3) provisions for notice to beneficiaries under a trust were not utilized, and (4) beneficiaries of a trust are represented and protected legally by the trustee. Toledo Soc'y for Crippled Children v. Toledo Trust Co., 61 N.M. 204, 297 P.2d 866 (1956) (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 80 Am. Jur. 2d Wills § 932.

Duty and liability of executor with respect to locating and notifying legatees, devisees or heirs, 10 A.L.R.3d 547.

33 C.J.S. Executors and Administrators § 53.

PART 3
INFORMAL PROBATE AND APPOINTMENT PROCEEDINGS

45-3-301. Informal probate or appointment proceedings; application; contents.

Applications for informal probate or informal appointment must be directed to the probate or district court and verified by the applicant to be accurate and complete to the best of his knowledge and belief as to the information found in Subsections A through F of this section.

A. Every application for informal probate of a will or for informal appointment of a personal representative, other than a special or successor representative, shall contain the following:

(1) a statement of the interest of the applicant;

(2) the name and date of death of the decedent; his age and the county and state of his domicile at the time of death; and the names and addresses of the spouse, children, heirs and devisees and the ages of any who are minors so far as known or ascertainable with reasonable diligence by the applicant;

(3) if the decedent was not domiciled in New Mexico at the time of his death, a statement showing venue;

(4) a statement identifying and indicating the address of any personal representative of the decedent appointed in New Mexico or elsewhere whose appointment has not been terminated;

(5) a statement indicating whether the applicant has received a demand for notice, or is aware of any demand for notice, of any probate or appointment proceeding concerning the decedent that may have been filed in New Mexico or elsewhere; and

(6) a statement that the time limit for informal probate or appointment as provided in Sections 45-3-101 through 45-3-1204 NMSA 1978 has not expired either because three years or less have passed since the decedent's death, or, if more than three years from death have passed, that circumstances as described by Section 45-3-108 NMSA 1978 authorizing tardy probate or appointment have occurred.

B. An application for informal probate of a will shall state the following in addition to the statements required by Subsection A of this section:

(1) that the original of the decedent's last will is in the possession of the court, or accompanies the application, or that an authenticated copy of his will probated in another jurisdiction accompanies the application;

(2) that the applicant, to the best of his knowledge, believes the will to have been validly executed; and

(3) that after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will, and that the applicant believes that the instrument which is the subject of the application is the decedent's last will.

C. An application for informal appointment of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name, address and priority for appointment of the person whose appointment is sought.

D. An application for informal appointment of a personal representative in intestacy shall state in addition to the statements required by Subsection A of this section:

(1) that after the exercise of a reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in New Mexico under Section 45-1-301 NMSA 1978; and

(2) the priority of the person whose appointment is sought and the names of any other person having a prior or equal right to the appointment under Section 45-3-203 NMSA 1978.

E. An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant.

F. An application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in Subsection C of Section 45-3-610 NMSA 1978 or whose appointment has been terminated by death or removal, shall:

(1) adopt the statements in the application or petition which led to the appointment of the person being succeeded except as specifically changed or corrected;

(2) state the name and address of the person who seeks appointment as successor; and

(3) describe the priority of the applicant.

G. By verifying an application for informal probate, or informal appointment, the applicant submits personally to the jurisdiction of the court in any proceeding for relief from fraud relating to the application, or for perjury, that may be instituted against him.

History: 1953 Comp., § 32A-3-301, enacted by Laws 1975, ch. 257, § 3-301; 1976 (S.S.), ch. 37, § 6; 1978, ch. 159, § 4.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-301 UPC.

Cross references. — For notice requirements, *see* 45-3-204, 45-3-306 NMSA 1978.

For oath that statements are true, *see* 45-3-303 NMSA 1978.

For appointment of administrator on application of revenue division of department of taxation and revenue, *see* 7-7-9 NMSA 1978.

Law reviews. — For article, "The Use of Revocable Inter Vivos Trusts in Estate Planning," see 1 N.M.L. Rev. 143 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Executors and Administrators §§ 236 to 239; 79 Am. Jur. 2d Wills § 841.

Statute limiting time for probate of will as applicable to will probated in another jurisdiction, 87 A.L.R.2d 721.

What circumstances excuse failure to submit will for probate within time limit set by statute, 17 A.L.R.3d 1361.

Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration, 2 A.L.R.4th 1315.

Who is resident within meaning of statute prohibiting appointment of nonresident executor or administrator, 9 A.L.R.4th 1223.

33 C.J.S. Executors and Administrators § 49; 95 C.J.S. Wills § 373.

45-3-302. Informal probate; duty of court; effect of informal probate.

Upon receipt of an application requesting informal probate of a will, the probate or the district court, upon making the findings required by Section 45-3-303 NMSA 1978, shall issue a written statement of informal probate if at least one hundred twenty hours have elapsed since the decedent's death. Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding. No defect in the application or procedure relating thereto which leads to informal probate of a will renders the probate void.

History: 1953 Comp., § 32A-3-302, enacted by Laws 1975, ch. 257, § 3-302; 1976 (S.S.), ch. 37, § 7; 1978, ch. 159, § 5.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-302 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills § 841.

Decree of court of domicile respecting validity or construction of will, or admitting it or denying its admission to probate, as conclusive as regards real estate in another state devised by will, 131 A.L.R. 1023.

95 C.J.S. Wills §§ 422, 574, 584.

45-3-303. Informal probate; proof and findings required.

A. In an informal proceeding for original probate of a will, the probate or the district court shall determine whether:

(1) the application is complete;

(2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;

(3) the applicant appears from the application to be an interested person as defined in Paragraph (2) [(23)] of Subsection A of Section 45-1-201 NMSA 1978;

(4) on the basis of the statements in the application, venue is proper;

(5) an original, duly executed and apparently unrevoked will is in the possession of the probate or the district court;

(6) any notice required by Section 45-3-204 NMSA 1978 has been given; and

(7) it appears from the application that the time limit for original probate has not expired.

B. The application shall be denied if it indicates that a personal representative has been appointed in another county of New Mexico or, except as provided in Subsection D of this section, if it appears that this or another will of the decedent has been the subject of a previous informal probate order.

C. A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under Section 45-2-502 or 45-2-506 NMSA 1978 have been met shall be probated without further proof. In other cases, the probate or the district court may presume execution if the will appears to have been properly executed, or it may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will.

D. Informal probate of a will which has been previously probated in another state or foreign country may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the order or statement probating it from the office or court where it was first probated.

E. A will from a place which does not provide for probate of a will after death and which is not eligible for probate under Subsection A of this section, may be probated in New Mexico upon receipt by the probate or the district court of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place.

History: 1953 Comp., § 32A-3-303, enacted by Laws 1975, ch. 257, § 3-303; 1978, ch. 159, § 6.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-303 UPC.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

The reference in Subsection A(3) of this section seemingly should be to Paragraph (23), and not Paragraph (2), of Subsection A of 45-1-201 NMSA 1978.

Cross references. — For venue of decedent's estates, *see* 45-1-303, 45-3-201 NMSA 1978.

For limitations for probate proceedings, *see* 45-3-108 NMSA 1978.

For venue of protective proceedings, *see* 45-5-403 NMSA 1978.

Claim for fraud. — District court erred in finding that there was no genuine issue as to one or more of the material facts necessary to give rise to a claim for fraud in connection with the informal probate of a will, where questions raised by the papers filed with the probate court constituted issues of fact and affidavits in support of a motion for summary judgment did not negate them. Eoff v. Forrest, 109 N.M. 695, 789 P.2d 1262 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills § 841; 80 Am. Jur. 2d Wills § 1008.

95 C.J.S. Wills §§ 383, 484, 486.

45-3-304. Reserved.

ANNOTATIONS

Compiler's notes. — Laws 1975, ch. 257, § 3-304, contained this section number, but no accompanying text.

45-3-305. Informal probate; court not satisfied.

The probate or the district court may decline application for informal probate of a will for any reason. A declination of informal probate is not an adjudication and does not preclude formal probate proceedings.

History: 1953 Comp., § 32A-3-305, enacted by Laws 1975, ch. 257, § 3-305; 1978, ch. 159, § 7.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-305 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills § 841.

Person entitled to appeal from decree admitting will to probate or denying probate, 88 A.L.R. 1158.

Power and duty of probate court to set aside decree admitting forged instrument to probate as a will, 115 A.L.R. 473.

95 C.J.S. Wills § 497.

45-3-306. Informal probate; notice requirements.

A. The applicant shall give notice as described by Section 45-1-401 NMSA 1978 of his application for informal probate to any person demanding it pursuant to Section 45-3-204 NMSA 1978 and to any personal representative of the decedent whose appointment has not been terminated. No other notice of informal probate is required.

B. If an informal probate is granted, within 30 days thereafter the applicant shall give written information of the probate to the heirs and devisees. The information shall include the name and address of the applicant, the name and location of the court granting the informal probate, and the date of the probate. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the applicant. No duty to give information is incurred under this section if a personal representative is appointed who is required to give written information pursuant to the provisions of Section 45-3-705 NMSA 1978. An applicant's failure to give information as required by this section is a breach of the applicant's duty to the heirs and devisees but does not affect the validity of the probate.

History: 1953 Comp., § 32A-3-306, enacted by Laws 1975, ch. 257, § 3-306; 1995, ch. 210, § 34.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-306 UPC.

The 1995 amendment, effective July 1, 1995, designated the existing provision as Subsection A; in the first sentence of Subsection A, substituted "shall" for "must",

substituted "Section 45-1-401 NMSA 1978" for "Section 1-401" and "Section 45-3-204 NMSA 1978" for "Section 3-204"; and added Subsection B.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 80 Am. Jur. 2d Wills § 932.

95 C.J.S. Wills § 370.

45-3-307. Informal appointment proceedings; delay in order; duty of court; effect of appointment.

A. Upon receipt of an application for informal appointment of a personal representative (other than a special administrator as provided in Section 45-3-614 NMSA 1978), if at least one hundred twenty hours have elapsed since the decedent's death, the probate or the district court, after making the findings required by Section 45-3-308 NMSA 1978, shall appoint the applicant subject to qualification and acceptance. However, if the decedent was a nonresident, the probate or the district court shall delay the order of appointment until thirty days have elapsed since death unless the personal representative appointed at the decedent's domicile is the applicant, or unless the decedent's will directs that his estate be subject to the laws of New Mexico.

B. The status of personal representative and the powers and duties pertaining to the office are fully established by informal appointment. An appointment, and the office of personal representative created thereby, is subject to termination as provided in Sections 45-3-608 through 45-3-612 NMSA 1978, but is not subject to retroactive vacation.

History: 1953 Comp., § 32A-3-307, enacted by Laws 1975, ch. 257, § 3-307; 1976 (S.S.), ch. 37, § 8; 1978, ch. 159, § 8.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-307 UPC.

Jurisdictional effect of informal appointment. — The district court had jurisdiction to enter a closing order absent an order entered on a formal petition for appointment challenging the informally appointed personal representative, since the status of personal representative and the powers and duties pertaining to the appointment are fully established by informal appointment, (45-3-307 NMSA 1978), and a personal representative may petition for an order of complete settlement of an estate at any time (45-3-1001 NMSA 1978). Trujillo v. Lopez, 106 N.M. 157, 740 P.2d 707 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Adverse interest or position as disqualification for appointment of administrator, executor, or other personal representative, 11 A.L.R.4th 638.

33 C.J.S. Executors and Administrators §§ 63, 72.

45-3-308. Informal appointment proceedings; proof and findings required.

A. In informal appointment proceedings, the probate or the district court must determine whether:

(1) the application for informal appointment of a personal representative is complete;

(2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;

(3) the applicant appears from the application to be an interested person as defined in Paragraph (20) [(23)] of Subsection A of Section 45-1-201 NMSA 1978;

(4) on the basis of the statements in the application, venue is proper;

(5) any will to which the requested appointment relates has been formally or informally probated; but this requirement does not apply to the appointment of a special administrator;

(6) any notice required by Section 45-3-204 NMSA 1978 has been given; and

(7) from the statements in the application, from the contents of the probated will, if any, and from any nominations and renunciations pursuant to Section 45-3-203 NMSA 1978 that have been filed before or at the time of the application, the person whose appointment is sought has priority entitling him to the appointment.

B. Unless Section 45-3-612 NMSA 1978 controls, the application must be denied if it indicates that a personal representative who has not filed a written statement of resignation as provided in Subsection C of Section 45-3-610 NMSA 1978 has been appointed in New Mexico, that (unless the applicant is the domiciliary personal representative or his nominee) the decedent was not domiciled in New Mexico and that a personal representative whose appointment has not been terminated has been appointed by a court in the state of domicile, or that other requirements of this section have not been met.

C. If the applicant is the domiciliary personal representative and the decedent was not domiciled in New Mexico, informal appointment proceedings may be allowed.

History: 1953 Comp., § 32A-3-308, enacted by Laws 1975, ch. 257, § 3-308; 1978, ch. 159, § 9.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

The reference in Subsection A(3) of this section seemingly should be to Paragraph (23), and not Paragraph (20), of Subsection A of 45-1-201 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Delegation by will of power to nominate executor, 11 A.L.R.2d 1284.

Probate, in state where assets are found, of will of nonresident which has not been admitted to probate in state of domicile, 20 A.L.R.3d 1033.

Eligibility of foreign corporation to appointment as executor, administrator or testamentary trustee, 26 A.L.R.3d 1019.

Construction and operation of will or trust provision appointing advisors to trustee or executor, 56 A.L.R.3d 1249.

33 C.J.S. Executors and Administrators §§ 61, 62.

45-3-309. Informal appointment proceedings; court not satisfied.

The probate or the district court may decline an application for informal appointment of a personal representative for any reason. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings.

History: 1953 Comp., § 32A-3-309, enacted by Laws 1975, ch. 257, § 3-309; 1978, ch. 159, § 10; 2011, ch. 124, § 45.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-309 UPC.

The 2011 amendment, effective January 1, 2012, provided that the court may deny an application for an informal appointment of a personal representative.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Power of court to refuse letters testamentary to one named in will as executor, absent specific statutory disqualification, 95 A.L.R. 828.

Judgment or order in connection with appointment of executor or administrator as res judicata, as law of the case, or as evidence, on questions other than the validity of the appointment, 119 A.L.R. 594.

33 C.J.S. Executors and Administrators § 63.

45-3-310. Informal appointment proceedings; notice requirements.

The applicant must give notice as described by Section 1-401 [45-1-401 NMSA 1978] of his intention to seek an appointment informally to any person demanding it pursuant to Section 3-204 [45-3-204 NMSA 1978]. No other notice of an informal appointment proceeding is required, except that the personal representative shall give notice pursuant to the provisions of Section 3-705 [45-3-705 NMSA 1978].

History: 1953 Comp., § 32A-3-310, enacted by Laws 1975, ch. 257, § 3-310.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Failure of personal representative to file proof of publication of notice of appointment or notice to creditors within specified time as tolling statute of nonclaim, 42 A.L.R.2d 1218.

33 C.J.S. Executors and Administrators § 53.

45-3-311. Informal appointment unavailable in certain cases.

If an application for informal appointment indicates the existence of a possible unrevoked testamentary instrument which may relate to property subject to the laws of New Mexico, and which is not filed for probate in the probate or the district court, the probate or the district court shall decline the application; however, such declination of informal probate is not an adjudication and does not preclude appointment in formal proceedings.

History: 1953 Comp., § 32A-3-311, enacted by Laws 1975, ch. 257, § 3-311; 1978, ch. 159, § 11.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 50.

PART 4
FORMAL TESTACY AND APPOINTMENT PROCEEDINGS

45-3-401. Formal testacy proceedings; nature; when commenced.

A. A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding may be commenced by an interested person filing:

(1) a petition as described in Subsection A of Section 3-402 [45-3-402 NMSA 1978] in which he requests that the court, after notice and hearing, enter an order probating a will; or

(2) a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application; or

(3) a petition in accordance with Subsection C of Section 3-402 [45-3-402 NMSA 1978] for an order that the decedent died intestate.

B. A petition may request formal probate of a will without regard to whether or not the same or a conflicting will has been informally probated. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.

C. During the pendency of a formal testacy proceeding, the probate court shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

D. Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously-appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding. If a petitioner requests the appointment of a different personal representative in a formal proceeding, the previously-appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate, or unless the district court orders otherwise.

History: 1953 Comp., § 32A-3-401, enacted by Laws 1975, ch. 257, § 3-401.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-401 UPC.

Cross references. — For right to jury trial in formal testacy proceeding, *see* 45-1-306 NMSA 1978.

Tort of interference with inheritance. — Where there was both an intervivos transfer of all the property of a decedent's estate prior to the decedent's death and a claim of improper influence in the revision of the decedent's will by the execution of a codicil, an attack on the codicil in a probate proceeding would not be an adequate remedy because the estate was devoid of assets. Plaintiff was not required to proceed in probate, but could proceed in a civil tort action of intentional interference with inheritance to attack the validity of the codicil. Peralta v. Peralta, 2006-NMCA-033, 139 N.M. 231, 131 P.3d 81.

Tort of interference with inheritance is an exception to the requirement that probate is the only forum for attacking the validity of a testamentary instrument and exists in a situation where the estate has been depleted so that there is no remedy in probate. Peralta v. Peralta, 2006-NMCA-033, 139 N.M. 231, 131 P.3d 81.

Statutes permitting contest of wills to be strictly construed. — There was no right to contest a will at common law and the right to do so exists by virtue of the statutes which being in derogation of common law must be strictly construed. De Baca v. Baca, 73 N.M. 387, 388 P.2d 392 (1964) (decided under former law).

Formal proceeding. — Under Paragraph (2) of Subsection A, the mere filing of a petition to set aside an informal probate of a will is enough to commence a formal probate proceeding; the court does not have to approve the petition. In re Estate of Duncan, 2002-NMCA-069, 132 N.M. 426, 50 P.3d 175, rev'd on other grounds sub nom. Estate of Duncan v. Kinsolving, 2003-NMSC-013, 133 N.M. 821, 70 P.3d 1260.

Declaratory judgment. — A motion for declaratory relief to resolve issues relating to a lease of property passed on through a will is a request to have the court exercise its general civil jurisdiction and, thus, a request to prevent informal probate. In re Estate of Duncan, 2002-NMCA-069, 132 N.M. 426, 50 P.3d 175, rev'd on other grounds sub nom. Estate of Duncan v. Kinsolving, 2003-NMSC-013, 133 N.M. 821, 70 P.3d 1260.

Settlement and distribution petition subordinate. — A will contestant's petition for a formal testacy proceeding filed pursuant to this section and within the three-year limit of 45-3-108 NMSA 1978 took precedence over a personal representative's petition for settlement and distribution of the estate filed pursuant to 45-3-1001 NMSA 1978. Vieira v. Estate of Cantu, 1997-NMCA-042, 123 N.M. 342, 940 P.2d 190.

Wills must be filed for probate upon death of testator, and no will may be accepted for filing prior to the death of the testator. 1957-58 Op. Att'y Gen. No. 58-159 (opinion rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills § 842; 80 Am. Jur. 2d Wills § 952.

Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration, 2 A.L.R.4th 1315.

Estoppel to contest will or attack its validity by acceptance of benefits thereunder, 78 A.L.R.4th 90.

95 C.J.S. Wills § 307.

45-3-402. Formal testacy or appointment proceedings; petition; contents.

A. Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the district court, request a judicial order after notice and hearing, and contain further statements as indicated in this section. A petition for formal probate of a will:

(1) contains the original will, unless excused under the provisions of Subsection B of this section;

(2) requests an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs; and

(3) contains the statements required for informal applications as stated in Subsection A of Section 3-301 [45-3-301 NMSA 1978] and the statements required by Paragraphs (1) through (3) of Subsection B of Section 3-301 [45-3-301 NMSA 1978].

B. If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will and why it is unavailable.

C. A petition for adjudication of intestacy and appointment of a personal representative must request a judicial finding and order that the decedent left no will and, determining the heirs, contain the statements required by Subsections A and D of Section 3-301 [45-3-301 NMSA 1978] and indicate whether supervised administration is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of a personal representative, in which case, the statements required by Paragraph (2) of Subsection D of Section 3-301 [45-3-301 NMSA 1978] may be omitted.

History: 1953 Comp., § 32A-3-402, enacted by Laws 1975, ch. 257, § 3-402.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-402 UPC.

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills § 842.

Establishment of will lost before testator's death, 34 A.L.R. 1304.

Proof of contents in establishment of lost will, 126 A.L.R. 1139.

Proof of nonrevocation in proceeding to establish lost will, 3 A.L.R.2d 949, 18 A.L.R.3d 606, 86 A.L.R.3d 980, 70 A.L.R.4th 323.

Who is resident within meaning of statute prohibiting appointment of nonresident executor or administrator, 9 A.L.R.4th 1223.

Adverse interest or position as disqualification for appointment of administrator, executor, or other personal representative, 11 A.L.R.4th 638.

Liability in damages for interference with expected inheritance or gift, 22 A.L.R.4th 1229.

Sufficiency of evidence of nonrevocation of lost will not shown to have been inaccessible to testator - modern cases, 70 A.L.R.4th 323.

95 C.J.S. Wills § 373.

45-3-403. Formal testacy proceeding; notice of hearing on petition.

A. Upon commencement of a formal testacy proceeding, the district court shall fix a time and place of hearing. Notice shall be given in the manner prescribed by Section 1-401 [45-1-401 NMSA 1978] by the petitioner to the persons enumerated in this section and to any additional person who has filed a demand for notice under Section 3-204 [45-3-204 NMSA 1978] of the [Uniform] Probate Code.

B. Notice shall be given to the following persons: the surviving spouse, children and other heirs of the decedent (who would have taken had the decedent died intestate); the devisees and personal representatives named in any will that is being, or has been, probated, or offered for informal or formal probate in the county, or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere; and any personal representative of the decedent whose appointment has not been terminated. Notice may be given to other persons. In addition, the petitioner shall give notice by publication to all unknown persons and to all known persons whose addresses are unknown who have any interest in the matters being litigated.

C. If it appears by the petition or otherwise that the fact of the death of the alleged decedent may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing on the petition shall be sent by registered or certified mail to the alleged decedent at his last known address. The district court shall direct the petitioner to report the results of, or make and report back concerning, a reasonably diligent search for the alleged decedent in any manner that may seem advisable, including any or all of the following methods:

(1) by inserting in one or more suitable periodicals, a notice requesting information from any person having knowledge of the where-abouts of the alleged decedent;

(2) by notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the alleged decedent; and

(3) by engaging the services of an investigator. The costs of any search so directed shall be paid by the petitioner if there is no administration or by the estate of the decedent in case there is administration.

History: 1953 Comp., § 32A-3-403, enacted by Laws 1975, ch. 257, § 3-403.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-403 UPC.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Beneficiary of prior will not entitled to notice. — The principal beneficiary of a prior but revoked will which had not been offered for informal or formal probate was not entitled to notice under this section. Barber v. Pound, 120 N.M. 541, 903 P.2d 852 (Ct. App. 1995).

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M. L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills § 842; 80 Am. Jur. 2d Wills §§ 932, 933.

95 C.J.S. Wills § 370.

45-3-404. Formal testacy proceedings; written objections to probate.

In a formal testacy proceeding, any interested person who opposes the probate of a will for any reason shall state in his pleadings his objections to probate of the will.

History: 1953 Comp., § 32A-3-404, enacted by Laws 1975, ch. 257, § 3-404.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-404 UPC.

Cross references. — For general provisions concerning fraud, *see* 45-1-106 NMSA 1978.

For fraud in closing statement, *see* 45-3-1005 NMSA 1978.

Time limit for filing objections and jury trial demand. — As long as the objection to the probate of a will under 45-3-404 NMSA 1978 is filed in good faith and at a reasonable time, and is not found by the trial court to be interposed for delay or other improper purpose, a jury demand filed contemporaneously with it should be deemed timely. Morlolock v Lozoya, 2001-NMCA-030, 130 N.M. 258, 23 P.3d 933.

Presumption of undue influence. — Where a transfer of property is made by a parent to his child, a husband to his wife, a brother to his sister, etc., it is ordinarily a natural result of the affection which normally is a concomitant of these relationships, and it would be unfair under such circumstances to impose a presumption of undue influence upon the transfer. But where, in addition to the usual circumstances, it is shown that the beneficiary of the transfer occupies a dominant position in the relationship which is not the usual circumstance in such relationships, then it is proper to impose a presumption of undue influence upon the transfer. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968)(decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 842, 847; 80 Am. Jur. 2d Wills § 938.

Compromise or settlement of controversy over will as changing nature of interest or estate under will, 5 A.L.R. 1384.

Right of creditor of heir to contest will, 46 A.L.R. 1490, 128 A.L.R. 963.

Contract to refrain from contesting will, 55 A.L.R. 811.

Form and particularity of allegations to raise issue of undue influence, 107 A.L.R. 832.

Right of assignee of expectancy to contest will, 112 A.L.R. 84.

Legal capacity of one whom testator had agreed to adopt, but whose adoption had not been effected, to contest will, 112 A.L.R. 1422.

Necessity of allegations that contestant of will is interested party, 117 A.L.R. 1455.

Right of heirs, next of kin or others who would have benefited by denial of probate of will, to share in the consideration for an agreement to which they were not parties to withdraw objections to probate, 120 A.L.R. 1495.

Presumption and burden of proof as regards continuance or revocation of will produced for probate, 165 A.L.R. 1188.

Estoppel to contest will or attack its validity, 28 A.L.R.2d 116, 78 A.L.R.4th 90.

Right of executor or administrator to contest will or codicil of his decedent, 31 A.L.R.2d 756.

Validity and enforceability of agreement to drop or compromise will contest or withdraw objections to probate, or of agreement to induce others to do so, 42 A.L.R.2d 1319.

Right of trustee named in earlier will to contest, or seek to revoke probate of, later will, 94 A.L.R.2d 1409.

Family settlement of testator's estate, 29 A.L.R.3d 8.

Modern status: inheritability or descendability of right to contest will, 11 A.L.R.4th 907.

What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary, 3 A.L.R.5th 590.

95 C.J.S. Wills §§ 322, 374.

45-3-405. Formal testacy proceedings; uncontested cases; hearings and proof.

A. If a petition in a formal testacy proceeding is unopposed, the district court may order probate or intestacy on the strength of the pleadings if satisfied that the conditions of Section 3-409 [45-3-409 NMSA 1978] have been met, or conduct a hearing in open court and require proof of the matters necessary to support the order requested.

B. If evidence concerning execution of a will which is not self-proved is necessary in uncontested cases, the affidavit or testimony of at least one of the attesting witnesses is required if he is within New Mexico, competent and able to testify. Otherwise, due execution of a will may be proved by other evidence.

C. If the will is self-proved in an uncontested case, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed, subject to rebuttal without the testimony of any witness, upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

History: 1953 Comp., § 32A-3-405, enacted by Laws 1975, ch. 257, § 3-405.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-405 UPC.

Cross references. — For general provisions concerning fraud, *see* 45-1-106 NMSA 1978.

Use of circumstantial evidence to show undue influence. — Where the only evidence is circumstantial, such evidence may be used to show the existence of undue influence. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968).

Existence of undue influence determined from circumstances of case. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills § 842; 80 Am. Jur. 2d Wills § 1008.

95 C.J.S. Wills §§ 392, 393, 411, 422.

45-3-406. Formal testacy proceedings; contested cases; testimony of attesting witnesses.

A. If evidence concerning execution of a will which is not self-proved is necessary in contested cases, the testimony of at least one of the attesting witnesses is required if he is within New Mexico, competent and able to testify. Otherwise, due execution of a will may be proved by other evidence.

B. If the will is self-proved in a contested case, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed, subject to rebuttal without the testimony of any witness, upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

History: 1953 Comp., § 32A-3-406, enacted by Laws 1975, ch. 257, § 3-406.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-406 UPC.

Compiler's notes. — This section includes within its scope some of the functions of former 30-2-9, 1953 Comp.

Cross references. — For general provisions concerning fraud, *see* 45-1-106 NMSA 1978.

For Rules of Evidence, *see* 11-101 NMRA.

Evidence sufficient to establish prima facie proof of execution. McKay v. Kimble, 117 N.M. 258, 871 P.2d 22 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills § 842; 80 Am. Jur. 2d Wills § 1008.

Compromise or settlement of controversy over will as changing nature of interest or estate under will, 5 A.L.R. 1384.

Creditor of heir, right to contest will, 46 A.L.R. 1490, 128 A.L.R. 963.

Contract to refrain from contesting will, 55 A.L.R. 811.

Executor or trustee named in will as beneficiary within rule that activity of beneficiary in preparation of will raises presumption of undue influence, 63 A.L.R. 948.

Admissibility of other than testimony of subscribing witness to prove execution of will or testamentary capacity, 63 A.L.R. 1195.

Presumption and burden of proof as to undue influence on testator, 66 A.L.R. 228, 154 A.L.R. 583.

Admissibility and credibility of testimony of subscribing witness tending to impeach execution of will or testamentary capacity of testator, 79 A.L.R. 394.

Admissibility of declarations of testator on issue of undue influence, 79 A.L.R. 1447, 148 A.L.R. 1225.

Admissibility and weight on issue of mental capacity or undue influence, in respect of will or conveyance, of instruments previously executed by person in question, 82 A.L.R. 963.

Codicil as affecting application of statutory provision to will, or previous codicil not otherwise subject, or as obviating objections to lack of testamentary capacity, undue influence or defective execution otherwise fatal to will, 87 A.L.R. 836.

Fraud as distinguished from undue influence as ground for contesting will, 92 A.L.R. 790.

Undue influence by third person in which immediate beneficiary did not participate, 96 A.L.R. 613.

Form and particularity of allegations to raise issue of undue influence, 107 A.L.R. 832.

Right of assignee of expectancy to contest will, 112 A.L.R. 84.

Legal capacity of one whom testator had agreed to adopt, but whose adoption had not been effected, to contest will, 112 A.L.R. 1422.

Necessity of allegations that contestant of will is interested party, 117 A.L.R. 1455.

Admissibility of evidence on question of testamentary capacity or undue influence in a will contest as affected by remoteness, relative to the time when the will was executed, of the facts or events to which the evidence relates, 124 A.L.R. 433, 168 A.L.R. 969.

Proof, or possibility of proof, of will without testimony of attesting witness as affecting application of statute relating to invalidation of will, or of devise or legacy, where attesting witness is beneficiary under will, 133 A.L.R. 1286.

Right of one not otherwise qualified to contest will or to appeal from probate to do so by virtue of status as husband or wife, prospective heir or next of kin of living person who is entitled but does not exercise or consent to exercise of the right, 149 A.L.R. 1270.

Probative value of opinion testimony of handwriting experts that document is not genuine, opposed to testimony of persons claiming to be attesting witnesses, 154 A.L.R. 649.

Contingent interest as sufficient to entitle one to oppose or contest will or codicil, 162 A.L.R. 843.

Instructions, in will contest, defining natural objects of testator's bounty, 11 A.L.R.2d 731.

Right of debtor of or person claimed to be liable to estate to contest will or challenge its admission to probate, 15 A.L.R.2d 864.

Nuncupative will, effectiveness where essential witness thereto is beneficiary, 28 A.L.R.2d 796.

Interlineations and changes appearing on face of will, 34 A.L.R.2d 619.

Proof of due execution of lost will, 41 A.L.R.2d 393.

Validity and enforceability of agreement to drop or compromise will contest or withdraw objections to probate, or of agreement to induce others to do so, 42 A.L.R.2d 1319.

Right of trustee named in earlier will to contest or seek to revoke probate of later will, 94 A.L.R.2d 1409.

Necessity of laying foundation for opinion of attesting witness as to mental condition of testator or testatrix, 17 A.L.R.3d 503.

Family settlement of testator's estate, 29 A.L.R.3d 8.

Competency, as witness attesting will, of attorney named therein as executor's attorney, 30 A.L.R.3d 1361.

May parts of will be upheld notwithstanding failure of other parts for lack of testamentary capacity or undue influence, 64 A.L.R.3d 261.

Liability in damages for interference with expected inheritance or gift, 22 A.L.R.4th 1229.

What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary, 3 A.L.R.5th 590.

Action for tortious interference with bequest as precluded by will contest remedy, 18 A.L.R.5th 211.

95 C.J.S. Wills §§ 392, 393, 411, 422.

45-3-407. Formal testacy proceedings; burdens in contested cases.

In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue and heirship. Proponents of a will have the burden of establishing prima facie proof of due execution in all cases, and if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate. If a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate.

History: 1953 Comp., § 32A-3-407, enacted by Laws 1975, ch. 257, § 3-407.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-407 UPC.

Cross references. — For proof of death or status, *see* 45-1-107 NMSA 1978.

For proof of self-proved wills, *see* 45-2-504 NMSA 1978.

For proof of due execution of wills in informal probate, *see* 45-3-303 NMSA 1978.

For proof of due execution of wills in formal probate, *see* 45-3-405, 45-3-406 NMSA 1978.

For proof of valid power of attorney, *see* 45-5B-106 NMSA 1978.

For Rules of Evidence, *see* 11-1102 NMRA.

Effect of presumption of undue influence. — A will contestant is never required to offer direct evidence of undue influence. The mechanism of a presumption allows the will contestant to get the issue of undue influence before the finder of fact by offering only proof of a confidential relationship and suspicious circumstances, even in the face of contradictory evidence. Chapman v. Varela, 2009-NMSC-041, 146 N.M. 680, 213 P.3d 1109, rev'g 2008-NMCA-108, 144 N.M. 709, 191 P.3d 567.

Sufficient evidence of undue influence. — Where decedent's will left one dollar to each of the decedent's children, except one child, who was appointed as personal representative and to whom the will conveyed the remainder of the decedent's estate; the decedent depended on the beneficiary for transportation, gave the beneficiary a power of attorney and placed the beneficiary's name on the decedent's bank accounts; the decedent suffered from age-related and stroke-related loss of cognitive functioning and memory loss; approximately one year before the decedent's last will was written, the decedent signed a separate and nearly identical document to the last will that the beneficiary had written using a will template which the beneficiary obtained at a stationery store; because the prior will had not been signed in accordance with the requirements of the Uniform Probate Code, the decedent and the beneficiary instructed an attorney to prepare a will that contained the same language as the earlier will; the beneficiary spoke for the decedent; the beneficiary disparaged the other siblings; the decedent was submissive around the beneficiary; the beneficiary manipulated the decedent's bank accounts; and the beneficiary did not tell the siblings about the will or about deeds which the decedent had executed conveying the decedent's real property to the beneficiary, the evidence was sufficient to prove the existence of a confidential relationship and suspicious circumstances and raise the presumption of undue influence in the execution of the decedent's will. Chapman v. Varela, 2009-NMSC-041, 146 N.M. 680, 213 P.3d 1109, rev'g 2008-NMCA-108, 144 N.M. 709, 191 P.3d 567.

Purpose of section. — This section was intended to clarify the previously existing case law concerning undue influence, rather than to effect a substantial change. Martinez v. Cantu, 108 N.M. 583, 775 P.2d 1300 (Ct. App. 1988).

Burden of proof. — This section requires that the contestant establish a prima facie case of undue influence. Once that initial burden has been met, the proponent has the burden of presenting evidence in opposition to the prima facie proof. If the proponent does not meet this burden, the contestant's evidence might require a finding of undue influence. Martinez v. Cantu, 108 N.M. 583, 775 P.2d 1300 (Ct. App. 1988).

Reliance on presumption. — In making a prima facie case, a contestant may be entitled to rely on a presumption. Martinez v. Cantu, 108 N.M. 583, 775 P.2d 1300 (Ct. App. 1988).

Proof of "due execution" where forgery in issue. — Where there was no forgery issue separable from the factual issue of "due execution," the proponent of a will, by claiming forgery, does not avoid her statutory burden of persuading the trial court of

"due execution" of the alleged will. Price v. Foster, 102 N.M. 707, 699 P.2d 638 (Ct. App. 1985).

Generally, as to imposition of presumption of undue influence. — Where a transfer of property is made by a parent to his child, a husband to his wife, a brother to his sister, etc., it is ordinarily a natural result of the affection which normally is a concomitant of these relationships, and it would be unfair under such circumstances to impose a presumption of undue influence upon the transfer. But where, in addition to the usual circumstances, it is shown that the beneficiary of the transfer occupies a dominant position in the relationship which is not the usual circumstance in such relationships, it is proper to impose a presumption of undue influence upon the transfer. Galvan v. Miller, 79 N.M. 540, 445 P.2d 961 (1968).

Factors raising undue influence presumption. — The facts of: (1) the age, poor eyesight and lack of education of decedent; (2) decedent's poor mental history; (3) the fiduciary and confidential relationship existing between testatrix and her brothers; (4) the opportunity to exercise an undue influence; (5) the brothers' participation in the procurement of the will; and (6) the unusually large proportion of the estate received by the brothers as beneficiaries give rise to a rebuttable presumption that the brothers of decedent exerted undue influence on decedent. Hummer v. Betenbough, 75 N.M. 274, 404 P.2d 110 (1965).

Not raising presumption. — A presumption of undue influence is not raised and the burden of proof is not shifted by the mere fact that a beneficiary occupies, with respect to the testator, a confidential or fiduciary relation. Hummer v. Betenbough, 75 N.M. 274, 404 P.2d 110 (1965).

Confidential relationship with testator. — Evidence that a beneficiary had a confidential relationship with the testatrix is sufficient to raise a presumption of undue influence only if other suspicious circumstances are shown. Lucero v. Lucero, 118 N.M. 636, 884 P.2d 527 (Ct. App. 1994).

Evidence not rebutting presumption. — Testimony by the attorney who prepared the will that if undue influence were exerted on decedent, he had no knowledge of such influence, standing alone in the face of the strong presumption to the contrary, is not sufficient to rebut the presumption of undue influence. Hummer v. Betenbough, 75 N.M. 274, 404 P.2d 110 (1965).

Presumption raised. — There was substantial evidence to support imposition of presumption of undue influence over an elderly woman who gave property to her step-grandson where: (1) the grandson gave no consideration for the property; (2) the grandmother never mentioned to close friends or family an affection for the grandson or her intent to give him the property; (3) the grandmother placed trust and reliance in the grandson's parents and grandfather to assist her in executing the documents to transfer the property; (4) the grandmother had a short and limited relationship with her

grandson; and (5) she had expressed an intention to leave the subject property to her son. Montoya v. Torres, 113 N.M. 105, 823 P.2d 905 (1991).

Lack of consideration for testamentary gift. — Lack of consideration for a testamentary gift is not ordinarily a "suspicious circumstance" giving rise to a finding of undue influence by the beneficiary upon the testator. Gersbach v. Warren, 1998-NMSC-013, 125 N.M. 269, 960 P.2d 811.

Secrecy on part of testator not "suspicious circumstance." — While secrecy on the part of a beneficiary of a testamentary gift may constitute a "suspicious circumstance" giving rise to a finding of undue influence, secrecy on the part of the testator does not. Gersbach v. Warren, 1998-NMSC-013, 125 N.M. 269, 960 P.2d 811.

Insufficient evidence of undue influence. — Contestant did not establish a prima facie case of undue influence, where decedent was found to be mentally alert, although elderly and sick, and she met with her lawyer on several occasions and divided her property among her closest relatives. Martinez v. Cantu, 108 N.M. 583, 775 P.2d 1300 (Ct. App. 1988).

The totality of the circumstances did not support contestant's claim of undue influence by beneficiary upon the testator; without such a showing, the court cannot speculate upon facts underlying the will without jeopardizing the principle of testamentary freedom. Gersbach v. Warren, 1998-NMSC-013, 125 N.M. 269, 960 P.2d 811.

Evidence sufficient to establish prima facie proof of execution. McKay v. Kimble, 117 N.M. 258, 871 P.2d 22 (Ct. App. 1994).

Execution of will. — The proponent of a document purporting to constitute a will has the burden of establishing at trial proof of the execution of the instrument. Mills v. Kelly, 99 N.M. 482, 660 P.2d 124 (Ct. App. 1983).

Probate exception precludes federal jurisdiction. — Plaintiff’s claim of tortious interference with inheritance based on the allegation that defendant used undue influence to cause the testator to execute a will in favor of defendant was a dispute cognizable only in the probate court, which precluded federal jurisdiction under the probate exception. Rienhardt v. Kelly, 164 F.3d 1296 (10th Cir. 1999).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 80 Am. Jur. 2d Wills §§ 952, 953.

Judgment denying validity of will because of undue influence, lack of mental capacity or the like, as res judicata as to validity of another will, deed or other instrument, 25 A.L.R.2d 657.

Modern status: inheritability or descendability of right to contest will, 11 A.L.R.4th 907.

Validity and enforceability of provision of will or trust instrument for forfeiture or reduction of share of contesting beneficiary, 23 A.L.R.4th 369.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings, 53 A.L.R.4th 561.

Sufficiency of evidence of nonrevocation of lost will not shown to have been inaccessible to testator - modern cases, 70 A.L.R.4th 323.

95 C.J.S. Wills § 384.

45-3-408. Formal testacy proceedings; will construction; effect of final order in another jurisdiction.

A final order of a court of another state determining testacy, the validity or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons, must be accepted as determinative by the courts of New Mexico if it includes, or is based upon, a finding that the decedent was domiciled at his death in the state where the order was made.

History: 1953 Comp., § 32A-3-408, enacted by Laws 1975, ch. 257, § 3-408.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-408 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 95 C.J.S. Wills § 577.

45-3-409. Formal testacy proceedings; order; foreign will.

A. After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the district court finds that the testator is dead, venue is proper and that the proceeding was commenced within the limitation prescribed by Section 3-108 [45-3-108 NMSA 1978], it shall determine the decedent's domicile at death, his heirs and his state of testacy. Any will found to be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by Section 3-612 [45-3-612 NMSA 1978]. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead.

B. A will from a foreign jurisdiction which does not provide for probate of a will after death, may be proved for probate in New Mexico by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become operative under the law of the foreign jurisdiction.

History: 1953 Comp., § 32A-3-409, enacted by Laws 1975, ch. 257, § 3-409.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-409 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills § 842.

95 C.J.S. Wills §§ 343, 348.

45-3-410. Formal testacy proceedings; probate of more than one instrument.

If two or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one instrument is probated, the order shall indicate what provisions control in respect to the nomination of a personal representative, if any. The order may, but need not, indicate how any provisions of a particular instrument are affected by the other instrument. After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of Section 3-412 [45-3-412 NMSA 1978].

History: 1953 Comp., § 32A-3-410, enacted by Laws 1975, ch. 257, § 3-410.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-410 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills §§ 824, 842.

Incorporation into will of provisions of will of another person by reference thereto, 37 A.L.R. 1476.

Probate where two or more testamentary documents, bearing the same date or undated, are proffered, 17 A.L.R.3d 603.

95 C.J.S. Wills § 313.

45-3-411. Formal testacy proceedings; partial intestacy.

If it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the district court shall enter an order to that effect.

History: 1953 Comp., § 32A-3-411, enacted by Laws 1975, ch. 257, § 3-411.

ANNOTATIONS

Cross references. — For burdens of proof in contested cases, *see* 45-3-407 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 80 Am. Jur. 2d Wills § 870.

May parts of will be upheld notwithstanding failure of other parts for lack of testamentary mental capacity or undue influence, 64 A.L.R.3d 261.

95 C.J.S. Wills §§ 317, 322.

45-3-412. Formal testacy proceedings; effect of order; vacation.

A. Subject to appeal and subject to vacation as provided in this section and in Section 45-3-413 NMSA 1978, a formal testacy order under Sections 45-3-409 through 45-3-411 NMSA 1978, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will and to the determination of heirs, except that:

(1) the court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of:

(a) its existence at the time of the earlier proceeding; or

(b) the earlier proceeding and were given no notice thereof except by publication;

(2) if intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or more persons were omitted from the determination and it is also shown that the persons were:

(a) unaware of their relationship to the decedent;

(b) were unaware of his death; or

(c) were given no notice of any proceeding concerning his estate except by publication;

(3) a petition for vacation under either Paragraph (1) or (2) of this subsection shall be filed prior to the earliest of the following time limits:

(a) if a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate or, if the estate is closed by statement, six months after the filing of the closing statement;

(b) whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by Section 45-3-108 NMSA 1978 when it is no longer possible to initiate an original proceeding to probate a will of the decedent; or

(c) twelve months after the entry of the order sought to be vacated;

(4) the order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs; and

(5) the finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at his last known address and the court finds that a search under Subsection C of Section 45-3-403 NMSA 1978 was made.

B. If the alleged decedent is not dead, even if notice was sent and search was made, he may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any estate or its proceeds from distributees that is in their hands or the value of distributions received by them to the extent that any recovery from distributees is equitable in view of all of the circumstances.

History: 1953 Comp., § 32A-3-412, enacted by Laws 1975, ch. 257, § 3-412; 1995, ch. 210, § 35.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-412 UPC.

The 1995 amendment, effective July 1, 1995, in Subsection A, substituted "Section 45-3-413 NMSA 1978" for "Section 3-413" and substituted "Sections 45-3-409 through 45-3-411 NMSA 1978" for "Sections 3-409 through 3-411" in the introductory paragraph; substituted "shall be filed" for "must be filed" in the introductory paragraph of Paragraph

(3); substituted "Section 45-3-108 NMSA 1978" for "Section 3-108" in Subparagraph (3)(b); substituted "Section 45-3-403 NMSA 1978" for "Section 3-403" in Paragraph (5); and made minor stylistic changes.

Knowledge of later-offered will. — Insofar as a party who had knowledge of the contents of a later-offered will reasonably believed that will to have been destroyed as of the time of the decedent's death, she was entitled to relief. Pidcock v. Apodaca, 2001-NMCA-037, 130 N.M. 460, 26 P.3d 764, cert. denied, 130 N.M. 484, 27 P.3d 476 (2001).

Rule not inconsistent with section. — The provisions of Rule 60(b)(1), N.M.R. Civ. P. (now Rule 1-060B(1) NMRA), which provide for relief for mistake, inadvertence, surprise, or excusable neglect, are not inconsistent with the grounds for relief stated in this section. Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Triggering of twelve-month time limit. — Amended order issued under Rule 1-060(A) NMRA to correct clerical orders in the original probate order did not vacate the original order; as a result, the twelve-month time limit in Subparagraph A(3)(c) for challenging the court's heirship findings was triggered at the time of the original order, not the amended order. Harrell v. Hayes, 1998-NMCA-136, 126 N.M. 23, 965 P.2d 939.

Adequate notice. — Where it was undisputed that son received first petition by certified mail and that he and his mother retained counsel to participate in probate proceeding, statutory and constitutional notice requirements were complied with. Gaines v. Gaines, 113 N.M. 652, 830 P.2d 569 (Ct. App. 1992).

Showing required. — This section requires a showing of a will or an omitted heir, and such a showing is a necessary circumstance without which it would be inappropriate to modify or vacate a "final" order. Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Husband's sworn disclaimer of any interest in his wife's estate, except insofar as he might be a devisee under a will, is substantial evidence, in itself, to support a trial court's finding that the husband had not brought himself within Subsection A(2) of this section. Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Where time for appealing formal testacy order had run, the distribution of the estate was res judicata absent fraud or jurisdictional error. Wisdom v. Kopel, 95 N.M. 513, 623 P.2d 1027 (Ct. App. 1981).

Law reviews. — For annual survey of New Mexico law relating to estates and trusts, see 12 N.M.L. Rev. 363 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Wills § 842; 80 Am. Jur. 2d Wills §§ 1063, 1065.

95 C.J.S. Wills §§ 502, 574, 584.

45-3-413. Formal testacy proceedings; vacation of order for other cause.

For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal as provided by the Rules Governing Appeals to the Supreme Court and Court of Appeals and Original Proceedings in the Supreme Court [12-101 NMRA].

History: 1953 Comp., § 32A-3-413, enacted by Laws 1975, ch. 257, § 3-413.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-413 UPC.

Where time for appealing formal testacy order had run, the distribution of the estate was res judicata absent fraud or jurisdictional error. Wisdom v. Kopel, 95 N.M. 513, 623 P.2d 1027 (Ct. App. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 80 Am. Jur. 2d Wills § 1063.

95 C.J.S. Wills § 502.

45-3-414. Formal proceedings concerning appointment of personal representative.

A. A formal proceeding for adjudication regarding the priority or qualification of one who is an applicant for appointment as personal representative, or of one who previously has been appointed personal representative in informal proceedings, if an issue concerning the testacy of the decedent is or may be involved, is governed by Section 3-402 [45-3-402 NMSA 1978], as well as by this section. In other cases, the petition shall contain or adopt the statements required by Subsection A of Section 3-301 [45-3-301 NMSA 1978] and describe the question relating to priority or qualification of the personal representative which is to be resolved. If the proceeding precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as any commenced thereafter. If the proceeding is commenced after appointment, the previously-appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the district court orders otherwise.

B. After notice to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously-appointed personal representative, and any person having or claiming priority for appointment as personal representative, the district court shall determine who is entitled to appointment under Section 3-203 [45-3-203 NMSA 1978], make a proper appointment and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under Section 3-611 [45-3-611 NMSA 1978].

History: 1953 Comp., § 32A-3-414, enacted by Laws 1975, ch. 257, § 3-414.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-414 UPC.

Limitations on informally appointed personal representative. — Once the district court denied a petition for formal appointment of the decedent's child as personal representative and ruled that the decedent's spouse should continue as personal representative, the limitation on the decedent's spouse's power as informally appointed personal representative in 45-3-414A NMSA 1978 no longer applied. Trujillo v. Lopez, 106 N.M. 157, 740 P.2d 707 (Ct. App. 1987).

Law reviews. — For article, "The Use of Revocable Inter Vivos Trusts in Estate Planning," see 1 N.M.L. Rev. 143 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 13.

PART 5
SUPERVISED ADMINISTRATION

45-3-501. Supervised administration; nature of proceeding.

A. Supervised administration is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the district court which extends until entry of an order approving distribution of the estate and discharging the personal representative or other order terminating the proceeding.

B. A supervised personal representative is responsible to the district court, as well as to the interested persons, and is subject to directions concerning the estate made by the district court on its own motion or on the motion of any interested person.

C. Except as otherwise provided in Sections 3-501 through 3-505 [45-3-501 through 45-3-505 NMSA 1978], or as otherwise ordered by the district court, a supervised

personal representative has the same duties and powers as a personal representative who is not supervised.

History: 1953 Comp., § 32A-3-501, enacted by Laws 1975, ch. 257, § 3-501.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-501 UPC.

Cross references. — For general fiduciary duties of personal representative, *see* 45-3-703 NMSA 1978.

Law reviews. — For article, "The Use of Revocable Inter Vivos Trusts in Estate Planning," see 1 N.M.L. Rev. 143 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Executors and Administrators §§ 146, 147, 243 to 245, 382, 383; 79 Am. Jur. 2d Wills §§ 56, 70, 183.

33 C.J.S. Executors and Administrators §§ 1, 3, 12.

45-3-502. Supervised administration; petition; order.

A. A petition for supervised administration may be filed by any interested person at any time or the request for supervised administration may be joined with a petition in a testacy or appointment proceeding. If the testacy of the decedent and the priority and qualification of any personal representative have not been adjudicated previously, the petition for supervised administration shall include the matters required of a petition in a formal testacy proceeding and the notice requirements and procedures applicable to a formal testacy proceeding apply. If not previously adjudicated, the district court shall adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative in any case involving a request for supervised administration, even though the request for supervised administration may be denied.

B. After notice to interested persons, the district court shall order supervised administration of a decedent's estate:

(1) if the decedent's will directs supervised administration, unless the district court finds that circumstances bearing on the need for supervised administration have changed since the execution of the will and that there is no necessity for supervised administration;

(2) if the decedent's will directs unsupervised administration, only upon a finding that supervised administration is necessary for protection of persons interested in the estate; or

(3) in other cases if the district court finds that supervised administration is necessary under the circumstances.

History: 1953 Comp., § 32A-3-502, enacted by Laws 1975, ch. 257, § 3-502.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-502 UPC.

Cross references. — For definition of "interested person", *see* 45-1-201 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 51.

45-3-503. Supervised administration; effect on other proceedings.

A. The pendency of a proceeding for supervised administration of a decedent's estate stays action on any informal application then pending or thereafter filed.

B. If a will has been previously probated in informal proceedings, the effect of the filing of a petition for supervised administration is as provided for formal testacy proceedings by Section 3-401 [45-3-401 NMSA 1978].

C. After he has received notice of the filing of a petition for supervised administration, a personal representative who has been appointed previously shall not exercise his power to distribute any estate. The filing of the petition does not affect his other powers and duties unless the district court restricts the exercise of any of them pending full hearing on the petition.

History: 1953 Comp., § 32A-3-503, enacted by Laws 1975, ch. 257, § 3-503.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-503 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 63.

45-3-504. Supervised administration; powers of personal representative.

Unless restricted by the district court, a supervised personal representative has, without interim orders approving exercise of a power, all powers of personal representatives under the [Uniform] Probate Code, but he shall not exercise his power

to make any distribution of the estate without prior order of the district court. Any other restriction on the power of a personal representative which may be ordered by the district court must be endorsed on his letters of appointment and, unless so endorsed, is ineffective as to persons dealing in good faith with the personal representative.

History: 1953 Comp., § 32A-3-504, enacted by Laws 1975, ch. 257, § 3-504.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-504 UPC.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For general fiduciary duties of personal representative, *see* 45-3-703 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 95.

45-3-505. Supervised administration; interim orders; distribution and closing orders.

A. Unless otherwise ordered by the district court, supervised administration is terminated by order in accordance with time restrictions, notices and contents of orders prescribed for proceedings under Section 3-1001 [45-3-1001 NMSA 1978].

B. Interim orders approving or directing partial distributions or granting other relief may be issued by the district court at any time during the pendency of a supervised administration on the application of the personal representative or any interested person.

C. A supervised personal representative shall file an account with the district court not less than annually during his administration and, on closing, shall file a final account to be approved under Section 3-1001 [45-3-1001 NMSA 1978]. The supervised personal representative shall also account to the district court on resignation or removal.

D. In connection with any account, the district court may require the supervised personal representative to submit to a physical check of the estate in his control, to be made in any manner the court may specify.

History: 1953 Comp., § 32A-3-505, enacted by Laws 1975, ch. 257, § 3-505.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-505 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 525.

PART 6
PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL AND TERMINATION OF AUTHORITY

45-3-601. Qualification.

Prior to receiving letters, a personal representative shall qualify by filing with the appointing probate court or district court any required bond and a statement of acceptance of the duties of the office.

History: 1953 Comp., § 32A-3-601, enacted by Laws 1975, ch. 257, § 3-601.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-601 UPC.

Compiler's notes. — This section includes within its scope some of the functions of former 31-1-17, 1953 Comp.

Cross references. — For bond requirements, *see* 45-3-603 NMSA 1978.

Executor without power until bond given. — An executor is without power to act as such until he has given bond required by the statute, unless bond was waived by the testator. Amberson v. Candler, 17 N.M. 455, 130 P. 255 (1913)(decided under former law).

Oath subsequent to grant of letters. — Where letters of administration are granted to an executrix on the condition that she be duly sworn first and the date of the oath is subsequent to that of the letters, the statute of nonclaim runs from the date of the oath. Brickley v. Spence, 33 N.M. 248, 264 P. 959 (1928)(decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Executors and Administrators §§ 263, 271 to 366, 1161 to 1167.

Liability of sureties on bond of administratrix who secures her appointment by misrepresenting the decedent's identity or her relationship to him, 9 A.L.R. 1138.

Acts or omissions in respect of cause of action for death, or the funds received on that account, as within coverage of bond of executor or administrator, 68 A.L.R. 1543.

Liability of sureties on bond of guardian, executor, administrator or trustee for defalcation or deficit occurring before bond was given, 82 A.L.R. 585.

Delay of executor or administrator in completing administration as affecting liability on bond, 85 A.L.R. 440.

Liability of sureties on bond of executor or administrator in respect of proceeds of sale of real property under testamentary direction or power, 91 A.L.R. 943.

Liability of guardian or his surety as affected by agreement by which he limits his control over funds or investments, 102 A.L.R. 1108.

Accounting by guardian, executor, administrator or trustee as a necessary condition of action on his bond, 119 A.L.R. 83.

Official bond of executor, administrator, guardian or trustee as covering appeal taken by him, 132 A.L.R. 1280.

Adverse interest or position as disqualification for appointment of administrator, executor, or other personal representative, 11 A.L.R.4th 638.

33 C.J.S. Executors and Administrators §§ 66, 67.

45-3-602. Acceptance of appointment; consent to jurisdiction.

By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the personal representative or mailed to him at his address as listed in the application or petition for appointment or as thereafter reported to the court.

History: 1953 Comp., § 32A-3-602, enacted by Laws 1975, ch. 257, § 3-602.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-602 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 72; 34 C.J.S. Executors and Administrators § 752.

45-3-603. Bond requirements.

A. No bond is required of a personal representative appointed in informal proceedings, except:

(1) upon the appointment of a special administrator;

(2) when a personal representative is appointed to administer an estate under a will containing an express requirement of bond; or

(3) when bond is required under Section 3-605 [45-3-605 NMSA 1978].

B. Bond may be required by court order at the time of appointment of a personal representative appointed in any formal proceeding, except that bond is not required of a personal representative appointed in formal proceedings if the will relieves the personal representative of bond, unless bond has been requested by an interested person in accordance with Section 3-605 and the district court so orders. Bond required by any will may be dispensed with in formal proceedings upon determination by the district court that it is not necessary.

C. No bond is required of any personal representative who, pursuant to statute, is exempt or has deposited cash or collateral with an agency of New Mexico to secure performance of his duties.

History: 1953 Comp., § 32A-3-603, enacted by Laws 1975, ch. 257, § 3-603.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-603 UPC.

Compiler's notes. — This section includes within its scope some of the functions of former 31-1-18, 1953 Comp.

Executor without power until bond given. — An executor is without power to act as such until he has given bond required by the statute, unless bond was waived by the testator. Amberson v. Candler, 17 N.M. 455, 130 P. 255 (1913) (decided under former law).

Suit on bond. — An administrator de bonis non cannot maintain suit on the original administrator's bond for the original administrator’s failure to prosecute the decedent’s surviving partners. To the administrator de bonis non is committed only the administration of the goods, chattels, and credits of the deceased which have not been administered. Beall v. New Mexico, 83 U.S. 535, 16 Wall. 535, 21 L. Ed. 292 (1873).

Necessity of bond where only asset is cause of action. — Under former law, a bond of the administrator of an estate was required where the only asset was a cause of

action in wrongful death. 1975 Op. Att'y Gen. No. 75-29 (opinion rendered under former law).

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 67.

45-3-604. Bond amount; security; procedure; reduction.

A. If bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the person qualifying shall file a statement under oath indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal and real estate during the next year, and he shall execute and file a bond, or give other suitable security, in an amount no less than the estimate. The court shall determine that the bond is executed by a corporate surety, or one or more individual sureties, acceptable to the court.

B. The court may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution, as defined in Section 6-101 [45-6-101 NMSA 1978], in a manner that prevents their unauthorized disposition.

C. On petition of the personal representative or another interested person, the district court may:

(1) excuse a requirement of bond;

(2) increase or reduce the amount of the bond;

(3) release sureties; or

(4) permit the substitution of another bond with the same or different sureties.

History: 1953 Comp., § 32A-3-604, enacted by Laws 1975, ch. 257, § 3-604.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-604 UPC.

Where an estate consists solely of a cause of action in wrongful death, the judge is called upon to estimate the value of that cause of action. In estimating the value, the judge should consider the likelihood of success, the possible judgment rendered and the likelihood the administrator will be called upon to pursue the action. 1975 Op. Att'y Gen. No. 75-30 (opinion rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Lapse of time after guardian's settlement as affecting liability of guardian or his sureties, 50 A.L.R. 61.

Power or discretion of court, after bond of executor, administrator or testamentary trustee has been given, to dispense with, discontinue or modify bond, 121 A.L.R. 951.

33 C.J.S. Executors and Administrators § 67.

45-3-605. Demand for bond by interested person.

Any person apparently having an interest in the estate worth in excess of seven thousand five hundred dollars ($7,500), or any creditor having a claim in excess of seven thousand five hundred [dollars] ($7,500), may make a written demand that a personal representative give bond. The demand must be filed with the court and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereafter, the personal representative shall post bond or petition the district court to determine the bond requirement. If bond is required, the requirement ceases if the person demanding bond ceases to be interested in the estate, or if bond is excused as provided in Sections 3-603 [45-3-603 NMSA 1978] or 3-604 [45-3-604 NMSA 1978]. After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate. Failure of the personal representative to meet a bond requirement within thirty days is cause for his removal.

History: 1953 Comp., § 32A-3-605, enacted by Laws 1975, ch. 257, § 3-605.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-605 UPC.

Bracketed material. — The bracketed was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Leave of court as prerequisite to action on bond, 2 A.L.R. 563.

When statute of limitations begins to run against action on bond of personal representative, 44 A.L.R.2d 807.

33 C.J.S. Executors and Administrators § 67.

45-3-606. Terms and conditions of bonds.

A. The following requirements and provisions apply to any bond required by Sections 3-601 through 3-618 [45-3-601 through 45-3-618 NMSA 1978]:

(1) bonds shall name New Mexico as obligee for the benefit of the interested persons in the estate and shall be conditioned upon the faithful discharge by the personal representative of all duties according to law;

(2) unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the personal representative and with each other. The address of sureties shall be stated in the bond;

(3) by executing an approved bond of a personal representative, the surety consents to the jurisdiction of the probate court or district court which issued letters to the primary obligor in any proceedings pertaining to the fiduciary duties of the personal representative and naming the surety as a party. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed;

(4) on petition of a successor personal representative, any other personal representative of the same decedent or any interested person, a proceeding in the district court may be initiated against a surety for breach of the obligation of the bond of the personal representative; and

(5) the bond of the personal representative is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

B. No action or proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

History: 1953 Comp., § 32A-3-606, enacted by Laws 1975, ch. 257, § 3-606.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-606 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of surety on bond of trustee, executor, administrator or guardian to terminate liability as regards future defaults of principal, 118 A.L.R. 1261, 150 A.L.R. 485.

Court's power, in absence of statute, to require corporate surety on fiduciary bond in probate proceeding, 82 A.L.R.2d 926.

33 C.J.S. Executors and Administrators § 67.

45-3-607. Order restraining personal representative.

A. On petition of any person who appears to have an interest in the estate, the district court by temporary order may restrain a personal representative from performing specified acts of administration, disbursement or distribution, or exercise of any powers or discharge of any duties of his office, or make any other order to secure proper performance of his duty. Persons with whom the personal representative may transact business may be made parties.

B. The matter shall be set for hearing within ten days. Notice shall be given to the personal representative and his attorney of record, if any, and to such other persons as the district court may direct.

History: 1953 Comp., § 32A-3-607, enacted by Laws 1975, ch. 257, § 3-607.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-607 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 147.

45-3-608. Termination of appointment; general.

A. Termination of appointment of a personal representative occurs as indicated in Sections 3-609 through 3-612 [45-3-609 through 45-3-612 NMSA 1978]. Termination ends the right and power pertaining to the office of personal representative as conferred by the [Uniform] Probate Code or any will, except that a personal representative, at any time prior to distribution or until restrained or enjoined by district court order, may perform acts necessary to protect the estate and may deliver the assets to a successor representative.

B. Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve him of the duty to preserve assets subject to his control, to account therefor and to deliver the assets. Termination does not affect the jurisdiction of the court over the personal representative, but terminates his authority to represent the estate in any pending or future proceeding.

History: 1953 Comp., § 32A-3-608, enacted by Laws 1975, ch. 257, § 3-608.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-608 UPC.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Continuing fiduciary duty until appointment terminated. — The personal representative of an estate has a continuing fiduciary duty to protect the assets of the estate and to properly account therefor until his appointment is terminated by court order or his death. Bowman v. Butler, 98 N.M. 357, 648 P.2d 815 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 78; 34 C.J.S. Executors and Administrators § 1039.

45-3-609. Termination of appointment; death or disability.

A. The death of a personal representative, or the appointment of a conservator for the estate of a personal representative, terminates his appointment.

B. Termination by death or appointment of a conservator imposes upon the personal representative of the deceased personal representative, or the conservator appointed for a living personal representative, the duty to protect the estate which has been possessed or is being administered by the personal representative at the time of his termination, and confers the power to perform acts necessary to protect the estate and account for, and deliver the assets to, a successor personal representative or special administrator upon his appointment and qualification.

History: 1953 Comp., § 32A-3-609, enacted by Laws 1975, ch. 257, § 3-609.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-609 UPC.

Duties of successor personal representative. — Following the death of a personal representative, his personal representative succeeds to the same fiduciary responsibility that the deceased had, as well as to the duty to render to the successor personal representative of the first estate any property, funds or assets contained in the first representative's estate which belong to the estate being administered by the personal representative at the time of his death. Bowman v. Butler, 98 N.M. 357, 648 P.2d 815 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators §§ 78, 81; 34 C.J.S. Executors and Administrators §§ 1039, 1048.

45-3-610. Termination of appointment; voluntary.

A. An appointment of a personal representative terminates as provided in Section 3-1003 [45-3-1003 NMSA 1978], one year after the filing of a closing statement.

B. An order closing an estate as provided in Sections 3-1001 [45-3-1001 NMSA 1978] or 3-1002 [45-3-1002 NMSA 1978] terminates an appointment of a personal representative.

C. A personal representative may resign his position by filing a written statement of resignation with the court after he has given at least fifteen days written notice to the known interested persons. If the person resigning is a sole representative and if no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment and in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him. If the person resigning is a co-representative, such resignation is effective only upon delivery of the assets in his possession to any remaining co-representatives.

History: 1953 Comp., § 32A-3-610, enacted by Laws 1975, ch. 257, § 3-610.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-610 UPC.

Compiler's notes. — This section includes within its scope some of the functions of 31-1-29, 1953 Comp.

Collateral attack on termination of appointment. — The probate court's order discharging the appellant as executor without allowing or rejecting his claim was not open to collateral attack, since the fraud which appellant alleged was not pleaded, nor presented in the trial of this cause. Cravens v. Coldren, 34 N.M. 209, 279 P. 944 (1929).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of executor or administrator to resign, 91 A.L.R. 712.

33 C.J.S. Executors and Administrators § 78.

45-3-611. Termination of appointment by removal; cause; procedure.

A. Any interested person may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the district court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to such other persons as the district court may direct. Except as otherwise ordered as provided in Section 3-607 [45-3-607 NMSA 1978], after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration or preserve the estate. If removal is ordered, the district court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.

B. Cause for removal exists when:

(1) removal would be in the best interests of the estate;

(2) it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment;

(3) the personal representative has disregarded an order of the district court;

(4) the personal representative has become incapable of discharging the duties of his office;

(5) the personal representative has mismanaged the estate; or

(6) the personal representative failed to perform any duty pertaining to the office.

C. Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in New Mexico to administer local assets.

History: 1953 Comp., § 32A-3-611, enacted by Laws 1975, ch. 257, § 3-611.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-611 UPC.

Compiler's notes. — This section includes within its scope some of the functions of former 31-1-26 and 31-1-28, 1953 Comp.

Court may reexamine facts of appointment. — Under former law, a probate court had power to reexamine the facts upon which an administratrix had been appointed, and to remove her if necessary. Dow v. Simpson, 17 N.M. 357, 132 P. 568 (1912), adhered to on rehearing, 17 N.M. 369, 132 P. 572 (1913); Koury v. Castillo, 13 N.M. 26, 79 P. 293 (1905) (decided under former law).

Executor's acting on advice of counsel not misconduct. — Under former law, a trial court does not abuse its discretion in refusing to remove an executor for misconduct where evidence indicates that the executor may have acted on the advice of counsel and an accountant who had previously handled decedent's financial affairs, and thus did not breach his duty intentionally. Aikens v. Hamilton, 97 N.M. 111, 637 P.2d 542 (1981).

Invalidity of will not basis for removal. — The court erred in removing the personal representative of the estate without conducting an evidentiary hearing and without expressly specifying the basis for his removal. The fact that portions of the decedent's will were determined to be invalid did not constitute a valid basis for removal of the personal representative. Boyer v. Morrison, 117 N.M. 74, 868 P.2d 1299 (Ct. App. 1994).

Removal of personal representative. — Pursuit of removal claim under this section can be characterized not as attacks on the validity of the will or of a provision of the will, but as a legal action under a valid will with valid provisions to enforce rights granted expressly by statute. Redman-Tafoya v. Armijo, 2006-NMCA-011, 138 N.M. 836, 126 P.3d 1200.

Appeal bond. — An appeal from a judgment probating a will and removing an administrator of an estate by the party so removed, as administrator, cannot be perfected by such party without the giving of an appeal bond or undertaking, because in such case such party is not appealing in his representative capacity. Baca v. Winters, 26 N.M. 340, 192 P. 479 (1920).

Am. Jur. 2d, A.L.R. and C.J.S. references. — What effects removal of executor or administrator, 8 A.L.R. 175.

Revocation of letters testamentary as affecting expenses and disbursements by executor or administrator thereafter, 31 A.L.R. 846.

Changes in corporate organization as affecting status of corporation as executor or administrator, 61 A.L.R. 994, 131 A.L.R. 753.

Revocation of grant of administration, on ground that administration is not necessary, 70 A.L.R. 386.

Effect of proceeding to supplant administrator or executor, or of appeal from order appointing or removing him, upon rights of persons who dealt with him pending such proceedings or appeal, 99 A.L.R. 862.

Insolvency of, or appointment of receiver or other liquidator for, corporation, as affecting its status as executor, administrator, guardian or trustee, 102 A.L.R. 124.

Personal interest of executor or administrator adverse to or conflicting with those of other persons interested in estate as ground for revocation of letters or removal, 119 A.L.R. 306.

Improper handling of funds, investments or assets as ground for removal of guardian of infant or incompetent, 128 A.L.R. 535.

Removal of executor because of delay in exercising power of sale under will, 132 A.L.R. 1479.

Failure of executor, administrator, trustee or guardian to disclose self-dealing, as ground for vacating order or decree settling account, 132 A.L.R. 1522.

Right of appeal from order on application for removal of personal representative, guardian or trustee, 37 A.L.R.2d 751.

Requisites of notice and hearing in court proceedings for removal of personal representative, 47 A.L.R.2d 307.

Power and responsibility of executor or administrator to compromise claim due estate, 72 A.L.R.2d 191.

Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation, 96 A.L.R.3d 1102.

Delay of executor or administrator in filing inventory, account, or other report, or in completing administration and distribution of estate, as ground for removal, 33 A.L.R.4th 708.

33 C.J.S. Executors and Administrators § 89.

45-3-612. Termination of appointment; change of testacy status.

Except as otherwise ordered in formal proceedings, if a personal representative is appointed and then, at a later time, the will under which he is acting is invalidated or if a will is later proved, changing an assumption of intestacy under which the personal representative is acting, his office is not automatically terminated although his powers may be reduced as provided in Section 3-401 [45-3-401 NMSA 1978]. The personal representative's office terminates only on appointment of a new personal representative. If no new personal representative is sought, the existing personal representative can continue to act under the new testacy status.

History: 1953 Comp., § 32A-3-612, enacted by Laws 1975, ch. 257, § 3-612.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-612 UPC.

Compiler's notes. — This section is similar to former 31-1-25, 1953 Comp.

Invalidity of will not basis for removal. — The court erred in removing the personal representative of the estate without conducting an evidentiary hearing and without expressly specifying the basis for his removal. The fact that portions of the decedent's will were determined to be invalid did not constitute a valid basis for removal of the personal representative. Boyer v. Morrison, 117 N.M. 74, 868 P.2d 1299 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Probate of will subsequently discovered or annulment of will as affecting removal of administrator, 8 A.L.R. 177.

Revocation of grant of administration, on ground that administration is not necessary, 70 A.L.R. 386.

Statute dealing with existing intestate administration, upon discovery of will, 65 A.L.R.2d 1202.

33 C.J.S. Executors and Administrators § 78; 34 C.J.S. Executors and Administrators § 1039.

45-3-613. Successor personal representative.

A. Sections 3-301 through 3-311 [45-3-301 through 45-3-311 NMSA 1978] and 3-401 through 3-414 [45-3-401 through 45-3-414 NMSA 1978] govern proceedings for appointment of a personal representative to succeed one whose appointment has been terminated.

B. After appointment and qualification, a successor personal representative shall be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process or claim which was given or served upon the former personal representative need be given or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative.

C. Except as otherwise ordered by the district court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated.

History: 1953 Comp., § 32A-3-613, enacted by Laws 1975, ch. 257, § 3-613.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-613 UPC.

Attorney's fees. — Where special administrator and no personal representative had been appointed and special administrator had a duty to probate the decedent's will, although the will was found to be invalid, the special administrator was entitled to recover attorney's fees and costs. Teutsch v. Cash, 99 N.M. 503, 660 P.2d 593 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Effect of proceeding to supplant administrator or executor, or of appeal from order appointing or removing him, upon rights of persons who dealt with him pending such proceedings or appeal, 99 A.L.R. 862.

33 C.J.S. Executors and Administrators §§ 48, 88.

45-3-614. Special administrator; appointment.

A special administrator may be appointed:

A. informally by the probate court on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative or if a prior appointment has been terminated by death or disability as provided in Section 3-609 [45-3-609 NMSA 1978]; or

B. in a formal proceeding by order of the district court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the district court that an emergency exists, appointment may be ordered without notice.

History: 1953 Comp., § 32A-3-614, enacted by Laws 1975, ch. 257, § 3-614.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-614 UPC.

Compiler's notes. — This section is similar to former 31-1-13, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Authority of special or temporary administrator, or administrator pendente lite, to dispose of, distribute, lease or encumber property of estate, 148 A.L.R. 275.

34 C.J.S. Executors and Administrators §§ 1035, 1036.

45-3-615. Special administrator; who may be appointed.

A. If a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate, the person named personal representative in the will shall be appointed if available, and qualified.

B. In all other cases, any proper person may be appointed special administrator.

History: 1953 Comp., § 32A-3-615, enacted by Laws 1975, ch. 257, § 3-615.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-615 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators §§ 1035, 1036.

45-3-616. Special administrator; appointed informally; powers and duties.

A special administrator appointed by the probate court in informal proceedings pursuant to Subsection A of Section 3-614 [45-3-614 NMSA 1978] has the duty to collect and manage the assets of the estate, to preserve them, to account for and to deliver such assets to the general personal representative upon his qualification. The special administrator appointed in informal proceedings has the power of a personal representative under the [Uniform] Probate Code necessary to perform his duties.

History: 1953 Comp., § 32A-3-616, enacted by Laws 1975, ch. 257, § 3-616.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators §§ 1035, 1036.

45-3-617. Special administrator; formal proceedings; powers and duties.

A special administrator appointed by order of the district court in any formal proceeding has the power of a general personal representative except as limited in the appointment and duties as prescribed in the order. The appointment may be for a specified time, or to perform particular acts or on other terms as the district court may direct.

History: 1953 Comp., § 32A-3-617, enacted by Laws 1975, ch. 257, § 3-617.

ANNOTATIONS

Cross references. — For general duties and liability of personal representative, *see* 45-3-703 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators §§ 1035, 1036.

45-3-618. Termination of appointment; special administrator.

The appointment of a special administrator pursuant to Section 3-614 [45-3-614 NMSA 1978] terminates in accordance with the provisions of the order of appointment or on the appointment of a general personal representative. In other cases, the appointment of a special administrator is subject to termination by resignation, or upon removal for cause, as provided in Sections 3-608 through 3-611 [45-3-608 through 45-3-611 NMSA 1978].

History: 1953 Comp., § 32A-3-618, enacted by Laws 1975, ch. 257, § 3-618.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators §§ 1035, 1036.

PART 7
DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

45-3-701. Time of accrual of duties and powers.

A. The duties and powers of a personal representative commence upon his appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter.

B. Prior to appointment, a person named personal representative in a will may carry out written instructions of the decedent relating to his body, funeral and burial arrangements.

C. A personal representative may ratify and accept acts on behalf of the estate done by others prior to the appointment of the personal representative where the acts would have been proper for a personal representative.

History: 1953 Comp., § 32A-3-701, enacted by Laws 1975, ch. 257, § 3-701.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Executors and Administrators §§ 367 to 437, 522 to 531, 922 to 959.

Amount of funeral expenses allowable against decedent's estate, 4 A.L.R.2d 995.

Relation back of letters testamentary or of administration as validating prior sales of decedent's property, 2 A.L.R.3d 1105.

Running of statute of limitations as affected by doctrine of relation back of appointment of administrator, 3 A.L.R.3d 1234.

25A C.J.S. Dead Bodies § 2; 33 C.J.S. Executors and Administrators §§ 72, 142.

45-3-702. Priority among different letters.

A person to whom general letters are rightly issued first has exclusive authority under the letters until his appointment is terminated or modified. If, through error, general letters are issued to another, the first rightly appointed representative may recover any property of the estate in the hands of the representative subsequently appointed, but the acts of the erroneously-appointed personal representative done in good faith before notice of the first letters are not void for want of validity of appointment.

History: 1953 Comp., § 32A-3-702, enacted by Laws 1975, ch. 257, § 3-702.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators §§ 48, 88.

45-3-703. General duties; relation and liability to persons interested in estate; standing to sue.

A. A personal representative is a fiduciary who shall observe the same standards of care applicable to trustees. A personal representative is under a duty to settle and distribute the estate of a decedent in accordance with the terms of any probated and effective will and the Uniform Probate Code and as expeditiously and efficiently as is consistent with the best interests of the estate. The personal representative shall use the authority conferred upon the personal representative by the Uniform Probate Code, the terms of the will, if any, and any order in proceedings to which the personal representative is party for the best interests of successors to the estate.

B. A personal representative may not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will authorizes a personal representative to administer and distribute the estate according to its terms.

C. An order of appointment of a personal representative, whether issued in informal or formal proceedings, authorizes a personal representative to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of:

(1) a pending testacy proceeding;

(2) a proceeding to vacate an order entered in an earlier testacy proceeding;

(3) a formal proceeding questioning the personal representative's appointment or fitness to continue; or

(4) a supervised administration proceeding.

D. This section does not affect the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants whose claims have been allowed, the surviving spouse, any minor and dependent children and any pretermitted child of the decedent.

E. Except as to proceedings that do not survive the death of the decedent, a personal representative of a decedent domiciled in New Mexico at the decedent's death has the same standing to sue and be sued in the courts of New Mexico and the courts of any other jurisdiction as the decedent had immediately prior to death.

History: 1953 Comp., § 32A-3-703, enacted by Laws 1975, ch. 257, § 3-703; 2011, ch. 124, § 46.

ANNOTATIONS

The 2011 amendment, effective January 1, 2012, provided that a personal representative is a fiduciary who must observe the standards of care of trustees.

Conflicts of interest. — Where decedent had initiated divorce proceedings against decedent's spouse and died prior to any rulings in that case, the trial court erred in appointing decedent’s spouse as personal representative of decedent’s estate pursuant to 45-3-703E NMSA 1978, since the pending divorce proceedings must continue in accordance with 40-4-20B NMSA 1978, and it was clear there was an inherent conflict of interest in having the spouse serve as personal representative of decedent’s estate. Oldham v. Oldham, 2009-NMCA-126, 147 N.M. 329, 222 P.3d 701, aff'd in part, rev'd in part, 2011-NMSC-007, 149 N.M. 215, 247 P.3d 736.

Division of marital estate. — Parents of decedent, as personal representatives of decedent's estate, succeeded to decedent's interest in division of marital property and had the same standing to be sued as did decedent during decedent's life, so that the district court had jurisdiction to divide the marital estate between decedent's spouse and the personal representatives of decedent's estate. Karpien v. Karpien 2009-NMCA-043, 146 N.M. 188, 207 P.3d 1165.

Standing to sue. — Once plaintiff's surviving spouse was appointed as decedent's estate's personal representative, plaintiff could be substituted as the real party in interest because, under the Uniform Probate Code, the personal representative is authorized to prosecute claims for the protection of the estate (45-3-715A(22) NMSA 1978) and has the same standing to sue as the decedent had immediately prior to death (45-3-703E NMSA 1978). Martinez v. Segovia, 2003-NMCA-023, 133 N.M. 240, 62 P.3d 331.

Breach of duty. — A personal representative who failed to distribute the estate in accordance with either the will or New Mexico law breached the personal representative's duty, since, although the decedent intended decedent's grandchildren to have a particular property if their father predeceased decedent, and the personal representative knew this fact, the personal representative misrepresented the terms of the will to the grandchildren and their mother, the personal representative promised to send them a copy of the will but failed to do so, thus preventing them from learning of their interest under the will, and the personal representative filed pleadings in probate and distributed the estate in a manner that, if the probate had not been contested, it would have appeared that petitioners had notice and had received their "intestate" share of the estate assets listed on the inventory, which omitted the property the decedent had intended decedent's grandchildren to have. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of administrator with will annexed to execute power of sale conferred by will, 9 A.L.R.2d 1324.

Power of sale conferred on executor by testator as authorizing private sale, 11 A.L.R.2d 955.

Implied power of executor to sell real estate, 23 A.L.R.2d 1000.

Time within which personal representative must commence action for refund of legacy or distribution, 29 A.L.R.2d 1248.

Necessity that person acting in fiduciary or representative capacity give bond to maintain appellate review proceedings, 41 A.L.R.2d 1324.

Power and responsibility of executor or administrator to compromise claim against estate, 72 A.L.R.2d 243.

Election by spouse to take under or against will as exercisable by agent or personal representative, 83 A.L.R.2d 1077.

Power of executor with power to sell or to lease real property, or to do both, to give an option to purchase, 83 A.L.R.2d 1310.

Duty and liability of executor with respect to locating and noticing legatees, devisees or heirs, 10 A.L.R.3d 547.

Right of executor or administrator to appeal from order granting or denying distribution, 16 A.L.R.3d 1274.

33 C.J.S. Executors and Administrators § 142; 34 C.J.S. Executors and Administrators §§ 688, 707.

45-3-704. Personal representative to proceed without court order; exception.

A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order or direction of the district court. However, the personal representative may invoke the jurisdiction of the district court, in proceedings authorized by the [Uniform] Probate Code, to resolve questions concerning the estate or its administration.

History: 1953 Comp., § 32A-3-704, enacted by Laws 1975, ch. 257, § 3-704.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Breach of fiduciary duties. — Where the personal representative failed to distribute the decedent's estate in accordance with the decedent's will and New Mexico law, wrongfully distributed the estate's assets, failed to give a copy of the will to the decedent's devisees, misrepresented the terms of the will, failed to give the devisees timely notices of the probate proceedings, and failed to report all assets, the personal representative breached the personal representative's fiduciary duties. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 147.

45-3-705. Duty of personal representative; notice to heirs and devisees.

A. Not later than ten days after his appointment, every personal representative, except any special administrator, shall give notice of his appointment to the heirs and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application or petition for appointment of a personal representative.

B. The notice shall be delivered or mailed to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require notice to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The notice shall:

(1) include the name and address of the personal representative;

(2) indicate that it is being sent to persons who have or may have some interest in the estate being administered;

(3) indicate whether bond has been filed; and

(4) describe the court where papers relating to the estate are on file.

C. The notice shall state that the estate is being administered by the personal representative pursuant to the provisions of the Uniform Probate Code without supervision by the court but that recipients are entitled to information regarding the administration from the personal representative and can petition the court in any matter relating to the estate, including distribution of assets and expenses of administration.

D. The personal representative shall file a statement with the appointing court giving the names and addresses of those persons notified pursuant to Subsection A of this section.

E. The personal representative's failure to give notice pursuant to this section is a breach of his duty to the persons concerned but does not affect the validity of his appointment, his powers or other duties. A personal representative may inform other persons of his appointment by delivery or mail.

History: 1953 Comp., § 32A-3-705, enacted by Laws 1975, ch. 257, § 3-705; 1993, ch. 174, § 69.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, added Subsection C and redesignated former Subsections C and D as Subsections D and E.

Breach of duty. — A personal representative breached the personal representative's duty to give timely notice to heirs and devisees under 45-3-705 NMSA 1978 when the

personal representative did not mail the requisite notice to the decedent's grandchildren to whom the decedent left property until after the estate had been distributed. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 72.

45-3-706. Duty of personal representative; inventory and appraisement.

A. Within three months after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare an inventory of property owned by the decedent at the time of his death, listing it with reasonable detail and indicating as to each listed item its estimated value as of the date of the decedent's death and the type and amount of any encumbrance that may exist with reference to any item.

B. The personal representative shall send a copy of the inventory to interested persons who request it. He may also file the original of the inventory with the appropriate court.

History: 1953 Comp., § 32A-3-706, enacted by Laws 1975, ch. 257, § 3-706; 1976 (S.S.), ch. 37, § 9; 1977, ch. 121, § 7; 1983, ch. 194, § 5.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-706 UPC.

Compiler's notes. — This section is similar to former 31-3-2, 1953 Comp.

Breach of duty. — A personal representative failed to report all the estate assets as required by 45-3-706 NMSA 1978 since, although the personal representative's appraisal and inventory included the estate funds, it did not include the 300-acre property bequeathed to the personal representative and the personal representative's siblings, which was significant because, if the deceased sibling's children were denied their inheritance under 45-2-608 NMSA 1978, they were entitled to one-fourth of that property and one-fourth of the cash under 45-2-302 NMSA 1978. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Surchargeability of trustee, executor, administrator or guardian with respect to mortgage investment, as affected by matters relating to value of property, 117 A.L.R. 871.

Delay of executor or administrator in filing inventory, account, or other report, or in completing administration and distribution of estate, as ground for removal, 33 A.L.R.4th 708.

33 C.J.S. Executors and Administrators § 95.

45-3-707. Employment of appraisers.

The personal representative may employ one or more qualified and disinterested appraisers to assist the personal representative in ascertaining the fair market value as of the date of the decedent's death of any asset the value of which may be subject to reasonable doubt. The name and address of any appraiser shall be indicated on the inventory with the item or items he appraised.

History: 1978 Comp., § 45-3-707, enacted by Laws 1995, ch. 210, § 36.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the act effective July 1, 1995.

45-3-708. Duty of personal representative; supplementary inventory.

A. If any property not included in the original inventory comes to the knowledge of a personal representative or if the personal representative learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he shall make a supplementary inventory or appraisement showing the estimated value as of the date of the decedent's death of the new item or the revised estimated value or descriptions.

B. The personal representative shall send a copy of the inventory to interested persons who request it. He may also file the original of the inventory with the appropriate court.

History: 1953 Comp., § 32A-3-708, enacted by Laws 1975, ch. 257, § 3-708; 1993, ch. 174, § 70.

ANNOTATIONS

Compiler's notes. — This section is similar to former 31-3-6, 1953 Comp.

The 1993 amendment, effective July 1, 1993, designated the formerly undesignated provisions as Subsection A; deleted "and file it with the district court and furnish copies thereof to interested persons who requested copies of the original inventory" at the end of Subsection A; and added Subsection B.

Filing of supplemental inventory required where real estate omitted. — Where the inventory is incomplete in that it fails to include real estate, the filing of a supplemental inventory is required. Barka v. Hopewell, 29 N.M. 166, 219 P. 799 (1923)(decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 134.

45-3-709. Duty of personal representative; possession of estate.

Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall take all steps reasonably necessary for the management, protection and preservation of the estate in his possession. He may maintain an action to recover possession of property or to determine the title thereto.

History: 1953 Comp., § 32A-3-709, enacted by Laws 1975, ch. 257, § 3-709.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-709 UPC.

Cross references. — For recovery of nontestamentary transfers at death, *see* 45-6-201 NMSA 1978.

Breach of duty. — A personal representative breached the personal representative's duty to preserve the estate by wrongfully distributing the assets where the personal representative did so in contravention of the will's terms and without a court order. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

Right extends only to administration. — A personal representative has a right to possession for purposes of administering the estate, not for personal use. Trujillo v. Lopez, 106 N.M. 157, 740 P.2d 707 (Ct. App. 1987).

Continuing fiduciary duty to protect assets of estate. — The personal representative of an estate has a continuing fiduciary duty to protect the assets of the estate and to properly account therefor until his appointment is terminated by court order or his death. Bowman v. Butler, 98 N.M. 357, 648 P.2d 815 (Ct. App. 1982).

Effect of divorce. — Since a divorce decree between the decedent and decedent's former spouse disposed of the savings account with its payable on death provision in favor of the decedent, the ex-spouse was precluded from claiming the account under the payable on death provision, and for the same reason the parties' savings account became property of the decedent's estate, as did life insurance policies and the decedent's Keogh fund originally giving the ex-spouse a beneficial interest. Romero v. Melendez, 83 N.M. 776, 498 P.2d 305 (1972).

Rights to possession. — When there is litigation pending between the personal representative and the legatee as to the separate or community status of real property of the estate, the legatee is entitled to retain possession of the property and maintain an action in forcible entry and detainer to eject the administrator from possession of the property in issue, although the executor has as the executor's sufficient protection the right to petition the court to sell the property, if need be, to pay the debts of the estate. Conley v. Wikle, 66 N.M. 366, 348 P.2d 485 (1960).

Possession of money due from heir. — An administrator is entitled to retain sufficient of the share of an heir in money derived from decedent's estate to pay a debt which the heir owes to the estate. Sheley v. Shafer, 35 N.M. 358, 298 P. 942 (1931).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of executor or administrator to avoid contract or conveyance by decedent on ground of mental incapacity, 1 A.L.R. 1517.

Right of administrator de bonis non to recover proceeds of personal property of the estate converted by his predecessor, 3 A.L.R. 1252.

Declaratory judgment as to management of estate, 12 A.L.R. 76, 19 A.L.R. 1124, 50 A.L.R. 42, 68 A.L.R. 110, 87 A.L.R. 1205, 114 A.L.R. 1361, 142 A.L.R. 8

Inspection of corporate books and records by personal representative of deceased stockholder, 22 A.L.R. 98, 43 A.L.R. 783, 59 A.L.R. 1373, 80 A.L.R. 1502, 174 A.L.R. 262, 15 A.L.R.2d 11.

Right of personal representative of leaseholder to enforce option to purchase contained in lease, 38 A.L.R. 1176, 45 A.L.R.2d 1034.

Death of party between giving and exercise of option to purchase as affecting rights of personal representatives of giver, 50 A.L.R. 1322.

Right or duty of executor or administrator to complete or enforce decedent's executory contract for purchase of real property, 58 A.L.R. 436.

Right of executor or administrator of claimant to file mechanic's lien, 83 A.L.R. 21.

Liability for interest or profits on funds of estate deposited in bank or trust company which is itself executor, administrator, trustee or guardian, or in which executor, etc., is interested, 88 A.L.R. 205.

Power of sale as including power to mortgage, 92 A.L.R. 882.

Power of sale of real estate given to executor as impliedly conferring right to possession, 94 A.L.R. 1140.

Power and duty of executor or administrator as to protection of investment in stocks by submitting to voluntary assessment, 104 A.L.R. 979.

Liability of executor or his sureties for losses incurred in carrying on business pursuant to direction or permission of will, 109 A.L.R. 639.

Loss or depreciation of assets for which executor, administrator or trustee is not responsible, as affecting the amount of his compensation, 110 A.L.R. 994.

Mortgage or other lien on real property of decedent, right of executor or administrator personally to purchase, and enforce same, 117 A.L.R. 1371.

Liability of estate for torts of executor, administrator or trustee, 127 A.L.R. 687.

Duty and liability of executor (or administrator with will annexed) in respect of personal property specifically bequeathed, and not needed for payment of debts, 127 A.L.R. 1071.

Beneficiary's consent to, acquiescence in, or ratification of, improper investment, 128 A.L.R. 4

Right of beneficiaries of decedent's estate to maintain action independent from executor or administrator to enforce contracts or other transactions entered into by executor or administrator on behalf of the estate, 135 A.L.R. 1130.

Right or duty of executor or administrator to require security from life tenant, 138 A.L.R. 443.

Corporate executor's or administrator's transactions with affiliated corporation as violation of rule against self-dealing, 151 A.L.R. 905.

Tax on real estate of decedent, duty or right of executor or administrator to pay, 163 A.L.R. 724.

Power of sale conferred on executor by testator as authorizing private sale, 11 A.L.R.2d 955.

Implied power of executor to sell real estate, 23 A.L.R.2d 1000.

Power of executor to create easements, 44 A.L.R.2d 573.

Construction and effect of will authorizing or directing executor to retain investments received under will, 47 A.L.R.2d 187.

Power of personal representative to repair personal property of estate, 64 A.L.R.2d 857.

Power of executor with power to sell or to lease real property, or to do both, to give an option to purchase, 83 A.L.R.2d 1310.

Who may exercise voting power of corporate stock pending settlement of estate of deceased owner, 7 A.L.R.3d 629.

33 C.J.S. Executors and Administrators § 295.

45-3-710. Power to avoid transfers.

The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his creditors. Subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, rests with the personal representative or upon petition of an interested person, with a person designated by order of the district court.

History: 1953 Comp., § 32A-3-710, enacted by Laws 1975, ch. 257, § 3-710.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-710 UPC.

Cross references. — For classification of claims against decedent's estate, *see* 45-3-805 NMSA 1978.

For recovery of transfer to distributees of decedent's estate, *see* 45-3-908 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Personal liability of heir or devisee of real property for debt secured by mortgage thereon, 139 A.L.R. 711.

33 C.J.S. Executors and Administrators § 124.

45-3-711. Powers of personal representatives; in general.

Until termination of his appointment, a personal representative has the same power over the title to property of the estate that an absolute owner would have, subject only to his trust to use and apply the property for the benefit of creditors and others interested in the estate. This power may be exercised without notice, hearing or order of court.

History: 1953 Comp., § 32A-3-711, enacted by Laws 1975, ch. 257, § 3-711.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-711 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 184.

45-3-712. Improper exercise of power; breach of fiduciary duty.

If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty. The rights of purchasers and others dealing with a personal representative shall be determined as provided in Sections 3-713 [45-3-713 NMSA 1978] and 3-714 [45-3-714 NMSA 1978].

History: 1953 Comp., § 32A-3-712, enacted by Laws 1975, ch. 257, § 3-712.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-712 UPC.

Cause of action arises upon termination of appointment. — A cause of action for conversion, breach of fiduciary duty and right of replevin does not arise until the termination of the representative's appointment. Bowman v. Butler, 98 N.M. 357, 648 P.2d 815 (Ct. App. 1982).

"Interested party". — A personal representative had a fiduciary duty to make a party aware that a later-offered will had been found as soon as it was found, because that will established that the party had a property right in, and/or claim against, the estate and thus was an "interested party". Pidcock v. Apodaca, 2001-NMCA-037, 130 N.M. 460, 26 P.3d 764, cert. denied, 130 N.M. 484, 27 P.3d 476 (2001).

Breach of fiduciary duty clearly established. — Breach of fiduciary duty was clearly established by the evidence where guardian of decedent-mother's estate sold entrusted property, filed tax returns, collected royalties and income, and entered into mineral and grazing leases therewith. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of personal representative with respect to completion of improvements, 5 A.L.R.2d 1250.

Personal liability of executor or administrator for interest on legacies or distributive shares where payment is delayed, 18 A.L.R.2d 1384.

Accountability of personal representative for his use of decedent's real estate, 31 A.L.R.2d 243.

Construction and effect of 31 U.S.C. § 192 imposing personal liability on fiduciary for paying debts due by person or estate for whom he acts before paying debts due United States, 41 A.L.R.2d 446.

Replevin or similar possessory action, availability to one not claiming as heir, legatee or creditor of decedent's estate against personal representative, 42 A.L.R.2d 418.

Liability of personal representative for losses incurred in carrying on, without testamentary authorization, decedent's nonpartnership mercantile or manufacturing business, 58 A.L.R.2d 365.

Coexecutor's or coadministrator's liability for defaults or wrongful acts of fiduciary in handling estate, 65 A.L.R.2d 1019.

Place of personal representative's appointment as venue of action against him in his official capacity, 93 A.L.R.2d 1199.

Liability of executor or administrator for negligence or default in defending action against estate, 14 A.L.R.3d 1036.

Liability of executor or administrator, or his bond, for loss caused to estate by act or default of his agent or attorney, 28 A.L.R.3d 1191.

Liability of executor, administrator, trustee or his counsel for interest, penalty or extra taxes assessed against estate because of tax law violations, 47 A.L.R.3d 507.

Liability of executor or administrator to estate because of overpaying or unnecessarily paying tax, 55 A.L.R.3d 785.

Garnishment against executor or administrator by creditor of estate, 60 A.L.R.3d 1301.

33 C.J.S. Executors and Administrators § 239.

45-3-713. Sale, encumbrance or transaction involving conflict of interest; voidable; exceptions.

A. Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any interested person except one who has consented after fair disclosure, unless:

(1) the will or a contract entered into by the decedent expressly authorized the transaction; or

(2) the transaction is approved by the district court after notice to interested persons.

B. An interested person must petition the district court to void the sale, encumbrance or transaction within the time limits set out by Section 3-1005 [45-3-1005 NMSA 1978].

History: 1953 Comp., § 32A-3-713, enacted by Laws 1975, ch. 257, § 3-713.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-713 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Purchase by executor, administrator or trustee of claims against estate or trust, 128 A.L.R. 917.

Corporate executor's or administrator's transaction with affiliated corporation as violation of rule against self-dealing, 151 A.L.R. 905.

33 C.J.S. Executors and Administrators §§ 239, 273, 292, 313, 314.

45-3-714. Persons dealing with personal representative; protection.

A. A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of supervised personal representatives which are endorsed on letters as provided in Section 3-504 [45-3-504 NMSA 1978], no provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection expressed in this section extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive.

B. The protection expressed in this section in [is] not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

History: 1953 Comp., § 32A-3-714, enacted by Laws 1975, ch. 257, § 3-714.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-714 UPC.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators §§ 271, 293, 320.

45-3-715. Transactions authorized for personal representatives; exceptions.

A. Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in Section 45-3-902 NMSA 1978, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) retain assets owned by the decedent pending distribution or liquidation, including those in which the representative is personally interested or which are otherwise improper for trust investment;

(2) receive assets from fiduciaries or other sources;

(3) perform, compromise or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(a) execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(b) deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent as designated in the escrow agreement;

(4) satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented

as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances;

(5) if funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including money received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements or other prudent investments which would be reasonable for use by trustees generally;

(6) acquire or dispose of an asset, including land in New Mexico or another state, for cash or on credit, at public or private sale, and manage, develop, improve, partition or change the character of an estate asset;

(7) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, or raze existing or erect new party walls or buildings;

(8) subdivide, develop or dedicate land to public use, make or obtain the vacation of plats and adjust boundaries, adjust differences in valuation on exchange or partition by giving or receiving considerations or dedicate easements to public use without consideration;

(9) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the period of administration;

(10) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(11) abandon property when, in the opinion of the personal representative, it is valueless or is so encumbered or is in condition that it is of no benefit to the estate;

(12) vote stocks or other securities in person or by general or limited proxy;

(13) pay calls, assessments and other sums chargeable or accruing against or on account of securities unless barred by the provisions relating to claims;

(14) hold a security in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative is liable for any act of the nominee in connection with the security so held;

(15) insure the assets of the estate against damage, loss and liability and himself against liability as to third persons;

(16) borrow money with or without security to be repaid from the estate assets or otherwise and advance money when necessary for the protection or preservation of the estate;

(17) effect a fair and reasonable compromise with any debtor or obligor or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner of the assets in satisfaction of the indebtedness secured by lien;

(18) pay taxes, assessments, compensation of the personal representative and other expenses incident to the administration of the estate;

(19) sell or exercise stock subscription or conversion rights or consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprise;

(20) allocate items of income or expense to either estate income or principal as permitted or provided by law;

(21) employ persons, including attorneys, accountants, investment advisors, appraisers or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and, instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;

(22) prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties;

(23) sell, transfer, exchange or otherwise dispose of the estate or any interest in the estate for cash or on credit or for part cash and part credit at public or private sale. Security shall be taken for unpaid balances unless waived by order of the district court upon petition and good cause shown;

(24) continue any unincorporated business or venture in which the decedent was engaged at the time of his death:

(a) in the same business form for a period of not more than four months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business, including good will;

(b) in the same business form for any additional period of time that may be approved by order of the district court in a formal proceeding to which the persons interested in the estate are parties; or

(c) throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

(25) incorporate any business or venture in which the decedent was engaged at the time of his death;

(26) provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate; and

(27) satisfy and settle claims and distribute the estate as provided in the Uniform Probate Code.

B. The powers granted in Subsection A of this section are given subject to those limitations contained in other sections of the Uniform Probate Code.

History: 1953 Comp., § 32A-3-715, enacted by Laws 1975, ch. 257, § 3-715; 1995, ch. 210, § 37.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-715 UPC.

Cross references. — For power to sell to pay estate taxes, *see* 7-7-11 NMSA 1978.

The 1995 amendment, effective July 1, 1995, in Subsection A, substituted "Section 45-3-902 NMSA 1978" for "Section 3-902" in the introductory paragraph, added Paragraph (4) and renumbered the remaining paragraphs accordingly; and made minor stylistic changes throughout the section.

Prosecution of claims. — Once plaintiff's surviving spouse was appointed as decedent's estate's personal representative, the surviving spouse could be substituted as the real party in interest because, under the Uniform Probate Code, the personal representative is authorized to prosecute claims for the protection of the estate (45-3-715 NMSA 1978) and has the same standing to sue as the decedent had immediately prior to death (45-3-703 NMSA 1978). Martinez v. Segovia, 2003-NMCA-023, 133 N.M. 240, 62 P.3d 331.

Borrowing money on behalf of estate. — Although the executor did not apply to the district court for prior authority to borrow money on behalf of the estate or as an incident of the administration of the estate, the court did approve these actions by adopting

general findings and approving the executor's amended final account and report of the executor; and the record amply supported the court's findings that these actions were necessary to preserve and protect the assets of the estate. Skarda v. Skarda, 88 N.M. 130, 537 P.2d 1392 (1975).

No allowance of attorney's fees where personal representative not employed. — The rule of law generally applied denies the right to an allowance of an attorney's fee out of an estate to an attorney whose services were rendered on behalf of an interested individual or group of individuals without employment by the personal representative of the estate. Gregg v. Gardner, 73 N.M. 347, 388 P.2d 68 (1963)(decided under former law).

Executors may refuse to employ attorney named in will. — The right of executors to refuse to employ an attorney who had been named as such in a will is upheld and the attorney is entitled to compensation only for services performed prior to the date of his discharge by the executor or executrix. Hoxsey v. Fullerton, 67 N.M. 77, 352 P.2d 652 (1960) (decided under former law).

Breach of fiduciary duty. — Executor, who also served as trustee of decedent's minor children's trusts and surviving spouse's trust, did not completely efface self-interest, nor exercise the executor's judgment and discretion with unstinted loyalty to the executor's cestuis que trustent and did not conform to the standards of conduct required of a trustee in purchasing stock of a corporation which the executor established for the ranch which the executor and the executor's deceased sibling had co-owned, and should have been held to account for stock in the corporation equal to one-half of the stock purchased by him from the ranch manager, as a trustee for Vendla E. Wootten and the children. Equitable adjustment was also required with respect to dividends that had been paid on the stock and for interest on moneys advanced by the executor to purchase the stock. Wootten v Wootten, 159 F.2d 567, (10th Cir. 1947), cert. denied, 331 U.S. 835, 67 S. Ct. 1516, 91 L. Ed. 1848, (1947).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Inspection of corporate books and records by personal representative of deceased stockholder, 22 A.L.R. 98, 43 A.L.R. 783, 59 A.L.R. 1373, 80 A.L.R. 1502, 174 A.L.R. 262, 15 A.L.R.2d 11.

Right to exercise power of sale of real estate after time limited by will, 31 A.L.R. 1394.

Right of personal representative of leaseholder to enforce option to purchase contained in lease, 38 A.L.R. 1176, 45 A.L.R.2d 1034.

Death of party between giving and exercise of option to purchase as affecting rights of personal representatives of giver, 50 A.L.R. 1322.

Right or duty of executor or administrator to complete or enforce decedent's executory contract for purchase of real property, 58 A.L.R. 436.

Rights and remedies in respect to sale and proceeds of land located in a state other than domicile, for payment of decedent's debts, 81 A.L.R. 665.

Right of executor or administrator of claimant to file mechanic's lien, 83 A.L.R. 21.

Liability of trustee, guardian, executor or administrator for loss of funds invested, as affected by order of court authorizing the investment, 88 A.L.R. 325.

Power of sale as including power to mortgage, 92 A.L.R. 882.

Power of sale of real estate given to executor as impliedly conferring right to possession, 94 A.L.R. 1140.

Power and duty of trustee, executor, administrator or guardian as regards protection of investment in stocks by submitting to voluntary assessment, 104 A.L.R. 979.

Liability to heirs, devisees, legatees or distributees of executor or administrator or his bond in respect of invalid sale of property of the estate, 106 A.L.R. 429.

Liability of executor or his sureties for losses incurred in carrying on business pursuant to direction or permission of will, 109 A.L.R. 639.

Construction and application of provision of will expressly giving executor or trustee power to mortgage realty, 115 A.L.R. 1417.

Liability of trustee, guardian, executor or administrator for loss of funds, as affected by failure to obtain order of court authorizing investment, in absence of mandatory statute, 116 A.L.R. 437.

Duty of executor or administrator of insolvent estate to sell real estate to pay debts, or duty of probate court to order such sale, as affected by mortgage or other encumbrances thereon, 116 A.L.R. 910.

Right of executor or administrator personally to purchase mortgage or other lien on real property of decedent and enforce same, 117 A.L.R. 1371.

Duty and liability of executor (or administrator with will annexed) in respect of personal property specifically bequeathed, and not needed for payment of debts, 127 A.L.R. 1071.

Beneficiary's consent to, acquiescence in, or ratification of, improper investment, 128 A.L.R. 4

Remedies in event of executor's or testamentary trustee's delay in exercise of power to sell real estate conferred by will, 132 A.L.R. 1473.

Right or duty of executor or administrator to require security from life tenant, 138 A.L.R. 443.

Power of sale conferred by will upon executor as extending to real property not specifically referred to in power nor devised by will, 139 A.L.R. 1143.

What agreement or conduct subsequent to assignment of lease amounts to assumption by assignee of covenants of lease, or estoppel to deny such assumption, 148 A.L.R. 393.

Rights and duties of executor, administrator or testamentary trustee in respect of property antecedently pledged to him by decedent, 154 A.L.R. 203.

Duty or right of executor or administrator to pay tax on real estate of decedent, 163 A.L.R. 724.

Rights and remedies of executor or administrator as regards estate or succession tax paid or payable by him on property not passing under will or coming into his possession, 1 A.L.R.2d 978.

Right of administrator with will annexed to execute power of sale conferred by will, 9 A.L.R.2d 1324.

Power of sale conferred on executor by testator as authorizing private sale, 11 A.L.R.2d 955.

Implied power of executor to sell real estate, 23 A.L.R.2d 1000.

Construction of specific provision of will or trust instrument giving executor or trustee power to determine what is income or what is principal, 27 A.L.R.2d 1323.

Power of executor to create easements, 44 A.L.R.2d 573.

Power of personal representative to repair personal property of estate, 64 A.L.R.2d 857.

Delivery or distribution to life tenant, or assent by executor to his possession or to the life interest, as inuring to benefit of the remaindermen and operating to take the remainder out of the estate, absent a trust or will provision retaining it, 68 A.L.R.2d 1107.

Power and responsibility of executor or administrator to compromise claim due estate, 72 A.L.R.2d 191.

Power and responsibility of executor or administrator to compromise claim against estate, 72 A.L.R.2d 243.

Power and responsibility of executor or administrator as to compromise or settlement of action or cause of action for death, 72 A.L.R.2d 285.

Power and standing of personal representative of deceased promisee to enforce a contract made for benefit of third party, 76 A.L.R.2d 231.

Election by spouse to take under or against will as exercisable by agent or personal representative, 83 A.L.R.2d 1077.

Power of executor with power to sell or to lease real property, or to do both, to give an option to purchase, 83 A.L.R.2d 1310.

Rights in growing, unmatured annual crops as between personal representatives of decedent's estate and heirs or devisees, 92 A.L.R.2d 1373.

Who may exercise voting power of corporate stock pending settlement of estate of deceased owner, 7 A.L.R.3d 629.

Duty and liability of executor with respect to locating and noticing legatees, devisees or heirs, 10 A.L.R.3d 547.

33 C.J.S. Executors and Administrators § 184.

45-3-716. Powers and duties of successor personal representative.

A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but he shall not exercise any power expressly made personally to any personal representative named in the will.

History: 1953 Comp., § 32A-3-716, enacted by Laws 1975, ch. 257, § 3-716.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 142.

45-3-717. Co-representatives; when joint action required.

A. If two or more persons are appointed co-representatives, the concurrence of all is required, unless the will provides otherwise, on all acts connected with the administration and distribution of the estate. This restriction does not apply when:

(1) any co-representative receives and receipts for property due the estate;

(2) the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate; or

(3) a co-representative has been delegated to act for the others.

B. Persons dealing with a co-representative, if actually unaware that another has been appointed to serve with him or if advised by the personal representative with whom they are dealing that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative.

C. A co-representative who abdicates his responsibility to coadminister the estate by a blanket delegation breaches his duty to interested persons as provided by Section 3-703 [45-3-703 NMSA 1978].

History: 1953 Comp., § 32A-3-717, enacted by Laws 1975, ch. 257, § 3-717.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-717 UPC.

Sale by one executor. — A sale by the executor named in a will, to whom letters testamentary have issued, under a power of sale authorizing the executors to sell the real and personal property, was not void because the other executor named in the will renounced the executor's appointment and refused to accept the trust, since the sale was made after the administrators had been discharged and the letters testamentary granted to the remaining executor. Smith v. Steen, 20 N.M. 436, 150 P. 927 (1915).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Coexecutor's or coadministrator's liability for defaults or wrongful acts of fiduciary in handling estate, 65 A.L.R.2d 1019.

Right of coexecutor to reimbursement from estate for fees paid independent legal counsel retained by him, 66 A.L.R.2d 1169.

34 C.J.S. Executors and Administrators § 1042.

45-3-718. Powers of surviving personal representative.

Unless the terms of the will otherwise provide, when one or more of several personal representatives fails or refuses to qualify as a personal representative or when one or more of several personal representatives, after appointment, dies, becomes disabled or is removed, the remaining personal representatives shall proceed to administer the estate and have all powers vested in all the personal representatives incident to the office.

History: 1953 Comp., § 32A-3-718, enacted by Laws 1975, ch. 257, § 3-718.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 1047.

45-3-719. Compensation for personal representatives.

A personal representative is entitled to reasonable compensation for his services. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, he may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of the fee may be filed with the court.

History: 1953 Comp., § 32A-3-719, enacted by Laws 1976 (S.S.), ch. 37, § 10; repealed and reenacted by Laws 1995, ch. 210, § 38.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-719 UPC.

Repeals and reenactments. — Laws 1995, ch. 210, § 38 repealed 45-3-719 NMSA 1978, as enacted by Laws 1976 (S.S.), ch. 37, § 10, and enacted a new section, effective July 1, 1995.

Compiler's notes. — This section is similar to former 31-10-1, 1953 Comp.

Use of compensation statute enacted after commencement of estate proceedings. — The constitutional prohibition against affecting right or remedy of a party in a pending case does not prevent the use of the administrator's compensation statute which was in effect at the time of allowing such compensation where it differed from the statute in effect at the time of commencement of the estate proceeding. Mayes v. Mayes, 57 N.M. 778, 264 P.2d 674 (1953) (decided under former law).

Compensation law in effect at time of account governs. — The compensation of a personal representative is governed by the law in effect at the time of the settlement of his account and making the order allowing the award. Mayes v. Mayes, 57 N.M. 778, 264 P.2d 674 (1953) (decided under former law).

Amount allowed executrix proper. — Where record shows amount allowed executrix to be the statutory allowance as set under this section (31-10-1, 1953 Comp., repealed), the allowance was proper. National Agric. Coll. v. Lavenson, 55 N.M. 583, 237 P.2d 925 (1951) (decided under former law).

United States treasury notes are "cash" and fall within the category of probate assets in this section that calls for a reduced rate of compensation for personal representatives. Merchants Bank & Trust Co. v. Meyer, 106 N.M. 316, 742 P.2d 528 (Ct. App. 1987) (decided under former law).

Additional compensation. — Under some circumstances, the introductory phrase "Unless otherwise ordered by the court," added in 1976, gives the trial court the authority to award reasonable fees above the amount authorized by the general compensation formula. Catron v. Rueckhaus, 107 N.M. 227, 755 P.2d 71 (Ct. App. 1988) (decided under former law).

Additional compensation for legal fees. — The introductory phrase added to this section in 1976 authorizes additional allowance for the performance of extraordinary services including legal services, where shown to be legal services not ordinarily performed by a personal representative and not duplicative of legal services rendered by personal representative's firm. Catron v. Rueckhaus, 107 N.M. 227, 755 P.2d 71 (Ct. App. 1988) (decided under former law).

Assets considered in awarding compensation. — Only estate assets may be considered in setting the personal representative's fee; assets of a trust created by decedent before her death, even though available for the reasonable expenses of estate administration as may be allowed, cannot be considered. Catron v. Rueckhaus, 107 N.M. 227, 755 P.2d 71 (Ct. App. 1988) (decided under former law).

Additional compensation on account of realty to representative was warranted where administrator had contributed about $8,000 of personal funds, devoted a great deal of time to the real estate, conducted successful litigation involving water rights for the land and sold it at a substantial profit without the customary brokerage commission. Mayes v. Mayes, 57 N.M. 778, 264 P.2d 674 (1953) (decided under former law).

Executor's statutory fee covers defense of final account. — Attending the hearing to defend the final account and report are part of the executor's duties that the statutory fee covers. He may not be awarded additional fees for that time. Aikens v. Hamilton, 97 N.M. 111, 637 P.2d 542 (1981) (decided under former law).

Payments not based on filed claims or court order improper. — Where payments made by the executor to himself are not based upon claims filed nor are they paid pursuant to motion and order of the court, they are improper and cannot be allowed. Aikens v. Hamilton, 97 N.M. 111, 637 P.2d 542 (1981) (decided under former law).

Trial court may set attorney fees on quantum meruit basis having due regard for the circumstances of the particular case. Hoxsey v. Fullerton, 67 N.M. 77, 352 P.2d 652 (1960) (decided under former law).

Personal representative to be compensated only when duties finished. — A personal representative is entitled to compensation only when he has finished the duties

imposed upon him, since it is only then that the court can fully evaluate his services. Mayes v. Mayes, 57 N.M. 778, 264 P.2d 674 (1953) (decided under former law).

Fees may differ for good cause shown. — The statutory policy of allowing attorneys' fees in an amount equal to the administrator's compensation is not without exception, and the attorneys' fees may be otherwise fixed by the court for good cause shown. Hanny v. Joyce, 37 N.M. 569, 25 P.2d 806 (1933) (decided under former law).

Statutory compensation for attorneys binding on court. — Except where a will otherwise provides, the compensation prescribed in the governing statute is binding upon the court. 1945-46 Op. Att'y Gen. No. 45-4671 (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of executor to an allowance for expenses incurred in unsuccessful attempt to uphold particular provisions of will, 7 A.L.R. 1499.

Death of trustee, executor, administrator or guardian as affecting right to compensation, 7 A.L.R. 1595.

Right of executor, administrator or testamentary trustee, who is himself an attorney, to employ attorney at the expense of the estate, 18 A.L.R. 635.

Revocation of letters testamentary as affecting expenses and disbursements by executor or administrator thereafter, 31 A.L.R. 846.

Computation of commissions of executors, administrators or trustee as affected by lien on or outstanding interest in property, 46 A.L.R. 239.

Right of executor or administrator to extra compensation for services other than attorney's services, 66 A.L.R. 512.

Right of executor or administrator to commissions as affected by fault in administration, 83 A.L.R. 726.

Allowance out of decedent's estate for costs and attorneys' fees incurred by parties interested in granting or revoking of letters of administration or letters testamentary, 90 A.L.R. 101.

Change in statute after decedent's death and before final account or after creation of trust as affecting compensation, 91 A.L.R. 1421.

Right of executor, administrator or testamentary trustee to allowance of attorneys' fees and expenses incident to controversy over surcharging his account, 101 A.L.R. 806.

Loss or depreciation of assets for which executor, administrator or trustee is not responsible, as affecting the amount of his compensation, 110 A.L.R. 994.

Fees of executor or administrator as applicable to discharge of his indebtedness to decedent, 123 A.L.R. 1285.

Right of executor or administrator to credit on account of advances to distributee before obtaining order of distribution, 126 A.L.R. 780.

Right of personal representative to allowance, out of property involved, for attorneys' fees or other expenses incurred in unsuccessful effort to claim the property for the estate, 126 A.L.R. 1349.

Appraised value of estate as shown by inventory of value at time of settlement as basis for determining commissions of executor or administrator, 173 A.L.R. 1346.

Costs and other expenses incurred by fiduciary whose appointment was improper as chargeable against estate, 4 A.L.R.2d 160.

Fiduciary's compensation on estate assets distributed in kind, 32 A.L.R.2d 778.

Right to allowance out of estate of attorneys' fees incurred in attempt to establish or defeat will, 40 A.L.R.2d 1407.

Right of executor or administrator to extra compensation for legal services rendered by him, 65 A.L.R.2d 809.

Right to double compensation where same person (natural or corporate) acts as executor and trustee, 85 A.L.R.2d 537.

Limiting effect of provision in contract, will or trust instrument fixing trustee's or executor's fees, 19 A.L.R.3d 520.

Resignation or removal of executor, administrator, guardian, or trustee before final administration or before termination of trust, as affecting his compensation, 96 A.L.R.3d 1102.

Authority of probate court to depart from statutory schedule fixing amount of executor's commissions and attorneys' fees, 40 A.L.R.4th 1189.

33 C.J.S. Executors and Administrators § 852.

45-3-720. Expenses in estate litigation.

If any personal representative or person nominated as a personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred.

History: 1953 Comp., § 32A-3-720, enacted by Laws 1976 (S.S.), ch. 37, § 11; repealed and reenacted by Laws 1995, ch. 210, § 39.

ANNOTATIONS

Repeals and reenactments. — Laws 1995, ch. 210, § 39 repealed 45-3-720 NMSA 1978, as enacted by Laws 1976 (S.S.), ch. 37, § 11, relating to compensation for attorneys for personal representatives, and enacted a new section, effective July 1, 1995.

Compiler's notes. — This section is similar to former 31-10-4, 1953 Comp.

Cross references. — For fees and costs, *see* 1-054 NMRA.

Generally. — An executor or administrator is entitled to be reimbursed for all expenses incurred in the care, management, and settlement of an estate, including reasonable attorney's fees incurred in the course of necessary litigation, or in matters requiring legal advice or counsel. Perez v. Gil's Estate, 29 N.M. 313, 222 P. 907 (1924).

Fees for actions benefiting the estate. — In order to charge attorney's fees against an estate under this section, the fees must be for services benefitting the estate. When the fees arise from actions which do not benefit the estate but cause prolonged litigation for the benefit of one person rather than the estate, the fees are not justified, even though the party sought to defend an earlier will. Lucero v. Lucero, 118 N.M. 636, 884 P.2d 527 (Ct. App. 1994) (decided under former law).

Section no longer requires that action benefit the estate. — The unambiguous language of this section, as amended in 1995, now only requires an action by the personal representative to be in good faith in order to receive attorneys' fees; it does not require that the suit benefit the estate and, in fact, allows for an award of attorneys' fees even if the personal representative is not successful in the litigation. Garcia v. Taylor, 1998-NMCA-145, 126 N.M. 16, 966 P.2d 183.

United States treasury notes are "cash" and fall within the category of probate assets in 45-3-719 NMSA 1978 that calls for a reduced rate of compensation for personal representatives. Merchants Bank & Trust Co. v. Meyer, 106 N.M. 316, 742 P.2d 528 (Ct. App. 1987) (decided under former law).

Generally, as to discharge of attorney named in will. — The right of executors to refuse to employ an attorney who had been named as such in a will is upheld and the attorney is entitled to compensation only for services performed prior to the date of his discharge by the executor or executrix. Hoxsey v. Fullerton, 67 N.M. 77, 352 P.2d 652 (1960) (decided under former law).

Allowance to attorney before and at discharge. — An allowance of the claim of an attorney for the executrix before his discharge was error, and upon his subsequent

discharge the allowance should be for the proportionate share of the statutory fee, or the reasonable value of the services performed. Winston v. Fitch, 40 N.M. 348, 59 P.2d 904 (1936) (decided under former law).

Attorney's fees allowed as long as good faith attempt to defend will. — As long as there is a good faith attempt by the personal representative to defend the will, attorney's fees will be allowed whether the will is upheld or not. Teutsch v. Cash, 99 N.M. 503, 660 P.2d 593 (1983) (decided under former law).

Where gifts excluded from community property in computing attorney's fee. — There is a presumption that property acquired during marriage is community property, however, gifts made directly to the husband, during marriage, by his father, must be regarded as separate property in computing attorney's fee for services rendered executrix. Winston v. Fitch, 40 N.M. 348, 59 P.2d 904 (1936) (decided under former law).

Attorneys' fees usually same as personal representatives'. — Ordinarily, in conducting probate proceeding, attorneys' fees are the same as those allowed to administrators and executors. However, the court may fix a different fee upon a proper showing. Mayes v. Mayes, 57 N.M. 778, 264 P.2d 674 (1953) (decided under former law).

Fees may differ for good cause shown. — The statutory policy of allowing attorneys' fees in an amount equal to the administrator's compensation is not without exception, and the attorneys' fees may be otherwise fixed by the court for good cause shown. Hanny v. Joyce, 37 N.M. 569, 25 P.2d 806 (1933) (decided under former law).

Attorney may receive quantum meruit till date of discharge. — The trial court may itself set the attorneys' fees on a quantum meruit basis to date of discharge having due regard for the circumstances of the particular case. Hoxsey v. Fullerton, 67 N.M. 77, 352 P.2d 652 (1960) (decided under former law).

No fee after discharge. — An attorney for an estate is not entitled to an allowance for work performed after discharge. Hoxsey v. Fullerton, 67 N.M. 77, 352 P.2d 652 (1960) (decided under former law).

Trial court may set attorneys' fees. — The trial court may, with due regard for the circumstances of the particular case, set the attorneys' fees. Hoxsey v. Fullerton, 67 N.M. 77, 352 P.2d 652 (1960) (decided under former law).

Fees set by trial court disturbed only if abuse of discretion. — The discretion of the trial court in fixing attorneys' fees in a proceeding to obtain approval of administrator's report will not be disturbed on appeal except upon a showing that there was an abuse of discretion. Mayes v. Mayes, 57 N.M. 778, 264 P.2d 674 (1953) (decided under former law).

Attorneys' fees for defense of executor's alleged misconduct not estate expenses. — Attorneys' fees incurred by the estate's attorneys in defending against allegations that the executor misused his position and improperly disbursed estate funds are not proper estate expenses, but should be borne by the executor personally. Aikens v. Hamilton, 97 N.M. 111, 637 P.2d 542 (1981) (decided under former law).

Law reviews. — For annual survey of New Mexico law relating to civil procedure, see 13 N.M.L. Rev. 251 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Authority of probate court to depart from statutory schedule fixing amount of executor's commissions and attorneys' fees, 40 A.L.R.4th 1189.

33 C.J.S. Executors and Administrators § 852.

45-3-721. Proceedings for review of employment and compensation.

After notice to all interested persons or on petition of an interested person or an appropriate motion if administration is supervised, the court may review the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed or the reasonableness of the compensation determined by the personal representative for his own services. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

History: 1978 Comp., § 45-3-721, enacted by Laws 1995, ch. 210, § 40.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-721 UPC.

Effective dates. — Laws 1995, ch. 210, § 94 made the act effective July 1, 1995.

PART 8
CREDITORS' CLAIMS

45-3-801. Notice to creditors.

A. A personal representative shall give written notice by mail or other delivery to any known creditor and to any creditor who is reasonably ascertainable by the personal representative within three months after the personal representative's appointment. A personal representative shall notify a creditor to present his claim within two months of

the published notice, if given as provided in Subsection B of this section, or within two months after the mailing or other delivery of the notice, whichever is later, or be forever barred.

B. A personal representative, within a reasonable time after his appointment, may also publish a notice to creditors once a week for two successive weeks in a newspaper of general circulation in the county announcing the appointment and the personal representative's address and the name of the decedent and notifying creditors of the estate to present their claims within two months after the date of the first publication of the notice or be forever barred.

C. A personal representative who has proceeded in accordance with Subsection A of this section is not liable to a creditor whose claim was not identified or to a successor of the decedent for giving or failing to give notice pursuant to the provisions of this section.

History: 1953 Comp., § 32A-3-801, enacted by Laws 1975, ch. 257, § 3-801; 1993, ch. 174, § 71.

ANNOTATIONS

Cross references. — For publication of notice of litigation in the district courts, *see* 14-11-10 NMSA 1978.

The 1993 amendment, effective July 1, 1993, rewrote this section to the extent that a detailed comparison is impracticable.

Law reviews. — For annual survey of New Mexico Law of Wills and Trusts, see 20 N.M.L. Rev. 439 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Executors and Administrators § 596 et seq.

Validity of nonclaim statute or rule provision for notice by publication to claimants against estate - post-1950 cases, 56 A.L.R.4th 458.

34 C.J.S. Executors and Administrators § 411.

45-3-802. Statutes of limitations.

A. Unless an estate is insolvent, the personal representative, with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate. If the defense is not waived, no claim that was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid.

B. The running of a statute of limitations measured from an event other than death or the giving of notice to creditors is suspended for four months after the decedent's death but resumes thereafter as to claims not barred by other sections.

C. For purposes of a statute of limitations, the presentation of a claim pursuant to Section 45-3-804 NMSA 1978 is equivalent to commencement of a proceeding on the claim.

History: 1953 Comp., § 32A-3-802, enacted by Laws 1975, ch. 257, § 3-802; 1993, ch. 174, § 72; 1995, ch. 210, § 41.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-802 UPC.

The 1995 amendment, effective July 1, 1995, inserted "whose interest would be affected" in the first sentence in Subsection A.

The 1993 amendment, effective July 1, 1993, deleted the former third sentence of Subsection A, pertaining to suspension of running of any statute of limitations; added current Subsection B; redesignated former Subsection B as Subsection C; deleted "proper" preceding "presentation" and substituted "pursuant to Section 45-3-804 NMSA 1978" for "under Section 3-804" in Subsection C; and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Direction in will for payment of debts of testator, or for payment of specified debt, as affecting debts or debt barred by limitation, 109 A.L.R. 1440.

Nonclaim statute as governing claim barred, subsequent to death of obligor, by general statute of limitations, 112 A.L.R. 289.

Effect of statement of claim against decedent's estate regarding debt apparently barred by the statute of limitations, 119 A.L.R. 426.

Estoppel by silence or other conduct (other than failure to file) to assert against estate claim antedating decedent's death, 146 A.L.R. 1179.

Waiver or tolling of statute of limitations by executor or administrator, 8 A.L.R.2d 660.

Running of statute of limitations as affected by doctrine of relation back of appointment of administrator, 3 A.L.R.3d 1234.

Delay in appointing administrator or other representative, effect on cause of action accruing at or after death of person in whose favor it would have accrued, 28 A.L.R.3d 1141.

What constitutes rejection of claim against estate to commence running of statute of limitations applicable to rejected claims, 36 A.L.R.4th 684.

34 C.J.S. Executors and Administrators § 404.

45-3-803. Limitations on presentation of claims.

A. All claims against a decedent's estate that arose before the death of the decedent, including claims of the state and any political subdivision of the state, whether due or to become due, absolute or contingent, liquidated or unliquidated or founded on contract, tort or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute, are barred against the estate, the personal representative and the heirs, devisees and nonprobate transferees of the decedent unless presented within the earlier of the following:

(1) one year after the decedent's death; or

(2) the time provided by Subsection A of Section 45-3-801 NMSA 1978 for creditors who are given actual notice and the time provided in Subsection B of Section 45-3-801 NMSA 1978 for all creditors barred by publication.

B. A claim described in Subsection A of this section that is barred by the nonclaim statute of the decedent's domicile before the giving of notice to creditors in this state is barred in this state.

C. All claims against a decedent's estate that arise at or after the death of the decedent, including claims of the state and any political subdivision of the state, whether due or to become due, absolute or contingent, liquidated or unliquidated or founded on contract, tort or other legal basis, are barred against the estate, the personal representative and the heirs and devisees of the decedent unless presented as follows:

(1) a claim based on a contract with the personal representative within four months after performance by the personal representative is due; or

(2) any other claim within the later of four months after it arises or the time specified in Paragraph (1) of this subsection.

D. Nothing in this section affects or prevents:

(1) any proceeding to enforce any mortgage, pledge or other lien upon property of the estate;

(2) to the limits of the insurance protection only, a proceeding to establish liability of the decedent or the personal representative for which the decedent or personal representative is protected by liability insurance; or

(3) collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

History: 1953 Comp., § 32A-3-803, enacted by Laws 1975, ch. 257, § 3-803; 1993, ch. 174, § 73; 2011, ch. 124, § 47.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-803 UPC.

Compiler's notes. — This section includes within its scope some of the functions of former 31-8-3, 1953 Comp.

The 2011 amendment, effective January 1, 2012, provided that claims against nonprobate transferees are barred if not timely presented.

The 1993 amendment, effective July 1, 1993, rewrote this section to the extent that a detailed comparison is impracticable.

Rule 6(b), N.M.R. Civ. P. (see Rule 1-006B NMRA) may not be applied to extend time limitation of Subsection A of this section because such an extension would be inconsistent with the barring of a disallowed claim unless proceedings were commenced not later than 60 days after mailing of notice of disallowance. Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Purpose of statutes permitting claims against estates and appeals therefrom. — The enactments providing for claims against estates and appeals from orders which allow or reject them complement each other, and are designed to speed the administration and closing of estates. Levers v. Houston, 49 N.M. 169, 159 P.2d 761 (1945).

Requirements of this section (31-8-3, 1953 Comp., repealed) are mandatory, and neither heirs nor administrator can waive them, nor can their conduct result in an estoppel which prevents the bar of the statute. Osborn v. Osborn, 34 N.M. 431, 283 P. 49 (1929).

Mandatory requirements. — Neither the heirs nor the personal representative can be estopped from asserting or can waive the mandatory requirements of the nonclaim statute, which is comprised of this section and 45-3-804 and 45-3-806 NMSA 1978. Mayfield v. Mayfield, 108 N.M. 246, 771 P.2d 179 (1989).

Applicability of filing provisions. — The filing provisions in Subsections A and B apply only to claims against the estate; claims that will be paid by insurance are not considered to be claims against the estate. Corlett v. Smith, 107 N.M. 707, 763 P.2d 1172 (Ct. App. 1988).

Inapplicable to estate devisees. — This section did not provide the controlling relevant limitations where petitioners were not creditors, but devisees of the estate. Accordingly, the relevant limitations period was found in 45-3-1006 NMSA 1978. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

Statute of limitations does not bar recovery of administration expenses. — No judgment could have been entered thereon until appellant's final report had been filed and accounting had thereon. In re Kenney's Estate, 41 N.M. 576, 72 P.2d 27 (1937).

Timely filing of claims against a decedent's estate is mandatory, and, if not timely filed, the claims are barred as a matter of law. Bowman v. Butler, 98 N.M. 357, 648 P.2d 815 (Ct. App. 1982).

Section's requirements not preempted by wrongful death statutes. — The burden of establishing a timely presentment of a claim against an estate rests upon the claimant, and nothing in the statutes allowing recovery for wrongful death, 41-2-1 to 41-2-4 NMSA 1978, expresses a legislative intent to create an exception to this section. Corlett v. Smith, 106 N.M. 207, 740 P.2d 1191 (Ct. App. 1987).

A cause of action against a personal representative for conversion, breach of fiduciary duty and right of replevin does not arise until the termination of the representative's appointment. Bowman v. Butler, 98 N.M. 357, 648 P.2d 815 (Ct. App. 1982).

Actions against a deceased personal representative on his surety bond are exempted from the time limitations imposed by this section. These claims are governed by 37-1-8 NMSA 1978. Bowman v. Butler, 98 N.M. 357, 648 P.2d 815 (Ct. App. 1982).

Redesignation of contract claim as fraud insufficient to change limitation. — The amendment or identification of a claim as one of fraud rather than in contract, after the two-month period has expired, is insufficient to change the time period from two months under Subsection A to four months under Subsection B. Oney v. Odom, 95 N.M. 640, 624 P.2d 1037 (Ct. App. 1981).

Extension of time limits not authorized. — Section 45-3-804C NMSA 1978 does not deal with the time limits for presenting claims under this section and does not authorize the trial court to extend this section's time limits. Oney v. Odom, 95 N.M. 640, 624 P.2d 1037 (Ct. App. 1981).

Workmen's compensation claims subject to own statute of limitations. — Workmen's compensation one-year statute of limitations, not Uniform Probate Code's

four-month limitation, applied to workmen's compensation action filed against employer, a sole proprietorship being run by personal representative after death of sole proprietor. Lucero v. Northrip Logging Co., 101 N.M. 420, 683 P.2d 1342 (Ct. App. 1984).

Exception to statute of limitations. — Claim against executor for superadded liability on bank stock owned by testator, on account of insolvency of state bank occurring after testator's death, is not governed by statutory requirements for filing in probate court nor by statute of nonclaim. Tierney v. Shakespeare, 34 N.M. 501, 284 P. 1019 (1930).

Claims expiring on Sunday may be filed following Monday. — This section is a continuing statute, and if time within which claims against estate of deceased person must be filed expires on Sunday, the act may be performed the following Monday. O'Brien v. Wilson, 26 N.M. 641, 195 P. 803 (1921).

Effect of section on contingent claims. — A contingent claim by a surety against estate of its principal who breached the condition of his official bond to recover indemnity accrued when the principal breached the bond, and such claim is barred by statute of limitations when it is not filed within six months (now two months) after first publication of notice of appointment of estate representative. Fidelity & Deposit Co. v. Hobbs, 144 F.2d 5 (10th Cir. 1944).

Setoff claims. — Where accounts are owing by an individual to an estate and in turn by the estate to the individual, the claim by the individual must be filed within the statutorily permitted time, and if approved the claim can be set off against the account owing to the estate. Counts v. Woods, 46 N.M. 273, 127 P.2d 398 (1942).

Claim filed two years after death. — A claim against an estate not filed with the clerk of the probate court until more than two years after death of decedent was barred by this statute of limitations (31-8-3, 1953 Comp., repealed). Janes v. Brunswick, 8 N.M. 105, 42 P. 72 (1895), modified, 8 N.M. 345, 45 P. 878 (1896).

"Limits of insurance protection". — For the purposes of former Subsection C(2), "protection" should be considered the potential right to payment of a claim against the insurance company. Corlett v. Smith, 107 N.M. 707, 763 P.2d 1172 (Ct. App. 1988).

Law reviews. — For annual survey of New Mexico law relating to estates and trusts, see 12 N.M.L. Rev. 363 (1982).

For annual survey of New Mexico law relating to estates and trusts, see 13 N.M.L. Rev. 395 (1983).

For annual survey of New Mexico law of estates and trusts, see 19 N.M.L. Rev. 669 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Prosecution of action or claim against estate by beneficiary as forfeiture of share in will by virtue of clause therein so providing, 30 A.L.R. 1014.

Necessity of presenting claim to executor or administrator before bringing suit, 34 A.L.R. 362.

Action on contingent claim, presentation of claim as condition precedent, 34 A.L.R. 372.

Presentation of claim for funeral expenses to executor or administrator, 34 A.L.R. 375.

Applicability of nonclaim statute to claims arising under contract executory at time of death, 47 A.L.R. 896.

Effect of recovery of judgment on unfiled or abandoned claim after expiration of time allowed for filing claim against estate, 60 A.L.R. 736.

Bar of statute of nonclaim of decedent's domicile as affecting assertion of claim elsewhere, 72 A.L.R. 1030.

Nonclaim statute as applied to real estate mortgage or mortgage debt, 78 A.L.R. 1126.

Superseded liability of stockholders as within statute of nonclaim, 87 A.L.R. 494.

Necessity of filing claim under Workmen's Compensation Act against estate of deceased employer, 94 A.L.R. 889.

Claim on decedent's contract of guaranty, surety ship or endorsement as contingent, 94 A.L.R. 1155.

Applicability of statute of nonclaim as between surviving partner and estate of deceased partner, 96 A.L.R. 449, 157 A.L.R. 1114.

Necessity of presenting claim against decedent's estate as affected by executor's or administrator's personal duty or obligation to claimant, 103 A.L.R. 337.

Right of nonresident creditor of decedent's estate to file claim in ancillary administration, 106 A.L.R. 893.

Claims for taxes as within contemplation of statute requiring presentation of claims against decedents' estates, 109 A.L.R. 1370.

Nonclaim statute as governing claim barred, subsequent to death of obligor, by general statute of limitations, 112 A.L.R. 289.

Necessity of presenting claim against decedent's estate for specific performance of contract to make will in favor of another or to will latter a specified sum or property, 113 A.L.R. 1070.

Presentation of claim against deceased debtor's estate as condition of action to enforce judgment lien, 114 A.L.R. 1167.

Presentment of claim or notice to one or more coadministrators, coexecutors, coguardians or cotrustees as presentment or notice to all, 115 A.L.R. 390.

Effect of statement of claim against decedent's estate setting out debt apparently barred by statute of limitations, 119 A.L.R. 426.

Filing claim against estate of decedent as affecting or precluding other remedies against estate, 120 A.L.R. 1225.

Claim of government or subdivision thereof as within provision of nonclaim statute, 34 A.L.R.2d 1003.

Availability of replevin or similar possessory action to one not claim as heir, legatee, or creditor of decedent's estate, against personal representative, 42 A.L.R.2d 418.

Amendment of claim against decedent's estate after expiration of time for filing claims, 56 A.L.R.2d 627.

Necessity of presenting spouse's claim under separation agreement to personal representative of other spouse's estate, 58 A.L.R.2d 1283.

Application of nonclaim statute to claim for unmatured payments under land contract, 99 A.L.R.2d 275.

Running of statute of limitations as affected by doctrine of relation back of appointment of administrator, 3 A.L.R.3d 1234.

Tort claim as within nonclaim statutes, 22 A.L.R.3d 493.

Delay in appointing administrator or other representative, effect on cause of action accruing at or after death of person in whose favor it would have accrued, 28 A.L.R.3d 1141.

Presentation of claim to executor or administrator as prerequisite of its availability as counterclaim or setoff, 36 A.L.R.3d 693.

Claims for expenses of last sickness or for funeral expenses as within contemplation of statute requiring presentation of claims against decedent's estate, or limiting time for bringing action thereon, 17 A.L.R.4th 530.

What constitutes rejection of claim against estate to commence running of statute of limitations applicable to rejected claims, 36 A.L.R.4th 684.

Limitations of actions applicable to action by trustees of employee benefit plan to enforce delinquent employer contributions under ERISA (29 USCS § 1132(a)), 90 A.L.R. Fed. 374.

34 C.J.S. Executors and Administrators § 404.

45-3-804. Manner of presentation of claims.

Claims against a decedent's estate may be presented as follows:

A. the claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed, or he may file a written statement of the claim with the appropriate court. The claim is presented on the first to occur of receipt of the written statement of claim by the personal representative or the filing of the claim with the appropriate court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty and the due date of a claim not yet due does not invalidate the presentation made;

B. the claimant, without the necessity of filing a claim, may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction, to obtain payment of his claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his death; and

C. if a claim is presented under Subsection A of this section, no proceeding thereon may be commenced more than sixty days after the personal representative has mailed a notice of disallowance. However, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the sixty-day period, or, to avoid injustice, the district court on petition may order an extension of the sixty-day period, but in no event shall the extension run beyond the applicable statute of limitations.

History: 1953 Comp., § 32A-3-804, enacted by Laws 1975, ch. 257, § 3-804; 1983, ch. 194, § 6.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-804 UPC.

A wrongful death claim may properly be filed against the estate of a decedent in formal probate proceedings before the district court sitting in probate. Garcia v. Underwriters at Lloyd's London, 2007-NMCA-042, 141 N.M. 421, 156 P.3d 712, aff'd 2008-NMSC-018, 143 N.M. 732, 182 P.3d 113.

Requirements are mandatory. — Neither the heirs nor the personal representative can be estopped from asserting or can waive the mandatory requirements of the nonclaim statute, which is comprised of this section and 45-3-803 and 45-3-806 NMSA 1978. Mayfield v. Mayfield, 108 N.M. 246, 771 P.2d 179 (1989).

Section consistent with 45-3-806 NMSA 1978. — Subsection C of this section is consistent and harmonious with 45-3-806 NMSA 1978, if the extension authorized by Subsection C is granted prior to expiration of the 60-day period. Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

No extension of time after 60-day period has expired. — A trial court has no authority under Subsection C of this section to extend the time for proceeding against a personal representative after the 60-day period has expired. Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Extensions of time. — Subsection C does not deal with the time limits for presenting claims under 45-3-803 NMSA 1978, and does not authorize the trial court to extend the time limits of 45-3-803 NMSA 1978. Oney v. Odom, 95 N.M. 640, 624 P.2d 1037 (Ct. App. 1981).

Claim via amended pleadings. — It was not an abuse of discretion to refuse to permit amendment to pleadings which would have added to claim statement that claimant would show that decedent had stated that decedent was going to provide for claimant in decedent's will, where the requested amendment was made at the commencement of trial and would add nothing to the claim, since it was nowhere alleged that claimant had performed services for decedent pursuant to an agreement that decedent would provide for claimant in decedent's will. Montoya v. Friedman, 61 N.M. 446, 301 P.2d 1094 (1956).

Claim of liability on bank stock owned by testator. — Claim against executor for superadded liability on bank stock owned by testator, on account of insolvency of state bank occurring after testator's death, is not governed by statutory requirements for filing in probate court nor by statute of nonclaim. Tierney v. Shakespeare, 34 N.M. 501, 284 P. 1019 (1930).

Revival of suit pending at death. — The revival of a suit which is pending against a decedent at the time of death, within the time prescribed for filing claims against decedent's estate, obviates the necessity to present a claim to the executor or administrator. Romero v. Hopewell, 28 N.M. 259, 210 P. 231 (1922).

Law reviews. — For annual survey of New Mexico law relating to estates and trusts, see 12 N.M.L. Rev. 363 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Prosecution of action or claim against estate by beneficiary as forfeiture of share in will by virtue of clause therein so providing, 30 A.L.R. 1014.

Necessity of presenting claim to executor or administrator before bringing suit, 34 A.L.R. 362.

Sufficiency of notice of claim against decedent's estate, 74 A.L.R. 368.

Sufficiency of presentation of claim for mortgage on real estate, 78 A.L.R. 1153.

Exclusiveness of grounds enumerated in statute providing, under specified circumstances, extension of time for filing claims against decedent's estate, 57 A.L.R.2d 1304.

Amount of claim filed against decedent's estate as limiting amount recoverable in action against estate, 25 A.L.R.3d 1356.

34 C.J.S. Executors and Administrators § 416.

45-3-805. Classification of claims.

A. If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(1) costs and expenses of administration, including compensation of personal representatives and of persons employed by the personal representatives;

(2) reasonable funeral expenses;

(3) debts and taxes with preference under federal law;

(4) reasonable medical and hospital expenses of the last illness of the decedent, including compensation of persons attending the decedent;

(5) debts and taxes with preference under other laws of New Mexico; and

(6) all other claims.

B. No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.

History: 1953 Comp., § 32A-3-805, enacted by Laws 1975, ch. 257, § 3-805; 1976 (S.S.), ch. 37, § 12; 1995, ch. 210, § 42.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-805 UPC.

Compiler's notes. — This section includes within its scope some of the functions of former 31-8-10 and 31-8-11, 1953 Comp.

The 1995 amendment, effective July 1, 1995, in Subsection A, inserted "including" and substituted "persons employed by the personal representatives" for "attorneys" at the end of Paragraph (1); transferred similar provisions to those contained in former Paragraph (2) to Paragraph (4); and redesignated former Paragraphs (3) and (4) as Paragraphs (2) and (3).

Spousal support and attorney fees awarded after death of spouse. — In a divorce proceeding continued after the death of a spouse pursuant to 40-4-20 NMSA 1978 in which the court awards lump-sum spousal support and attorney fees, the final judgment is not a claim against the estate of the deceased spouse for purposes of the Probate Code's creditor's claims provisions of 45-3-805 NMSA 1978. Estate of Nauert v. Morgan-Nauret, 2012-NMCA-037, 274 P.3d 799.

Where the deceased spouse who filed for divorce in March 2006 died while the divorce action was pending; in September 2007, the probate court appointed a personal representative of the estate; in November 2007, the divorce court awarded the surviving spouse monthly spousal support from September 2007 and attorney fees and ordered the estate to pay the awards immediately; and the personal representative claimed that the awards were Class Six claims under 45-3-805 NMSA 1978, the awards were not claims under the Probate Code to which the creditors' claims provisions of 45-3-805 NMSA 1978 applied. Estate of Nauert v. Morgan-Nauret, 2012-NMCA-037, 274 P.3d 799.

Where a divorce proceeding was continued after the death of a spouse and the divorce court ordered the deceased spouse's estate to immediately pay a lump-sum amount for spousal support and attorney fees to the surviving spouse, the award did not violate the Federal Insolvency Act, 31 U.S.C. § 3713(a)(1)(B) which requires claims of the United States government to be paid first when the estate of the deceased debtor is not enough to pay all debts of the debtor, because the divorce court awards were not claims against the estate of the deceased spouse and the act did not apply. Estate of Nauert v. Morgan-Nauret, 2012-NMCA-037, 274 P.3d 799.

A claim for funeral and medical expenses of the decedent was a valid claim against the estate and was accorded priority in accordance with the provisions of this section. Garcia v. Garcia, 105 N.M. 472, 734 P.2d 250 (Ct. App. 1987).

Priority of decedent's lien on specific property. — Expenses necessary to the administration of the estate are subject to the lien of a mortgage executed on specific property by the deceased in his lifetime; the justice of this rule is plain: the creditor merely gets the benefit of a contract made with the deceased. Shortle v. Mccloskey, 39 N.M. 273, 46 P.2d 50 (1935).

Third party's expenses in operating decedent's business. — Where a third person furnishes supplies which are used by an executor or administrator in operating and conducting the business of the decedent, as well as money which is used in defraying the expenses of conducting such business, the third person is entitled to take the place and stead of the executor or administrator and to be likewise reimbursed therefor before the creditors are paid anything upon their accounts. Perez v. Gil's Estate, 29 N.M. 313, 222 P. 907 (1924).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Meaning of phrase "last sickness" and the like in statutes giving preference to expenses, 9 A.L.R. 462.

When funeral expenses deemed ordered on personal credit rather than on credit of estate, 30 A.L.R. 444.

Expense of removing and reinterring remains as a funeral expense, 40 A.L.R. 1459.

State's prerogative right of preference at common law, 51 A.L.R. 1355, 65 A.L.R. 1331, 90 A.L.R. 184, 167 A.L.R. 640.

Foreclosure decree which ascertains amount of mortgage due or other claim as judgment within statute relating to rank of claims against decedent's estate, 57 A.L.R. 489.

Rank or preference of claim against insolvent estate with respect to stockholder's superadded liability, 92 A.L.R. 1040.

Expenses of preserving assets before appointment of executor or administrator as entitled to priority, 108 A.L.R. 393.

Priority in event of incompetent's death of claims incurred during guardianship over other claims against estate, 113 A.L.R. 402.

Judgment against executor or administrator, or levy of attachment or execution against him, as affecting rank of creditor's claims against estate or his rights in respect of property of estate, 121 A.L.R. 656.

Tombstone or monument as a proper charge against estate of decedent, 121 A.L.R. 1103.

Construction and application of statutory provisions as to classification or priority of claims against decedent's estate in respect of money or property received by decedent in trust or as a fiduciary, 125 A.L.R. 1487.

Rank of foreign judgment, or judgment of sister state, rendered in lifetime of debtor, in settlement of debtor's estate after his death, 128 A.L.R. 1400.

Personal claim of executor or administrator against estate, antedating death of decedent, 144 A.L.R. 953.

Amount of funeral expenses allowable against decedent's estate, 4 A.L.R.2d 995.

Family allowance granted widow as payable from community interests of decedent and widow, 9 A.L.R.2d 529.

Propriety of payment of funeral expenses of life beneficiary or life tenant out of corpus or estate under instrument providing for invasion of corpus or estate for support of such person, 18 A.L.R.2d 1236.

Reimbursement, from decedent's estate, of person other than personal representative or surviving spouse paying funeral expenses, 35 A.L.R.2d 1399.

Powers and duties of a public administrator, 56 A.L.R.2d 1183.

Liability for funeral expenses of married women, 82 A.L.R.2d 873.

Preference or priority of claims arising out of continuation of decedent's business by personal representative, 83 A.L.R.2d 1347.

Rent or its equivalent accruing after lessee's death as expense of administration of estate, 22 A.L.R.3d 814.

Construction of statutory provisions giving priority on distribution to claims for wages of servants, employees or the like, 52 A.L.R.3d 940.

34 C.J.S. Executors and Administrators § 458.

45-3-806. Allowance of claims.

A. As to claims presented in the manner described in Section 45-3-804 NMSA 1978 within the time limit prescribed in Section 45-3-803 NMSA 1978, the personal representative may mail a notice to any claimant stating that the claim has been disallowed. If after allowing or disallowing a claim the personal representative changes his decision concerning the claim, he shall notify the claimant. The personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and

the claim has been barred. Every claim that is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the district court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance or partial allowance. Failure of the personal representative to mail notice to a claimant of action on his claim for sixty days after the time for original presentation of the claim has expired has the effect of a notice of allowance.

B. After allowing or disallowing a claim the personal representative may change the allowance or disallowance as hereafter provided. The personal representative may prior to payment change the allowance to a disallowance in whole or in part but not after allowance by a court order or judgment or an order directing payment of the claim. He shall notify the claimant of the change to disallowance, and the disallowed claim is then subject to bar as provided in Subsection A of this section. The personal representative may change a disallowance to an allowance, in whole or in part, until it is barred pursuant to Subsection A of this section; after it is barred, it may be allowed and paid only if the estate is solvent and all successors whose interests would be affected consent.

C. Upon the petition of the personal representative or of a claimant in a proceeding for the purpose, the district court may allow in whole or in part any claim presented to the personal representative or filed with the clerk of the district court in due time and not barred by Subsection A of this section. Notice in this proceeding shall be given to the claimant, the personal representative and those other persons interested in the estate, as the court may direct by order entered at the time the proceeding is commenced.

D. A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

E. Unless otherwise provided in any judgment in another court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing sixty days after the time for original presentation of the claim has expired unless based on a contract making a provision for interest, in which case they bear interest in accordance with that provision.

History: 1953 Comp., § 32A-3-806, enacted by Laws 1975, ch. 257, § 3-806; 1993, ch. 174, § 74.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-806 UPC.

Compiler's notes. — This section includes within its scope some of the functions of former 31-8-5, 1953 Comp.

The 1993 amendment, effective July 1, 1993, substituted "45-3-804 NMSA 1978" and "45-3-803 NMSA 1978" for "3-804" and "3-803" in the first sentence in Subsection A; added Subsection B; redesignated former Subsections B to D as Subsections C to E; and made minor stylistic changes.

Purpose of enactments regarding claims and appeals. — The enactments providing for proof of claims against estates and for the disposition of appeals from orders which allow or reject them are complementary and are designed to speed administration and closing of estates. Levers v. Houston, 49 N.M. 169, 159 P.2d 761 (1945).

Inapplicable to estate devisees. — This section did not provide the controlling relevant limitations where petitioners were not creditors, but devisees of the estate. Accordingly, the relevant limitations period was found in 45-3-1006 NMSA 1978. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

Requirements are mandatory. — Neither the heirs nor the personal representative can be estopped from asserting or can waive the mandatory requirements of the nonclaim statute, which is comprised of this section and 45-3-803 and 45-3-804 NMSA 1978. Mayfield v. Mayfield, 108 N.M. 246, 771 P.2d 179 (1989).

Failure to comply with reasonable procedural requirements defeats relief. — Failure to comply with reasonable procedural requirements regulating appeals to the district court operates to defeat relief sought to be obtained by the appeal. Levers v. Houston, 49 N.M. 169, 159 P.2d 761 (1945).

Compliance with petition requirements. — While it is possible that Subsection A could be satisfied other than by strict adherence to its formal dictates, it is hard to see how a claimant, who does not engage in any legal activity of record within the limitation period of the nonclaim statute, could comply substantially with its mandatory requirements. Mayfield v. Mayfield, 108 N.M. 246, 771 P.2d 179 (1989).

Allowance of claim against decedent's estate is a judicial act, with the force and effect of a judgment; it is final and conclusive between parties until set aside, and cannot be attacked collaterally. In re Fields Estate, 40 N.M. 423, 60 P.2d 945 (1936); Ross v. Lewis, 23 N.M. 524, 169 P. 468 (1917).

Section consistent with 45-3-804 NMSA 1978. — Section 45-3-804 NMSA 1978 is consistent and harmonious with Subsection A of this section, if the extension authorized by 45-3-804 NMSA 1978 is granted prior to expiration of the 60-day period. Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Rule 6(b), N.M.R. Civ. P. (now see Rule 1-006B NMRA) may not be applied to extend time limitation of Subsection A of this section because such an extension would be inconsistent with the barring of a disallowed claim unless proceedings were commenced not later than 60 days after mailing of notice of disallowance. Mathieson v.

Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Disallowed claim is barred by Subsection A of this section unless the claimant files a petition for allowance in district court or commences a proceeding against the personal representative not later than 60 days after the mailing of the notice of disallowance or partial disallowance. Mathieson v. Hubler, 92 N.M. 381, 588 P.2d 1056 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

District court jurisdiction of account due while suit pending. — Neither the district court of the county where probate proceedings are pending nor of any other county can entertain jurisdiction of a suit on an account due brought against administrator of a decedent's estate, where the claim was never rejected by the court in which the probate proceedings are pending. McBeath v. Champion, 55 N.M. 114, 227 P.2d 625 (1951).

Priority of New Mexico allowance over foreign court disallowance. — The judgment of a New Mexico court allowing claims against an estate takes precedence over a partial disallowance of the claims by a foreign court. Ware v. Farmers' Nat'l Bank, 37 N.M. 415, 24 P.2d 269 (1933).

Filing a wrongful death claim in a formal probate proceeding constitutes the filing of a "suit" and invokes the duty to defend. — Where a liquor liability insurance policy provided that the insurer had the right and duty to defend the insured against any "suit" seeking damages for injuries to which the policy applied and the policy defined "suit" to mean a civil proceeding in which damages, because of injury to which the insurance applied, are alleged, the filing of a wrongful death claim in a formal probate constituted a "suit" as defined in the policy and invoked the duty to defend. Garcia v. Underwriters at Lloyd’s London, 2007-NMCA-042, 141 N.M. 421, 156 P.3d 712, aff'd 2008-NMSC-018, 143 N.M. 732, 182 P.3d 113.

Vacation pay claims. — Evidence was sufficient to support the claims for two weeks' vacation pay each year of two employees who worked for the decedent and decedent's sibling as private nurses, although the written notations that each employee testified the employee and the decedent signed could not be located after the decedent's death, but the amount awarded did not follow from the only factors in the record , i.e., length of employment and rate of pay, requiring remand for further fact-finding. Catanach v. Gunn, 107 N.M. 574, 761 P.2d 452 (Ct. App. 1988).

Decedent’s promissory note. — Since decedent could not have enforced payment of a promissory note from decedent against the entire community estate, because decedent failed to have his spouse sign the note, decedent’s child, to whom the note was devised, could not do so either, and the trial court thus erred in failing to limit the child’s claim as one against the separate and community personal property of the estate; when a member of a community takes a promissory note from the member as a member of the community, the member is charged with the knowledge that any document purporting to pledge the credit of the community can only refer to the

community's personal property. Shadden v. Shadden, 93 N.M. 274, 599 P.2d 1071 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979), overruled on other grounds, Huntington Nat'l Bank v. Sproul, 116 N.M. 254, 861 P.2d 935 (1993).

Claims by executor. — Payments made by the executor to the executor for salary due from the decedent, reimbursement for a set of scales installed after decedent's death on ranch property inherited by executor, and reimbursement for ranch expenses and interest paid on loan to operate the ranch were not based on claims filed or by order of the district court, were improper, and could not be allowed. Aikens v. Hamilton, 97 N.M. 111, 637 P.2d 542 (1981).

Failure to prove payment of taxes. — Where the personal representative of the estate of the personal representative's step parent filed an affidavit claiming the personal representative had individually paid the property taxes on the estate's real property for ten years; and the surviving spouse of the decedent, who was the parent of the personal representative, had possession and control over the property of the estate and there had been no accounting for the assets of the estate as required by the Probate Code, the district court did not err in finding that the personal representative had failed to prove that the personal representative had paid the taxes from the personal representative's personal funds rather than from the estate's funds. Duran v. Vigil, 2012-NMCA-121, 296 P.3d 1209, cert. denied, 2012-NMCERT-011.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Allowance out of property or funds of estate for services of attorney rendered in protection of estate of decedent, 49 A.L.R. 1161, 107 A.L.R. 749.

Direction of verdict based on testimony of interested witnesses as to claims against estates of deceased persons, 72 A.L.R. 58.

Allowance out of decedent's estate for services rendered by attorney not employed by executor or administrator, 79 A.L.R. 521, 142 A.L.R. 1459.

Who is entitled to contest, or appeal from, allowance of claim against decedent's estate, 118 A.L.R. 743.

Rank of creditor's claim against decedent's estate or his rights in respect of property of estate as affected by reduction of his claim to judgment against executor or administrator, or levy of attachment or execution, 121 A.L.R. 656.

Right of executor or administrator to contest or appeal from court's rejection of claim against decedent's estate, 129 A.L.R. 922.

Claims based on provisions of statutes relating specifically to rights, duties and obligations between employer and employee as subject to arbitration provisions of contracts or statutes, 149 A.L.R. 276.

Personal liability of executor or administrator for interest on legacies or distributive shares where payment is delayed, 18 A.L.R.2d 1384.

Interest on decree or judgment of probate court allowing a claim against estate or making an allowance for services, 54 A.L.R.2d 814.

Appealability of probate orders allowing or disallowing claims against estate, 84 A.L.R.4th 269.

34 C.J.S. Executors and Administrators § 426.

45-3-807. Payment of claims.

A. Upon the expiration of the earlier of the time limitations provided in Section 45-3-803 NMSA 1978, the personal representative shall proceed to pay the claims allowed against the estate in the order of priority described, after making provision for family and personal property allowances, for claims already presented that have not yet been allowed or whose allowance has been appealed and for unbarred claims that may yet be presented, including costs and expenses of administration. By petition to the district court in a proceeding for the purpose or by appropriate motion if the administration is supervised, a claimant whose claim has been allowed but not paid may secure an order directing the personal representative to pay the claim to the extent funds of the estate are available to pay it.

B. The personal representative at any time may pay any just claim that has not been barred, with or without formal presentation, but he is personally liable to any other claimant whose claim is allowed and who is injured by its payment if:

(1) payment was made before the expiration of the time limit stated in Subsection A of this section and the personal representative failed to require the payee to give adequate security for the refund of any of the payment necessary to pay other claimants; or

(2) payment was made, due to negligence or willful fault of the personal representative, in such manner as to deprive the injured claimant of priority.

History: 1953 Comp., § 32A-3-807, enacted by Laws 1975, ch. 257, § 3-807; 1993, ch. 174, § 75.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-807 UPC.

Cross references. — For classification of claims, *see* 45-3-805 NMSA 1978.

For allowance of claims, *see* 45-3-806 NMSA 1978.

The 1993 amendment, effective July 1, 1993, substituted "the earlier of the time limitations provided in Section 45-3-803 NMSA 1978" for "two months from the date of the first publication of the notice to creditors" in the first sentence in Subsection A; substituted "willful fault" for "willful act" in Paragraph (2) in Subsection B; and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Remedies of creditors of insolvent decedent's estate where other creditors have received excessive payments, 77 A.L.R. 981.

Validity, construction and application of provision of fidelity bond as to giving of notice of loss or claim within specified time after close of bond year, 149 A.L.R. 945.

34 C.J.S. Executors and Administrators § 457.

45-3-808. Individual liability of personal representative.

A. Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity.

B. A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

C. Claims based on contracts entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate or on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

D. Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

History: 1953 Comp., § 32A-3-808, enacted by Laws 1975, ch. 257, § 3-808.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-808 UPC.

Cross references. — For liability for failure to pay or secure payment of estate taxes before distribution or delivery, *see* 7-7-12 NMSA 1978.

Proceeding for accounting not required. — Subsection D does not require that a proceeding for an accounting is required for the personal representative to be held personally liable. On the contrary, the statute states that a personal representative will be individually liable for torts committed in the administration of the estate if the personal representative is personally at fault. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

Jurisdiction lacking for finding of liability. — The district court lacked jurisdiction to enter an order awarding damages against the personal representative, individually, where no claim was originally pleaded or asserted against him individually and where the assets, consisting of realty, against which the majority of the claims were asserted were not part of decedent's estate. Garcia v. Garcia, 105 N.M. 472, 734 P.2d 250 (Ct. App. 1987).

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Contract of trustee as basis of suit to reach the trust estate or to charge the trustee personally or as trustee, 139 A.L.R. 134.

Allowance out of decedent's estate for services rendered by attorney not employed by executor or administrator, 142 A.L.R. 1459.

Treatment of personal claim of executor or administrator antedating the death of decedent, 144 A.L.R. 940.

Liability of personal representative with respect to completion of improvements, 5 A.L.R.2d 1250.

Personal liability of executor or administrator for interest on legacies or distributive shares where payment is delayed, 18 A.L.R.2d 1384.

Accountability of personal representative for his use of decedent's real estate, 31 A.L.R.2d 243.

Construction and effect of 31 U.S.C. § 192 imposing personal liability on fiduciary for paying debts due by person or estate for whom he acts before paying debts due United States, 41 A.L.R.2d 446.

Replevin or similar possessory action, availability to one not claiming as heir, legatee or creditor of decedent's estate, against personal representative, 42 A.L.R.2d 418.

Liability of personal representative for losses incurred in carrying on, without testamentary authorization, decedent's nonpartnership mercantile or manufacturing business, 58 A.L.R.2d 365.

Coexecutor's or coadministrator's liability for defaults or wrongful acts of fiduciary in handling estate, 65 A.L.R.2d 1019.

Place of personal representative's appointment as venue of action against him in his official capacity, 93 A.L.R.2d 1199.

Liability of executor or administrator for negligence or default in defending action against estate, 14 A.L.R.3d 1036.

Liability of executor or administrator, or his bond, for loss caused to estate by act or default of his agent or attorney, 28 A.L.R.3d 1191.

Liability of executor, administrator, trustee or his counsel for interest, penalty or extra taxes assessed against estate because of tax law violations, 47 A.L.R.3d 507.

Liability of executor or administrator to estate because of overpaying or unnecessarily paying tax, 55 A.L.R.3d 785.

Garnishment against executor or administrator by creditor of estate, 60 A.L.R.3d 1301.

17A C.J.S. Contracts § 347; 33 C.J.S. Executors and Administrators § 142; 34 C.J.S. Executors and Administrators § 367.

45-3-809. Secured claims.

Payment of a secured claim is upon the basis of the amount allowed if the creditor surrenders his security; otherwise payment is upon the basis of one of the following:

A. if the creditor exhausts his security before receiving payment (unless precluded by other law), upon the amount of the claim allowed less the fair value of the security; or

B. if the creditor does not have the right to exhaust his security or has not done so, upon the amount of the claim allowed less the fair value of the security determined, if applicable, by the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise or litigation.

History: 1953 Comp., § 32A-3-809, enacted by Laws 1975, ch. 257, § 3-809.

ANNOTATIONS

Cross references. — For compromise of claim, *see* 45-3-813 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of heir or devisee to have realty exonerated from lien thereon at expense of personal estate, 4 A.L.R.3d 1023.

34 C.J.S. Executors and Administrators §§ 368, 458.

45-3-810. Claims not due and contingent or unliquidated claims.

A. If a claim which will become due at a future time or if a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.

B. In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the district court, may provide for payment as follows:

(1) if the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account; or

(2) arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation, may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee or otherwise.

History: 1953 Comp., § 32A-3-810, enacted by Laws 1975, ch. 257, § 3-810.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Action on contingent claim, presentation of claim as condition precedent, 34 A.L.R. 372.

Claim on decedent's contract of guarantyship, suretyship or endorsement, as contingent, 94 A.L.R. 1155.

Tort claim as within nonclaim statutes, 22 A.L.R.3d 493.

34 C.J.S. Executors and Administrators § 377.

45-3-811. Counterclaims.

A. In allowing a claim, the personal representative may deduct any counterclaim which the estate has against the claimant.

B. In determining a claim against an estate the district court shall reduce the amount allowed by the amount of any counterclaims and, if the counterclaims exceed the claim, render a judgment against the claimant in the amount of the excess.

History: 1953 Comp., § 32A-3-811, enacted by Laws 1975, ch. 257, § 3-811.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Presentation of claim to executor or administrator as prerequisite of its availability as counterclaim or setoff, 36 A.L.R.3d 693.

34 C.J.S. Executors and Administrators §§ 468, 470.

45-3-812. Execution and levies prohibited.

No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages, pledges or liens upon real or personal property in an appropriate proceeding.

History: 1953 Comp., § 32A-3-812, enacted by Laws 1975, ch. 257, § 3-812.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Family allowance from decedent's estate as exempt from attachment, garnishment, execution and foreclosure, 27 A.L.R.3d 863.

45-3-813. Compromise of claims.

When a claim against the estate has been presented in any manner, the personal representative may, if it appears for the best interest of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated.

History: 1953 Comp., § 32A-3-813, enacted by Laws 1975, ch. 257, § 3-813.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Power and responsibility of executor or administrator to compromise claim due estate, 72 A.L.R.2d 191.

Power and responsibility of executor or administrator to compromise claim against estate, 72 A.L.R.2d 243.

Power and responsibility of executor or administrator as to compromise or settlement of action or cause of action for death, 72 A.L.R.2d 285.

Effect of settlement with and acceptance of release from one wrongful death beneficiary upon liability of tortfeasor to other beneficiaries or decedent's personal representative, 21 A.L.R.4th 275.

34 C.J.S. Executors and Administrators § 469.

45-3-814. Encumbered assets.

If any assets of the estate are encumbered by mortgage, pledge, lien or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has presented a claim, if it appears to be for the best interest of the estate. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration.

History: 1953 Comp., § 32A-3-814, enacted by Laws 1975, ch. 257, § 3-814; 1976 (S.S.), ch. 37, § 13.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-814 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of executor or administrator personally to purchase and enforce mortgage or other lien on real property of decedent, 117 A.L.R. 1371.

33 C.J.S. Executors and Administrators §§ 189, 201; 34 C.J.S. Executors and Administrators §§ 468, 470.

45-3-815. Administration in more than one state; duty of personal representative.

A. All assets of estates being administered in New Mexico are subject to all claims, allowances and charges existing or established against the personal representative wherever appointed.

B. If the estate, either in New Mexico or as a whole, is insufficient to cover all family exemptions and allowances (as determined by the law of the decedent's domicile), prior charges and claims, after satisfaction of the exemptions, allowances and charges, each claimant whose claim has been allowed, either in New Mexico or elsewhere in administrations of which the personal representative is aware, is entitled to receive payment of an equal proportion of his claim. If a preference or security in regard to a claim is allowed in another jurisdiction but not in New Mexico, the creditor so benefited

is to receive distributions from local assets only upon the balance of his claim after deducting the amount of the benefit.

C. In case the family exemptions and allowances, prior charges and claims of the entire estate exceed the total value of the portions of the estate being administered separately, and New Mexico is not the state of the decedent's last domicile, the claims allowed in New Mexico shall be paid their proportion if local assets are adequate for that purpose, and the balance of local assets shall be transferred to the domiciliary personal representative. If local assets are not sufficient to pay all claims owed in New Mexico in the amount to which they are entitled, local assets shall be marshalled so that each claim allowed in this state is paid its correct proportion as far as possible, after taking into account all distributions on claims allowed in New Mexico from assets in other jurisdictions.

History: 1953 Comp., § 32A-3-815, enacted by Laws 1975, ch. 257, § 3-815.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-815 UPC.

Foreign wrongful death judgment enforceable. — The Uniform Probate Code, as adopted in New Mexico, allows the enforcement of a wrongful death judgment entered in another jurisdiction. Torrez v. State Farm Mut. Auto. Ins. Co., 705 F.2d 1192 (10th Cir. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of executor or administrator personally to purchase and enforce mortgage or other lien on real property of decedent, 117 A.L.R. 1371.

34 C.J.S. Executors and Administrators §§ 368, 478.

45-3-816. Final distribution to domiciliary representative.

The estate of a nonresident decedent being administered by a personal representative appointed in New Mexico shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless:

A. by virtue of the decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant to the local law of New Mexico without reference to the local law of the decedent's domicile;

B. the personal representative of New Mexico, after reasonable inquiry, is unaware of existence or identity of a domiciliary personal representative; or

C. the court orders otherwise in a proceeding for a closing order under Section 3-1001 [45-3-1001 NMSA 1978] or incident to the closing of a supervised administration.

History: 1953 Comp., § 32A-3-816, enacted by Laws 1975, ch. 257, § 3-816.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 1006.

PART 9
SPECIAL PROVISIONS RELATING TO DISTRIBUTION

45-3-901. Successors' rights if no administration.

In the absence of administration, the heirs and devisees are entitled to the estate in accordance with the terms of a probated will or the laws of intestate succession. Devisees may establish title by the probated will to devised property. Persons entitled to property by the family allowance, personal property allowance or intestacy may establish title thereto by proof of the decedent's ownership, his death and their relationship to the decedent. Successors take subject to all charges incident to adminstration [administration], including the claims of creditors and allowances of surviving spouse and dependent children, and subject to the rights of others resulting from abatement, retainer, advancement and ademption.

History: 1953 Comp., § 32A-3-901, enacted by Laws 1975, ch. 257, § 3-901.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-901 UPC.

Bracketed material. — The bracketed material was inserted material by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Executors and Administrators § 1012 et seq.

26A C.J.S. Descent and Distribution § 61; 95 C.J.S. Wills § 310.

45-3-902. Distribution; order in which assets appropriated; abatement.

A. Except as provided in Subsection C of this section, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

(1) property not disposed of by the will;

(2) residuary devises;

(3) general devises; and

(4) specific devises.

B. For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged and, upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

C. If the will expresses an order of abatement or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in Subsection A of this section, the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

D. If an estate of a decedent consists partly of separate property and partly of community property, the debts and expenses of administration shall be apportioned and charged against the different kinds of property in accordance with the provisions of Subsection B of Section 45-2-805 NMSA 1978.

E. If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in or contribution from other interests in the remaining assets.

History: 1953 Comp., § 32A-3-902, enacted by Laws 1975, ch. 257, § 3-902; 1995, ch. 210, § 43.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-902 UPC.

Cross references. — For sale of specifically devised or bequeathed property to pay proportionate amount of estate taxes, *see* 7-7-11 NMSA 1978.

For community and separate property, *see* the Community Property Act of 1973, 40-3-6 through 40-3-17 NMSA 1978.

The 1995 amendment, effective July 1, 1995, substituted "Section 45-2-805 NMSA 1978" for "Section 2-804" at the end in Subsection D.

Abatement to satisfy decedent's promissory note. — Where decedent made a promissory note payable to decedent; decedent's surviving spouse did not sign the note; and decedent's will bequeathed the note and the remainder of decedent's separate property to decedent's child and devised decedent's interest in real and community property to decedent's spouse, because decedent's spouse did not sign the note, the note was payable from the separate and community personal property of decedent's estate, first from the real and personal property in the residuary devise to decedent's child and then proportionately from the specific legacies and no part of the community real property could be assessed to pay any balance due. Shadden v. Shadden, 93 N.M. 274, 599 P.2d 1071 (Ct. App. 1979), overruled Huntington Nat'l Bank v. Sproul, 116 N.M. 254, 816 P.2d 935 (1993).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

For article, "Survey of New Mexico Law, 1979-80: Estates and Trusts," see 11 N.M.L. Rev. 151 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Preference among general legacies as regards abatement, 34 A.L.R. 1247.

Specific devises and specific legacies as subject to ratable contribution for payment of debts, 42 A.L.R. 1519.

Construction and effect of provisions of will regarding abatement of legacies or devises in event of insufficiency of assets to pay all in full, 101 A.L.R. 704.

Right of executor, administrator or testamentary trustee to allowance of attorney's fees and expenses incident to controversy over surcharging his account, 101 A.L.R. 806.

Doctrine of election as applicable as against beneficiary of will where provision for other beneficiary is invalid, not for reasons personal to former but because of statute or public policy, 112 A.L.R. 377.

Depreciation of assets of decedent's estate between final settlement, but after partial distribution or setting up of trust, 114 A.L.R. 458.

Preference as regards life interest created by will as carrying similar preference in respect of remainder interest, 117 A.L.R. 1339.

Fund remaining at termination of trust or annuity as applicable to make up deficiencies in particular bequest in preference to claims of residuary beneficiaries, 118 A.L.R. 352.

Charging specific legacy of stock of close corporation to pay general legacy for which assets of estate are otherwise insufficient, 144 A.L.R. 546.

Surviving spouse who accepts provision of will in lieu of dower or other marital rights, priority over other legatees, devisees and creditors, 2 A.L.R.2d 607.

Who must bear loss occasioned by election against will, 36 A.L.R.2d 291.

Right of devisee of real property specifically devised but subject to mortgage to relief from specific devisee of other property, 72 A.L.R.2d 383.

Conclusiveness of testator's statement as to amount of debt or advancement to be charged against legacy or devise, 98 A.L.R.2d 273.

Bequest of stated amount to several legatees as entitling each to full amount or proportionate share thereof, 1 A.L.R.3d 479.

Allocation, as between income and principal, of income on property used in paying legacies, debts and expenses, 2 A.L.R.3d 1061.

Right of heir or devisee to have realty exonerated from lien thereon at expense of personal estate, 4 A.L.R.3d 1023.

Ademption of legacy of business or interest therein, 65 A.L.R.3d 541.

34 C.J.S. Executors and Administrators § 482; 96 C.J.S. Wills § 1153.

45-3-903. Successor's indebtedness offset against interest; defenses.

The amount of a noncontingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.

History: 1953 Comp., § 32A-3-903, enacted by Laws 1975, ch. 257, § 3-903.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 494.

45-3-904. Interest on general pecuniary devise.

General pecuniary devises bear interest at five percent per annum beginning one year after the first appointment of a personal representative until payment, unless a

contrary intent is indicated by the will or unless distribution is withheld under the provisions of a court order upon a showing of good cause by the personal representative.

History: 1953 Comp., § 32A-3-904, enacted by Laws 1975, ch. 257, § 3-904.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-904 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Bequest of bank deposits, stocks, bonds, notes or other securities as carrying dividends or interest accruing between testator's death and payment of legacy, 15 A.L.R.3d 1038.

97 C.J.S. Wills § 1345.

45-3-905. Reserved.

ANNOTATIONS

Compiler's notes. — Laws 1975, ch. 257, § 3-905, contained this section number, but no accompanying text.

45-3-906. Distribution in kind; valuation; method.

A. Unless a contrary intention is indicated by the will, the distributable assets of a decedent's estate shall be distributed in kind to the extent possible through application of the following provisions:

(1) a specific devisee is entitled to distribution of the thing devised to him, and a spouse or child who has selected particular assets of an estate as provided in Section 45-2-402 NMSA 1978 shall receive the items selected;

(2) any family allowance, personal property allowance or devise of a stated sum of money may be satisfied in kind, provided:

(a) the person entitled to the payment has not demanded payment in cash;

(b) the property distributed in kind is valued at fair market value as of the date of its distribution; and

(c) no residuary devisee has requested that the asset in question remain a part of the residue of the estate; and

(3) the residuary estate shall be distributed in any equitable manner.

B. For the purpose of valuation pursuant to Paragraph (2) of Subsection A of this section, securities regularly traded on recognized exchanges, if distributed in kind, are valued at the price for the last sale of like securities traded on the business day prior to distribution or, if there was no sale on that day, at the median between amounts bid and offered at the close of that day. Assets consisting of sums owed the decedent or the estate by solvent debtors as to which there is no known dispute or defense are valued at the sum due with accrued interest or discounted to the date of distribution. For assets that do not have readily ascertainable values, a valuation as of a date not more than thirty days prior to the date of distribution, if otherwise reasonable, controls. For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable way, including the employment of qualified appraisers, even if the assets may have been previously appraised.

C. After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, if not waived earlier in writing, terminates if he fails to object in writing received by the personal representative within thirty days after mailing or delivery of the proposal.

History: 1953 Comp., § 32A-3-906, enacted by Laws 1975, ch. 257, § 3-906; 1993, ch. 174, § 76.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-906 UPC.

The 1993 amendment, effective July 1, 1993, in Subsection A, substituted "45-2-402 NMSA 1978" for "2-402" in Paragraph (1), substituted "of a stated sum of money may be satisfied in kind" for "payable in money may be satisfied by value in kind" in the introductory paragraph of Paragraph (2), rewrote Paragraph (3) which read "the residuary estate shall be distributed in kind if there is no objection to the proposed distribution and it is practicable to distribute undivided interests. In other cases, residuary property may be converted into cash for distribution" and made minor stylistic changes throughout the section.

Effect of request for formal proceeding. — Where a distributee has requested, and the personal representative has agreed to, adjudication of the distributee's share of estate assets in a formal proceeding, and neither the parties nor the district court have agreed to or ordered any change in the nature of the proceeding, procedures provided by Subsection C, relating to proposals for distribution in informal proceedings, are inapplicable. Estates of Brown v. Brown, 2000-NMCA-030, 128 N.M. 825, 999 P.2d 1057.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of recovery against person to whom, by mistake of law, property of decedent's estate has been improperly distributed, 147 A.L.R. 121.

Title of, or right to possession by, specific legatee prior to order or decree of distribution, 150 A.L.R. 91.

Time within which personal representative must commence action for refund of legacy or distribution, 29 A.L.R.2d 1248.

Fiduciary's compensation on estate assets distributed in kind, 32 A.L.R.2d 778.

Family settlement of testator's estate, 29 A.L.R.3d 8.

34 C.J.S. Executors and Administrators § 492.

45-3-907. Distribution in kind; evidence.

If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property.

History: 1953 Comp., § 32A-3-907, enacted by Laws 1975, ch. 257, § 3-907.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-907 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 488.

45-3-908. Distribution; right or title of distributee.

Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all interested persons. However, the personal representative may recover the assets or their value if the distribution was improper.

History: 1953 Comp., § 32A-3-908, enacted by Laws 1975, ch. 257, § 3-908.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-908 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 488.

45-3-909. Improper distribution; liability of distributee.

Unless the distribution or payment no longer can be questioned because of adjudication, estoppel or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and the income and gain from that property received by him.

History: 1953 Comp., § 32A-3-909, enacted by Laws 1975, ch. 257, § 3-909.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-909 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators §§ 502, 504, 510.

45-3-910. Purchases from distributees protected.

If property distributed in kind or a security interest therein is acquired for value by a purchaser from or lender to a distributee who has received an instrument or deed of distribution from the personal representative, or is so acquired by a purchaser from or lender to a transferee from such distributee, the purchaser or lender takes title free of rights of any interested person in the estate and incurs no personal liability to the estate, or to any interested person, whether or not the distribution was proper or supported by court order or the authority of the personal representative was terminated before execution of the instrument or deed. This section protects a purchaser from or lender to a distributee who, as personal representative, has executed a deed of distribution to himself, as well as a purchaser from or lender to any other distributee or transferee. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind, even if the personal representative and the distributee are the same person, or whether the authority of the personal representative had terminated before the distribution.

History: 1953 Comp., § 32A-3-910, enacted by Laws 1975, ch. 257, § 3-910; repealed and reenacted by Laws 1993, ch. 174, § 77.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-910 UPC.

Repeals and reenactments. — Laws 1993, ch. 174, § 77 repealed 45-3-910 NMSA 1978, as enacted by Laws 1975, ch. 257, § 3-910, and enacted a new section, effective July 1, 1993.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26A C.J.S. Descent and Distribution § 78; 96 C.J.S. Wills § 1121.

45-3-911. Partition for purpose of distribution.

A. When two or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the heirs or devisees may petition the district court prior to the formal or informal closing of the estate, to make partition.

B. After notice to the interested heirs or devisees, the district court shall partition the property.

C. The district court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the interested heirs and devisees and which cannot conveniently be allotted to any one party.

History: 1953 Comp., § 32A-3-911, enacted by Laws 1975, ch. 257, § 3-911.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-911 UPC.

Jurisdiction to liquidate business. — District courts sitting in probate possess general civil jurisdiction in formal probate proceedings; therefore, a trial court had jurisdiction to liquidate a business pursuant to either 45-3-911 or 53-16-16 NMSA 1978. Harrington v. Bannigan, 2000-NMCA-058, 129 N.M. 266, 5 P.3d 1070.

Where property at issue consists of a single-family home, it is unlikely the property could be partitioned without prejudice to one of the heirs, nor can it be allotted to one heir, where there are no other assets in the estate. Therefore, unless the parties are able to reach a settlement, the court has two options: the parties may retain undivided interests in the property as tenants-in-common, or the property may be sold and the proceeds divided. Trujillo v. Lopez, 106 N.M. 157, 740 P.2d 707 (Ct. App. 1987).

No forced sell. — There is no statutory authority for the court to force one heir to sell her undivided interest to the other. Trujillo v. Lopez, 106 N.M. 157, 740 P.2d 707 (Ct. App. 1987).

Partition determined by probate court. — Where an heir with an undivided property interest requests partition, it should be determined by the court conducting the probate

proceedings, rather than in a separate action. Trujillo v. Lopez, 106 N.M. 157, 740 P.2d 707 (Ct. App. 1987).

Law reviews. — For 1986-88 survey of New Mexico law of real property, see 19 N.M.L. Rev. 751 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of executor or administrator to bring proceedings for partition of real property, 57 A.L.R. 573.

Testamentary provision operating to prohibit or postpone partition, 85 A.L.R. 1321.

Rights of surviving spouse and children in proceeds of partition sale of homestead in decedent's estate, 6 A.L.R.2d 515.

Pleading in partition action to authorize incidental relief, 11 A.L.R.2d 1449.

Timber rights as subject to partition, 21 A.L.R.2d 618.

45-3-912. Private agreements among successors to decedent binding on personal representative.

Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing in this section relieves trustees of any duties owed to beneficiaries of trusts.

History: 1953 Comp., § 32A-3-912, enacted by Laws 1975, ch. 257, § 3-912.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-912 UPC.

Agreement valid. — Where the decedent entered into a lease/purchase contract with defendants to sell decedent's ranch to defendants for a nominal sum; decedent's will bequeathed $10,000 to plaintiff who is decedent's child and devised the remainder of decedent's estate to a foundation; plaintiff and the foundation agreed to file an action to set aside the lease/purchase contract, and in exchange for the payment of all litigation

expenses, the foundation agreed to sell the ranch to plaintiff for a nominal sum; if the court set aside the lease/purchase contract, the agreement between plaintiff and the foundation legally altered their interests under the will and only affected their interests and was valid under New Mexico law. Reinhardt v. Kelly, 1996-NMCA-050, 121 N.M. 964, 917 P.2d 963.

No agreement found. — Even if the deceased child of decedent had acquiesced to the decedent's conservator's sale of a property which had been specifically devised to the deceased child, the deceased child's acquiescence would be insufficient to waive the deceased child's surviving childrens' rights under the will, since no written contract executed by decedent's successors was entered into evidence as required by 45-3-912 NMSA 1978 of the Uniform Probate Code. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

This section is effectively a mini-statute of frauds which does not require that the agreement be in the form of a single formal written document. Tyrrell v. McCaw, 103 N.M. 539, 710 P.2d 733 (1985).

Law reviews. — For annual survey of New Mexico law of estates and trusts, see 19 N.M.L. Rev. 669 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Provision for post-mortem payment or performance as affecting instrument's character and validity as a contract, 1 A.L.R.2d 1178.

Family settlement of testator's estate, 29 A.L.R.3d 8.

Effect of settlement with and acceptance of release from one wrongful death beneficiary upon liability of tortfeasor to other beneficiaries or decedent's personal representative, 21 A.L.R.4th 275.

26A C.J.S. Descent and Distribution § 73; 96 C.J.S. Wills § 1110.

45-3-913. Distributions to trustee.

A. Before distributing to a trustee, the personal representative may require that the trust be registered if the state in which it is to be administered provides for registration and that the trustee inform the beneficiaries as provided in Section 46A-8-813 NMSA 1978.

B. If the trust instrument does not excuse the trustee from giving bond, the personal representative may petition the appropriate court to require that the trustee post bond if the personal representative apprehends that distribution might jeopardize the interests of persons who are not able to protect themselves, and the personal representative may withhold distribution until the court has acted.

C. No inference of negligence on the part of the personal representative shall be drawn from the personal representative's failure to exercise the authority conferred by Subsections A and B of this section.

History: 1953 Comp., § 32A-3-913, enacted by Laws 1975, ch. 257, § 3-913; 1995, ch. 210, § 44; 2011, ch. 124, § 48.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-913 UPC.

The 2011 amendment, effective January 1, 2012, in Subsection A, changed the statutory reference to Section 46A-8-813 NMSA 1978.

The 1995 amendment, effective July 1, 1995, added Subsection A; redesignated former Subsections A and B as Subsections B and C; and substituted "Subsections A and B" for "Subsection A" in Subsection C.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Conflict of laws as to administration of testamentary trusts and proper forum for judicial proceedings relating thereto, 115 A.L.R. 802.

34 C.J.S. Executors and Administrators § 482.

45-3-914. Disposition of unclaimed assets.

If an heir, devisee or claimant cannot be found, the personal representative shall distribute the share of the missing person to his conservator, if any. Otherwise, the personal representative shall sell the share of the missing person and distribute the proceeds to the state treasurer as prescribed by the Uniform Unclaimed Property Act [Chapter 7, Article 8A NMSA 1978].

History: 1953 Comp., § 32A-3-914, enacted by Laws 1975, ch. 257, § 3-914; 1993, ch. 174, § 78.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-914 UPC.

The 1993 amendment, effective July 1, 1993, substituted "Uniform Unclaimed Property Act" for "Uniform Disposition of Unclaimed Property Act Sections 22-22-1 through 22-22-29 NMSA 1953".

Escheat to state. — In the event of the death of a patient for whom there are no records of dependents, relatives, friends or beneficiaries, the disposition of personal effects and/or moneys left at the hospital by the deceased should be escheated to the state. 1961-62 Op. Att'y Gen. No. 61-116 (opinion rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Necessity of judicial proceedings to vest title to real property in state by escheat, 23 A.L.R. 1237, 79 A.L.R. 1364.

Necessity and sufficiency of notice to support title by escheat to decedent's estate, 48 A.L.R. 1342.

Inheritance from illegitimate, 48 A.L.R.2d 759.

Escheat of personal property of intestate domiciled or resident in another state, 50 A.L.R.2d 1375.

Duty and liability of executor with respect to locating and noticing legatees, devisees or heirs, 10 A.L.R.3d 547.

30A C.J.S. Escheat §§ 4 to 6.

45-3-915. Distribution to person under disability.

A. A personal representative may discharge an obligation to distribute to a minor or person under other disability by distributing in a manner expressly provided in the will or other governing instrument.

B. Unless contrary to an express provision in the will or other governing instrument, the personal representative may discharge an obligation to distribute to a minor or person under other disability as authorized by Section 45-5-103 NMSA 1978 or any other statute. If the personal representative knows that a conservator has been appointed or that a proceeding for appointment of a conservator is pending, the personal representative is authorized to distribute only to the conservator.

C. If the heir or devisee is under disability other than minority, the personal representative is authorized to distribute to:

(1) an agent who has authority under a power of attorney to receive property for that person; or

(2) the spouse, parent or other close relative with whom the person under disability resides if the distribution is of amounts not exceeding ten thousand dollars ($10,000) a year or property not exceeding fifty thousand dollars ($50,000) in value unless the court authorizes a larger amount or greater value.

D. Persons receiving money or property for the disabled person are obligated to apply the money or property to the support of the disabled person. Persons may not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the support of the disabled person. Excess sums must be preserved for future support of the disabled person. The personal representative is not responsible for the proper application of money or property distributed pursuant to this subsection.

History: 1953 Comp., § 32A-3-915, enacted by Laws 1975, ch. 257, § 3-915; 1993, ch. 174, § 79; 2011, ch. 124, § 49.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-915 UPC.

The 2011 amendment, effective January 1, 2012, in Subsections A and B, provided that distributions are governed by wills and other governing instruments; in Subsection B, changed the statutory reference to Section 45-5-103 NMSA 1978; and in Subsection C, increased the maximum amount of the distribution to fifty thousand dollars.

The 1993 amendment, effective July 1, 1993, designated the formerly undesignated provision as Subsection A; substituted "in a manner expressly provided in the will" for "to his conservator or any other person authorized by the Uniform Probate Code or otherwise to give a valid receipt and discharge for the distribution" in Subsection A; and added Subsections B and C.

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 497.

45-3-916. Repealed.

ANNOTATIONS

Repeals. — Laws 2005, ch. 143, § 18 repealed 45-3-916, relating to apportionment of estate taxes, effective July 1, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMONESOURCE.COM*. For the comparable provisions governing apportionment of estate taxes, *see* the Uniform Estate Tax Apportionment Act, 45-3-920 through 45-3-930 NMSA 1978..

45-3-920. Short title.

Sections 5 through 17 [15] [45-3-920 through 45-3-930 NMSA 1978] of this act may be cited as the "Uniform Estate Tax Apportionment Act".

History: Laws 2005, ch. 143, § 5; 1978 Comp., § 45-9A-1 recompiled as § 45-3-920 by Laws 2011, ch. 124, § 99.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2005, ch. 143, § 16, relating to uniformity of application and construction of the Uniform Estate Tax Apportionment Act, was repealed by Laws 2011, ch. 124, § 97, effective January 1, 2012.

Laws 2005, ch. 143, § 17, relating to severability, was repealed by Laws 2011, ch. 124, § 97, effective January 1, 2012.

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-1 NMSA 1978 as 45-3-920 NMSA 1978, effective January 1, 2012.

Law reviews. — For annual survey of New Mexico law of estates and trusts, see 19 N.M.L. Rev. 669 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 42 Am. Jur. 2d Inheritance, Estate, and Gift Taxes § 341 et seq.

What law governs apportionment of estate taxes among persons interested in estate, 16 A.L.R.2d 1282.

Construction and effect of provisions of will relied upon as affecting the burden of taxation, 37 A.L.R.2d 7, 70 A.L.R.3d 630.

Statutes apportioning or prorating estate taxes, 37 A.L.R.2d 199.

Liability of executor or administrator to estate because of overpaying or unnecessarily paying tax, 55 A.L.R.3d 785.

26A C.J.S. Descent and Distribution § 72; 85 C.J.S. Taxation §§ 1167, 1168; 96 C.J.S. Wills §§ 1109, 1171.

45-3-921. Definitions.

As used in the Uniform Estate Tax Apportionment Act [45-3-920 through 45-3-930 NMSA 1978]:

A. "apportionable estate" means the value of the gross estate as finally determined for purposes of the estate tax to be apportioned reduced by:

(1) any claim or expense allowable as a deduction for purposes of the tax;

(2) the value of any interest in property that, for purposes of the tax, qualifies for a marital or charitable deduction or otherwise is deductible or is exempt; and

(3) any amount added to the decedent's gross estate because of a gift tax on transfers made before death;

B. "estate tax" means a federal, state or foreign tax imposed because of the death of an individual and interest and penalties associated with the tax. The term does not include an inheritance tax, income tax or generation-skipping transfer tax other than a generation-skipping transfer tax incurred on a direct skip taking effect at death;

C. "gross estate" means, with respect to an estate tax, all interests in property subject to the tax;

D. "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, agency or instrumentality, or any other legal or commercial entity;

E. "ratable" means apportioned or allocated pro rata according to the relative values of interests to which the term is to be applied. "Ratably" has a corresponding meaning;

F. "time-limited interest" means an interest in property which terminates on a lapse of time or on the occurrence or nonoccurrence of an event or which is subject to the exercise of discretion that could transfer a beneficial interest to another person. The term does not include a cotenancy unless the cotenancy itself is a time-limited interest; and

G. "value" means, with respect to an interest in property, fair market value as finally determined for purposes of the estate tax that is to be apportioned, reduced by any outstanding debt secured by the interest without reduction for taxes paid or required to be paid or for any special valuation adjustment.

History: Laws 2005, ch. 143, § 6; 1978 Comp., § 45-9A-2 recompiled as § 45-3-921 by Laws 2011, ch. 124, § 99.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-2 NMSA 1978 as 45-3-921 NMSA 1978, effective January 1, 2012.

45-3-922. Apportionment by will or other dispositive instrument.

A. Except as otherwise provided in Subsection C of this section, the following rules apply:

(1) to the extent that a provision of a decedent's will expressly and unambiguously directs the apportionment of an estate tax, the tax must be apportioned accordingly;

(2) any portion of an estate tax not apportioned pursuant to Paragraph (1) of this subsection must be apportioned in accordance with any provision of a revocable trust of which the decedent was the settlor that expressly and unambiguously directs the apportionment of an estate tax. If conflicting apportionment provisions appear in two or more revocable trust instruments, the provision in the most recently dated instrument prevails. For purposes of this paragraph:

(a) a trust is revocable if it was revocable immediately after the trust instrument was executed, even if the trust subsequently becomes irrevocable; and

(b) the date of an amendment to a revocable trust instrument is the date of the amended instrument only if the amendment contains an apportionment provision; and

(3) if any portion of an estate tax is not apportioned pursuant to Paragraph (1) or (2) of this subsection, and a provision in any other dispositive instrument expressly and unambiguously directs that any interest in the property disposed of by the instrument is or is not to be applied to the payment of the estate tax attributable to the interest disposed of by the instrument, the provision controls the apportionment of the tax to that interest.

B. Subject to Subsection C of this section, and unless the decedent expressly and unambiguously directs the contrary, the following rules apply:

(1) if an apportionment provision directs that a person receiving an interest in property under an instrument is to be exonerated from the responsibility to pay an estate tax that would otherwise be apportioned to the interest:

(a) the tax attributable to the exonerated interest must be apportioned among the other persons receiving interests passing under the instrument; or

(b) if the values of the other interests are less than the tax attributable to the exonerated interest, the deficiency must be apportioned ratably among the other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax;

(2) if an apportionment provision directs that an estate tax is to be apportioned to an interest in property a portion of which qualifies for a marital or charitable deduction, the estate tax must first be apportioned ratably among the holders of the portion that does not qualify for a marital or charitable deduction and then apportioned ratably among the holders of the deductible portion to the extent that the value of the nondeductible portion is insufficient;

(3) except as otherwise provided in Paragraph (4) of this subsection, if an apportionment provision directs that an estate tax be apportioned to property in which one or more time-limited interests exist, other than interests in specified property under Section 11 [45-3-926 NMSA 1978] of this act, the tax must be apportioned to the principal of that property, regardless of the deductibility of some of the interests in that property; and

(4) if an apportionment provision directs that an estate tax is to be apportioned to the holders of interests in property in which one or more time-limited interests exist and a charity has an interest that otherwise qualifies for an estate tax charitable deduction, the tax must first be apportioned, to the extent feasible, to interests in property that have not been distributed to the persons entitled to receive the interests.

C. A provision that apportions an estate tax is ineffective to the extent that it increases the tax apportioned to a person having an interest in the gross estate over which the decedent had no power to transfer immediately before the decedent executed the instrument in which the apportionment direction was made. For purposes of this subsection, a testamentary power of appointment is a power to transfer the property that is subject to the power.

History: Laws 2005, ch. 143, § 7; 1978 Comp., § 45-9A-3 recompiled as § 45-3-922 by Laws 2011, ch. 124, § 99.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-3 NMSA 1978 as 45-3-922 NMSA 1978, effective January 1, 2012.

45-3-923. Statutory apportionment of estate taxes.

To the extent that apportionment of an estate tax is not controlled by an instrument described in Section 7 [45-3-922 NMSA 1978] of this act and except as otherwise provided in Sections 10 and 11 of this act [45-3-925 and 45-3-926 NMSA 1978], the following rules apply:

A. subject to Subsections B, C and D of this section, the estate tax is apportioned ratably to each person that has an interest in the apportionable estate;

B. a generation-skipping transfer tax incurred on a direct skip taking effect at death is charged to the person to which the interest in property is transferred;

C. if property is included in the decedent's gross estate because of Section 2044 of the federal Internal Revenue Code of 1986 or any similar estate tax provision, the difference between the total estate tax for which the decedent's estate is liable and the amount of estate tax for which the decedent's estate would have been liable if the property had not been included in the decedent's gross estate is apportioned ratably among the holders of interests in the property. The balance of the tax, if any, is apportioned ratably to each other person having an interest in the apportionable estate; and

D. except as otherwise provided in Paragraph (4) of Subsection B of Section 7 of this act [45-3-922 NMSA 1978] and except as to property to which Section 11 [45-3-926 NMSA 1978] of this act applies, an estate tax apportioned to persons holding interests in property subject to a time-limited interest must be apportioned, without further apportionment, to the principal of that property.

History: Laws 2005, ch. 143, § 8; 1978 Comp., § 45-9A-4 recompiled as § 45-3-923 by Laws 2011, ch. 124, § 99.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-4 NMSA 1978 as 45-3-923 NMSA 1978, effective January 1, 2012.

45-3-924. Credits and deferrals.

Except as otherwise provided in Sections 10 and 11 of this act [45-3-925 and 45-3-926 NMSA 1978], the following rules apply to credits and deferrals of estate taxes:

A. a credit resulting from the payment of gift taxes or from estate taxes paid on property previously taxed inures ratably to the benefit of all persons to which the estate tax is apportioned;

B. a credit for state or foreign estate taxes inures ratably to the benefit of all persons to which the estate tax is apportioned, except that the amount of a credit for a state or foreign tax paid by a beneficiary of the property on which the state or foreign tax was imposed, directly or by a charge against the property, inures to the benefit of the beneficiary; and

C. if payment of a portion of an estate tax is deferred because of the inclusion in the gross estate of a particular interest in property, the benefit of the deferral inures ratably to the persons to which the estate tax attributable to the interest is apportioned. The burden of any interest charges incurred on a deferral of taxes and the benefit of any tax

deduction associated with the accrual or payment of the interest charge is allocated ratably among the persons receiving an interest in the property.

History: Laws 2005, ch. 143, § 9; 1978 Comp., § 45-9A-5 recompiled as § 45-3-924 by Laws 2011, ch. 124, § 99.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-5 NMSA 1978 as 45-3-924 NMSA 1978, effective January 1, 2012.

45-3-925. Insulated property; advancement of tax.

A. In this section:

(1) "advanced fraction" means a fraction that has as its numerator the amount of the advanced tax and as its denominator the value of the interests in insulated property to which that tax is attributable;

(2) "advanced tax" means the aggregate amount of estate tax attributable to interests in insulated property that is required to be advanced by uninsulated holders under Subsection C of this section;

(3) "insulated property" means property subject to a time-limited interest that is included in the apportionable estate but is unavailable for payment of an estate tax because of impossibility or impracticability;

(4) "uninsulated holder" means a person who has an interest in uninsulated property; and

(5) "uninsulated property" means property included in the apportionable estate other than insulated property.

B. If an estate tax is to be advanced pursuant to Subsection C of this section by persons holding interests in uninsulated property subject to a time-limited interest other than property to which Section 11 of this act [45-3-926 NMSA 1978] applies, the tax must be advanced, without further apportionment, from the principal of the uninsulated property.

C. Subject to Subsections B and D of Section 13 [45-3-928 NMSA 1978] of this act, an estate tax attributable to interests in insulated property must be advanced ratably by uninsulated holders. If the value of an interest in uninsulated property is less than the amount of estate taxes otherwise required to be advanced by the holder of that interest, the deficiency must be advanced ratably by the persons holding interests in properties that are excluded from the apportionable estate under Paragraph (2) of Subsection A of

Section 6 of this act [45-3-921 NMSA 1978] as if those interests were in uninsulated property.

D. A court having jurisdiction to determine the apportionment of an estate tax may require a beneficiary of an interest in insulated property to pay all or part of the estate tax otherwise apportioned to the interest if the court finds that it would be substantially more equitable for that beneficiary to bear the tax liability personally than for that part of the tax to be advanced by uninsulated holders.

E. When a distribution of insulated property is made, each uninsulated holder may recover from the distributee a ratable portion of the advanced fraction of the property distributed. To the extent that undistributed insulated property ceases to be insulated, each uninsulated holder may recover from the property a ratable portion of the advanced fraction of the total undistributed property.

F. Upon a distribution of insulated property for which, pursuant to Subsection D of this section, the distributee becomes obligated to make a payment to uninsulated holders, a court may award an uninsulated holder a recordable lien on the distributee's property to secure the distributee's obligation to that uninsulated holder.

History: Laws 2005, ch. 143, § 10; 1978 Comp., § 45-9A-6 recompiled as § 45-3-925 by Laws 2011, ch. 124, § 99.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-6 NMSA 1978 as 45-3-925 NMSA 1978, effective January 1, 2012.

45-3-926. Apportionment and recapture of special elective benefits.

A. In this section:

(1) "special elective benefit" means a reduction in an estate tax obtained by an election for:

(a) a reduced valuation of specified property that is included in the gross estate;

(b) a deduction from the gross estate, other than a marital or charitable deduction, allowed for specified property; or

(c) an exclusion from the gross estate of specified property; and

(2) "specified property" means property for which an election has been made for a special elective benefit.

B. If an election is made for one or more special elective benefits, an initial apportionment of a hypothetical estate tax must be computed as if no election for any of those benefits had been made. The aggregate reduction in estate tax resulting from all elections made must be allocated among holders of interests in the specified property in the proportion that the amount of deduction, reduced valuation or exclusion attributable to each holder's interest bears to the aggregate amount of deductions, reduced valuations and exclusions obtained by the decedent's estate from the elections. If the estate tax initially apportioned to the holder of an interest in specified property is reduced to zero, any excess amount of reduction reduces ratably the estate tax apportioned to other persons that receive interests in the apportionable estate.

C. An additional estate tax imposed to recapture all or part of a special elective benefit must be charged to the persons that are liable for the additional tax under the law providing for the recapture.

History: Laws 2005, ch. 143, § 11; 1978 Comp., § 45-9A-7 recompiled as § 45-3-926 by Laws 2011, ch. 124, § 99.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-7 NMSA 1978 as 45-3-926 NMSA 1978, effective January 1, 2012.

45-3-927. Securing payment of estate tax from property in possession of fiduciary.

A. A fiduciary may defer a distribution of property until the fiduciary is satisfied that adequate provision for payment of the estate tax has been made.

B. A fiduciary may withhold from a distributee an amount equal to the amount of estate tax apportioned to an interest of the distributee.

C. As a condition to a distribution, a fiduciary may require the distributee to provide a bond or other security for the portion of the estate tax apportioned to the distributee.

History: Laws 2005, ch. 143, § 12; 1978 Comp., § 45-9A-8 recompiled as § 45-3-927 by Laws 2011, ch. 124, § 99.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-8 NMSA 1978 as 45-3-927 NMSA 1978, effective January 1, 2012.

45-3-928. Collection of estate tax by fiduciary.

A. A fiduciary responsible for payment of an estate tax may collect from any person the tax apportioned to and the tax required to be advanced by the person.

B. Except as otherwise provided in Section 10 [45-3-925 NMSA 1978] of this act, any estate tax due from a person that cannot be collected from the person may be collected by the fiduciary from other persons in the following order of priority:

(1) any person having an interest in the apportionable estate that is not exonerated from the tax;

(2) any other person having an interest in the apportionable estate; and

(3) any person having an interest in the gross estate.

C. A domiciliary fiduciary may recover from an ancillary personal representative the estate tax apportioned to the property controlled by the ancillary personal representative.

D. The total tax collected from a person pursuant to the Uniform Estate Tax Apportionment Act [45-3-920 through 45-3-930 NMSA 1978] may not exceed the value of the person's interest.

History: Laws 2005, ch. 143, § 13; 1978 Comp., § 45-9A-9 recompiled as § 45-3-928 by Laws 2011, ch. 124, § 99.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-9 NMSA 1978 as 45-3-928 NMSA 1978, effective January 1, 2012.

45-3-929. Right of reimbursement.

A. A person required under Section 13 [45-3-928 NMSA 1978] of this act to pay an estate tax greater than the amount due from the person under Section 7 or 8 [45-3-922 or 45-3-923 NMSA 1978] of this act has a right to reimbursement from another person to the extent that the other person has not paid the tax required by Section 7 or 8 of this act and a right to reimbursement ratably from other persons to the extent that each has not contributed a portion of the amount collected under Subsection B of Section 13 of this act.

B. A fiduciary may enforce the right of reimbursement under Subsection A of this section on behalf of the person that is entitled to the reimbursement and shall take reasonable steps to do so if requested by the person.

History: Laws 2005, ch. 143, § 14; 1978 Comp., § 45-9A-10 recompiled as § 45-3-929 by Laws 2011, ch. 124, § 99.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-10 NMSA 1978 as 45-3-929 NMSA 1978, effective January 1, 2012.

45-3-930. Action to determine or enforce act.

A fiduciary, transferee or beneficiary of the gross estate may maintain an action for declaratory judgment to have a court determine and enforce the Uniform Estate Tax Apportionment Act [45-3-920 through 45-3-930 NMSA 1978].

History: Laws 2005, ch. 143, § 15; 1978 Comp., § 45-9A-11 recompiled as § 45-3-930 by Laws 2011, ch. 124, § 99.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-11 NMSA 1978 as 45-3-930 NMSA 1978, effective January 1, 2012.

PART 10
CLOSING ESTATES

45-3-1001. Formal proceedings terminating administration; testate or intestate; order of general protection.

A. A personal representative or any interested person may petition for an order of complete settlement of the estate. The personal representative may petition at any time, and any other interested person may petition after one year from the appointment of the original personal representative, except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired.

B. The petition may request the district court to:

(1) determine testacy, if not previously determined;

(2) consider the final account or compel or approve an accounting and distribution;

(3) construe any will or determine heirs; and

(4) adjudicate the final settlement and distribution of the estate.

C. After notice to all interested persons and subsequent hearing, the district court may enter an order or orders, on appropriate conditions, determining the persons

entitled to distribution of the estate, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any interested person.

D. If one or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, the district court, on proper petition for an order of complete settlement of the estate under this section, and after notice to the omitted or unnotified persons and other interested persons determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs.

E. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding shall constitute prima facie proof of due execution of any will previously admitted to probate, or the fact that the decedent left no valid will if the prior proceedings determined this fact.

History: 1953 Comp., § 32A-3-1001, enacted by Laws 1975, ch. 257, § 3-1001.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-1001 UPC.

Compiler's notes. — This section includes within its scope some of the functions of former 31-12-6, 31-12-7 and 31-12-11 to 31-12-15, 1953 Comp.

Cross references. — For necessity for certificate as to estate taxes to allow final settlement, *see* 7-7-8 NMSA 1978.

Applicability of section. — A party seeking to set aside an order admitting the deceased's will to probate was not entitled to relief under this section because he was neither an heir nor a devisee under the will. This section applies only when an heir or devisee was admitted as a party or not given notice of the previous formal testacy proceeding. In re Estate of Newalla, 114 N.M. 290, 837 P.2d 1373 (Ct. App. 1992).

Objections on file from previous appeals may be relied on. — Where the original objections to a final account and report of the administration of an estate are not included in the transcript for an appeal, but are on file with the court from previous appeals, neither the parties nor the appellate court shall be prevented from relying on those objections. Aikens v. Hamilton, 97 N.M. 111, 637 P.2d 542 (1981).

Effect of request for formal proceeding. — Where a distributee has requested, and the personal representative has agreed to adjudication of the distributee's share of estate assets in a formal proceeding, and neither the parties nor the district court have

agreed to or ordered any change in the nature of the proceeding, procedures provided by Subsection C of 45-3-906 NMSA 1978, relating to proposals for distribution in informal proceedings, are inapplicable. Brown v. Brown, 2000-NMCA-030, 128 N.M. 825, 999 P.2d 1057.

Formal testacy proceeding takes precedence. — A will contestant's petition for a formal testacy proceeding filed pursuant to 45-3-401 NMSA 1978 and within the three-year limit of 45-3-108 NMSA 1978 took precedence over a personal representative's petition for settlement and distribution of the estate filed pursuant to this section; procedural rules requiring five days' notice to opposing parties did not apply to the contestant, and her petition should not have been quashed on grounds that she did not produce another will. Vieira v. Estate of Cantu, 1997-NMCA-042, 123 N.M. 342, 940 P.2d 190.

Jurisdictional effect of informal appointment. — The district court had jurisdiction to enter a closing order absent an order entered on a formal petition for appointment challenging the informally appointed personal representative, since the status of personal representative and the powers and duties pertaining to the appointment are fully established by informal appointment, (45-3-307 NMSA 1978) and a personal representative may petition for an order of complete settlement of an estate at any time (45-3-1001A NMSA 1978). Trujillo v. Lopez, 106 N.M. 157, 740 P.2d 707 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Executors and Administrators §§ 1002 to 1011.

Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration, 2 A.L.R.4th 1315.

34 C.J.S. Executors and Administrators § 903.

45-3-1002. Formal proceedings terminating testate administration; order construing will without adjudicating testacy.

A. A personal representative administering an estate under an informally probated will, or any devisee under an informally probated will, may petition for an order of settlement of the estate which will not adjudicate the testacy status of the decedent. The personal representative may petition at any time, and a devisee may petition after one year from the appointment of the original personal representative, except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired.

B. The petition may request the district court to consider the final account or compel or approve an accounting and distribution, to construe the will and adjudicate final settlement and distribution of the estate.

C. After notice to all devisees and the personal representative and hearing, the district court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate under the will and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any devisee who is a party to the proceeding and those he represents.

D. If it appears that a part of the estate is to pass intestate, the proceedings shall be dismissed or amendments made to meet the provisions of Section 3-1001 [45-3-1001 NMSA 1978].

History: 1953 Comp., § 32A-3-1002, enacted by Laws 1975, ch. 257, § 3-1002.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-1002 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 903.

45-3-1003. Closing estates; by sworn statement of personal representative.

A. Unless prohibited by order of the district court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court, no earlier than three months after the date of original appointment of a general personal representative for the estate, a verified statement stating that the personal representative or a previous personal representative has:

(1) determined that the time limited for presentation of creditors' claims has expired;

(2) fully administered the estate of the decedent by making payment, settlement or other disposition of all claims that were presented, expenses of administration and estate, inheritance and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement shall state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees or it shall state in detail other arrangements that have been made to accommodate outstanding liabilities; and

(3) sent a copy of the statement to all distributees of the estate and to all creditors or other claimants of whom the personal representative is aware whose claims are neither paid nor barred and has furnished a full account in writing of the personal

representative's administration to the distributees whose interests are affected thereby, including guardians ad litem appointed pursuant to Section 45-1-403 NMSA 1978, conservators and guardians.

B. If no proceedings involving the personal representative are pending in the district court one year after the closing statement is filed, the appointment of the personal representative terminates.

History: 1953 Comp., § 32A-3-1003, enacted by Laws 1975, ch. 257, § 3-1003; 1983, ch. 194, § 7; 1993, ch. 174, § 81.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-1003 UPC.

The 1993 amendment, effective July 1, 1993, substituted "no earlier than three months after the date of original appointment of a general personal representative for the estate" for "after the time for presenting claims which arose prior to the death of the decedent has expired" in the introductory paragraph of Subsection A; rewrote Paragraph (1) in Subsection A which read "published notice to creditors as provided by Section 45-3-801 NMSA 1978 and that the first publication occurred more than two months prior to the date of the statement"; and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 837.

45-3-1004. Liability of distributees to claimants.

A. After assets of an estate have been distributed and subject to Section 45-3-1006 NMSA 1978, an unpaid claim not barred may be prosecuted in a proceeding against one or more distributees.

B. No distributee shall be liable to claimants for amounts received as family or personal property allowances or for amounts in excess of the value of his distribution as of the time of distribution. As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied in the course of administration.

C. Any distributee who fails to notify other distributees of the demand made upon him by the claimant in sufficient time to permit them to join in any proceeding in which the claim was asserted against him loses his right of contribution against other distributees.

History: 1953 Comp., § 32A-3-1004, enacted by Laws 1975, ch. 257, § 3-1004; 1995, ch. 210, § 45.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-1004 UPC.

The 1995 amendment, effective July 1, 1995, substituted "Section 45-3-1006 NMSA" for "Section 3-1006" in Subsection A; inserted "received as family or personal property allowances or for amounts" in the first sentence in Subsection B; and made a minor stylistic change.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26A C.J.S. Descent and Distribution § 116; 97 C.J.S. Wills § 1311.

45-3-1005. Limitations on proceedings against personal representative.

Unless previously barred by adjudication and except as provided in the closing statement, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert such rights is commenced within six months after the filing of the closing statement. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation or inadequate disclosure related to the settlement of the decedent's estate.

History: 1953 Comp., § 32A-3-1005, enacted by Laws 1975, ch. 257, § 3-1005.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-1005 UPC.

Compiler's notes. — This section is similar to former 31-12-13, 1953 Comp.

Exception for fraud. — The record did not support an heir’s claim that the personal representative improperly or fraudulently took money received from the September 11th victim compensation fund of 2001 which was awarded when the decedent died on September 11, 2001, so as to lift the six-month statute of limitations under 45-3-1005 NMSA 1978; only one claimant was permitted to file a claim for compensation from the fund, the personal representative filed a claim and gave notice to all heirs and potential beneficiaries of the decedent’s estate, including the heir in the instant case, who chose not to participate in or contest the claim before the special master. Marchand v. Marchand, 2007-NMCA-138, 142 N.M. 795, 171 P.3d 309, aff’d, 2008-NMSC-065, 145 N.M. 378, 199 P.3d 281.

Interest of pretermitted child was not affected by decedent's will. — The final decree, purporting to distribute pursuant to the last will and testament, distributed only that portion which passed to executrix under the will and did not include intestate share of pretermitted child. Consequently, the six-month period of limitations in former 31-12-13 1953 Comp., is not applicable in suit charging an interest. Hagerman v. Gustafson, 85 N.M. 420, 512 P.2d 1256 (1973)(decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — When statute of limitations begins to run against action on bond of personal representative, 44 A.L.R.2d 807.

34 C.J.S. Executors and Administrators § 729.

45-3-1006. Limitations on actions and proceedings against distributees.

Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or unless otherwise barred, the claim of a claimant to recover from a distributee who is liable to pay the claim and the right of an heir or devisee or of a successor personal representative acting in their behalf to recover property improperly distributed or its value from any distributee is forever barred at the later of three years after the decedent's death or one year after the time of its distribution, but all claims of creditors of the decedent are barred one year after the decedent's death. This section does not bar an action to recover property or value received as the result of fraud.

History: 1953 Comp., § 32A-3-1006, enacted by Laws 1975, ch. 257, § 3-1006; 1993, ch. 174, § 82.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-1006 UPC.

The 1993 amendment, effective July 1, 1993, added the language beginning "but all claims" at the end of the first sentence and made minor stylistic changes.

Applicable to estate devisees. — Neither 45-3-803 NMSA 1978 nor 45-3-806 NMSA 1978 provided the controlling relevant limitations where petitioners were not creditors, but devisees of the estate. Accordingly, the relevant limitations period was found in this section. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

Previous adjudication in formal testacy proceeding bars heir's claim to recover improperly distributed property, absent fraud. Wisdom v. Kopel, 95 N.M. 513, 623 P.2d 1027 (Ct. App. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26A Descent and Distribution § 133; 97 C.J.S. Wills § 1328.

45-3-1007. Certificate discharging liens securing fiduciary performance.

After his appointment has terminated, the personal representative, his sureties, or any successor of either such person, upon the filing of a verified application showing, so far as is known by the applicant, that no action concerning the estate is pending in any court, is entitled to receive a certificate from the court that the personal representative appears to have fully administered the estate in question. The certificate evidences discharge of any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety, but does not preclude action against the personal representative or the surety.

History: 1953 Comp., § 32A-3-1007, enacted by Laws 1975, ch. 257, § 3-1007.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-1007 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 957.

45-3-1008. Subsequent administration.

If other property of the estate is discovered after an estate has been settled and the personal representative discharged, or after one year after a closing statement has been filed, the district court, upon petition of any interested person and upon notice as it directs, may appoint the same or a successor personal representative to administer the subsequently discovered estate. If a new appointment is made, unless the district court orders otherwise, the provisions of the [Uniform] Probate Code apply as appropriate. However, no claim previously barred may be asserted in the subsequent administration.

History: 1953 Comp., § 32A-3-1008, enacted by Laws 1975, ch. 257, § 3-1008.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-1008 UPC.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators §§ 48, 88.

PART 11
COMPROMISE OF CONTROVERSIES

45-3-1101. Effect of approval of agreements involving trusts, inalienable interests or interests of third persons.

A. A compromise of any controversy is binding on all the parties thereto as to:

(1) admission to probate of any instrument offered for formal probate as the will of a decedent;

(2) the construction, validity or effect of any governing instrument;

(3) the rights or interests in the estate of the decedent;

(4) the rights or interests of any successor; or

(5) the administration of the estate, if approved in a formal proceeding in the district court for that purpose.

B. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it.

History: 1953 Comp., § 32A-3-1101, enacted by Laws 1975, ch. 257, § 3-1101; 1995, ch. 210, § 46.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-1101 UPC.

Cross references. — For private agreements amongst successors to decedent binding on personal representative, *see* 45-3-912 NMSA 1978.

The 1995 amendment, effective July 1, 1995, substituted "governing instrument" for "probated will" at the end in Paragraph A(2).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Executors and Administrators § 86; 80 Am. Jur. 2d Wills §§ 1098 to 1101, 1104.

Power and responsibility of executor or administrator to compromise claim due estate, 72 A.L.R.2d 191.

Power and responsibility of executor or administrator to compromise claim against estate, 72 A.L.R.2d 243.

Power and responsibility of executor or administrator as to compromise or settlement of action or cause of action for death, 72 A.L.R.2d 285.

Family settlement of intestate estate, 29 A.L.R.3d 174.

94 C.J.S. Wills §§ 322, 325.

45-3-1102. Procedure for securing court approval of compromise.

The procedure for securing court approval of a compromise is as follows:

A. The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise.

B. Any interested person, including the personal representative, if any, or a trustee, may then submit the agreement to the district court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust and other fiduciaries and representatives.

C. After notice to all interested persons or their representatives, including the personal representative of any estate and all affected trustees of trusts, the district court, if it finds that an actual contest or controversy exists and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries under its supervision to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate shall then be made in accordance with the terms of the agreement.

History: 1953 Comp., § 32A-3-1102, enacted by Laws 1975, ch. 257, § 3-1102; 1995, ch. 210, § 47.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-1102 UPC.

Cross references. — For private agreements amongst successors to decedent binding on personal representative, *see* 45-3-912 NMSA 1978.

The 1995 amendment, effective July 1, 1995, inserted "if any" near the beginning in Subsection B.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 80 Am. Jur. 2d Wills §§ 1098 to 1101, 1104.

15A C.J.S. Compromise and Settlement §§ 6, 24.

PART 12
COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT
AND SUMMARY ADMINISTRATION PROCEDURE FOR SMALL ESTATES

45-3-1201. Collection of personal property by affidavit.

A. Thirty days after the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the successor of the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

(1) the value of the entire estate, wherever located, less liens and encumbrances, does not exceed fifty thousand dollars ($50,000);

(2) thirty days have elapsed since the death of the decedent;

(3) no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction; and

(4) the claiming successor is entitled to payment or delivery of the property.

B. A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in Subsection A of this section.

C. The affidavit made pursuant to this section may not be used to perfect title to real estate.

History: 1953 Comp., § 32A-3-1201, enacted by Laws 1975, ch. 257, § 3-1201; 1983, ch. 194, § 8; 1995, ch. 210, § 48; 2011, ch. 124, § 50.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-1201 UPC.

Compiler's notes. — This section includes within its scope some of the functions of former 31-13-1 and 31-13-2, 1953 Comp.

Cross references. — For collection of employee's final payment for wages by surviving spouse without administration, *see* 45-3-1301 NMSA 1978.

The 2011 amendment, effective January 1, 2012, in Subsection A, increased the maximum value of the estate from thirty thousand dollars to fifty thousand dollars.

The 1995 amendment, effective July 1, 1995, substituted "thirty thousand dollars ($30,000)" for "twenty thousand dollars ($20,000)" in Paragraph A(1).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Executors and Administrators § 16 et seq.; 79 Am. Jur. 2d Wills § 827.

33 C.J.S. Executors and Administrators §§ 5, 153.

45-3-1202. Effect of affidavit.

The person paying, delivering, transferring or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer or issuance compelled upon proof of their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.

History: 1953 Comp., § 32A-3-1202, enacted by Laws 1975, ch. 257, § 3-1202.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-1202 UPC.

Compiler's notes. — This section includes within its scope some of the functions of 31-13-2, 1953 Comp.

Cross references. — For effect of affidavit on collection of employee's final payment for wages by surviving spouse, *see* 45-3-1302 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators §§ 5, 153.

45-3-1203. Small estates; summary administrative procedure.

If it appears from the inventory and appraisal that the value of the entire estate, less liens and encumbrances, does not exceed the family allowance, personal property allowance, costs and expenses of administration, reasonable and necessary medical and hospital expenses of the last illness of the decedent and reasonable funeral expenses, the personal representative, without giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in Section 3-1204 [45-3-1204 NMSA 1978].

History: 1953 Comp., § 32A-3-1203, enacted by Laws 1975, ch. 257, § 3-1203.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-1203 UPC.

Compiler's notes. — This section includes within its scope some of the functions of former 31-1A-2 and 31-1A-3, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 5; 34 C.J.S. Executors and Administrators § 1056.

45-3-1204. Small estates; closing by sworn statement of personal representative.

A. Unless prohibited by order of the district court and except for estates being administered by supervised personal representatives, a personal representative may close an estate administered under the summary procedures of Section 45-3-1203 NMSA 1978 by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(1) to the best knowledge of the personal representative, the value of the entire estate, less liens and encumbrances, did not exceed the family allowance, personal property allowance, costs and expenses of administration, reasonable necessary medical and hospital expenses of the last illness of the decedent and reasonable funeral expenses;

(2) the personal representative has fully administered the estate by disbursing and distributing it to the persons entitled thereto; and

(3) the personal representative has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected.

B. If no actions or proceedings involving the personal representative are pending in court one year after the closing statement is filed, the appointment of the personal representative terminates.

C. A closing statement filed under this section has the same effect as one filed under Section 45-3-1003 NMSA 1978.

History: 1953 Comp., § 32A-3-1204, enacted by Laws 1975, ch. 257, § 3-1204; 1983, ch. 194, § 9.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 3-1204 UPC.

Compiler's notes. — This section includes within its scope some of the functions of former 31-1A-3, 1953 Comp.

Authority to reopen probate and vacate verified statement. — Where the trial court determined that a fraudulent conveyance by the decedent and the failure to notify plaintiff of the probate proceedings improperly thwarted plaintiff's efforts to satisfy his judgment against decedent, and ordered the verified statement vacated and the probate matter reopened, and where after the filing of their notice of appeal the court entered an order appointing a new administrator for decedent's estate, the order implemented the judgment in this case which provided that such a person would be appointed. Because defendants did not seek to file a supersedeas bond to preserve the status quo, the judgment of the trial court remained in effect and could be enforced. Beagles v. Espinoza, 111 N.M. 206, 803 P.2d 1111 (Ct. App. 1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 5; 34 C.J.S. Executors and Administrators § 837.

45-3-1205. Small estates; transfer of title to homestead to surviving spouse by affidavit.

A. Where a husband and wife own a homestead as community property and when either the husband or wife dies intestate or dies testate and by the husband's or wife's

will devises the husband's or wife's interest in the homestead to the surviving spouse, the homestead passes to the survivor and no probate or administration is necessary.

B. Six months after the death of a decedent, the surviving spouse may record with the county clerk in the county in which the homestead is located an affidavit describing the real property and stating that:

(1) six months have elapsed since the death of the decedent as shown on the death certificate;

(2) the affiant and the decedent were at the time of the death of the decedent married and owned the homestead as community property;

(3) a copy of the deed with a legal description of the homestead is attached to the affidavit;

(4) but for the homestead, the decedent's estate need not be subject to any judicial probate proceeding either in district court or probate court;

(5) no application or petition for appointment of a personal representative or for admittance of a will to probate is pending or has been granted in any jurisdiction;

(6) funeral expenses, expenses of last illness and all unsecured debts of the decedent have been paid;

(7) the affiant is the surviving spouse of the decedent and is entitled to title to the homestead by intestate succession as provided in Section 45-2-102 NMSA 1978 or by devise under a valid last will of the decedent, the original of which is attached to the affidavit;

(8) no other person has a right to the interest of the decedent in the described property;

(9) no federal or state tax is due on the decedent's estate; and

(10) the affiant affirms that all statements in the affidavit are true and correct and further acknowledges that any false statement may subject the person to penalties relating to perjury and subornation of perjury.

C. As used in this section, "homestead" means the principal place of residence of the decedent or surviving spouse or the last principal place of residence if neither the decedent nor the surviving spouse is residing in that residence because of illness or incapacitation and that consists of one or more dwellings together with appurtenant structures, the land underlying both the dwellings and the appurtenant structures and a quantity of land reasonably necessary for parking and other uses that facilitates the use of the dwellings and appurtenant structures, and provided the full value of this property

as assessed for property taxation purposes does not exceed five hundred thousand dollars ($500,000).

History: 1978 Comp., § 45-3-1205, enacted by Laws 1985, ch. 12, § 1; 1985, ch. 132, § 1; 2011, ch. 124, § 51; 2011, ch. 134, § 18.

ANNOTATIONS

2011 amendments. — Laws 2011, ch. 124, § 51 and Laws 2011, ch. 134, § 18 both enacted amendments to this section. The section was set out as amended by Laws 2011, ch. 134, § 18. *See* 12-1-8 NMSA 1978.

Laws 2011, ch. 134, § 18, effective July 1, 2011, in Subsection B, eliminated the requirement that a death certificate be certified; and in Subsection C, increased the maximum value of the property from one hundred thousand dollars to five hundred thousand dollars.

Laws 2011, ch. 124, § 51, effective January 1, 2012, in Subsection C, increased the maximum value of the property from one hundred thousand dollars to five hundred thousand dollars, as set out below:

"45-3-1205. Transfer of title to homestead to surviving spouse by affidavit.

A. Where a husband and wife own a homestead as community property and when either the husband or wife dies intestate or dies testate and by the husband's or wife's will devises the husband's or wife's interest in the homestead to the surviving spouse, the homestead passes to the survivor and no probate or administration is necessary.

B. Six months after the death of a decedent, the surviving spouse may record with the county clerk in the county in which the homestead is located an affidavit describing the real property and stating that:

(1) six months have elapsed since the death of the decedent as shown on the death certificate;

(2) the affiant and the decedent were at the time of the death of the decedent married and owned the homestead as community property;

(3) a copy of the deed with a legal description of the homestead is attached to the affidavit;

(4) but for the homestead, the decedent's estate need not be subject to any judicial probate proceeding either in district court or probate court;

(5) no application or petition for appointment of a personal representative or for admittance of a will to probate is pending or has been granted in any jurisdiction;

(6) funeral expenses, expenses of last illness and all unsecured debts of the decedent have been paid;

(7) the affiant is the surviving spouse of the decedent and is entitled to title to the homestead by intestate succession as provided in Section 45-2-102 NMSA 1978 or by devise under a valid last will of the decedent, the original of which is attached to the affidavit;

(8) no other person has a right to the interest of the decedent in the described property;

(9) no federal or state tax is due on the decedent's estate; and

(10) the affiant affirms that all statements in the affidavit are true and correct and further acknowledges that any false statement may subject the person to penalties relating to perjury and subornation of perjury.

C. As used in this section, "homestead" means the principal place of residence of the decedent or surviving spouse or the last principal place of residence if neither the decedent nor the surviving spouse is residing in that residence because of illness or incapacitation and that consists of one or more dwellings together with appurtenant structures, the land underlying both the dwellings and the appurtenant structures and a quantity of land reasonably necessary for parking and other uses that facilitates the use of the dwellings and appurtenant structures, and provided the full value of this property as assessed for property taxation purposes does not exceed five hundred thousand dollars ($500,000)."

45-3-1206. Effect of affidavit.

A purchaser of real property from or lender to the surviving spouse designated as such in the affidavit recorded under Section 45-3-1205 NMSA 1978 is entitled to the same protection as a person purchasing from or lending to a distributee who has received a deed of distribution from a personal representative as provided in Section 45-3-910 NMSA 1978.

History: 1978 Comp., § 45-3-1206, enacted by Laws 1985, ch. 12, § 2; 1985, ch. 132, § 2.

ANNOTATIONS

Compiler's notes. — Laws 1985, ch. 12, § 2, effective March 13, 1985, and Laws 1985, ch. 132, § 2, effective April 2, 1985, enacted identical new sections. The section was set out as enacted by Laws 1985, ch. 132, § 2. *See* 12-1-8 NMSA 1978.

PART 13
PAYMENT OF EARNINGS, ETC., TO SURVIVING SPOUSE

45-3-1301. Collection of employee's final payment without administration.

The surviving spouse of a deceased person may, without procuring letters, collect any sum representing the final payment owed the decedent at the time of his death for wages, earnings, salary, commissions, travel or other reimbursement from the state or any of its political subdivisions or from any corporation, copartnership, association, individual, bank or trust company.

History: 1953 Comp., § 32A-3-1301, enacted by Laws 1978, ch. 159, § 12; 1983, ch. 194, § 10.

ANNOTATIONS

Cross references. — For collection of personal property by affidavit in small estate, *see* 45-3-1201 NMSA 1978.

45-3-1302. Affidavit showing death of employee; payment.

Upon receiving an affidavit stating that a person previously in its employ is dead and that the affiant is the surviving spouse, the state or any of its political subdivisions, or any corporation, copartnership, association, individual, bank or trust company may pay to the affiant the amount of the wages, earnings, commissions, salary, travel or other reimbursement earned by the deceased and the affiant's receipt shall release the payor from all liability therefor.

History: 1953 Comp., § 32A-3-1302, enacted by Laws 1978, ch. 159, § 13.

ANNOTATIONS

Cross references. — For effect of affidavit on collection of personal property in small estate, *see* 45-3-1202 NMSA 1978.

ARTICLE 4
Foreign Personal Representatives; Ancillary Administration

PART 1
DEFINITIONS

45-4-101. Definitions.

In Sections 4-101 through 4-401 [45-4-101 through 45-4-401 NMSA 1978]:

A. "local administration" means administration by a personal representative appointed in New Mexico pursuant to appointment proceedings described in Sections 3-101 through 3-1204 [45-3-101 through 45-3-1204 NMSA 1978];

B. "local personal representative" includes any personal representative appointed in New Mexico pursuant to appointment proceedings described in Sections 3-101 through 3-1204 [45-3-101 through 45-3-1204 NMSA 1978] and excludes foreign personal representatives who acquire the power of a local personal representative pursuant to Section 4-205 [45-4-205 NMSA 1978]; and

C. "resident creditor" means a person domiciled in or doing business in New Mexico, who is, or could be, a claimant against an estate of a nonresident decedent.

History: 1953 Comp., § 32A-4-101, enacted by Laws 1975, ch. 257, § 4-101.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 4-101 UPC.

Legislative intent. — The legislature enacted the ancillary probate system to provide a way to assure that a will is valid and that an executor proceeds according to law. Allen v. Amoco Prod. Co., 114 N.M. 18, 833 P.2d 1199 (Ct. App. 1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Executors and Administrators § 1169.

What constitutes estate of nonresident decedent within statute providing for local ancillary administration where decedent died leaving an estate in jurisdiction, 34 A.L.R.2d 1270.

Right of foreign personal representative or guardian to vote stock owned by estate or ward, 41 A.L.R.2d 1082.

Right of nonresident surviving spouse or minor children to allowance of property exempt from administration or to family allowance from local estate of nonresident decedent, 51 A.L.R.2d 1026.

Capacity of local or foreign personal representative to maintain action for death under foreign statute providing for action by personal representative, 52 A.L.R.2d 1016.

Capacity of foreign domiciliary or of ancillary personal representative to maintain action for death under statute of forum providing for action by personal representative, 52 A.L.R.2d 1048.

Applications of rule permitting courts to exercise jurisdiction over equity actions against foreign personal representatives where there are assets within forum, 53 A.L.R.2d 323.

State statutes or rules of court conferring in personam jurisdiction over nonresidents on the basis of isolated acts or transactions within state as applicable to personal representative of deceased nonresident, 19 A.L.R.3d 171.

34 C.J.S. Executors and Administrators § 988.

PART 2
POWERS OF FOREIGN PERSONAL REPRESENTATIVES

45-4-201. Payment of debt and delivery of property to domiciliary foreign personal representative without local administration.

At any time after the expiration of sixty days from the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession or control of personal property, or of an instrument evidencing a debt, obligation, stock or chose in action belonging to the estate of the nonresident decedent, may pay the debt, deliver the personal property, or the instrument evidencing the debt, obligation, stock or chose in action, to the domiciliary foreign personal representative of the nonresident decedent upon being presented with proof of his appointment and an affidavit made by or on behalf of the representative stating:

A. the date of the death of the nonresident decedent;

B. that no local administration, or application or petition therefor, is pending in this state; and

C. that the domiciliary foreign personal representative is entitled to payment or delivery.

History: 1953 Comp., § 32A-4-201, enacted by Laws 1975, ch. 257, § 4-201.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 4-201 UPC.

Cross references. — For general powers, duties and liabilities of a personal representative, *see* 45-3-703 NMSA 1978.

For powers of domiciliary foreign personal representative, *see* 45-4-205 NMSA 1978.

Right of nonresident to be ancillary administrator not questioned. — There is no question of the right of a nonresident to be appointed in New Mexico as an ancillary administrator subject to compliance with the formal requirements. Hubbell v. First Nat'l Bank, 57 N.M. 649, 261 P.2d 833 (1953) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Executors and Administrators §§ 1183 to 1197.

Payment of negotiable paper to, or enforcement thereof by, personal representative of owner appointed in one state, as affected by appointment of another representative in another state, 149 A.L.R. 1083.

Right of foreign domiciliary, or of ancillary, personal representative to maintain action for death under Federal Employers' Liability Act, 163 A.L.R. 1284.

Basis of distribution among decedent's unsecured creditors, of ancillary assets where entire estate or ancillary estate is insolvent, 164 A.L.R. 765.

33 C.J.S. Executors and Administrators § 11; 34 C.J.S. Executors and Administrators §§ 998, 1056.

45-4-202. Payment or delivery discharges.

Payment or delivery made in good faith on the basis of the proof of authority and affidavit releases the debtor or person having possession of the personal property of his obligation to the same extent as if payment or delivery had been made to a local personal representative.

History: 1953 Comp., § 32A-4-202, enacted by Laws 1975, ch. 257, § 4-202.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 998.

45-4-203. Resident creditor notice.

Payment or delivery under Section 4-201 [45-4-201 NMSA 1978] may not be made if a resident creditor of the nonresident decedent has notified the debtor of the nonresident decedent or the person having possession of the personal property belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative.

History: 1953 Comp., § 32A-4-203, enacted by Laws 1975, ch. 257, § 4-203.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 33 C.J.S. Executors and Administrators § 11; 34 C.J.S. Executors and Administrators §§ 598, 1056.

45-4-204. Proof of authority; bond.

If no local administration or application or petition therefor is pending in New Mexico, a domiciliary foreign personal representative may file with the court of a county in which property belonging to the decedent is located authenticated copies of his appointment and of any official bond he has given and a statement of the domiciliary foreign personal representative's address.

History: 1953 Comp., § 32A-4-204, enacted by Laws 1975, ch. 257, § 4-204; 1983, ch. 194, § 11.

ANNOTATIONS

Compiler's notes. — This section is similar to former 31-2-4, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 998.

45-4-205. Powers.

A domiciliary foreign personal representative who has complied with Section 4-204 [45-4-204 NMSA 1978] may exercise as to assets in New Mexico all powers of a local personal representative and may maintain actions and proceedings in New Mexico subject to any conditions imposed upon nonresident parties generally.

History: 1953 Comp., § 32A-4-205, enacted by Laws 1975, ch. 257, § 4-205.

ANNOTATIONS

Compiler's notes. — This section includes within its scope some of the functions of former 31-2-5 and 31-2-8, 1953 Comp.

Jurisdiction where multiple nonresident representatives. — An action by a Colorado domiciliary executor against a New Mexico ancillary administrator to enforce an accounting was properly dismissed by a federal court because the New Mexico court had exclusive jurisdiction under former 16-4-10, 1953 Comp., of the estate in New Mexico and was the proper forum in which to bring the administrator to account for any money due the estate. Patterson v. Wynkoop, 329 F.2d 59 (10th Cir. 1964) (decided under former law).

Discretion not abused in refusing to transmit distribution to California. — Where more than enough money had been collected in California by decedent's widow as domiciliary administratrix to satisfy and discharge all unpaid, approved claims which had priority over the family allowance under California law, even though she had consumed the moneys collected in payment of the family allowance, and left the preferred claims unsatisfied, there was no abuse of discretion on the part of the New Mexico trial court in refusing to transmit surplus funds for distribution in California. Anderson v. Minton, 52 N.M. 393, 200 P.2d 361 (1948) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 998.

45-4-206. Power of representatives in transition.

A. The power of a domiciliary foreign personal representative under Section 4-201 [45-4-201 NMSA 1978] or 4-205 [45-4-205 NMSA 1978] shall be exercised only if there is no administration or application for administration pending in New Mexico. An application or petition for local administration of the estate terminates the power of the foreign personal representative to act under Section 4-205, but the district court may allow the foreign personal representative to exercise limited powers to preserve the estate.

B. No person who, before receiving actual notice of a pending local administration, has changed his position in reliance upon the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration.

C. The local personal representative is subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for him in any action or proceedings in New Mexico.

History: 1953 Comp., § 32A-4-206, enacted by Laws 1975, ch. 257, § 4-206.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 998.

45-4-207. Ancillary and other local administrations; provisions governing.

A. Upon the filing of an authenticated copy of the will, if any, and an authenticated copy of the domiciliary letters with the court, a foreign personal representative may be granted ancillary letters of administration in formal proceedings in the same manner as provided in Section 3-414 [45-3-414 NMSA 1978] and subject to any bond requirement as provided in Sections 3-603 and 3-604 [45-3-603 and 45-3-604 NMSA 1978].

B. In respect to a nonresident decedent, the provisions of Sections 3-101 through 3-1204 [45-3-101 to 45-3-1204 NMSA 1978] govern:

(1) proceedings, if any, in a court of New Mexico for probate of the will, appointment, removal, supervision and discharge of the local personal representative, and any other order concerning the estate; and

(2) the status, powers and duties and liabilities of any local personal representative and the rights of claimants, purchasers, distributees and others in regard to a local administration.

History: 1953 Comp., § 32A-4-207, enacted by Laws 1975, ch. 257, § 4-207.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 4-207 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 998.

PART 3
JURISDICTION OVER FOREIGN PERSONAL REPRESENTATIVES

45-4-301. Jurisdiction by act of foreign personal representative.

A. A foreign personal representative submits personally to the jurisdiction of the courts of New Mexico in any proceeding relating to the estate by:

(1) filing the documents and statement as provided in Section 4-204 [45-4-204 NMSA 1978];

(2) receiving payment of money or taking delivery of personal property under Section 4-201 [45-4-201 NMSA 1978]; or

(3) doing any act as a personal representative in New Mexico which would have given the state jurisdiction over him as an individual.

B. Jurisdiction under Paragraph (2) of Subsection A of this section is limited to the money or value of personal property collected.

History: 1953 Comp., § 32A-4-301, enacted by Laws 1975, ch. 257, § 4-301.

ANNOTATIONS

Official comments. — *See* Commissioners on Uniform State Law official comment to 4-301 UPC.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Capacity of foreign domiciliary or of ancillary personal representative to maintain action for death under statute of forum providing for action by personal representative, 52 A.L.R.2d 1048.

Applications of rule permitting courts to exercise jurisdiction over equity actions against foreign personal representatives where there are assets within forum, 53 A.L.R.2d 323.

State statutes or rules of court conferring in personam jurisdiction over nonresidents on the basis of isolated acts or transactions within state as applicable to personal representative of deceased nonresident, 19 A.L.R.3d 171.

34 C.J.S. Executors and Administrators § 988.

45-4-302. Jurisdiction by act of decedent.

In addition to jurisdiction conferred by Section 4-301 [45-4-301 NMSA 1978], a foreign personal representative is subject to the jurisdiction of the courts of New Mexico to the same extent that his decedent was subject to jurisdiction immediately prior to death.

History: 1953 Comp., § 32A-4-302, enacted by Laws 1975, ch. 257, § 4-302.

ANNOTATIONS

Compiler's notes. — This section includes within its scope some of the functions of former 31-2-5 and 31-2-9, 1953 Comp.

Generally. — The generally accepted rule, absent exceptional circumstances, is that the personal representative of a decedent cannot be sued in an action at law in a state other than that of his appointment, unless ancillary letters of administration have issued. State ex rel. Scott v. Zinn, 74 N.M. 224, 392 P.2d 417 (1964)(decided under former law).

Texas administrator not liable in New Mexico for Colorado tort. — The administrator of an estate in Texas is not subject to suit at law in New Mexico for the alleged torts of his decedent in Colorado. State ex rel. Scott v. Zinn, 74 N.M. 224, 392 P.2d 417 (1964)(decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 1012.

45-4-303. Notice to a foreign personal representative.

Notice shall be given to a foreign personal representative in the manner prescribed by Section 45-1-401 NMSA 1978.

History: 1953 Comp., § 32A-4-303, enacted by Laws 1975, ch. 257, § 4-303; 1977, ch. 121, § 8; repealed and reenacted by Laws 1978, ch. 159, § 14.

ANNOTATIONS

Repeals and reenactments. — Laws 1978, ch. 159, § 14, repealed former 32A-4-303, as enacted by Laws 1975, ch. 257, § 4-303, as amended by Laws 1977, ch. 121, § 8, relating to service on foreign personal representative, and enacted a new section, effective March 6, 1978.

Compiler's notes. — This section includes within its scope some of the functions of former 31-2-6, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 34 C.J.S. Executors and Administrators § 1012.

PART 4
ADJUDICATION

45-4-401. Effect of adjudication.

An adjudication rendered in any jurisdiction in favor of or against any personal representative of the estate is as binding on the local personal representative as if the local personal representative were a party to the adjudication.

History: 1978 Comp., § 45-4-401, enacted by Laws 1995, ch. 210, § 49.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the act effective July 1, 1995.

ARTICLE 5
Protection of Persons Under Disability and Their Property

PART 1
GENERAL PROVISIONS

45-5-101. Definitions and use of terms.

Unless otherwise apparent from the context or unless otherwise specifically defined in other sections that are applicable to specific articles, parts or sections of the Uniform Probate Code, as used in Chapter 45, Article 5 NMSA 1978:

A. "conservator" means a person who is appointed by a court to manage the property or financial affairs or both of a protected person;

B. "court" means the district court or the children's or family division of the district court where such jurisdiction is conferred by the Children's Code [Chapter 32A NMSA 1978];

C. "functional impairment" means an impairment that is measured by a person's inability to manage the person's personal care or the person's inability to manage the person's estate or financial affairs or both;

D. "guardian" has the same meaning as set forth in Section 45-1-201 NMSA 1978;

E. "guardian ad litem" has the same meaning as set forth in Section 45-1-201 NMSA 1978;

F. "incapacitated person" means any person who demonstrates over time either partial or complete functional impairment by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that the person is unable to manage the person's personal affairs or the person is unable to manage the person's estate or financial affairs or both;

G. "inability to manage the person's personal care" means the inability, as evidenced by recent behavior, to meet one's needs for medical care, nutrition, clothing, shelter, hygiene or safety so that physical injury, illness or disease has occurred or is likely to occur in the near future;

H. "inability to manage the person's estate or financial affairs or both" means gross mismanagement, as evidenced by recent behavior, of one's income and resources or medical inability to manage one's income and resources that has led or is likely in the near future to lead to financial vulnerability;

I. "interested person" means any person who has an interest in the welfare of the person to be protected pursuant to Chapter 45, Article 5 NMSA 1978;

J. "least restrictive form of intervention" means that the guardianship or conservatorship imposed on the incapacitated person or minor protected person represents only those limitations necessary to provide the needed care and rehabilitative services and that the incapacitated person or minor protected person shall enjoy the greatest amount of personal freedom and civil liberties;

K. "letters" has the same meaning as set forth in Section 45-1-201 NMSA 1978;

L. "limited conservator" means any person who is qualified to manage the estate and financial affairs of an incapacitated person pursuant to a court appointment in a limited conservatorship;

M. "limited conservatorship" means that an incapacitated person is subject to a conservator's exercise of some but not all of the powers enumerated in Sections 45-5-424 and 45-5-425 NMSA 1978;

N. "limited guardian" means any person who is qualified to manage the care, custody and control of an incapacitated person pursuant to a court appointment of a limited guardianship;

O. "limited guardianship" means that an incapacitated person is subject to a guardian's exercise of some but not all of the powers enumerated in Section 45-5-312 NMSA 1978;

P. "minor" has the same meaning as set forth in Section 45-1-201 NMSA 1978;

Q. "minor protected person" means a minor for whom a guardian or conservator has been appointed solely because of minority;

R. "parent" means a parent whose parental rights have not been terminated or relinquished;

S. "protective proceeding" means a conservatorship proceeding under Section 45-5-401 NMSA 1978;

T. "protected person" means a minor or other person for whom a guardian or conservator has been appointed or other protective order has been made;

U. "qualified health care professional" means a physician, psychologist, physician assistant, nurse practitioner or other health care practitioner whose training and expertise aid in the assessment of functional impairment; and

V. "visitor" means a person who is an appointee of the court who has no personal interest in the proceeding and who has been trained or has the expertise to appropriately evaluate the needs of the person who is allegedly incapacitated. A "visitor" may include, but is not limited to, a psychologist, a social worker, a developmental incapacity professional, a physical and occupational therapist, an educator and a rehabilitation worker.

History: 1953 Comp., § 32A-5-101, enacted by Laws 1975, ch. 257, § 5-101; 1987, ch. 12, § 1; 1989, ch. 252, § 3; 1993, ch. 301, § 1; 2008, ch. 9, § 4; 2009, ch. 159, § 26; 2011, ch. 124, § 52.

ANNOTATIONS

The 2011 amendment, effective January 1, 2012, defined "conservator" and "parent".

The 2009 amendment, effective June 19, 2009, in Subsections J and Q, changed "ward" to "protected person"; in Subsection S, after "person for whom a", added "guardian or"; and deleted Subsection U which defined "ward".

The 2008 amendment, effective May 14, 2008, added "physician assistant" in Subsection T.

The 1993 amendment, effective July 1, 1993, substituted "estate" for "property" throughout the section; substituted "Chapter 45, Article 5 NMSA 1978" for "the Probate Code" in the introductory paragraph; inserted "or medical inability to manage one's income and resources" in Subsection H; substituted "Sections 45-5-424 and 45-5-425" for "Subsection E of Section 45-5-407" in Subsection M; deleted "Subsection B of" preceding "Section" in Subsection O; rewrote Subsection R; and made minor stylistic changes throughout the section.

The 1989 amendment, effective June 16, 1989, made a minor stylistic change in Subsection B; substituted the present provisions in Subsection C for "'disability' is as defined in Section 45-1-201 NMSA 1978"; substituted the present provisions of Subsection F for "'incapacitated person' means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or management of his affairs"; added Subsections G through J; redesignated former Subsection G as Subsection K; added Subsections L through O; redesignated former Subsections H through K as Subsections P through S; inserted "conservatorship proceedings pursuant to" in Subsection R; added Subsection T; redesignated former Subsections L and M as Subsections U and V; and in Subsection V substituted all of the language of the first sentence following "means" for "with respect to guardianship proceedings, a person with no personal interest in the proceedings who is trained in law, nursing or social work and is appointed by the district court", and added the second sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity of guardianship proceeding based on brainwashing of subject by religious, political or social organization, 44 A.L.R.4th 1207.

14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward § 2; 57 C.J.S. Mental Health §§ 21 et seq., 108 et seq.

45-5-102. Jurisdiction of subject matter; consolidation of proceedings.

A. Chapter 45, Article 5 NMSA 1978 applies to guardianship and protective proceedings for individuals over whom the court has jurisdiction and to property coming into the control of a guardian or conservator who is subject to the laws of New Mexico.

B. The court has exclusive jurisdiction over protective proceedings for minors domiciled in or having property located in New Mexico. Except to the extent that the guardianship is subject to the Uniform Child-Custody Jurisdiction and Enforcement Act [40-10A-101 through 40-10A-403 NMSA 1978], the court has exclusive jurisdiction over guardianship proceedings for minors domiciled or present in New Mexico.

C. The court has exclusive jurisdiction over guardianship and protective proceedings for an adult individual as provided in the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act [Chapter 45, Article 5A NMSA 1978].

D. When both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated.

History: 1953 Comp., § 32A-5-102, enacted by Laws 1975, ch. 257, § 5-102; 2011, ch. 124, § 53.

ANNOTATIONS

The 2011 amendment, effective January 1, 2012, added Subsection A to specify the jurisdiction of the district court in guardianship and guardianship protective proceedings for minors and adults; and added Subsection C.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Power of guardian or committee of incompetent in respect of insurance on ward's life, or of policy under which he has interest, 84 A.L.R. 366.

Divorce court's acquisition of jurisdiction over custody and maintenance of child as precluding guardianship proceedings in another court, 146 A.L.R. 1167.

Power of guardian or committee to compromise liquidated, contract claim or money judgment, and of courts to authorize or approve such a compromise, 155 A.L.R. 196.

Function, power and discretion of court as affected by testamentary appointment of guardian of minor, 67 A.L.R.2d 803.

Power to make charitable gifts from estate of incompetent, 99 A.L.R.2d 946.

Power of court or guardian to make noncharitable gifts or allowances out of funds of incompetent ward, 24 A.L.R.3d 863.

Ademption or revocation of specific devise or bequest by guardian, committee, conservator or trustee of mentally or physically incompetent testator, 84 A.L.R.4th 462.

14 C.J.S. Chemical Dependents § 9; 39 C.J.S. Guardian and Ward § 11; 57 C.J.S. Mental Health §§ 21 et seq., 108 et seq.

45-5-103. Facility of payment or delivery.

A. A person under a duty to pay or deliver money or personal property to a minor may perform this duty, in amounts not exceeding ten thousand dollars ($10,000) per year, by paying or delivering the money or property to:

(1) a person having the care and custody of the minor and with whom the minor resides;

(2) a guardian of the minor;

(3) a financial institution for deposit in a federally insured savings account in the sole name of the minor and giving notice of the deposit to the minor; or

(4) a custodian for the minor pursuant to the Uniform Transfers to Minors Act [46-7-11 through 46-7-34 NMSA 1978].

B. This section does not apply if the person making payment or delivery has actual knowledge that a conservator has been appointed or proceedings for appointment of a conservator of the estate of the minor are pending. The persons, other than the minor or any financial institution under Paragraph (4) of Subsection A of this section, receiving money or property for a minor are obligated to apply the money to the support and education of the minor but shall not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the minor's support. Any excess sums shall be preserved for future support of the minor, and any balance not so used and any property received for the minor shall be turned over to the minor when the minor ceases to be a minor. Persons who pay or deliver in accordance with provisions of this section are not responsible for the proper application of such payments.

History: 1953 Comp., § 32A-5-103, enacted by Laws 1975, ch. 257, § 5-103; 2011, ch. 124, § 54.

ANNOTATIONS

The 2011 amendment, effective January 1, 2012, increased the maximum amount that a person may pay to a minor per year from five thousand dollars to ten thousand dollars and permitted the payment to be made to a custodian for the minor.

Wrongful death proceeds. — An attorney handling a wrongful death case owes to the statutory beneficiaries of that action a duty of reasonable care to protect their interest in receiving any proceeds obtained, and, although distributing the proceeds to a court-monitored conservator is one way an attorney may protect the interest of the statutory beneficiaries, it is not the only way. Leyba v. Whitley, 120 N.M. 768, 907 P.2d 172 (1995).

Conservator's action against lawyers in wrongful death action. — Further proceedings were required in the case of a conservator for a minor child against lawyers who distributed proceeds of a wrongful death settlement to the decedent's personal representative, who subsequently dissipated the proceeds, to determine whether they used reasonable care in protecting the interests of the statutory beneficiary, i.e., the minor child. Leyba v. Whitley, 120 N.M. 768, 907 P.2d 172 (1995).

Law reviews. — For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 43 C.J.S. Infants §§ 126, 135.

45-5-104. Delegation of powers by parent or guardian.

A parent or a guardian of a minor or an incapacitated person, by an acknowledged power of attorney, may delegate to another person, for a period not exceeding six months, any of the parent's or guardian's powers regarding care, custody or property of the minor child or protected person, except the power to consent to marriage or adoption of a minor protected person.

History: 1953 Comp., § 32A-5-104, enacted by Laws 1975, ch. 257, § 5-104; 2009, ch. 159, § 27.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, deleted "ward" and added "protected person".

Agreements subject to judicial modification. — Agreements between parents and third parties regarding the guardianship, care, custody, maintenance or education of children are subject to judicial modification. In re Adoption of Doe, 98 N.M. 340, 648 P.2d 798 (Ct. App. 1982), cert. denied, Cook v. Brownfield, 98 N.M. 336, 648 P.2d 794 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward § 55; 57 C.J.S. Mental Health § 108 et seq.

45-5-105. Compensation and expenses.

If not otherwise compensated for services rendered, any visitor, attorney, qualified health care professional or guardian appointed in a guardianship proceeding is entitled to reasonable compensation from the estate of the incapacitated person.

History: Laws 1993, ch. 301, § 23.

45-5-106. Repealed.

ANNOTATIONS

Repeals. — Laws 1997, ch. 168 § 15 repealed 45-5-106 NMSA 1978, as enacted by Laws 1993, ch. 301, § 27, relating to enforceability of an advance directive executed in another jurisdiction, effective July 1, 1997. For provisions of former section, *see* the 1996 NMSA 1978 on *NMONESOURCE.COM*. For present comparable provisions, *see* 24-7A-16C NMSA 1978.

PART 2
GUARDIAN OF MINORS

45-5-201. Appointment and status of guardian of minor; general.

A person becomes a guardian of a minor by parental appointment or upon appointment by the court. The guardianship status continues until terminated, without regard to the location from time to time of the guardian or minor protected person.

History: 1953 Comp., § 32A-5-201, enacted by Laws 1975, ch. 257, § 5-201; 1995, ch. 210, § 50; 2009, ch. 159, § 28.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, deleted "ward" and added "protected person".

The 1995 amendment, effective July 1, 1995, added "Appointment and" in the section heading; substituted "parental appointment" for "acceptance of a testamentary appointment" in the first sentence; and substituted "or" for "and" preceding "minor" in the second sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Minority of parent as affecting right to guardianship or custody of person or estate of child, 19 A.L.R. 1043.

Guardian de facto or de son tort of minor, 25 A.L.R.2d 752.

39 C.J.S. Guardian and Ward §§ 15, 35.

45-5-202. Parental appointment of guardian of minor.

A. The parent of an unmarried minor may appoint a guardian for the minor by will, or other writing signed by the parent and attested by at least two witnesses.

B. Subject to the right of the minor under Section 45-5-203 NMSA 1978, if both parents are dead or incapacitated or the surviving parent has no parental rights or has been adjudged to be incapacitated, a parental appointment becomes effective when the guardian's acceptance is filed in the court in which a nominating instrument is probated, or, in the case of a non-testamentary nominating instrument, in the court at the place where the minor resides or is present. If both parents are dead, an effective appointment by the parent who died later has priority.

C. A parental appointment effected by filing the guardian's acceptance under a will probated in the state of the testator's domicile is effective in this state.

D. Upon acceptance of appointment, the guardian shall give written notice of acceptance to the minor and to the person having the minor's care or the minor's nearest adult relative. If the minor is fourteen years of age or older, the notice shall state that the appointment may be terminated by filing a written objection in the court, as provided in Section 45-5-203 NMSA 1978.

History: 1953 Comp., § 32A-5-202, enacted by Laws 1975, ch. 257, § 5-202; repealed and reenacted by Laws 1995, ch. 210, § 51.

ANNOTATIONS

Repeals and reenactments. — Laws 1995, ch. 210, § 51 repealed 45-5-202 NMSA 1978, as enacted by Laws 1975, ch. 257, § 5-202, relating to testamentary appointment of guardian of minor, and enacted a new section, effective July 1, 1995.

Compiler's notes. — This section is similar to former 32-1-5, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Power of parent to appoint testamentary guardian for adult imbecile child, 24 A.L.R. 1458.

Domicile of infant on death of both parents; doctrine of natural guardianship, 32 A.L.R.2d 863.

39 C.J.S. Guardian and Ward § 15.

45-5-203. Objection by minor of fourteen or older to parental appointment.

A minor of fourteen or more years who is the subject of a parental appointment of a guardian may prevent the appointment or may cause it to terminate by filing in the court in which the will is probated or, in the case of a non-testamentary instrument, in the court where the minor resides or is present, a written objection to the appointment before it is accepted or after its acceptance. An objection may be withdrawn. An objection does not prevent appointment by the court in a proper proceeding of the parental nominee or any other suitable person.

History: 1953 Comp., § 32A-5-203, enacted by Laws 1975, ch. 257, § 5-203; 1976 (S.S.), ch. 37, § 14; 1995, ch. 210, § 52.

ANNOTATIONS

Compiler's notes. — This section includes within its scope some of the functions of former 32-1-41, 1953 Comp.

Cross references. — For age of majority, *see* 12-2A-3 and 28-6-1 NMSA 1978.

The 1995 amendment, effective July 1, 1995, substituted "parental" for "testamentary" in the section heading and rewrote the section to such an extent that a detailed comparison would be impracticable.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of infant to select his own guardian, 85 A.L.R.2d 921.

39 C.J.S. Guardian and Ward § 16.

45-5-204. Court appointment of guardian of minor; conditions for appointment.

A. The court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order.

B. A guardian, appointed as provided in Section 45-5-202 NMSA 1978, whose appointment has not been prevented or terminated under Section 45-5-203 NMSA 1978, has priority over any guardian who may be appointed by the court, but the court may proceed with another appointment upon a finding that the parental nominee has failed to accept the appointment within thirty days after notice of the guardianship proceeding.

C. If necessary, and upon appropriate petition or application, the court may appoint a temporary guardian, who shall have the full authority of a general guardian of a minor,

but the authority of a temporary guardian may not last longer than six months. The appointment of a temporary guardian for a minor may occur even though the conditions described in Subsection A of this section have not been established.

History: 1953 Comp., § 32A-5-204, enacted by Laws 1975, ch. 257, § 5-204; 1995, ch. 210, § 53.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, in Subsection B, deleted "testamentary" preceding "guardian", substituted "Section 45-5-202 NMSA 1978" and "Section 45-5-203 NMSA 1978" for "Section 5-202" and "Section 5-203", respectively, substituted "parental nominee" for "testamentary guardian" and made stylistic changes; and added Subsection C.

Involuntary termination of custody. — Over objection of a parent, guardianship proceedings are not the proper means to involuntarily terminate a parent's right to custody of his or her children. In re Guardianship of Sabrina Mae D., 114 N.M. 133, 835 P.2d 849 (Ct. App. 1992), cert. denied, Sabrina Mae D. v. Notrhcutt, 113 N.M. 744, 832 P.2d 1223 (1992).

Because whereabouts of mother were known and mother contested the appointment of grandparents as guardians, the district court erred in finding that her right to custody was "suspended by circumstances" under Subsection A and erred in appointing grandparents as guardians under provision of the Uniform Probate Code, Chapter 45 NMSA 1978. In re Guardianship of Ashleigh R., 2002-NMCA-103, 132 N.M. 772, 55 P.3d 984, cert. denied, 132 N.M. 732, 55 P.3d 428 (2002).

"Suspended by circumstances" construed. — A parent's right to custody is not "suspended by circumstances" if in fact the parent has lawful custody, is present, and has not voluntarily relinquished physical custody of the child. In re Guardianship of Lupe C., 112 N.M. 116, 812 P.2d 365 (Ct. App. 1991).

Construction with Children's Code. — To read 45-5-204 NMSA 1978 of the Uniform Probate Code broadly to provide an alternate means of proceeding with respect to neglected children would dispense with the rights guaranteed to parents under the Children's Code, and would allow the district court to enter orders of guardianship unlimited in time, and not be subject to the requirement of periodic review. It also would not require efforts to remedy the causes of neglect and return the child to the child's home. In re Guardianship of Lupe C., 112 N.M. 116, 812 P.2d 365 (Ct. App. 1991).

Presumption that child should be in custody of natural parents. — The "parental right" doctrine creates a presumption that the welfare and best interests of the minor child will best be served in the custody of the natural parent and casts the burden of proving the contrary on the nonparent. Greene v. French, 97 N.M. 493, 641 P.2d 524 (Ct. App. 1982).

Best interest of the children is always a fundamental consideration in the determination of custody, no matter what the context. Greene v. French, 97 N.M. 493, 641 P.2d 524 (Ct. App. 1982).

Present parental rights must be based on current evidence. — The evidence must show the parent's ability or inability at the present time to take responsibility for her children. Evidence pertaining to past behavior is irrelevant to a finding of present fitness. Greene v. French, 97 N.M. 493, 641 P.2d 524 (Ct. App. 1982).

Agreements subject to judicial modification. — Agreements between parents and third parties regarding the guardianship, care, custody, maintenance or education of children are subject to judicial modification. In re Adoption of Doe, 98 N.M. 340, 648 P.2d 798 (Ct. App. 1982), cert. denied, Cook v. Brownfield, 98 N.M. 336, 648 P.2d 794 (1982).

Jurisdiction found. — Mother's voluntary placement of her child with grandparents in this state and allowing the child to remain in New Mexico for almost ten months prior to seeking her return, provided a proper basis for the court's determination that the child had a significant connection with this state so as to enable the court to exercise jurisdiction over the child. In re Guardianship of Sabrina Mae D., 114 N.M. 133, 835 P.2d 849 (Ct. App. 1992), cert. denied, Sabrina Mae D. v. Northcutt, 113 N.M. 744, 832 P.2d 1223 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Consideration and weight of religious affiliations in appointment or removal of guardian for minor child, 22 A.L.R.2d 696.

Function, power and discretion of court where there is testamentary appointment of guardian of minor, 67 A.L.R.2d 803.

Right of putative father to custody of illegitimate child, 45 A.L.R.3d 216.

39 C.J.S. Guardian and Ward §§ 9, 10, 15.

45-5-205. Court appointment of guardian of minor; venue.

The venue for guardianship proceedings for a minor is in the judicial district where the minor resides or is present.

History: 1953 Comp., § 32A-5-205, enacted by Laws 1975, ch. 257, § 5-205.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 C.J.S. Guardian and Ward § 20.

45-5-205.1. Recompiled.

ANNOTATIONS

Recompilations. — Former 45-5-205.1 NMSA 1978, relating to foreign guardians, was recompiled as 45-5-301.2 NMSA 1978 in 1994. Laws 2011, ch. 124, § 97 repealed 45-5-301.2 NMSA 1978, effective January 1, 2012.

45-5-206. Court appointment of guardian of minor; qualifications; priority of minor's nominee.

The court may appoint as guardian any person whose appointment would be in the best interests of the minor. The court shall appoint a person nominated by the minor, if the minor is fourteen years of age or older, unless the court finds the appointment contrary to the best interests of the minor.

History: 1953 Comp., § 32A-5-206, enacted by Laws 1975, ch. 257, § 5-206.

ANNOTATIONS

Compiler's notes. — This section is similar to former 32-1-41, 1953 Comp.

Appointment of guardian selected by minor. — The court has a duty to appoint the person selected by the minor if he is competent and suitable, but it may disapprove of the selection if, in its judgment, the person so selected is not a proper choice. In re Guardianship of Howard, 66 N.M. 445, 349 P.2d 547 (1960).

Trial court has wide latitude in custody matters in the exercise of its discretion. In re Guardianship of Howard, 66 N.M. 445, 349 P.2d 547 (1960).

An order awarding custody is subject to modification upon a sufficient showing that circumstances and conditions affecting the welfare of the minor have changed. In re Guardianship of Howard, 66 N.M. 445, 349 P.2d 547 (1960).

Welfare of the minor is paramount consideration in custody cases. In re Guardianship of Howard, 66 N.M. 445, 349 P.2d 547 (1960).

Preference of minor in relation to incapacitated adults. — The provisions in the New Mexico Uniform Probate Code for appointment of a guardian for an incapacitated person provide some opportunity for choice or preference by the incapacitated person under 45-5-311 NMSA 1978. The same is true of the provisions for appointment of a conservator under 45-5-410 NMSA 1978. However, the provisions for choice or preference in those cases are not as liberal as the provision for appointment of a minor's guardian under this section. In re Conservatorship & Guardianship of Pulver, 117 N.M. 329, 871 P.2d 985 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Minority of parent as affecting right to guardianship of child, 19 A.L.R. 1043.

Bastardizing child as affecting right to appointment as guardian, 37 A.L.R. 531.

Contract in consideration of renunciation of one's status, or right to appointment, as guardian, executor, administrator, trustee or other fiduciary, as contrary to public policy, 121 A.L.R. 677.

Validity of condition in will in restraint of marriage as applied to appointment of guardian, 122 A.L.R. 26.

Religious affiliations, consideration and weight in appointment or removal of guardian for minor child, 22 A.L.R.2d 696.

Right of infant to select own guardian, 85 A.L.R.2d 921.

Right of putative father to custody of illegitimate child, 45 A.L.R.3d 216.

Who is minor's next of kin for guardianship purposes, 63 A.L.R.3d 813.

39 C.J.S. Guardian and Ward §§ 16 to 18.

45-5-207. Court appointment of guardian of minor; notice; procedure.

A. Notice of the time and place of hearing of a petition for the appointment of a guardian of a minor is to be given by the petitioner in the manner prescribed by Section 1-401 [45-1-401 NMSA 1978] to:

(1) the minor, if he is fourteen or more years of age;

(2) the person who has had the principal care and custody of the minor during the sixty days preceding the date of the petition; and

(3) any living parent of the minor.

B. Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of Section 5-204 [45-5-204 NMSA 1978] have been met and the best interests of the minor will be served by the requested appointment, it shall make the appointment. In other cases the court may dismiss the proceedings, or make any other disposition of the matter that will serve the best interests of the minor.

C. If necessary, the court may appoint a temporary guardian, with the status of a permanent guardian of a minor, but the authority of a temporary guardian shall not last longer than six months.

D. If, at any time in the proceeding, the court finds the minor is or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is fourteen years of age or older.

History: 1953 Comp., § 32A-5-207, enacted by Laws 1975, ch. 257, § 5-207.

ANNOTATIONS

Participation in visitation action does not waive rights in guardianship action. — Mother did not waive her right to notice of a permanent guardianship proceeding, despite her subsequent entry of appearance and participation in stipulations regarding visitation. Marlaine F.G. v. Fastle, 1998-NMCA-003, 124 N.M. 468, 952 P.2d 463.

Notice to living parent. — Grandparents failed to give requisite notice of their petition for guardianship of their grandchild to the grandchild's living parent; it was undisputed that the document given to grandparents authorizing them to sign papers for medical reasons included the parent's address and telephone number, and that grandparents made no attempt to notify the grandchild's parent in any way, including publication. In re Guardianship of Sabrina Mae D., 114 N.M. 133, 835 P.2d 849 (Ct. App. 1992), cert. denied, Sabrina Mae D. v. Northcutt, 113 N.M. 744, 832 P.2d 1223 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity of appointment of guardian or curator for infant without service of process upon, or notice to, latter, 1 A.L.R. 919.

Construction and application of statute prescribing that notice of petition or hearing for appointment of guardian be of such nature or be given to such persons as court deems reasonable or proper, 109 A.L.R. 338.

Necessity and sufficiency of notice to infant or other incompetent of application for appointment of successor to guardian or committee, 138 A.L.R. 1364.

39 C.J.S. Guardian and Ward §§ 20, 23, 27, 28.

45-5-208. Consent to service by acceptance of appointment; notice.

By accepting a parental or court appointment as guardian, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of a proceeding shall be delivered to the guardian or mailed to the guardian at the address listed in the court records and to the address then known to the petitioner. Letters of guardianship shall indicate whether the guardian was appointed by parental appointment or by court order.

History: 1953 Comp., § 32A-5-208, enacted by Laws 1975, ch. 257, § 5-208; 2011, ch. 124, § 55.

ANNOTATIONS

The 2011 amendment, effective January 1, 2012, eliminated the testamentary appointment of guardians and provided for parental appointment of guardians.

Human services department as guardian. — Where the portions of a wrongful death payment due minors who were in custody of the human services department (HSD), were delivered to a representative of HSD who transmitted the order and the funds to Santa Fe, with a cover letter pointing out the need to deposit the funds in interest-bearing accounts until the minors reach the age of majority, HSD received notice sufficient to subject it to the jurisdiction of the court, and HSD's failure to contest either the court's jurisdiction or the terms of the trust, estopped HSD from now asserting the trial court's lack of jurisdiction to enforce its 1977 order. Guerra v. New Mexico Human Servs. Dep't, 96 N.M. 608, 633 P.2d 716 (Ct. App. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and effect of provision for service of process against minor on a parent, guardian or other designated person, 92 A.L.R.2d 1336.

39 C.J.S. Guardian and Ward § 30.

45-5-209. Powers and duties of guardian of minor.

A. A guardian of a minor protected person has the powers and responsibilities of a parent regarding the protected person's support, care and education, but a guardian is not personally liable for the protected person's expenses and is not liable to third persons by reason of the relationship for acts of the protected person.

B. In particular and without qualifying the foregoing, a guardian shall:

(1) become or remain personally acquainted with the protected person and maintain sufficient contact with the protected person to know of the protected person's capacities, limitations, needs, opportunities and physical and mental health;

(2) take reasonable care of the protected person's personal effects and commence protective proceedings if necessary to protect other property of the protected person;

(3) apply any available money of the protected person to the protected person's current needs for support, care and education;

(4) conserve any excess money of the protected person for the protected person's future needs, but if a conservator has been appointed for the estate of the protected person, the guardian, at least quarterly, shall pay to the conservator money of the protected person to be conserved for the protected person's future needs; and

(5) report the condition of the protected person and of the protected person's estate that has been subject to the guardian's possession or control, as ordered by the court on petition of any person interested in the protected person's welfare or as required by court rule.

C. A guardian may:

(1) receive money payable for the support of the protected person to the protected person's parent, guardian or custodian under the terms of any statutory benefit or insurance system or any private contract, devise, trust, conservatorship or custodianship and money or property of the protected person paid or delivered pursuant to the provisions of Section 45-5-103 NMSA 1978 or any other statute;

(2) if consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the protected person, take custody of the person of the protected person and establish the protected person's place of abode within or without New Mexico;

(3) if no conservator for the estate of the protected person has been appointed, institute proceedings, including administrative proceedings, or take other appropriate action to compel the performance by any person of a duty to support the protected person or to pay sums for the welfare of the protected person;

(4) consent to medical or other professional care, treatment or advice for the protected person without liability by reason of the consent for injury to the protected person resulting from the negligence or acts of third persons unless a parent would have been liable in the circumstances;

(5) consent to the marriage or adoption of the protected person; and

(6) if reasonable under all of the circumstances, delegate to the protected person certain responsibilities for decisions affecting the protected person's well-being.

D. A guardian is entitled to reasonable compensation for services as guardian and to reimbursement for room, board and clothing personally provided to the protected person, but only as approved by order of the court. If a conservator, other than the guardian or one who is affiliated with the guardian, has been appointed for the estate of the protected person, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator without order of the court controlling the guardian.

E. In the interest of developing self-reliance on the part of a protected person or for other good cause, the court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the minor or other interested person, may limit the powers of a guardian otherwise conferred by this section and thereby create a limited guardianship. Any limitation on the statutory power of a guardian of a minor must be

endorsed on the guardian's letters or, in the case of a guardian by parental appointment, must be reflected in letters that are issued at the time any limitation is imposed. Following the same procedure, a limitation may be removed and appropriate letters issued.

History: 1953 Comp., § 32A-5-209, enacted by Laws 1975, ch. 257, § 5-209; repealed and reenacted by Laws 1995, ch. 210, § 54; 2009, ch. 159, § 29.

ANNOTATIONS

Repeals and reenactments. — Laws 1995, ch. 210, § 54 repealed 45-5-209 NMSA 1978, as enacted by Laws 1975, ch. 257, § 5-209, and enacted a new section, effective July 1, 1995.

Compiler's notes. — This section includes within its scope some of the functions of former 32-1-17, 1953 Comp.

The 2009 amendment, effective June 19, 2009, deleted "ward" and added "protected person".

Continuing obligation to protect ward's assets. — A guardian had a continuing obligation to accept and protect assets belonging to ward according to any terms attached to those assets, until the guardianship had been terminated. Guerra v. New Mexico Human Servs. Dep't, 96 N.M. 608, 633 P.2d 716 (Ct. App. 1981) (decided under former law).

Regardless of assets' source. — The guardianship statutes establish a guardian's duty to receive and account for funds deliverable or delivered for the ward's benefit, regardless of the manner in which those funds come into the guardian's possession. Guerra v. New Mexico Human Servs. Dep't, 96 N.M. 608, 633 P.2d 716 (Ct. App. 1981) (decided under former law).

Accounting by guardian. — The matter of honesty in rendition of account, of good faith in the discharge of the duty as it applies both to an administrator and a guardian, and the question whether the expenditures were entitled to be made and were in fact made are paramount in the consideration and allowance of credits. The guardian is entitled to be credited with all reasonable expenses incurred in the maintenance and education of the ward. Stroope v. Potter, 48 N.M. 404, 151 P.2d 748 (1944).

For comment, "Statute of Limitations Applied to Minors: The New Mexico Court of Appeals' Balance of Competing State Interests to Favor Children," see 35 N.M. L. Rev. 535 (2005).

For note, "Tort Law – Either the Parents or the Child May Claim Compensation for the Child's Medical and Non-Medical Damages: Lopez v. Southwest Community Health Services," see 23 N.M.L. Rev. 373 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Constitutionality of statute authorizing guardian to sell or lease land of ward, 4 A.L.R. 1552.

Right of guardian to expend principal of ward's estate for support and maintenance, 5 A.L.R. 632.

Right of guardian to invest trust funds in corporate stock, 12 A.L.R. 574, 122 A.L.R. 657, 78 A.L.R.2d 7.

Court's power to authorize guardian to borrow ward's money, 30 A.L.R. 461.

Exchange as within power of sale, 63 A.L.R. 1003.

Character of claims or obligations contemplated by statute expressly giving guardian authority as to borrowing money, 85 A.L.R. 215.

Power of guardian as to mortgaging infant's real property, 95 A.L.R. 839.

Power and duty of court as to protection of investment in stocks by submitting to voluntary assessment, 104 A.L.R. 979.

Guardian's purchase from corporation of which he is officer or stockholder as voidable or as ground for surcharging his account, 105 A.L.R. 449.

Ownership of stock in corporation in which guardian holds stock in fiduciary capacity by guardian in his own right, 106 A.L.R. 220, 161 A.L.R. 1039.

Sale without order of court, 108 A.L.R. 936.

Option under insurance policy, guardian's power to make election, 112 A.L.R. 1063, 127 A.L.R. 454, 136 A.L.R. 1045.

Liability in absence of mandatory statute, of guardian for loss of funds as affected by failure to obtain court order authorizing investment, 116 A.L.R. 437.

Transaction with affiliated corporation by corporate guardian as violation of rule against self-dealing, 151 A.L.R. 905.

Power of guardian as to compromise of liquidated contract claim or money judgment, 155 A.L.R. 196.

Guardian's contract employing attorney as binding upon ward or his estate, 171 A.L.R. 468.

Validity and enforceability of agreement to drop or compromise will contest or withdraw objections to probate, or of agreement to induce others to do so, 42 A.L.R.2d 1319.

Power of court to confirm sale of ward's property over objection of guardian, 43 A.L.R.2d 1445.

Guardian's liability for interest on ward's funds, 72 A.L.R.2d 757.

Capacity of guardian to sue or be sued outside state where appointed, 94 A.L.R.2d 162.

Guardian's power to make lease for infant ward beyond minority or term of guardianship, 6 A.L.R.3d 570.

Judgment in guardian's final accounting proceedings as res judicata in ward's subsequent action against guardian, 34 A.L.R.4th 1121.

Guardian's authority, without seeking court approval, to exercise ward's right to revoke trust, 53 A.L.R.4th 1297.

Validity of inter vivos gift by ward to guardian or conservator, 70 A.L.R.4th 499.

Propriety of surgically invading incompetent or minor for benefit of third party, 4 A.L.R.5th 1000.

39 C.J.S. Guardian and Ward §§ 55 to 109.

45-5-210. Termination of appointment of guardian; general.

A guardian's authority and responsibility terminate upon the death, resignation or removal of the guardian or upon the minor's death, adoption, emancipation, marriage or attainment of majority, but termination does not affect the guardian's liability for prior acts nor the guardian's obligation to account for money and property of the protected person. Resignation of a guardian does not terminate the guardianship until it has been approved by the court. A testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding.

History: 1953 Comp., § 32A-5-210, enacted by Laws 1975, ch. 257, § 5-210; 2009, ch. 159, § 30; 2011, ch. 124, § 56.

ANNOTATIONS

Compiler's notes. — This section includes within its scope the functions of former 32-1-42, 1953 Comp.

Cross references. — For age of majority, *see* 12-2A-3 and 28-6-1 NMSA 1978.

The 2011 amendment, effective January 1, 2012, provides that a guardian’s authority and responsibility terminate upon the emancipation of a minor.

The 2009 amendment, effective June 19, 2009, deleted "his ward" and added "the protected person".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 C.J.S. Guardian and Ward §§ 36 to 40, 48.

45-5-211. Proceedings subsequent to appointment; venue.

A. The court where the protected person resides has concurrent jurisdiction with the court that appointed the guardian or in which acceptance of a testamentary appointment was filed over resignation, removal, accounting and other proceedings relating to the guardianship.

B. If the court located where the protected person resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, in New Mexico or another state, and, after consultation with that court, determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever is in the best interests of the protected person. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed.

History: 1953 Comp., § 32A-5-211, enacted by Laws 1975, ch. 257, § 5-211; 2009, ch. 159, § 31.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, deleted "ward" and added "protected person".

Jurisdiction to grant temporary custody. — The New Mexico court which appointed the guardian had concurrent jurisdiction with the Texas court, where the child resided, to grant temporary custody to the father pursuant to 45-2-211 NMSA 1978. Hooker v. Lucero, 94 N.M. 798, 617 P.2d 1313 (1980)..

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 C.J.S. Guardian and Ward § 176.

45-5-212. Resignation, removal and other post-appointment proceedings.

A. Any person interested in the welfare of a protected person, or the protected person if fourteen or more years of age, may petition for removal of a guardian on the ground that removal would be in the best interest of the protected person. A guardian may petition for permission to resign. A petition for removal or for permission to resign may, but need not, include a request for appointment of a successor guardian.

B. Notice of hearing on a petition for an order after the appointment of a guardian must be given to the protected person, the guardian and any other person as ordered by the court.

C. After notice pursuant to Section 45-1-401 NMSA 1978 and hearing on a petition for removal or for permission to resign, the court may terminate the guardianship and make any further order that may be appropriate.

D. If at any time in the proceeding the court finds that the interest of the protected person is or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is fourteen or more years of age.

History: 1953 Comp., § 32A-5-212, enacted by Laws 1975, ch. 257, § 5-212; 1995, ch. 210, § 55; 2009, ch. 159, § 32.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, deleted "ward" and added "protected person".

The 1995 amendment, effective July 1, 1995, substituted "removal and other postappointment proceedings" for "or removal proceedings" in the section heading; added Subsection B; redesignated former Subsections B and C as Subsections C and D; substituted "Section 45-1-401 NMSA 1978" for "Section 1-401" in Subsection C; and made a minor stylistic change in Subsection D.

Substitution of guardian. — In a proceeding to substitute the paternal uncle for the maternal grandmother as the guardian of a minor child, the district court did not commit reversible error in stating that it had made an independent investigation, had caused the state welfare department to make an investigation, and had heard evidence, witnesses and arguments of counsel, even though the record failed to disclose testimony upon which the order was based; the court would presume the correctness and regularity of the trial court’s decision. Hidalgo v. Cortese, 69 N.M. 320, 366 P.2d 848 (1961).

Loan to guardian’s family. — Removal of guardian who loaned the money of the guardian's ward to the ward's son was appropriate; the conflict of interest was apparent where guardian had failed to comply with the order requiring the guardian to file a new guardian's bond, leaving the only security for the ward as the mortgages on the guardian’s land, but debt secured by the mortgages was past due and no interest had been collected, and the land pledged to secure the note had been allowed to become incumbered with tax liens, and no foreclosure proceedings had been commenced. In re Hay’s Guardianship, 37 N.M. 55, 17 P.2d 943 (1932).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 C.J.S. Guardian and Ward §§ 48 to 52.

PART 3
GUARDIANS OF INCAPACITATED PERSONS

45-5-301. Appointment of guardian for incapacitated person; notice.

A. The parent of an unmarried incapacitated person may appoint by will, or other writing signed by the parent and attested by at least two witnesses, a guardian of the incapacitated person. If both parents are dead or incapacitated or the surviving parent has no parental rights or has been adjudged incapacitated, appointment becomes effective when, after having given seven days' prior written notice of intention to do so to the incapacitated person and to the person having care of the incapacitated person or to the nearest adult relative, the guardian files acceptance of appointment in the court in which the will is probated, or in the case of a non-testamentary instrument, in the court at the place where the incapacitated person resides or is present. The notice shall state that the appointment may be terminated by filing a written objection in the court, as provided in Subsection D of this section. If both parents are dead, an effective appointment by the parent who died later has priority.

B. The spouse of a married incapacitated person may appoint by will, or other writing signed by the spouse and attested by at least two witnesses, a guardian of the incapacitated person. The appointment becomes effective when, after having given seven days' prior written notice of intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is probated or, in the case of a non-testamentary nominating instrument, in the court at the place where the incapacitated person resides or is present. The notice shall state that the appointment may be terminated by filing a written objection in the court, as provided in Subsection D of this section. An effective appointment by a spouse has priority over an appointment by a parent.

C. An appointment effected by filing the guardian's acceptance under a will probated in the state of testator's domicile is effective in New Mexico.

D. On the filing in the court in which the will was probated or, in the case of a non-testamentary nominating instrument, in the court at the place where the incapacitated person resides or is present, of written objection to the appointment by the incapacitated person for whom a parental or spousal appointment of guardian has been made, the appointment is terminated. An objection does not prevent appointment by the court in a proper proceeding of the parental or spousal nominee or any other suitable person upon an adjudication of incapacity in proceedings under Sections 45-5-301.1 through 45-5-315 NMSA 1978.

History: 1953 Comp., § 32A-5-301, enacted by Laws 1975, ch. 257, § 5-301; 1995, ch. 210, § 56.

ANNOTATIONS

Compiler's notes. — This section includes within its scope some of the functions of former 30-2-7, 32-1-6 and 32-1-7, 1953 Comp.

The 1995 amendment, effective July 1, 1995, deleted "Testamentary" at the beginning in the section heading and rewrote the section to such an extent that a detailed comparison would be impracticable.

Law reviews. — For note, "Limited Guardianship for the Mentally Retarded," see 8 N.M.L. Rev. 231 (1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 49 C.J.S. Insane Persons §§ 42, 43.

45-5-301.1. When guardianship is to be used.

Guardianship for an incapacitated person shall be used only as is necessary to promote and to protect the well being of the person, shall be designed to encourage the development of maximum self reliance and independence of the person and shall be ordered only to the extent necessitated by the person's actual functional mental and physical limitations. An incapacitated person for whom a guardian has been appointed retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by the court.

History: 1978 Comp., § 45-5-301.1, enacted by Laws 1989, ch. 252, § 4.

45-5-301.2. Repealed.

ANNOTATIONS

Repeals. — Laws 2011, ch. 124, § 97 repealed 45-5-301.2 NMSA 1978, as enacted by Laws 1993, ch. 301, § 24, relating to foreign guardians, effective January 1, 2012. For provisions of former section, *see* the 2010 NMSA 1978 on *NMONESOURCE.COM*.

45-5-302. Venue.

Venue for guardianship proceedings for an alleged incapacitated person is in the judicial district where the alleged incapacitated person resides or is present. If the alleged incapacitated person is admitted to an institution pursuant to order of a court of competent jurisdiction, venue is also in the judicial district in which that court sits.

History: 1953 Comp., § 32A-5-302, enacted by Laws 1975, ch. 257, § 5-302; 1993, ch. 301, § 2.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, inserted "alleged" in three places and made a minor stylistic change.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical dependents § 4; 49 C.J.S. Insane Persons § 12.

45-5-303. Procedure for court appointment of a guardian of an incapacitated person.

A. An interested person may file a petition for the appointment of a person to serve as guardian for an alleged incapacitated person under the Uniform Probate Code. The petition shall state the following:

(1) the name, date of birth and address of the alleged incapacitated person for whom the guardian is sought to be appointed;

(2) the nature of the alleged incapacity as it relates to the functional limitations and physical and mental condition of the alleged incapacitated person and the reasons why guardianship is being requested;

(3) if a limited guardianship is sought, the particular limitations requested;

(4) whether a guardian has been appointed or is acting in any state for the alleged incapacitated person;

(5) the efforts that have been made that demonstrate due diligence to locate the other court-appointed guardian, agent or surrogate designated by the allegedly incapacitated person;

(6) the name and address of the proposed guardian;

(7) the name and address of two persons able to contact the proposed guardian if address or telephone contact information of the proposed guardian changes;

(8) the names and addresses, as far as known or as can reasonably be ascertained, of the persons most closely related by blood or marriage to the alleged incapacitated person;

(9) the name and address of the person or institution having the care and custody of the alleged incapacitated person;

(10) the number of other protected persons served by the proposed guardian, the other protected persons' relationships to the proposed guardian and the types of guardianship held if the proposed guardian is an individual;

(11) the reasons the appointment of a guardian is sought and the interest of the petitioner in the appointment;

(12) the steps taken to find less restrictive alternatives to the proposed guardianship; and

(13) the qualifications of the proposed guardian, including whether the guardian has ever been convicted of a felony.

B. Notice of a petition under this section for the appointment of a guardian and the hearing on the petition shall be given as provided in Section 45-5-309 NMSA 1978.

C. After the filing of a petition, the court shall set a date for hearing on the issues raised by the petition. Unless an alleged incapacitated person already has an attorney of the alleged incapacitated person's own choice, the court shall appoint an attorney to represent the alleged incapacitated person. The court-appointed attorney in the proceeding shall have the duties of a guardian ad litem, as set forth in Section 45-5-303.1 NMSA 1978.

D. The person alleged to be incapacitated shall be examined by a qualified health care professional appointed by the court who shall submit a report in writing to the court. The report shall:

(1) describe the nature and degree of the alleged incapacitated person's incapacity, if any, and the level of the respondent's intellectual, developmental and social functioning; and

(2) contain observations, with supporting data, regarding the alleged incapacitated person's ability to make health care decisions and manage the activities of daily living.

E. The court shall appoint a visitor who shall interview the person seeking appointment as guardian and the person alleged to be incapacitated. The visitor shall also visit the present place of abode of the person alleged to be incapacitated and the place where it is proposed the alleged incapacitated person will be detained or reside if the requested appointment is made. The visitor shall evaluate the needs of the person alleged to be incapacitated and shall submit a written report to the court. The report shall include a recommendation regarding the appropriateness of the appointment of the proposed guardian. The report to the court shall also include recommendations regarding:

(1) those aspects of personal care that the alleged incapacitated person can manage without supervision or assistance;

(2) those aspects of personal care that the alleged incapacitated person could manage with the supervision or assistance of support services and benefits; and

(3) those aspects of personal care that the alleged incapacitated person is unable to manage without the supervision of a guardian.

Unless otherwise ordered by the court, the appointment of the visitor terminates and the visitor is discharged from the visitor's duties upon entry of an order appointing a guardian and acceptance of the appointment by the guardian.

F. A person alleged to be incapacitated shall be present at the hearing on the issues raised by the petition and any response to the petition unless the court determines by evidence that it is not in the alleged incapacitated person's best interest to be present because of a threat to the health or safety of the alleged incapacitated person or others as determined by the court.

G. The court upon request or its own motion may conduct hearings at the location of the alleged incapacitated person who is unable to be present in court.

H. The rules of evidence shall apply and no hearsay evidence that is not otherwise admissible in a court shall be admitted into evidence except as otherwise provided in this article. There is a legal presumption of capacity, and the burden of proof shall be on the petitioner to prove the allegations set forth in the petition. Such proof shall be established by clear and convincing evidence.

I. A record of the proceedings shall be made if requested by the alleged incapacitated person or the alleged incapacitated person's attorney or when ordered by the court. Records, reports and evidence submitted to the court or recorded by the court shall be confidential, except that the public shall be granted access to the following information:

(1) docket entries;

(2) date of the proceeding, appointment and termination;

(3) duration of the guardianship; and

(4) the name and other information necessary to identify the alleged incapacitated person.

J. Notwithstanding the provisions of Subsection I of this section, a disclosure of information shall not include diagnostic information, treatment information or other medical or psychological information.

K. The issue of whether a guardian shall be appointed for the alleged incapacitated person shall be determined by the court at a closed hearing unless the alleged incapacitated person requests otherwise.

L. Upon request of the petitioner or alleged incapacitated person, the court shall schedule a jury trial.

History: 1953 Comp., § 5-303, enacted by Laws 1975, ch. 257, § 5-303; repealed and reenacted by Laws 1989, ch. 252, § 5; 1993, ch. 301, § 3; 1998, ch. 32, § 3; 2009, ch. 159, § 33.

ANNOTATIONS

Repeals and reenactments. — Laws 1989, ch. 252, § 5 repealed former 45-5-303 NMSA 1978, as enacted by Laws 1975, ch. 257, § 5-303, relating to procedure for court appointment of a guardian of an incapacitated person, and enacted a new section, effective June 16, 1989.

Cross references. — For involuntary commitment of developmentally disabled adults by Uniform Probate Code guardian, *see* 43-1-13 NMSA 1978.

For voluntary admission, *see* 43-1-14 NMSA 1978.

The 2009 amendment, effective June 19, 2009, in Paragraph (1) of Subsection A, changed "age" to "date of birth"; added Paragraphs (5), (7) and (10) of Subsection A; deleted Paragraph (8) of Subsection A, which required a statement of the names and addresses of any other incapacitated persons for whom the proposed guardian is acting; and in Paragraph (13) of Subsection A, added "including whether the guardian has ever been convicted of a felony".

The 1998 amendment, effective May 20, 1998, in Subsection A, inserted "Uniform"; in Paragraph A(1) inserted "and"; in the last sentence of Subsection H, substituted "shall" for "must"; in Subsection I, inserted "except that the public shall be granted access to the following information:"; added Paragraphs I(1) to I(4); added Subsection J and redesignated the following subsections accordingly.

The 1993 amendment, effective July 1, 1993, in Subsection A inserted "name and" in Paragraph (5) and substituted "alleged incapacitated person" for "person for whom the guardian is sought to be appointed" in Paragraphs (6) and (7); in Subsection C, inserted "of his own choice" in the second sentence and substituted the third sentence for two sentences which read "The attorney in the proceedings shall have the duties of a guardian ad litem. Such attorney shall visit the alleged incapacitated person prior to the hearing"; in Subsection D, substituted "report" for "evaluation" twice in the introductory paragraph and rewrote Paragraph (2); rewrote Subsection E; deleted former Paragraph (1) in Subsection F which read "it is impossible for the alleged incapacitated person to be present at the hearing; or"; and made minor stylistic changes throughout the section.

Strict accordance with statutory proceedings required. — Proceedings to adjudicate a person incompetent, insane or so mentally ill as to require hospitalization must be in strict accordance with the statutory requirements and proceedings. If the

required procedure is not followed in material respects, the proceedings are void and of no effect. Blevins v. Cook, 66 N.M. 381, 348 P.2d 742 (1960) (decided under former law).

Substantial compliance found. — A failure to strictly comply with the requirements of the guardianship statutes did not deprive the trial court of jurisdiction since the trial court took the utmost care at trial to ensure that the purposes of the guardianship statutes were substantially complied with by the parties. In re Conservatorship and Guardianship of Pulver, 117 N.M. 329, 871 P.2d 985 (Ct. App. 1994).

Adequate notice of proceedings. — Where relative of a person who was alleged to be incompetent was not served with a pleading making the relative a party to the guardianship proceedings; relative was mailed a copy of the petition and notice of hearing; relative was not given notice of a change of the hearing date or of any other action in the proceeding; and there was no evidence that relative did not understand that relative could seek to participate in the proceedings, the notice to the relative was adequate. In re the Protective Proceedings for Strozzi, 112 N.M. 270, 814 P.2d 138 (Ct. App. 1991).

Appointment of medical professional. — Where the trial court did not on its own initiative appoint a qualified health care professional, but heard testimony about the medical and mental status from a qualified professional registered nurse who cared for the incapacitated person on a daily basis, there was substantial compliance. In re Conservatorship and Guardianship of Pulver, 117 N.M. 329, 871 P.2d 985 (Ct. App. 1994).

Reports of medical evaluations. — The evaluations, together with the testimony of the nurse and the testimony of the psychologist, all of which unqualifiedly supported the appointment of a guardian and conservator, fulfilled the statutory intent, even though not all of it was written. In re Conservatorship and Guardianship of Pulver, 117 N.M. 329, 871 P.2d 985 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Constitutionality of statute making physical disability ground for appointment of guardian of person or property, 30 A.L.R. 1381.

Mental condition which will justify the appointment of guardian, committee or conservator of the estate for an incompetent or spendthrift, 9 A.L.R.3d 774.

Priority and preference in appointment of conservator or guardian for an incompetent, 65 A.L.R.3d 991.

Validity of guardianship proceeding based on brainwashing of subject by religious, political or social organization, 44 A.L.R.4th 1207.

14 C.J.S. Chemical Dependents § 4; 49 C.J.S. Insane Persons §§ 37, 40.

45-5-303.1. Duties of guardian ad litem.

A. The guardian ad litem shall:

(1) interview in person the alleged incapacitated person prior to the hearing;

(2) present the alleged incapacitated person's declared position to the court;

(3) interview the qualified health care professional, the visitor and the proposed guardian;

(4) review both the medical report submitted by the qualified health care professional and the report by the visitor; and

(5) obtain independent medical or psychological assessments, or both, if necessary.

B. Unless otherwise ordered by the court, the duties of the guardian ad litem terminate and the guardian ad litem is discharged from his duties upon entry of the order appointing the guardian and acceptance of the appointment by the guardian.

History: 1978 Comp., § 45-5-303.1, enacted by Laws 1989, ch. 252, § 6; 1993, ch. 301, § 4.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, designated Subsection A; in Subsection A, deleted "appointed by the court pursuant to Subsection C of Section 45-5-303 NMSA 1978" following "litem" in the introductory paragraph, redesignated former Subsections A to E as Paragraphs (1) to (5), inserted "in person" in Paragraph (1), and substituted "report" for "affidavit" in Paragraph (4); added Subsection B; and made a minor stylistic change.

45-5-304. Findings; order of appointment.

A. The court, at the hearing on the petition for appointment for a guardian pursuant to provisions of Chapter 45, Article 5 NMSA 1978, shall:

(1) inquire into the nature and extent of the functional limitations of the alleged incapacitated person; and

(2) ascertain the alleged incapacitated person's capacity to care for the alleged incapacitated person's own self.

B. If it is determined that the alleged incapacitated person possesses the capacity to care for the alleged incapacitated person's own self, the court shall dismiss the petition.

C. Alternatively, the court may appoint a full guardian as requested in the petition or a limited guardian and confer specific powers of guardianship after finding in the record based on clear and convincing evidence that:

(1) the person for whom a guardian is sought is totally incapacitated or is incapacitated only in specific areas as alleged in the petition;

(2) the guardianship is necessary as a means of providing continuing care, supervision and rehabilitation of the incapacitated person;

(3) there are no available alternative resources that are suitable with respect to the alleged incapacitated person's welfare, safety and rehabilitation;

(4) the guardianship is appropriate as the least restrictive form of intervention consistent with the preservation of the civil rights and liberties of the alleged incapacitated person; and

(5) the proposed guardian is both qualified and suitable, has reviewed the proposed order of appointment and is willing to serve.

D. The court may enter any other appropriate order consistent with the findings of this section.

E. A copy of the order appointing the guardian shall be furnished to the proposed guardian, the incapacitated person and the incapacitated person's counsel.

F. The order shall contain the name and address of the guardian as well as notice of the incapacitated person's right to appeal the guardianship appointment and of the right to seek alteration or termination of the guardianship at any time.

History: 1953 Comp., § 5-304, enacted by Laws 1975, ch. 257, § 5-304; repealed and reenacted by Laws 1989, ch. 252, § 7; 1993, ch. 301, § 5; 2009, ch. 159, § 34.

ANNOTATIONS

Repeals and reenactments. — Laws 1989, ch. 252, § 7 repealed former 45-3-304 NMSA 1978, as enacted by Laws 1975, ch. 257, § 5-304, relating to findings and order of appointment, and enacted a new section, effective June 16, 1989.

The 2009 amendment, effective June 19, 2009, in Paragraph (5) of Subsection C, added "has reviewed the proposed order of appointment" and in Subsection E, added "proposed guardian,".

The 1993 amendment, effective July 1, 1993, deleted "dismiss the proceedings or" following "court may" in Subsection D and made a minor stylistic change.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 49 C.J.S. Insane Persons § 40.

45-5-305. Acceptance of appointment; consent to jurisdiction.

By accepting a testamentary or court appointment as guardian, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person. Notice of any proceeding shall be delivered to the guardian or mailed to him at his address as listed in the court records and to his address as then known to the petitioner.

History: 1953 Comp., § 32A-5-305, enacted by Laws 1975, ch. 257, § 5-305.

ANNOTATIONS

Guardians of minors. — While 45-5-305 NMSA 1978 deals specifically with guardians of incapacitated persons, it applies equally to guardians of wards who are legally incapacitated by their minority, to confer personal jurisdiction over a guardian. Hooker v. Lucero, 94 N.M. 798, 617 P.2d 1313 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 49 C.J.S. Insane Persons § 41.

45-5-306. Death of protected person or guardian; incapacity of guardian.

The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or protected person, the determination of incapacity of the guardian or upon removal or resignation as provided in Section 45-5-307 NMSA 1978. Upon the death of the protected person, the guardian shall submit notice to the appointing court. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect the guardian's liability for prior acts nor the guardian's obligation to account for funds and assets of the guardian's protected person.

History: 1953 Comp., § 32A-5-306, enacted by Laws 1975, ch. 257, § 5-306; 2009, ch. 159, § 35.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, deleted "ward" and added "protected person"; and added the second sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 49 C.J.S. Insane Persons § 45.

45-5-307. Substitution, review and termination of guardianship.

A. On the petition of the incapacitated person or any person interested in the incapacitated person's welfare and upon notice and hearing, the court may remove a guardian and appoint a successor if it is in the best interest of the incapacitated person.

B. Upon death, removal or resignation of a guardian, the court may appoint another guardian or make any other order that may be appropriate. If a successor guardian is appointed, the successor guardian succeeds to the title and powers of the successor guardian's predecessor.

C. The incapacitated person or any person interested in the incapacitated person's welfare may petition for an order that the incapacitated person is no longer incapacitated and for removal or resignation of the guardian. A request for this order may be made by informal letter to the court or judge. Any person who knowingly interferes with transmission of this kind of request to the court may be adjudged guilty of contempt of court.

D. Unless waived by the court upon the filing of a petition to terminate a guardianship for reasons other than the death of the incapacitated person, the court shall follow the same procedures to safeguard the rights of the incapacitated person as those that apply to a petition for appointment of a guardian as set forth in Section 45-5-303 NMSA 1978.

E. In a proceeding that increases the guardian's authority or reduces the autonomy of the protected person, the court shall follow the same procedures to safeguard the rights of the incapacitated person as those that apply to a petition for appointment of a guardian, as set forth in Section 45-5-303 NMSA 1978.

F. Following receipt of a request for review, the court shall hold a status hearing, which may be informal, to determine the appropriate order to be entered. If the court finds the incapacitated person is capable of more autonomy than at the time of the original order, the court may enter an order removing the guardian, terminating the guardianship or reducing the powers previously granted to the guardian. The court has the option to follow all or part of the procedures that apply for the appointment of a guardian as set forth in Section 45-5-303 NMSA 1978.

G. At any time following the appointment of a guardian, but not later than ten years after the initial appointment of a guardian for a protected person and every ten years thereafter, the court shall hold a status hearing, after notice to the guardian, the protected person and appropriate interested persons, to review the status of the protected person's capacity and the continued need for a guardian. If the court is unable to contact either the guardian or the protected person and neither appears for the status hearing, the court shall appoint a guardian ad litem to investigate and advise the court as to the status of the protected person and the guardian.

H. Following the status hearing or the court's report from the guardian ad litem on the status of the protected person and the guardian as provided in Subsection G of this section, the court may enter an appropriate order; provided that, in entering an order that increases the guardian's authority or reduces the autonomy of the protected person, the court shall follow the same procedures to safeguard the rights of the incapacitated person as those that apply to a petition for appointment of a guardian, as set forth in Section 45-5-303 NMSA 1978.

History: 1953 Comp., § 32A-5-307, enacted by Laws 1975, ch. 257, § 5-307; 1989, ch. 252, § 8; 1993, ch. 301, § 6; 2009, ch. 159, § 36.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, added Subsections E through H.

The 1993 amendment, effective July 1, 1993, inserted "Death" and substituted "Guardianship" for "Incapacity" in the section heading; inserted "and upon notice and hearing" in Subsection A; rewrote Subsections B and D; and made minor stylistic changes in Subsection A.

The 1989 amendment, effective June 16, 1989, substituted "incapacitated person" for "ward" several times throughout the section; in Subsection C, deleted the former first sentence, which read "An order adjudicating incapacity may specify a minimum period, not exceeding one year, during which no petition for an adjudication that the ward is no longer incapacitated may be filed without special leave", and deleted "Subject to this restriction" at the beginning of the second sentence; and, in Subsection D, substituted "Upon" for "Before removing a guardian, accepting the resignation of a guardian or" and substituted "shall" for "may" in the first sentence, added the second sentence, and made minor stylistic changes throughout the subsection.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 49 C.J.S. Insane Persons § 45.

45-5-308. Letters of guardianship.

Letters of guardianship shall contain:

A. the names, addresses and telephone numbers of the guardian;

B. the name, address and telephone number of the incapacitated person; and

C. the scope of the guardianship including the specific legal limitations imposed by the court on the powers of the guardian.

History: 1978 Comp., § 45-5-308, enacted by Laws 1989, ch. 252, § 9.

45-5-309. Notices in guardianship proceedings.

A. In a proceeding for the appointment or removal of a guardian of an incapacitated person, other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing and a copy of the petition and any interim orders that may have been entered shall be given to each of the following:

(1) the person alleged to be incapacitated;

(2) the person's spouse, parents and adult children, or if there are no adult children, at least one of the person's closest adult relatives if any can be found;

(3) the proposed guardian; and

(4) a person, as far as known or as can reasonably be ascertained, previously nominated or designated in a writing signed by the incapacitated person prior to incapacity that has not been revoked by the incapacitated person or terminated by a court. This includes but is not limited to writings executed under the Uniform Health-Care Decisions Act [Chapter 24, Article 7A NMSA 1978], the Mental Health Care Treatment Decisions Act [Chapter 24, Article 7B NMSA 1978], the Uniform Power of Attorney Act [45-5B-101 through 45-5B-403 NMSA 1978], the Uniform Probate Code and the Uniform Trust Code [Chapter 46A NMSA 1978].

Notice of hearing shall be given to a person who is serving as the guardian or conservator of the person to be protected or who has primary responsibility for the person's care.

B. Notice shall be served personally on the alleged incapacitated person and the person's spouse if they can be found within New Mexico. Notice to an out-of-state spouse, the parents and to all other persons, except the alleged incapacitated person, shall be given as provided in Section 45-1-401 NMSA 1978.

C. At least fourteen days' notice shall be given before the hearing takes place. The notice shall be in plain language and large type and shall include the following information and shall be substantially in the following form:

"NOTICE

TO: (name and address of person receiving notice)

On (date of hearing) at (time of hearing) in (place of hearing) at (city), New Mexico, the (name and address of court) will hold a hearing to determine whether a guardian should be appointed for (name of alleged incapacitated person). The purpose of this proceeding is to protect (name of alleged incapacitated person). A copy of the petition requesting appointment of a guardian is attached to this notice.

At the hearing, the court will determine whether (name of alleged incapacitated person) is an incapacitated person under New Mexico law.

If the court finds that (name of alleged incapacitated person) is incapacitated, the court at the hearing shall also consider whether (name of proposed guardian, if any) should be appointed as guardian of (name of alleged incapacitated person). The court may, in its discretion, appoint some other qualified person as guardian. The court may also, in its discretion, limit the powers and duties of the guardian to allow (name of alleged incapacitated person) to retain control over certain activities.

(Name of alleged incapacitated person) shall attend the hearing and be represented by an attorney. The petition may be heard and determined in the absence of (name of alleged incapacitated person) if the court determines that the presence of (name of alleged incapacitated person) is not possible. If (name of alleged incapacitated person) attends the hearing and is not represented by an attorney, the court must appoint an attorney to represent the alleged incapacitated person.

The court may, on its own motion or on request of any interested person, postpone the hearing to another date and time.

_____

(signature of petitioner)".

History: 1953 Comp., § 32A-5-309, enacted by Laws 1975, ch. 257, § 5-309; 1989, ch. 252, § 10; 1993, ch. 301, § 7; 2009, ch. 159, § 37.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, added Paragraphs (3) and (4) of Subsection A.

The 1993 amendment, effective July 1, 1993, deleted "waiver" following "proceedings" and "guardian ad litem" at the end of the section heading; in Subsection A, inserted "if there are no adult children" in Paragraph (2), deleted former Paragraph (3) which read "any person who is serving as his guardian or conservator or who has primary responsibility for his care and custody" and added the final paragraph of Subsection A; in Subsection B, deleted "and parents" following "spouse" in the first sentence and substituted "Notice to an out-of-state spouse, the parents" for "Notice to the spouse, and parents if they cannot be found within New Mexico" at the beginning of the second sentence; substituted "shall" for "should" in the first and second sentences in Subsection C; and made minor stylistic changes throughout the section.

The 1989 amendment, effective June 16, 1989, in Subsection A, inserted "and a copy of the petition and any interim orders which may have been entered" in the introductory paragraph, and deleted "the ward or" at the beginning of Paragraph (1); in Subsection B

substituted "45-1-401 NMSA 1978" for "1-401" in the second sentence; substituted Subsection C for former provisions, which read "Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is confirmed in an interview with the visitor"; and deleted former Subsection D, which read "Representation of the alleged incapacitated person by a guardian ad litem is not necessary".

Alternative methods of service. — Where the incapacitated person cannot see or read, service on his attorney would suffice, particularly when the attorney requested the hearing, insured the party's attendance and participation, and vigorously contested the petition. Indeed, it would appear quite pointless to reverse the case on grounds of lack of notice. In re Conservatorship & Guardianship of Pulver, 117 N.M. 329, 871 P.2d 985 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 49 C.J.S. Insane Persons §§ 40, 47.

45-5-310. Temporary guardians.

A. When a petition for guardianship has been filed, but adherence to the procedures set out in this section would cause immediate and irreparable harm to the alleged incapacitated person's physical health, the court may appoint a temporary guardian prior to the final hearing and decision on the petition, subject to the requirements of this section.

B. Upon motion of the petitioner, the court shall schedule a hearing on the appointment of a temporary guardian for the earliest possible date, appoint counsel for the alleged incapacitated person and give notice as provided in Section 45-5-309 NMSA 1978. Upon a finding that serious and irreparable harm to the alleged incapacitated person's health would result during the pendency of petition, the court shall appoint a temporary guardian and shall specify the temporary guardian's powers in order to prevent serious and irreparable harm to the alleged incapacitated person. The duration of the temporary guardianship shall not exceed sixty days, except that upon order of the court, the temporary guardianship may be extended for not more than thirty days.

C. A temporary guardian may be appointed without notice to the alleged incapacitated person and his attorney only if it clearly appears from specific facts shown by affidavit or sworn testimony that immediate and irreparable harm will result to the alleged incapacitated person before a hearing on the appointment of a temporary guardian can be held. The alleged incapacitated person shall be notified within twenty-four hours of the appointment of a temporary guardian by the petitioner as provided in Subsection C of Section 45-5-309 NMSA 1978. On two days' notice to the party who obtained the appointment of a temporary guardian without notice, or on such shorter notice to that party as the court may prescribe, the alleged incapacitated person or his counsel may appear and move dissolution or modification of the court's order, and, in

that event, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

D. A temporary guardian is entitled to the care and custody of the alleged incapacitated person, and the authority of any permanent guardian previously appointed by the court is suspended as to those specific matters granted to the temporary guardian by the court. A temporary guardian may be removed by the court at any time. A temporary guardian shall make any report the court requires. In all other respects, the provisions of the [Uniform] Probate Code concerning guardians apply to temporary guardians.

E. Appointment of a temporary guardian shall have the effect of limiting the legal rights of the individual as specified in the court order. Appointment of a temporary guardian shall not be evidence of incapacity.

History: 1953 Comp., § 32A-5-310, enacted by Laws 1975, ch. 257, § 5-310; 1989, ch. 252, § 11; 1993, ch. 301, § 8.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

The 1993 amendment, effective July 1, 1993, added the language beginning "except that" at the end of the final sentence in Subsection B and inserted "alleged" near the beginning of the second sentence in Subsection C.

The 1989 amendment, effective June 16, 1989, rewrote the section to the extent that a detailed comparison would be impracticable.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 49 C.J.S. Insane Persons §§ 37, 38.

45-5-311. Who may be appointed guardian; priorities.

A. Any person deemed to be qualified by the court may be appointed guardian of an incapacitated person, except that no individual who operates or is an employee of a boarding home, residential care home, nursing home, group home or other similar facility in which the incapacitated person resides may serve as guardian for the incapacitated person, except an employee may serve in such capacity when related by affinity or consanguinity.

B. Persons who are not disqualified have priority for appointment as guardian in the following order:

(1) a guardian or other like fiduciary appointed by the appropriate court of any other jurisdiction;

(2) a person, as far as known or as can be reasonably ascertained, previously nominated or designated in a writing as defined in Paragraph (4) of Subsection A of Section 45-5-309 NMSA 1978 to serve as guardian or agent in a writing signed by the incapacitated person prior to the incapacitated person's incapacity that has not been revoked by the incapacitated person or terminated by a court;

(3) the spouse of the incapacitated person;

(4) an adult child of the incapacitated person;

(5) a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

(6) any relative of the incapacitated person with whom the incapacitated person has resided for more than six months prior to the filing of the petition;

(7) a person nominated by the person who is caring for the incapacitated person or paying benefits to the incapacitated person; and

(8) any other person.

C. With respect to persons having equal priority, the court shall select the person it considers best qualified to serve as guardian. The court, acting in the best interest of the incapacitated person and for good cause shown, may pass over a person having priority and appoint a person having a lower priority under this section and shall take into consideration:

(1) the preference of the incapacitated person, giving weight to preferences expressed in writing by the person while having capacity;

(2) the geographic location of the proposed guardian;

(3) the relationship of the proposed guardian to the incapacitated person;

(4) the ability of the proposed guardian to carry out the powers and duties of the guardianship; and

(5) potential financial conflicts of interest between the incapacitated person and proposed guardian.

History: 1953 Comp., § 32A-5-311, enacted by Laws 1975, ch. 257, § 5-311; 1989, ch. 252, § 12; 1993, ch. 301, § 9; 2009, ch. 159, § 38.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, in Paragraph (2) of Subsection B, added "as far as known or as can be reasonably ascertained"; added "or designated in a writing as defined in Paragraph (4) of Subsection A of Section 45-5-309 NMSA 1978"; added "or agent"; and added "that has not been revoked by the incapacitated person or terminated by a court"; in Subsection C, added "and for good cause shown"; and in Paragraph (1) of Subsection C, added "giving weight to preferences expressed in writing by the person while having capacity".

The 1993 amendment, effective July 1, 1993, inserted "Appointed" in the section heading; in Subsection B, added current Paragraphs (1) and (2) and redesignated former Paragraphs (1) through (6) as Paragraphs (3) through (8).

The 1989 amendment, effective June 16, 1989, substituted the present provisions of Subsection A for "Any competent person or a suitable institution may be appointed guardian of an incapacitated person"; and added Subsections B(6) and C.

Preference of incapacitated person. — The provisions in the New Mexico Uniform Probate Code for appointment of a guardian for an incapacitated person do provide some opportunity for choice or preference by the incapacitated person under this section. The same is true of the provisions for appointment of a conservator under 45-5-410NMSA 1978. However, the provisions for choice or preference in these cases are not as liberal as the provision for appointment of a minor's guardian under 45-5-206 NMSA 1978. In re Conservatorship & Guardianship of Pulver, 117 N.M. 329, 871 P.2d 985 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Priority and preferences in appointment of conservator or guardian for an incompetent, 65 A.L.R.3d 991.

14 C.J.S. Chemical Dependents § 4; 49 C.J.S. Insane Persons §§ 42, 43.

45-5-312. General powers and duties of the limited guardian and guardian.

A. If the court enters judgment pursuant to Subsection C of Section 45-5-304 NMSA 1978, it shall appoint a limited guardian if it determines that the incapacitated person is able to manage some but not all aspects of personal care. The court shall specify those powers that the limited guardian shall have and may further restrict each power so as to permit the incapacitated person to care for the incapacitated person's own self commensurate with the incapacitated person's ability to do so. A person for whom a limited guardian has been appointed retains all legal and civil rights except those that have been specifically granted to the limited guardian by the court. The limited guardian shall exercise supervisory powers over the incapacitated person in a manner that is the least restrictive form of intervention consistent with the order of the court.

B. A guardian of an incapacitated person has the same powers, rights and duties respecting the incapacitated person that a parent has respecting an unemancipated minor child, except that a guardian is not legally obligated to provide from the guardian's own funds for the incapacitated person and is not liable to third persons for acts of the incapacitated person solely by reason of the guardianship. In particular and without qualifying the foregoing, a guardian or the guardian's replacement has the following powers and duties, except as modified by order of the court:

(1) to the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the incapacitated person, a guardian is entitled to custody of the incapacitated person and may establish the incapacitated person's place of abode within or without New Mexico;

(2) if entitled to custody of the incapacitated person, a guardian shall make provision for the care, comfort and maintenance of the incapacitated person and, whenever appropriate, arrange for training and education. The guardian shall take reasonable care of the incapacitated person's clothing, furniture, vehicles and other personal effects and commence conservatorship proceedings if other property of the incapacitated person is in need of protection;

(3) if no agent is entitled to make health-care decisions for the incapacitated person under the provisions of the Uniform Health-Care Decisions Act [Chapter 24, Article 7A NMSA 1978], then the guardian shall make health-care decisions for the incapacitated person in accordance with the provisions of that act. In exercising health-care powers, a guardian may consent or withhold consent that may be necessary to enable the incapacitated person to receive or refuse medical or other professional care, counsel, treatment or service. That decision shall be made in accordance with the values of the incapacitated person, if known, or the best interests of the incapacitated person if the values are not known;

(4) if no conservator for the estate of the incapacitated person has been appointed, if the court has determined that a conservatorship is not appropriate and if a guardian appointed by the court has been granted authority to make financial decisions on behalf of the protected person in the order of appointment and in the letters of guardianship pursuant to Subsection C of Section 45-5-308 NMSA 1978, the guardian has the following powers and duties, including the power:

(a) to institute proceedings to compel any person under a duty to support the protected person or to pay sums for the welfare of the protected person to perform that duty;

(b) to receive money and tangible property deliverable to the protected person and apply the money and property for support, care and education of the protected person, but the guardian shall not use funds from the protected person's estate for room and board that the guardian or the guardian's spouse, parent or child has furnished the protected person, unless a charge for the service is approved by order of the court

made upon notice to at least one of the next of kin of the protected person, if notice is possible;

(c) to serve as advocate and decision-maker for the protected person in any disputes with persons or organizations, including financial institutions, regarding the protected person's finances;

(d) to obtain information regarding the protected person's assets and income from persons or organizations handling the protected person's finances;

(e) to file an initial inventory of all property belonging to the protected person within ninety days after appointment; and

(f) to exercise care to conserve any excess for the protected person's needs and include in the guardian's ninety-day and annual reports a description of decisions made regarding the protected person's finances and property; and

(5) the guardian shall exercise the guardian's supervisory powers over the incapacitated person in a manner that is least restrictive of the incapacitated person's personal freedom and consistent with the need for supervision.

C. A guardian of an incapacitated person for whom a conservator also has been appointed shall control the care and custody of the incapacitated person and is entitled to receive reasonable sums for services and for room and board furnished to the incapacitated person. The guardian may request the conservator to expend the incapacitated person's estate by payment to third persons or institutions for the incapacitated person's care and maintenance.

History: 1953 Comp., § 32A-5-312, enacted by Laws 1975, ch. 257, § 5-312; 1984, ch. 99, § 8; 1989, ch. 252, § 13; 1993, ch. 301, § 10; 1997, ch. 168, § 12; 2009, ch. 159, § 39.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, in Paragraph (4) of Subsection B, after "person has been appointed:", deleted "the guardian may institute proceedings to compel any person under a duty to support the incapacitated person or to pay sums for the welfare of the incapacitated person" and added the remainder of the sentence; and added Subparagraphs (a) through (f) of Paragraph (4) of Subsection B.

The 1997 amendment, effective July 1, 1997, added the first sentence and added "In exercising health-care powers," at the beginning of the second sentence of Paragraph B(3), and deleted former Paragraph B(5) relating to the authority of a guardian to consent to removing or withholding maintenance medical treatment of an incapacitated person.

The 1993 amendment, effective July 1, 1993, substituted "shall" for "may", deleted "alleged" preceding "incapacitated" and substituted "able" for "unable" in the first sentence in Subsection A; deleted "as defined in Subsection M of Section 45-5-101 NMSA 1978" following "guardian" in the second sentence of Subsection A; inserted "and" preceding "consistent" in Paragraph (6) of Subsection B; in Subsection C, substituted "an incapacitated person" for "one" near the beginning and deleted "as agreed upon between him and the conservator, provided the amounts agreed upon are reasonable under the circumstances" at the end of the first sentence; and made minor stylistic changes.

The 1989 amendment, effective June 16, 1989, added Subsection A; redesignated former Subsections A and B as Subsections B and C; and rewrote Subsection B to the extent that a detailed comparison would be impracticable.

Powers of guardians. — A guardian has only the care, custody, or control of the person and is not authorized to sell property, enter into leases or employ accountants and attorneys. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

Proper adjudication of incompetency necessary to give guardian authority. — Where there was no adjudication of incompetency in accordance with the statutory requirements, the adjudication was a nullity as were subsequent acts by guardian whose appointment was based on that adjudication. Blevins v. Cook, 66 N.M. 381, 348 P.2d 742 (1960) (decided under former law).

Guardians may initiate divorce. — A guardian of an adult incompetent ward may initiate divorce proceedings on behalf of the ward. Nelson v. Nelson, 118 N.M. 17, 878 P.2d 335 (Ct. App. 1994).

Law reviews. — For note, "New Mexico Expands the Power of a Guardian to Include the Right to Initiate and Maintain a Divorce Action on Behalf of the Guardian's Incompetent Ward: Nelson v. Nelson," see 25 N.M.L. Rev. 295 (1995).

For article, "Trends in New Mexico Law: 1993-94: Family Law – New Mexico Expands the Power of a Guardian to Include the Right to Initiate and Maintain a Divorce Action on Behalf of the Guardian's Incompetent Ward: Nelson v. Nelson," see 25 N.M.L. Rev. 295 (1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Constitutionality of statute authorizing guardian to sell or lease land of ward, 4 A.L.R. 1552.

Right of guardian to expend principal of ward's estate for support and maintenance, 5 A.L.R. 632.

Right of guardian to invest trust funds in corporate stock, 12 A.L.R. 574, 122 A.L.R. 657, 78 A.L.R.2d 7.

Court's power to authorize guardian to borrow ward's money, 30 A.L.R. 461.

Exchange as within power of sale, 63 A.L.R. 1003.

Character of claims or obligations contemplated by statute expressly giving guardian authority as to borrowing money, 85 A.L.R. 215.

Power and duty of guardian as to protection of investment in stocks by submitting to voluntary assessment, 104 A.L.R. 979.

Guardian's purchase from corporation of which he is officer or stockholder as voidable or as ground for surcharging his account, 105 A.L.R. 449.

Ownership of stock in corporation in which guardian holds stock in fiduciary capacity by guardian in his own right, 106 A.L.R. 220, 161 A.L.R. 1039.

Sale without order of court, 108 A.L.R. 936.

Option under insurance policy, guardian's power to make election, 112 A.L.R. 1063, 127 A.L.R. 454, 136 A.L.R. 1045.

Liability in absence of mandatory statute, of guardian for loss of funds as affected by failure to obtain court order authorizing investment, 116 A.L.R. 437.

Transaction with affiliated corporation, by corporate guardian as violation of rule against self-dealing, 151 A.L.R. 905.

Power of guardian as to compromise of liquidated contract claim or money judgment, 155 A.L.R. 196.

Guardian's contract employing attorney as binding upon ward or his estate, 171 A.L.R. 468.

Power of guardian of incompetent to change beneficiaries in ward's life insurance policy, 21 A.L.R.2d 1191.

Liability of incompetent's estate for torts committed by guardian, committee or trustee in managing estate, 40 A.L.R.2d 1103.

Validity and enforceability of agreement to drop or compromise will contest or withdraw objections to probate, or of agreement to induce others to do so, 42 A.L.R.2d 1319.

Power of court to confirm sale of ward's property over objection of guardian, 43 A.L.R.2d 1445.

Power of guardian, committee or trustee of mental incompetent, after latter's death, to pay debts and obligations, 60 A.L.R.2d 963.

Effect of incompetency of joint depositor upon status and ownership of bank account, 62 A.L.R.2d 1091.

Waiver of attorney-client privilege by personal representative or heir of deceased client or by guardian of incompetent, 67 A.L.R.2d 1268.

Guardian's liability for interest on ward's funds, 72 A.L.R.2d 757.

Capacity of guardian to sue or be sued outside state where appointed, 94 A.L.R.2d 162.

Power to make charitable gifts from estate of incompetent, 99 A.L.R.2d 946.

Factors considered in making election for incompetent to take under or against will, 3 A.L.R.3d 6.

Time within which election must be made for incompetent to take under or against will, 3 A.L.R.3d 119.

Who may make election for incompetent to take under or against will, 21 A.L.R.3d 320.

Power of court or guardian to make noncharitable gifts or allowances out of funds of incompetent ward, 24 A.L.R.3d 863.

Right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without approval by court, 63 A.L.R.3d 780.

Guardian's authority, without seeking court approval, to exercise ward's right to revoke trust, 53 A.L.R.4th 1297.

Validity of inter vivos gift by ward to guardian or conservator, 70 A.L.R.4th 499.

Involuntary disclosure or surrender of will prior to testator's death, 75 A.L.R.4th 1144.

Ademption or revocation of specific devise or bequest by guardian, committee, conservator or trustee of mentally or physically incompetent testator, 84 A.L.R.4th 462.

Propriety of surgically invading incompetent or minor for benefit of third party, 4 A.L.R.5th 1000.

Power of incompetent spouse's guardian or representative to sue for granting or vacation of divorce or annulment of marriage, or to make compromise or settlement in such suit, 32 A.L.R.5th 673.

14 C.J.S. Chemical Dependents § 4; 49 C.J.S. Insane Persons § 49.

45-5-313. Proceedings subsequent to appointment; venue.

A. The court where the protected person resides has concurrent jurisdiction with the court that appointed the guardian, or in which acceptance of a testamentary appointment was filed, over resignation, removal, accounting and other proceedings relating to the guardianship.

B. Subject to the transfer provisions of the Uniform Adult Guardianship and Protective Proceedings Jurisdication [Jurisdiction] Act, if the court located where the protected person resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, in this or another state, and after consultation with that court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever may be in the best interests of the protected person. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed.

History: 1953 Comp., § 32A-5-313, enacted by Laws 1975, ch. 257, § 5-313; 2009, ch. 159, § 40; 2011, ch. 124, § 57.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler to correct a typographical error, and is not part of the law.

The 2011 amendment, effective January 1, 2012, made the transfer of jurisdiction subject to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

The 2009 amendment, effective June 19, 2009, deleted "ward" and added "protected person".

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and effect of provision for service of process against minor on a parent, guardian or other designated person, 92 A.L.R.2d 1336.

14 C.J.S. Chemical Dependents § 4; 49 C.J.S. Insane Persons § 137.

45-5-314. Annual report.

A. The guardian of an incapacitated person shall file an initial report with the appointing court within ninety days of the guardian's appointment. Thereafter, the guardian shall file an annual report within thirty days of the anniversary date of the guardian's appointment. A copy of the report shall also be submitted to the district judge who appointed the guardian or the judge's successor, to the incapacitated person and to

the incapacitated person's conservator, if any. The court shall review this report. The report shall include information concerning the progress and condition of the incapacitated person, including but not limited to the incapacitated person's health, medical and dental care, residence, education, employment and habitation; a report on the manner in which the guardian carried out the guardian's powers and fulfilled the guardian's duties; and the guardian's opinion regarding the continued need for guardianship. If the guardian has been provided power pursuant to Paragraph (4) of Subsection B of Section 45-5-312 NMSA 1978, the report shall contain information on financial decisions made by the guardian. The report shall be substantially in the following form:

"STATE OF NEW MEXICO
COUNTY OF _____
_____ JUDICIAL DISTRICT COURT
IN THE MATTER OF THE GUARDIANSHIP OF
_____

CAUSE NO. _____

an incapacitated adult

GUARDIAN'S 90-DAY ____ ANNUAL ____ FINAL ____ (check one)
REPORT ON THE CONDITION AND WELL-BEING OF AN ADULT PROTECTED PERSON

Date of Appointment: _____

Pursuant to Section 45-5-314 NMSA 1978, the undersigned duly appointed, qualified and acting guardian of the above- mentioned protected person reports to the court as follows (attach additional sheets, if necessary):

1. PROTECTED PERSON:
Name_____
Residential Address_____
Facility Name _____
City, State, Zip Code_____
Telephone _____ Date of Birth _____

Name of person primarily responsible at protected person's place of residence:

2. GUARDIAN:
Name _____
Business Name (if any) _____

Address _____
City, State, Zip Code _____
Telephone _____ Alternate Telephone # _____
Relation to Protected Person _____

3. FINAL REPORTS ONLY (otherwise, go to #4)

I am filing a Final Report because of: ___ My resignation
___ Death of the Protected Person ___ Court Order
___ Other (please explain): _____

A. If because of resignation, Name of successor, if appointed:
Address _____
City, State, Zip Code_____
B. If because of Protected Person's death: (attach copy of death certificate, if available)

Date and place of death:_____
Name of personal representative if appointed: _____
Address _____
City, State, Zip Code_____

4. During the past year or 90 days (if initial report), I have visited the Protected Person _____ times. The date of my last personal visit was _____.

5. (A) Describe the residence of the Protected Person:

_____ Hospital/medical facility _____ Protected Person's home
_____ Guardian's home _____ Relative's home (explain below)
_____ Nursing home _____ Boarding/Foster/Group Home
_____
Other: _____

(B) During the past year or 90 days (if first report), has the Protected Person changed his/her residence? _____

Do you anticipate a change of residence for the protected person in the next year?_____

6. The name and address of any hospital or other institution (if any) where the Protected Person is now admitted:
_____
_____.

7. The Protected Person is under a physician's regular care.

_____ Yes _____ No

Identify the health care providers.
Physician: _____
Dentist (if any): _____
Mental Health Professional (i.e., psychiatrist, counselor):
_____
Other:_____

8. (A) During the past year or 90 days (if initial report), the Protected Person's physical health:
Remained the same _____
Primary diagnosis: _____

_____ improved _____ deteriorated

(explain) _____

(B) During the past year or 90 days (if initial report), the Protected Person's mental health:

Remained the same _____

Major diagnosis, if any: _____

Improved _____ deteriorated (explain) _____

If physical or mental health has deteriorated, please explain:
_____

9. Describe any significant hospitalizations or mental or medical events during the past year or 90 days (if initial report):
_____

10. List the Protected Person's activities and changes, if any, over the past year or 90 days (if initial report):
Recreational Activities:

Educational Activities:
Social Activities:
List Active Friends and/or Relatives:
Occupational activities:
Other:

11. Describe briefly any contracts entered into and major decisions made on behalf of the Protected Person during the past year or 90 days (if initial report):
_____

12. The Protected Person has made the following statements regarding his/her living arrangements and the guardianship over him/her:
_____

13. I believe the Protected Person has unmet needs.
_____ Yes (explain) _____ No
_____

If yes, indicate efforts made to meet these needs:
_____

14. The Protected Person continues to require the assistance of a guardian:
_____ Yes _____ No
Explain why or why not: _____
_____.

15. The authority given to me by the Court should:
_____ remain the same _____ be decreased _____ be increased
Why: _____
_____

16. Additional information concerning the Protected Person or myself (the guardian) that I wish to share with the Court:
_____
_____
_____

17. If the court has granted you the authority to make financial decisions on behalf of the Protected Person, then please describe the decisions you have made for the protected person: _____.
Signature of Guardian: _____ Date: _____

Printed Name: _____."

A.[B.] Any guardian may rely on a qualified health care professional's current written report to provide descriptions of the physical and mental conditions required in items 7, 8, 9, 14 and 15 of the annual report as specified in Subsection A of this section.

B.[C.] The guardian may be fined five dollars ($5.00) per day for an overdue annual report. The fine shall be used to fund the costs of visitors, counsel and functional assessments utilized in conservatorship and guardianship proceedings pursuant to the Uniform Probate Code.

C.[D.] The court shall not waive the requirement of an annual report under any circumstance but may grant an extension of time not to exceed sixty days. The court may require the filing of more than one report annually.

History: 1978 Comp., § 45-5-314, enacted by Laws 1989, ch. 252, § 14; 1993, ch. 301, § 11; 2009, ch. 159, § 41.

ANNOTATIONS

Bracketed material. — The bracketed material, "[B.], [C.] and [D.]" was inserted by the compiler to correct errors in the enrolled and engrossed bill and is not part of the law.

The 2009 amendment, effective June 19, 2009, in Subsection A, in the first sentence, after "incapacitated person shall file an", changed "annual" to "initial"; after "appointing court within", changed "thirty" to "ninety"; after "ninety days of", deleted "the anniversary date of"; added the second, fourth and sixth sentences; and deleted the former form of guardian's report and added a new form of guardian's 90-day, annual or final report; and in Subsection B, after "items 7, 8", deleted "and 11" and added "9, 14 and 15".

The 1993 amendment, effective July 1, 1993, inserted the second sentence in Subsection A; added current Subsection B; redesignated former Subsections B and C as Subsections C and D; added the second sentence in Subsection D; and made a minor stylistic change in Subsection C.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Guardian and Ward §§ 162 to 165.

39 C.J.S. Guardian and Ward § 145.

45-5-315. Consent to guardianship not permitted.

An alleged incapacitated person shall not be permitted by the court to consent to the appointment of a guardian. All the procedural safeguards contained in Chapter 45, Article 5 NMSA 1978 pursuant to the appointment of a guardian for an incapacitated person shall apply in every guardianship proceeding.

History: 1978 Comp., § 45-5-317, enacted by Laws 1989, ch. 252, § 15.

ANNOTATIONS

Compiler's notes. — This section was enacted as 45-5-317 NMSA 1978 by Laws 1989, ch. 252, § 14, but was redesignated by the compiler as 45-5-315 NMSA 1978.

PART 4
PROTECTION OF PROPERTY OF PERSONS UNDER DISABILITY AND MINORS

45-5-401. Conservatorship proceedings.

Upon petition and after notice and hearing in accordance with the provisions of the [Uniform] Probate Code, the court may appoint a conservator as follows:

A. appointment of a conservator may be made in relation to the estate and financial affairs of a minor if the court determines that:

(1) a minor owns property that requires management or protection that cannot otherwise be provided;

(2) a minor has or may have financial affairs that may be jeopardized or prevented by his minority; or

(3) funds are needed for a minor's support and education and that protection is necessary or desirable to obtain or provide funds; and

B. appointment of a conservator may be made in relation to the estate and financial affairs of a person for reasons other than minority if the court finds that the person has property that may be wasted or dissipated unless proper management is provided; that funds are needed for the support, care and welfare of the person or those entitled to be supported by him; that protection is necessary or desirable to obtain or provide funds; and that:

(1) the person is incapacitated; or

(2) the person is unable to manage his estate and financial affairs effectively for reasons such as confinement, detention by a foreign power or disappearance.

History: 1953 Comp., § 32A-5-401, enacted by Laws 1975, ch. 257, § 5-401; 1987, ch. 12, § 2; 1989, ch. 252, § 16; 1993, ch. 301, § 12.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — This section includes within its scope some of the functions of former 32-2-1 and 32-2-3, 1953 Comp.

The 1993 amendment, effective July 1, 1993, in Subsection A, inserted "financial" in the introductory paragraph, substituted "financial" for "business" in Paragraph (2) and made minor stylistic changes; and rewrote Subsection B.

The 1989 amendment, effective June 16, 1989, substituted "Conservatorship" for "Protective" in the section heading; deleted "or make other protective order for cause" following "conservator" in the undesignated introductory paragraph; in Subsection A deleted "or other protective order" following "conservator" in the introductory paragraph; and in Subsection B deleted "or other protective order" following "conservator" in the introductory paragraph and substituted "property or financial affairs, or both" for "the estate and affairs" in that paragraph, added present Paragraph (1), redesignated former Paragraph (1) as Paragraph (2) while substituting therein "financial affairs effectively for reasons such as confinement" for "affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement", and redesignated former Paragraph (2) as Paragraph (3) while substituting "and" for "or" near the middle of that paragraph.

Conservatorship does not automatically preclude mental capacity for will. — The Uniform Probate Code carefully separated the disability that is the basis for conservatorship from the incapacity necessitating guardianship; therefore, a testatrix, although a conservator of her property had been appointed, could have the requisite mental capacity and knowledge to execute a will. Lucero v. Lucero, 118 N.M. 636, 884 P.2d 527 (Ct. App. 1994).

Costs of administration. — The cost to prepare a transcript for an appeal taken in good faith is an administrative expense and is chargeable against the ward's estate. In re the Conservatorship and Guardianship of Pulver, 117 N.M. 329, 817 P.2d 985 (Ct. App. 1994), cert. denied, 117 N.M. 524, 873 P.2d 270 (1994).

Law reviews. — For article, "The Family Legal Check-Up: A Guide to Planning and Drafting Wills for Middle-Income Couples with Minor Children," see 8 N.M.L. Rev. 171 (1978).

For note, "Tort Law – Either the Parents or the Child May Claim Compensation for the Child and Medical and Non-Medical Damages: Lopez v. Southwest Community Health Services," see 23 N.M. L. Rev. 373 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of natural guardian to custody or control of infant's property, 6 A.L.R. 115.

Necessity and sufficiency of notice to alleged incompetent of application for appointment of guardian or committee, 23 A.L.R. 594.

Constitutionality of statute making physical disability ground for appointment of guardian of person or property, 30 A.L.R. 1381.

Remedy for conservation of property of alleged incompetent prior to his adjudication as such, 107 A.L.R. 1392.

Construction and application of statute prescribing that notice of petition or hearing for appointment of guardian be of such nature or be given to such persons as court deems reasonable or proper, 109 A.L.R. 338.

Contract in consideration of renunciation of one's status, or right to appointment, as guardian, executor, administrator, trustee or other fiduciary, as contrary to public policy, 121 A.L.R. 677.

Mental condition which will justify the appointment of guardian, committee or conservator of the estate for an incompetent or spendthrift, 9 A.L.R.3d 774.

14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 9, 10; 49 C.J.S. Insane Persons § 11.

45-5-402. Protective proceedings; jurisdiction of affairs of protected persons.

After the service of notice in a proceeding seeking the appointment of a conservator or other protective order and until termination of the proceeding, the court in which the petition is filed has:

A. exclusive jurisdiction to determine the need for a conservator or other protective order;

B. exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of New Mexico shall be managed, expended or distributed to or for the use of the protected person or any of his dependents; and

C. jurisdiction to determine the validity of claims against the person or estate of the protected person and his title to any property or claim.

History: 1953 Comp., § 32A-5-402, enacted by Laws 1975, ch. 257, § 5-402.

ANNOTATIONS

District court had jurisdiction to void incapacitated person’s estate plan. — Where the district court appointed a guardian and conservator to protect the person and assets of the incapacitated person who was suffering from Alzheimer’s disease; after the conservator was appointed and without notifying the district court, the conservator, or the guardian ad litem, the spouse of the incapacitated person and the spouse’s attorney met with the incapacitated person; during the meeting, the incapacitated person executed a new estate plan giving the spouse control of the incapacitated person’s estate; and the conservator tried to stop the meeting and the execution of the new

estate plan, the district court had general civil jurisdiction over the conservatorship and jurisdiction to void the new estate plan prior to the death of the incapacitated person. Clinesmith v. Temmerman, 2013-NMCA-024, 298 P.3d 458, cert. denied, 2013-NMCERT-001.

Distribution of estate of protected person. — Where, during the lifetime of the decedent, the conservator of the property and affairs of the decedent discovered an executed inter vivos trust agreement which provided for the distribution of the trust estate after the decedent's death to a cousin and three step-children; the conservator did not discover any assets or property that the decedent transferred to the trust or any documents identifying the trust assets; the conservator also found an unexecuted pour-over will that provided for the transfer of the decedent's probate assets to the trust upon the decedent's death; before the decedent died, the conservator filed a petition for instructions with the district court regarding whether the conservator should transfer the decedent's assets to the trust; before the district court heard the conservator's petition, the decedent died leaving an estate of seven million dollars; one of the decedent's intestate heirs instituted a separate probate proceeding in district court; and the district court in the conservatorship proceedings determined that the probate court should decide the issue of whether to transfer the decedent's assets to the trust and terminated the protective proceeding without deciding the petition for instructions, the proper forum to determine whether to fund the decedent's trust and give effect to the decedent's pour-over will was in the probate court. In re Borland, 2012-NMCA-108, 288 P.3d 912.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward § 11; 49 C.J.S. Insane Persons § 10.

45-5-402.1. Permissible court orders.

A. The court shall exercise the authority conferred in Chapter 45, Article 5 NMSA 1978 to encourage the development of maximum self-reliance and independence of a protected person and make protective orders only to the extent necessitated by the protected person's mental and adaptive limitations and other conditions warranting the procedure.

B. The court has the following powers that may be exercised directly or through a conservator in respect to the estate and financial affairs of a protected person:

(1) while a petition for appointment of a conservator or other protective order is pending and after notice and a preliminary hearing, the court may preserve and apply the property of the person to be protected as may be required for the support of the person or his dependents;

(2) after notice and hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and financial affairs of the

minor which are or may be necessary for the best interest of the minor and members of the minor's immediate family;

(3) after notice and hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court, for the benefit of the person and members of the person's immediate family, has all the powers over the estate and financial affairs which the person could exercise if present and not under disability, except the power to make a will. These powers include, but are not limited to, the power to:

(a) make gifts;

(b) convey or release contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy;

(c) exercise or release powers held by the protected person as trustee, personal representative, custodian for minors, conservator or donee of a power of appointment;

(d) enter into contracts;

(e) create revocable or irrevocable trusts of property of the estate which may extend beyond the disability or life of the person;

(f) exercise rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value;

(g) exercise options of the person to purchase securities or other property;

(h) exercise any right to an elective share in the estate of the person's deceased spouse; and

(i) renounce or disclaim any interest by testate or intestate succession or by inter vivos transfer.

C. The court may exercise or direct the exercise of the following powers only if satisfied, after notice and hearing, that it is in the best interest of the protected person, and that the person either is incapable of consenting or has consented to the proposed exercise of power:

(1) to exercise or release powers of appointment of which the protected person is donee;

(2) to renounce or disclaim interests;

(3) to make gifts in trust or otherwise exceeding twenty percent of any year's income of the estate; and

(4) to change beneficiaries under insurance and annuity policies.

D. A determination that a basis for appointment of a conservator or other protective order exists has no effect on the capacity of the protected person.

History: Laws 1993, ch. 301, § 25.

ANNOTATIONS

Settlement proceeds for benefit of protected person. — To the extent that the settlement proceeds in an action against a health care provider arising from injury to the protected child at birth were to benefit the child, the child's parent did not have the ability to place the proceeds in trust on the parent's own initiative, and the district court had the authority to remove the settlement proceeds from the trust, pursuant to 45-5-402.1 NMSA 1978. Chisholm v. Chisholm, 1999-NMCA-025, 126 N.M. 584, 973 P.2d 261, cert. quashed 128 N.M. 10, 990 P.2d 824 (1999).

For article, "The New Mexico Uniform Trust Code," see 34 N.M.L. Rev. 1 (2004).

45-5-403. Venue.

Venue for conservatorship proceedings is:

A. in the judicial district where the person to be protected resides or is present; or

B. if the person to be protected does not reside in New Mexico, in any judicial district in New Mexico where he has property. If the person to be protected is admitted to an institution pursuant to the order of a court of competent jurisdiction, venue is also in the judicial district in which that court sits.

History: 1953 Comp., § 32A-5-403, enacted by Laws 1975, ch. 257, § 5-403; 1993, ch. 301, § 13.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, inserted "conservatorship" and deleted "under Sections 5-401 through 5-432" in the introductory paragraph; rewrote Subsection A; and added the second sentence in Subsection B.

Venue restrictions apply to proceedings involving institution and conduct of conservatorship. Santa Fe Nat'l Bank v. Galt, 94 N.M. 111, 607 P.2d 649 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1979).

There is no conflict between this section and 38-3-1 NMSA 1978 in connection with a damage suit filed by a conservator. Santa Fe Nat'l Bank v. Galt, 94 N.M. 111, 607 P.2d 649 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward § 20; 49 C.J.S. Insane Persons § 12.

45-5-404. Original petition for appointment of conservator.

A. Any of the following persons may petition for the appointment of a conservator:

(1) the person for whom a conservator is sought;

(2) any person who is interested in the estate, affairs or welfare of the person to be protected, including his spouse, parent, guardian or custodian; or

(3) any person who would be adversely affected by lack of effective management of the property and affairs of the person to be protected.

B. The petition shall state the following:

(1) the interest of the petitioner;

(2) the name, age, residence and address of the person for whom a conservator is sought;

(3) the name and address of the guardian, if any, of the person for whom a conservator is sought;

(4) the names and addresses, as far as known or as can be reasonably ascertained, of the persons most closely related by blood or marriage to the person for whom a conservator is sought;

(5) the approximate value and description of the property of the person for whom a conservator is sought including any compensation, insurance, pension or allowance to which the person may be or is entitled;

(6) the reasons why appointment of a conservator is necessary, including but not limited to evidence of the person's recent behavior that demonstrates gross mismanagement of his income and resources to the extent that it has led or is likely to lead in the near future to waste and dissipation of the income and resources;

(7) the name and address of the person or institution, if any, having the care and custody of the person for whom a conservator is sought;

(8) the steps taken to find less restrictive alternatives to the proposed conservatorship;

(9) the name and address of the person whose appointment is sought;

(10) the basis of his priority for appointment;

(11) the names and addresses of any other persons for whom the proposed conservator is a conservator if the proposed conservator is an individual; and

(12) the qualifications of the proposed conservator.

History: 1953 Comp., § 32A-5-404, enacted by Laws 1975, ch. 257, § 5-404; 1989, ch. 252, § 17.

ANNOTATIONS

Compiler's notes. — This section includes within its scope some of the functions of former 32-3-2, 1953 Comp.

The 1989 amendment, effective June 16, 1989, substituted "of conservator" for "or protective order" in the section heading; in Subsection A, deleted "or for other appropriate protective order" at the end of the introductory paragraph and substituted all of the present language of Paragraph (1) following "person" for "to be protected"; in Subsection B, substituted "state the following" for "set forth to the extent known" in the introductory paragraph and substituted "for whom a conservator is sought" for "to be protected" in Paragraphs (2) and (3) and added Subsections B(11) and B(12); rewrote former Subsection C as Subsections B(9) and B(10).

No jurisdiction where statutory requirements not fulfilled. — Where in the proceeding under former 31-7-14, 1953 Comp., there were no parties defendant, even though the statute specifically stated that the widow and the minors "shall" be made parties defendant, and there was never any service obtained upon the minor heirs of decedent, as the file showed that no summons was ever issued even though the statute provided "summons shall issue," the district court failed to obtain jurisdiction of the parties or the subject matter. Bonds v. Joplin's Heirs, 64 N.M. 342, 328 P.2d 597 (1958)(decided under former law).

Law reviews. — For note, "Tort Law – Either the Parents or the Child May Claim Compensation for the Child's Medical and Non-Medical Damages: Lopez v. Southwest Community Health Services," see 23 N.M. L. Rev. 373 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 21, 25; 49 C.J.S. Insane Persons § 40.

45-5-404.1. Duties of guardian ad litem.

A. The guardian ad litem shall:

(1) interview the person to be protected in person prior to the hearing;

(2) present the position of the person to be protected to the court;

(3) interview the qualified health care professional, the visitor, the proposed conservator and any other person who may have relevant information concerning the person to be protected;

(4) review both the medical report submitted by the qualified health care professional and the report by the visitor; and

(5) obtain independent medical or psychological assessments, or both, if necessary.

B. Unless otherwise ordered by the court, the duties of the guardian ad litem terminate and the guardian ad litem is discharged from his duties upon entry of the order appointing the conservator and acceptance of the appointment by the conservator.

History: 1978 Comp., § 45-5-404.1, enacted by Laws 1989, ch. 252, § 18; 1993, ch. 301, § 14.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, designated and rewrote Subsection A and added Subsection B.

45-5-405. Notice in conservatorship proceedings.

A. In a proceeding for the appointment or removal of a conservator of an incapacitated person or a person to be protected, other than the appointment of a temporary conservator or the temporary suspension of a conservator, notice of hearing and a copy of the petition and any interim orders that may have been entered shall be given to each of the following:

(1) the person to be protected; and

(2) his spouse, parents and adult children, or if there are no adult children, at least one of his closest adult relatives if any can be found.

Notice of hearing shall be given to any person who is serving as the guardian or conservator of the person to be protected or who has primary responsibility for his care.

B. Notice shall be served personally on the person to be protected and his spouse if the spouse can be found within New Mexico. Notice to an out-of-state spouse, parent and all other persons, except the person to be protected, shall be given as provided in Section 45-1-401 NMSA 1978.

C. At least fourteen days' notice shall be given before the hearing takes place. The notice should be in plain language and large type and shall include the following information and shall be substantially in the following form:

"NOTICE

TO: (name and address of person receiving notice)

On (date of hearing) at (time of hearing) in (place of hearing) at (city), New Mexico, the (name and address of court) will hold a hearing to determine whether a conservator should be appointed for (name of the person to be protected). The purpose of this proceeding is to appoint a conservator. A copy of the petition requesting appointment of a conservator is attached to this notice.

At the hearing, the court will determine whether (name of person to be protected) needs to be protected by a conservator under New Mexico law.

If the court finds that (name of the person to be protected) is in need of a conservator, the court at the hearing shall also consider whether (name of proposed conservator, if any) should be appointed as conservator of (name of person to be protected). The court may, in its discretion, appoint some other qualified person as conservator. The court may also, in its discretion, limit the powers and duties of the conservator to allow (name of person to be protected) to retain control over certain activities.

(Name of person to be protected) shall attend the hearing and be represented by an attorney. The petition may be heard and determined in the absence of (name of person to be protected) if the court determines that the presence of (name of person to be protected) is not required. If (name of person to be protected) attends the hearing and is not represented by an attorney, the court shall appoint an attorney to represent the person to be protected.

_____

(signature of petitioner)".

D. Notice of a petition for appointment of a conservator and of any subsequent hearing shall be given to any interested person who has filed a request for notice under Section 45-5-406 NMSA 1978 and to such other persons as the court may direct. Except as otherwise provided in Subsection A of this section, notice shall be given in accordance with Section 45-1-401 NMSA 1978.

History: 1953 Comp., § 32A-5-405, enacted by Laws 1975, ch. 257, § 5-405; 1989, ch. 252, § 19; 1993, ch. 301, § 15.

ANNOTATIONS

Compiler's notes. — This section includes within its scope some of the functions of former 31-7-14, 31-7-16 and 32-3-2, 1953 Comp.

The 1993 amendment, effective July 1, 1993, rewrote this section to the extent that a detailed comparison is impracticable.

The 1989 amendment, effective June 16, 1989, added "of petition; waivers" to the section heading; in Subsection A substituted "the person for whom a conservator is sought" for "or other protective order, the person to be protected" near the beginning of the first sentence and inserted near the middle of that sentence "and a copy of the petition and any interim orders that may have been entered", and substituted the present language of the second sentence for "Waiver by a person to be protected is not effective unless he attends the hearing, or unless minority is the reason for the proceeding, waiver is confirmed in an interview with the visitor appointed by the court"; added present Subsection B; redesignated former Subsection B as Subsection C, while deleting in the first sentence thereof "or other initial protective order" following "conservator"; and made minor stylistic changes throughout the section.

No jurisdiction where statutory requirements not fulfilled. — Where, in the proceeding under former 31-7-14, 1953 Comp., there were no parties defendant even though the statute specifically stated that the widow and the minors "shall" be made parties defendant, and there was never any service obtained upon the minor heirs of decedent, as no summons was issued even though the statute provided "summons shall issue," the district court failed to obtain jurisdiction of the parties or the subject matter. Bonds v. Joplin's Heirs, 64 N.M. 342, 328 P.2d 597 (1958) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 23, 24; 49 C.J.S. Insane Persons § 40.

45-5-405.1. Protective arrangements and single transactions authorized.

A. If after notice in accordance with Section 45-5-405 NMSA 1978 to all interested persons, as defined in Section 45-1-201 NMSA 1978, and after hearing, it is established that a basis exists as described in Section 45-5-401 NMSA 1978, for affecting the estate and financial affairs of a person, the court, without appointing a conservator, may authorize, direct or ratify any transaction necessary or desirable to achieve any security, service or care arrangement meeting the foreseeable needs of the person. The court shall appoint a guardian ad litem to represent the interests of the person at the hearing. Protective arrangements and single transactions include:

(1) payment, delivery, deposit or retention of funds or property;

(2) sale, mortgage, lease or other transfer of property;

(3) entry into an annuity contract, a contract for life care, a deposit contract and a contract for training and education; and

(4) addition to or establishment of a trust.

B. When it has been established in a proceeding authorized by this section that a basis exists as described in Section 45-5-401 NMSA 1978 for affecting the estate and financial affairs of a person, the court, without appointing a conservator, may authorize, direct or ratify any contract, trust or other single transaction relating to the protected person's estate and financial affairs if the court finds that the transaction is in the best interests of the protected person.

C. Before approving a transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of the disability, whether the protected person needs the continuing protection of a conservator. The court may appoint one or more persons to assist in the accomplishment of any protective arrangement or other transaction authorized under this section. That person shall have the authority conferred by order of the court, shall serve until discharged by order of the court and shall report to the court of all matters done pursuant to the court's order.

History: Laws 1993, ch. 301, § 26.

45-5-406. Guardianship and protective proceedings; request for notice; interested person.

A. Any interested person who desires to be notified before any order is made in a guardianship proceeding, including any proceeding subsequent to the appointment of a guardian, or in a protective proceeding may file a request for notice with the clerk of the court in which the proceeding is pending. The clerk shall mail a copy of the request to the petitioner and to the guardian or conservator if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and the address of that person or an attorney to whom notice is to be given. The request is effective only as to matters occurring after the filing.

B. Any governmental agency paying or planning to pay benefits to the person to be protected is an interested person in a protective proceeding.

C. In addition to the notices required by Section 45-5-207 or 45-5-309 NMSA 1978, notice of a petition for guardianship and of any subsequent proceedings or requests for orders shall be given to each interested person who has filed a request for notice

pursuant to the provisions of Subsection A of this section. Except as otherwise required by law, notice shall be given in accordance with Section 45-1-401 NMSA 1978.

History: 1953 Comp., § 32A-5-406, enacted by Laws 1975, ch. 257, § 5-406; 1993, ch. 301, § 16; 1995, ch. 210, § 57.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, added "Guardianship and" to the beginning in the section heading; rewrote Subsection A to such an extent that a detailed comparison would be impracticable; in Subsection B deleted "An interested person in protective proceedings includes" at the beginning and added "is an interested person in a protective proceeding" at the end; and added Subsection C.

The 1993 amendment, effective July 1, 1993, inserted "petitioner or the" in the second sentence in Subsection A and rewrote Subsection B which read "Any governmental agency paying or planning to pay benefits to the person to be protected is an interested person in protective proceedings."

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward § 22; 49 C.J.S. Insane Persons § 40.

45-5-407. Procedure for court appointment of a conservator.

A. Upon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for hearing on the matters alleged in the petition. If at any time in the proceeding the court finds the minor is or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if fourteen years of age or older. An attorney appointed by the court to represent a minor shall represent and protect the interests of the minor.

B. Upon receipt of a petition for appointment of a conservator for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected is already represented by an attorney of his own choice, the court shall appoint an attorney to represent him in the proceeding. The court-appointed attorney shall have the duties of a guardian ad litem as set forth in Section 45-5-404.1 NMSA 1978.

C. If the petition is for the appointment of a conservator for an incapacitated person, the person to be protected shall be examined by a qualified health care professional appointed by the court who shall submit a report in writing to the court. The report shall:

(1) describe the nature and degree of the person's incapacity, if any, and the level of the intellectual, developmental and social functioning of the person to be protected; and

(2) contain observations, with supporting data, regarding the ability of the person to be protected to manage his estate or financial affairs.

D. The court shall also appoint a visitor who shall interview the person seeking appointment as conservator and the person to be protected. The visitor shall also visit the present place of residence of the person to be protected. The visitor shall evaluate the needs of the person to be protected and shall submit a written report to the court. The report shall include a recommendation regarding the appropriateness of the appointment of the proposed conservator. The report shall also include recommendations regarding:

(1) those aspects of his financial affairs that the person to be protected can manage without supervision or assistance;

(2) those aspects of his financial affairs that the person to be protected could manage with the supervision or assistance of support services and benefits; and

(3) those aspects of his financial affairs that the person to be protected is unable to manage even with the supervision or assistance of support services and benefits.

Unless otherwise ordered by the court, the appointment of the visitor terminates and the visitor is discharged from his duties upon entry of the order appointing the conservator and acceptance of the appointment by the conservator.

E. The person to be protected shall be present at the hearing on the issues raised by the petition and any response to the petition, unless the court determines it is not in the best interest of the person for whom a conservator is sought to be present because of a threat to the health or safety of the person for whom a conservator is sought or others as determined by the court. The court upon request or its own motion may conduct hearings at the location of the person to be protected if he is unable to be present in court.

F. The person to be protected shall not be permitted by the court to consent to the appointment of a conservator.

G. The court, at the hearing on the petition for appointment of conservator, shall:

(1) inquire into the nature and extent of the functional limitations of the person to be protected; and

(2) ascertain his capacity to manage his financial affairs.

H. If it is determined that the person to be protected possesses the capacity to manage his estate or financial affairs, or both, the court shall dismiss the petition.

I. Alternatively, the court may appoint a full conservator, as requested in the petition, or a limited conservator and confer specific powers of conservatorship after finding in the record based on clear and convincing evidence that:

(1) the person to be protected is totally incapacitated or is incapacitated only in specific areas as alleged in the petition;

(2) the conservatorship is necessary as a means of effectively managing the estate or financial affairs, or both, of the person to be protected;

(3) there are not available alternative resources that enable the effective management of the estate and financial affairs of the person to be protected;

(4) the conservatorship is appropriate as the least restrictive form of intervention consistent with the preservation of the property of the person to be protected; and

(5) the proposed conservator is both qualified and suitable and is willing to serve.

J. After hearing, upon finding that a basis for the appointment of a conservator has been established, the court shall make an appointment of a conservator. The court shall appoint a limited conservator if it determines that the incapacitated person is able to manage some but not all aspects of his estate and financial affairs. The court shall specify those powers that the limited conservator shall have and may further restrict each power so as to permit the incapacitated person to care for his estate and financial affairs commensurate with his ability to do so.

K. A person for whom a conservator has been appointed retains all legal and civil rights except those that have been specifically granted to the conservator by the court. The conservator shall exercise his supervisory powers over the estate and financial affairs of the incapacitated person in a manner that is the least restrictive form of intervention consistent with the order of the court.

L. The rules of evidence shall apply and no hearsay evidence that is not otherwise admissible in a court shall be admitted into evidence except as otherwise provided in the Uniform Probate Code.

M. A record of the proceedings shall be made if requested by the person to be protected, his attorney or when ordered by the court. Records, reports and evidence submitted to the court or recorded by the court shall be confidential, except that the public shall be granted access to the following information:

(1) docket entries;

(2) date of the proceeding, appointment and termination;

(3) duration of the conservatorship and whether limited or unlimited;

(4) for a limited conservatorship, the nature of the limitation; and

(5) the name and other information necessary to identify the alleged incapacitated person.

N. Notwithstanding the provisions of Subsection M of this section, any disclosure of information shall not include any diagnostic information, treatment information or other medical or psychological information.

O. The issue of whether a conservator shall be appointed shall be determined by the court at a closed hearing unless the person to be protected requests otherwise.

P. Upon request of the petitioner or person to be protected, the court shall schedule a jury trial.

Q. Upon entry of an order appointing a conservator, a copy of the order shall be furnished to the person for whom the conservator was appointed and that person's counsel. The order shall contain the name and address of the conservator as well as notice to the person for whom the conservator was appointed of that person's right to appeal the appointment and of that person's right to seek alteration or termination of the conservatorship at any time.

History: 1953 Comp., § 32A-5-407, enacted by Laws 1975, ch. 257, § 5-407; 1989, ch. 252, § 20; 1993, ch. 301, § 17; 1998, ch. 32, § 4.

ANNOTATIONS

The 1998 amendment, effective May 20, 1998, inserted "person" at the end of Paragraph I(4); inserted "Uniform" in Subsection L; in Subsection M, inserted "except that the public shall be granted access to the following information:" and added Paragraphs M(1) to M(5); and added Subsection N and redesignated the following subsections accordingly.

The 1993 amendment, effective July 1, 1993, rewrote this section to the extent that a detailed comparison is impracticable.

The 1989 amendment, effective June 16, 1989, in Subsection A substituted "shall represent and protect the interests of the minor" for "has the duties of a guardian ad litem" in the last sentence; in Subsection B deleted "or other protective order" following "conservator" in the first sentence, and rewrote the last three sentences; added present Subsections C through F; redesignated former Subsection C as present Subsection G, while deleting "or other protective order" following "conservator" near the beginning and substituting "of a conservator" for "or other appropriate protective order" at the end;

deleted former Subsection D, relating to cases involving the veterans administration; and added Subsections H through K.

Conservator for estate of minor. — In the appointment of a conservator for the estate of a minor, the district court was not required to find by clear and convincing evidence that the conservatorship is the least restrictive form of intervention. Chisholm v. Chisholm, 1999-NMCA-025, 126 N.M. 584, 973 P.2d 261, cert. quashed, 128 N.M. 10, 990 P.2d 824 (1999).

Appointment and appearance of attorney cannot cure defect in jurisdiction. — Where the jurisdiction of the court was not properly invoked by following the statute in the first instance, the mere appointment and appearance of a member of the bar to act as guardian ad litem cannot cure this defect. Bonds v. Joplin's Heirs, 64 N.M. 342, 328 P.2d 597 (1958)(decided under former law).

Appointment as guardian ad litem is position of highest trust and no attorney should ever blindly enter an appearance as guardian ad litem and allow a matter to proceed without a full and complete investigation into the facts and law so that his clients will be fairly and competently represented and their rights fully and adequately protected and preserved. Bonds v. Joplin's Heirs, 64 N.M. 342, 328 P.2d 597 (1958)(decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 26 to 28; 49 C.J.S. Insane Persons §§ 37, 40.

45-5-408. Temporary conservators.

A. When a petition for appointment of a conservator has been filed, but adherence to the procedures set out in this section would cause serious, immediate and irreparable harm to the estate or financial interests, or both, of the person to be protected, the court may appoint a temporary conservator prior to the final hearing and decision on the petition, subject to the requirements of this section.

B. Upon motion of the petitioner, the court shall schedule a hearing on the appointment of a temporary conservator for the earliest possible date, appoint counsel for the person to be protected and give notice as provided in Section 45-5-405 NMSA 1978. Upon a finding that serious, immediate and irreparable harm to the estate and financial interests of the person to be protected would result during the pendency of petition, the court shall appoint a temporary conservator and shall specify the temporary conservator's powers in order to prevent serious, immediate and irreparable harm to the property of the person to be protected. The duration of the temporary conservatorship shall not exceed sixty days, except that upon order of the court, the temporary conservatorship may be extended for no more than thirty days.

C. A temporary conservator may be appointed without notice to the person to be protected only if it clearly appears from specific facts shown by affidavit or sworn

testimony that serious, immediate and irreparable harm will result to the estate or financial interests of the person to be protected before a hearing on the appointment of a temporary conservator can be held. The person to be protected shall be notified in a writing by the petitioner within twenty-four hours of the appointment of a temporary conservator in substantial accordance with the provisions of Subsection B of Section 45-5-405 NMSA 1978. On two days' notice to the party who obtained the appointment of a temporary conservator without notice or on such shorter notice to that party as the court may prescribe, the person to be protected may appear and move for dissolution or modification of the court's order, and, in that event, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

D. Appointment of a temporary conservator shall have the effect of limiting the legal rights of the person to be protected. Appointment of a temporary conservator shall not be evidence of incapacity.

History: 1978 Comp., § 45-5-408, enacted by Laws 1989, ch. 252, § 21; 1993, ch. 301, § 18.

ANNOTATIONS

Repeals and reenactments. — Laws 1989, ch. 252, § 21, repealed former 45-5-408 NMSA 1978, as enacted by Laws 1975, ch. 257, § 5-408, relating to permissible court orders, and enacted a new section, effective June 16, 1989.

The 1993 amendment, effective July 1, 1993, rewrote this section to the extent that a detailed comparison is impracticable.

45-5-409. Annual report and account.

A. Every conservator shall file an annual report and account with the appointing court within thirty days of the anniversary date of the conservator's appointment, upon the conservator's resignation or removal or upon termination of the conservatorship. A copy of the annual report and account shall also be mailed to the district judge who appointed the conservator or his successor, to the incapacitated person and to his guardian, if any. The report shall include information concerning the progress and condition of the person under conservatorship, a report on the manner in which the conservator carried out his powers and fulfilled his duties and the conservator's opinion regarding the continued need for conservatorship. The report may be substantially in the following form:

"IN THE DISTRICT COURT

_____ COUNTY, STATE OF NEW MEXICO

In the matter of the	)	No. _____
Conservatorship of	)	
(Enter Name of Person	)	

Under Conservatorship)

CONSERVATOR'S REPORT AND ACCOUNT

Pursuant to Section 45-5-407 NMSA 1978, the undersigned duly appointed, qualified and acting conservator of the above-mentioned protected person reports to the court as follows:

1. My name is:

2. My address and telephone number are:

3. The name, if applicable, and address of the place where the person under conservatorship now resides are:

4. The name of the person primarily responsible for the care of the person under conservatorship at such person's place of residence is:

5. The name and address of any hospital or other institution where the person under conservatorship is now admitted on a temporary basis are:

6. A brief description of the physical condition of the person under conservatorship is:

7. A brief description of the mental condition of the person under conservatorship is:

8. A description of contracts entered into on behalf of the person under conservatorship during the past year:

9. Describe all financial decisions made during the past year including all receipts and disbursements, any sale, lease or mortgage of estate assets and any investment made on behalf of the person under conservatorship:

10. The reasons, if any, why the conservatorship should continue are:

Signature of Conservator:

Date: _____ ".

B. Any conservator may rely on a qualified health care professional's current written report to provide descriptions of the physical and mental conditions required in items 6, 7 and 10 of the annual report and account as specified in Subsection A of this section.

C. The court shall not waive the requirement of an annual report and account under any circumstance, but may grant an extension of time. The court may require the filing of more than one report and account annually.

D. The conservator may be fined five dollars ($5.00) per day for an overdue annual report and account. The fine shall be used to fund the costs of visitors, counsel and functional assessments utilized in conservatorship and guardianship proceedings pursuant to the [Uniform] Probate Code.

E. In connection with any account, the court may require a conservator to submit to a physical check of the property in his control, to be made in any manner the court may order.

F. In any case in which property consists in whole or in part of benefits paid by the veterans administration to the conservator or his predecessor for the benefit of the protected person, the veterans administration office that has jurisdiction over the area is entitled to a copy of any report and account filed under Chapter 45, Article 5 NMSA 1978.

History: 1953 Comp., enacted by Laws 1975, ch. 257, § 5-409; repealed and reenacted by Laws 1989, ch. 252, § 22; 1993, ch. 301, § 19.

ANNOTATIONS

Repeals and reenactments. — Laws 1989, ch. 252, § 22, repealed former 45-5-409 NMSA 1978, as enacted by Laws 1975, ch. 257, § 5-409, relating to protective arrangements and single transactions authorized, and enacted a new section, effective June 16, 1989.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

The 1993 amendment, effective July 1, 1993, rewrote this section to the extent that a detailed comparison is impracticable.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 39 Am. Jur. 2d Guardian and Ward §§ 162 to 165.

39 C.J.S. Guardian and Ward § 145.

45-5-410. Who may be appointed conservator; priorities.

A. The court may appoint an individual, or a corporation with general power to serve as trustee, as conservator of the incapacitated person. The following are entitled to consideration for appointment in the order listed:

(1) a conservator, guardian of property or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the incapacitated person resides;

(2) any person previously nominated to serve as conservator in a writing signed by the incapacitated person prior to his incapacity;

(3) an individual or corporation nominated by the incapacitated person if he is fourteen or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;

(4) the spouse of the incapacitated person;

(5) an adult child of the incapacitated person;

(6) a parent of the incapacitated person or a person nominated by the will of a deceased parent;

(7) any relative of the incapacitated person with whom he has resided for more than six months prior to the filing of the petition;

(8) a person nominated by the person who is caring for the incapacitated person or paying benefits to him; and

(9) any other person.

B. A person under the priorities of Paragraph (1), (2), (4), (5), (6) or (7) of Subsection A of this section may nominate in writing a person to serve in his stead. With respect to persons having equal priority, the court shall select the one who is best qualified of those willing to serve.

C. The court, for good cause, may pass over a person having priority and appoint a person having lesser priority under this section and shall take into consideration:

(1) the preference of the incapacitated person;

(2) geographic location of the proposed conservator;

(3) the relationship of the proposed conservator to the incapacitated person;

(4) the ability of the proposed conservator to carry out the powers and duties of the conservatorship; and

(5) potential financial conflicts of interest between the incapacitated person and the proposed conservator.

History: 1953 Comp., § 32A-5-410, enacted by Laws 1975, ch. 257, § 5-410; 1989, ch. 252, § 23; 1993, ch. 301, § 20.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, substituted "incapacitated person" for "person for whom a conservator is sought" throughout the section; in Subsection A, added Paragraph (2) and redesignated former Paragraphs (2) through (8) as Paragraphs (3) through (9); and made a related stylistic change in Subsection B.

The 1989 amendment, effective June 16, 1989, in Subsection A, substituted "the person for whom a conservator is sought" for "the estate of a protected person" in the first sentence of the introductory paragraph, substituted "person for whom a conservator is sought" for "protected person" in Paragraphs (1) through (7), and added Paragraph (8); and designated the former third sentence of Subsection B as Subsection C, while substituting therein all of the language following "lesser priority" for "or no priority".

Preference of incapacitated person. — The provisions in the New Mexico Uniform Probate Code for appointment of a guardian for an incapacitated person provide some opportunity for choice or preference by the incapacitated person under 45-5-311 NMSA 1978. The same is true of the provisions for appointment of a conservator under this section. However, the provisions for choice or preference in these cases are not as liberal as the provision for appointment of a minor's guardian under 45-5-206 NMSA 1978. In re Conservatorship & Guardianship of Pulver, 117 N.M. 329, 871 P.2d 985 (Ct. App. 1994).

Law reviews. — For comment, "In-Migration of Couples from Common Law Jurisdictions: Protecting the Wife at the Dissolution of the Marriage," see 9 N.M.L. Rev. 113 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Minority of parent as affecting right to guardianship of child, 19 A.L.R. 1043.

Right of infant to select own guardian, 85 A.L.R.2d 921.

Who is minor's next of kin for guardianship purposes, 63 A.L.R.3d 813.

Priority and preference in appointment of conservator or guardian for an incompetent, 65 A.L.R.3d 991.

14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 17, 18; 49 C.J.S. Insane Persons §§ 42, 43.

45-5-411. Bond.

A. The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify. Unless otherwise directed, the bond shall be in the amount of the total value of the property of the estate in his control plus one year's estimated income less the value of securities deposited under arrangements requiring an order of the court for their removal less the value of property which may not be sold or conveyed without an order of the court. The court, in lieu of sureties on a bond, may accept other security for the performance of the bond.

B. If the veterans administration is paying or planning to pay benefits to a person to be protected, the court may, upon the request of the veterans administration, require a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify.

History: 1953 Comp., § 32A-5-411, enacted by Laws 1975, ch. 257, § 5-411.

ANNOTATIONS

Compiler's notes. — This section contains within its scope some of the functions of former 32-2-3 and 74-6-9, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward § 31; 49 C.J.S. Insane Persons § 44.

45-5-412. Reserved.

ANNOTATIONS

Compiler's notes. — Laws 1975, ch. 257, § 5-412, contained this section number, but no accompanying text.

45-5-413. Acceptance of appointment; consent to jurisdiction.

A. By accepting appointment, a conservator submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person.

B. Notice of any proceeding shall be delivered to the conservator, or mailed to him by registered or certified mail at his address as listed in the petition for appointment or as thereafter reported to the court and to his address as then known to the petitioner.

History: 1953 Comp., § 32A-5-413, enacted by Laws 1975, ch. 257, § 5-413.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward § 30; 49 C.J.S. Insane Persons § 41.

45-5-414. Compensation and expenses.

If not otherwise compensated for services rendered, any visitor, attorney, physician, conservator or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate.

History: 1953 Comp., § 32A-5-414, enacted by Laws 1975, ch. 257, § 5-414.

ANNOTATIONS

Compiler's notes. — This section is similar to former 32-2-8, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Death of trustee, executor, administrator or guardian as affecting right to compensation, 7 A.L.R. 1595.

Right of guardian who promises to provide out of own estate for ward to allowance out of ward's estate, 56 A.L.R. 536.

Right and obligation of guardian other than parent in respect of services rendered by, or board or services furnished to, ward, 64 A.L.R. 692.

Right of guardian to allowance for expenditures prior to appointment, 67 A.L.R. 1405.

Guardian's contract employing attorney is binding on ward or his estate, 171 A.L.R. 468.

Fiduciary's compensation on estate assets distributed in kind, 32 A.L.R.2d 778.

Amount of attorney's compensation in matters involving guardianship and trusts, 57 A.L.R.3d 550.

14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 76, 83, 162, 164; 49 C.J.S. Insane Persons §§ 51, 88.

45-5-415. Death, resignation or removal of conservator; termination of conservatorship.

A. On the petition of the incapacitated person or any person interested in his welfare, the court may remove a conservator for good cause, upon notice and hearing.

A temporary conservator may be appointed pursuant to Section 45-5-408 NMSA 1978 pending a final hearing.

B. Upon death, resignation or removal of a conservator, the court may appoint another conservator or make any other order that may be appropriate. If a successor conservator is appointed, he succeeds to the title and powers of his predecessor.

C. The incapacitated person or any person interested in his welfare may petition for an order that he is no longer in need of a conservator and for removal or resignation of the conservator. A request for this order may be made by informal letter to the court or judge. Any person who knowingly interferes with transmission of this kind of request to the court may be adjudged guilty of contempt of court.

D. Upon the filing of a petition to terminate a conservatorship for reasons other than termination of minority or the death of the person under conservatorship, the court, shall follow the same procedures as set forth in Section 45-5-407 NMSA 1978.

History: 1953 Comp., § 32A-5-415, enacted by Laws 1975, ch. 257, § 5-415; 1989, ch. 252, § 24; 1993, ch. 301, § 21.

ANNOTATIONS

Compiler's notes. — This section includes within its scope some of the functions of former 32-1-39 and 33-4-4, 1953 Comp.

The 1993 amendment, effective July 1, 1993, rewrote this section to the extent that a detailed comparison is impracticable.

The 1989 amendment, effective June 16, 1989, added "termination of conservatorship" to the section heading, substituted the present provisions of Subsection A for "The court may remove a conservator for good cause, upon notice and hearing", and added Subsections C and D.

Protected person’s change of will. — A conservator who believes the protected person legitimately wants to change the protected person's will, is not required to either: (1) petition to terminate the conservatorship under 45-5-430 NMSA 1978; or (2) seek instruction from the appointing court pursuant to 45-5-416 NMSA 1978; while either of these may be a legitimate procedure, neither is required by the UPC before a person whose property is under a conservatorship is entitled to execute a will. Lucero v. Lucero, 118 N.M. 636, 884 P.2d 527 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 37, 48 to 53; 49 C.J.S. Insane Persons § 45.

45-5-416. Petitions for orders subsequent to appointment.

A. Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order:

(1) requiring bond or security or additional bond or security, or reducing bond;

(2) requiring an accounting for the administration of the estate;

(3) directing distribution;

(4) removing the conservator and appointing a temporary or successor conservator; or

(5) granting other appropriate relief.

B. A conservator may petition the appointing court for instructions concerning his fiduciary responsibility.

C. Upon notice and hearing, the court may give appropriate instructions or make any appropriate order.

History: 1953 Comp., § 32A-5-416, enacted by Laws 1975, ch. 257, § 5-416.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 33, 45, 54, 147, 154; 49 C.J.S. Insane Persons § 40.

45-5-417. General duty of conservator.

In the exercise of a conservator's powers, a conservator shall act as a fiduciary and shall observe the standards of care applicable to trustees as described by Sections 46A-8-801 through 46A-8-807 NMSA 1978.

History: 1953 Comp., § 32A-5-417, enacted by Laws 1975, ch. 257, § 5-417; 2011, ch. 124, § 58.

ANNOTATIONS

The 2011 amendment, effective January 1, 2012, changed the statutory reference to Sections 46A-8-801 through 46A-8-807 NMSA 1978.

Conservator may facilitate execution of will. — Although a conservator must avoid conflicts of interest and must act as a trustee of property, it does not follow that because the conservator is appointed by the district court the conservator is an officer of the court, or that by arranging for the execution of a new will the conservator breached his fiduciary duties. Lucero v. Lucero, 118 N.M. 636, 884 P.2d 527 (Ct. App. 1994).

Conservator may not file bankruptcy petition for missing debtor. — A conservator may not file a voluntary petition for bankruptcy on behalf of a debtor who is missing and whose whereabouts are unknown. In re King, 234 B.R. 515 (Bankr. D.N.M. 1999).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Care required of trustee or guardian with respect to retaining securities coming into his hands as assets of the estate, 112 A.L.R. 355.

Right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without prior approval by court, 63 A.L.R.3d 780.

Validity of inter vivos gift by ward to guardian or conservator, 70 A.L.R.4th 499.

14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward § 69; 49 C.J.S. Insane Persons § 49.

45-5-418. Inventory and records.

A. Within ninety days after his appointment, every conservator shall prepare and file with the appointing court a complete inventory of the estate of the protected person together with his oath or affirmation that it is complete and accurate so far as he is informed.

B. The conservator shall provide a copy of the inventory to the protected person if he can be located, has attained the age of fourteen years, and has sufficient mental capacity to understand these matters, and to any parent or guardians with whom the protected person resides.

C. The conservator shall keep suitable records of his administration and exhibit the same on request of any interested person.

History: 1953 Comp., § 32A-5-418, enacted by Laws 1975, ch. 257, § 5-418.

ANNOTATIONS

Compiler's notes. — This section is similar to former 32-2-5, 1953 Comp.

Accounting to be according to statute. — Where guardianship was authorized by the court, the guardian of an incapacitated person's estate must account according to the liability imposed by statute. In re Miera's Guardianship, 38 N.M. 377, 34 P.2d 299 (1934) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Conclusiveness and effect of annual or intermediate account of guardian of infant or incompetent, 99 A.L.R. 996.

Surchargeability of trustee, executor, administrator or guardian in respect of mortgage investment, as affected by matters relating to value of property, 117 A.L.R. 871.

14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 74, 145; 49 C.J.S. Insane Persons § 87.

45-5-419. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 301, § 28 repealed 45-5-419 NMSA 1978, as enacted by Laws 1975, ch. 257, § 5-419, relating to the filing of a conservator's account of his or her administration of the estate, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMONESOURCE.COM*.

45-5-420. Conservators; title by appointment.

A. The appointment of a conservator vests in him title as trustee to all property of the protected person, presently held or thereafter acquired, including title to any property previously held for the protected person by custodians or attorneys-in-fact.

B. The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator.

History: 1953 Comp., § 32A-5-420, enacted by Laws 1975, ch. 257, § 5-420.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward § 73; 49 C.J.S. Insane Persons § 85.

45-5-421. Recording of conservator's letters.

Subject to the requirements of laws governing the filing or recordation of documents of title to land or other property, letters of conservatorship, and orders terminating conservatorships, may be filed or recorded to give record notice of title as between the conservator and the protected person.

History: 1953 Comp., § 32A-5-421, enacted by Laws 1975, ch. 257, § 5-421.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 28, 34, 35, 52; 49 C.J.S. Insane Persons § 41.

45-5-421.1. Letters of conservatorship.

Letters of conservatorship shall contain:

A. the names, addresses and telephone numbers of the conservator;

B. the name, address and telephone number of the person for whom a conservator has been appointed; and

C. the scope of the conservatorship including the specific legal limitations imposed by the court on the powers of the conservator.

History: 1978 Comp., § 45-5-421.1, enacted by Laws 1989, ch. 252, § 26.

45-5-422. Sale, encumbrance or transaction involving conflict of interest; voidable; exceptions.

Any sale or encumbrance to a conservator, his spouse, agent or attorney, or to any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest is voidable unless the transaction is approved by the court after notice to interested persons and others as directed by the court.

History: 1953 Comp., § 32A-5-422, enacted by Laws 1975, ch. 257, § 5-422.

ANNOTATIONS

Change in will. — Section 45-5-422 NMSA 1978 speaks in general terms of "any sale or encumbrance to a conservator" and does not speak directly to transfers by will or changes in an estate plan so as to constitute a breach of fiduciary duty by a conservator’s efforts to make arrangements requested by the protected person to change the protected person's will. Lucero v. Lucero, 118 N.M. 636, 884 P.2d 527 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Guardian's purchase from corporation of which he is officer or stockholder as voidable or as ground for surcharging his account, 105 A.L.R. 449.

Ownership of stock in corporation in which guardian holds stock in fiduciary capacity by guardian in his own right, 106 A.L.R. 220, 161 A.L.R. 1039.

Transaction with affiliated corporation by corporate guardian as violation of rule against self-dealing, 151 A.L.R. 905.

Validity of inter vivos gift by ward to guardian or conservator, 70 A.L.R.4th 499.

14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 98 to 100; 49 C.J.S. Insane Persons § 85.

45-5-423. Persons dealing with conservators; protection.

A person who in good faith either assists a conservator or deals with him for value in any transaction other than those requiring a court order as provided in Section 5-408, is protected as if the conservator properly exercised the power. The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, except that restrictions on powers of conservators which are endorsed on letters as provided in Section 5-426 [45-5-426 NMSA 1978] are effective as to third persons. A person is not bound to see to the proper application of estate assets paid or delivered to a conservator. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters. The protection here expressed is in addition to that provided by comparable provisions of laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

History: 1953 Comp., § 32A-5-423, enacted by Laws 1975, ch. 257, § 5-423.

ANNOTATIONS

Compiler's notes. — This section includes within its scope some of the functions of former 32-1-35, 1953 Comp.

The reference to Section 5-408 is a reference to a certain section of Chapter 257 of Laws 1975, which enacted the Uniform Probate Code, and was compiled as Section 45-5-408 NMSA 1978. That section was repealed and new provisions were enacted in 1993.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward § 138; 49 C.J.S. Insane Persons § 107.

45-5-424. Powers of conservator in administration.

A. A conservator has all of the powers conferred herein and any additional powers conferred by law on trustees in New Mexico. In addition, a conservator for an unmarried minor, as to whom no one has parental rights, has the duties and powers of a guardian of a minor described in Section 5-209 [45-5-209 NMSA 1978] until the minor attains majority or marries. However, the parental rights so conferred on a conservator do not prevent appointment of a guardian.

B. A conservator has power, without court authorization or confirmation, to invest and reinvest funds of the estate as would a trustee.

C. A conservator, acting reasonably in efforts to accomplish the purpose for which he was appointed, may act without court authorization or confirmation, to:

(1) collect, hold and retain assets of the estate including land in another state, until, in his judgment, disposition of the assets should be made, and the assets may be retained even though they include an asset in which he is personally interested;

(2) receive additions to the estate;

(3) continue or participate in the operation of any business or other enterprise;

(4) acquire an undivided interest in an estate asset in which the conservator, in any fiduciary capacity, holds an undivided interest;

(5) invest and reinvest estate assets in accordance with Subsection B of this section;

(6) deposit estate funds in a bank including a bank operated by the conservator;

(7) acquire or dispose of an estate asset including land in another state for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of or abandon an estate asset;

(8) make ordinary or extraordinary repairs or alterations in buildings or other structures; to demolish any improvements; and to raze existing, or erect new, party walls or buildings;

(9) subdivide, develop or dedicate land to public use; to make or obtain the vacation of plats and adjust boundaries; to adjust differences in valuation on exchange or to partition by giving or receiving considerations; and to dedicate easements to public use without consideration;

(10) enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship;

(11) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) grant an option involving disposition of an estate asset; and to take an option for the acquisition of any asset;

(13) vote a security, in person or by general or limited proxy;

(14) pay calls, assessments and any other sums chargeable or accruing against or on account of securities;

(15) sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprise;

(16) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery, but the conservator is liable for any act of the nominee in connection with the security so held;

(17) insure the assets of the estate against damage or loss, and the conservator against liability with respect to third persons;

(18) borrow money to be repaid from estate assets or otherwise; to advance money for the protection of the estate or the protected person, and for all expenses, losses and liability sustained in the administration of the estate or because of the holding or ownership of any estate assets and the conservator has a lien on the estate as against the protected person for advances so made;

(19) pay or contest any claim; to settle a claim by or against the estate or the protected person by compromise, arbitration or otherwise; and to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible;

(20) pay taxes, assessments, compensation of the conservator and other expenses incurred in the collection, care, administration and protection of the estate;

(21) allocate items of income or expense to either estate income or principal, including creation or [of] reserves out of income for depreciation, obsolescence or amortization, or for depletion in mineral or timber properties;

(22) pay any sum distributable to a protected person or his dependent, without liability to the conservator, by paying the sum to the distributee or by paying the sum for the use of the distributee either to his guardian or, if none, to a relative or other person with custody of his person;

(23) employ persons, including attorneys, auditors, investment advisors or agents, even though they are associated with the conservator to advise or assist him in the performance of his administrative duties; to act upon their recommendation without independent investigation; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(24) prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties; and

(25) execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the conservator.

History: 1953 Comp., § 32A-5-424, enacted by Laws 1975, ch. 257, § 5-424.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Authority generally. — A conservator is authorized to generally manage all aspects of the incapacitated person's estate, including operating any business, investing funds, buying and selling property, and employing accountants and attorneys, pursuant to 45-5-424 NMSA 1978. Gardner v. Gholson, 114 N.M. 793, 845 P.2d 1247 (Ct. App. 1992).

Conservator may not file bankruptcy petition for missing debtor. — A conservator may not file a voluntary petition for bankruptcy on behalf of a debtor who is missing and whose whereabouts are unknown. In re King, 234 B.R. 515 (Bankr. D.N.M. 1999).

Purchases and support for ward and the ward's spouse. — Where an automobile, stove and refrigerator had been used for the care and comfort of ward and had been reasonably necessary for the support of the ward's spouse, purchase of these items by the guardian of an incompetent's estate was a reasonable and justifiable expenditure. Also, in the absence of a statute, continuation of a payment of $350 per month from the ward’s estate for the ward's spouse's support was reasonable, in light of the needs of the dependent, the actions and fidelity of the dependent toward the incompetent, and the size of the corpus of the estate. Bachechi v. Albuquerque Nat'l Bank, 59 N.M. 159, 280 P.2d 1048 (1955).

Law reviews. — For note, "Contracts - Exculpatory provisions - A Bank's Liability for Ordinary Negligence: Lynch v. Santa Fe National Bank," see 12 N.M.L. Rev. 821 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Constitutionality of statutes authorizing guardian to sell or lease land of ward, 4 A.L.R. 1552.

Right of guardian to expend principal of ward's estate for maintenance and support, 5 A.L.R. 632.

Right of guardian to invest trust funds in corporate stock, 12 A.L.R. 574, 122 A.L.R. 657, 78 A.L.R.2d 7.

Court's power to authorize guardian to borrow ward's money, 30 A.L.R. 461.

Duty of one purchasing ward's property, or loaning money on security of such property, to see that proceeds are properly applied, 56 A.L.R. 195.

Exchange as within power of sale, 63 A.L.R. 1003.

Character of claims or obligations contemplated by statute expressly giving guardian authority as to borrowing money, 85 A.L.R. 215.

Liability for interest or profits on funds of estate deposited in bank or trust company which is itself executor, administrator, trustee or guardian, or in which executor, etc., is interested, 88 A.L.R. 205.

Liability of trustee, guardian, executor or administrator for loss of funds invested, as affected by order of court authorizing the investment, 88 A.L.R. 325.

Power of court or guardian as to mortgaging infant's real property, 95 A.L.R. 839.

Power and duty of trustee, executor, administrator or guardian as regards protection of investment in stocks by submitting to voluntary assessment, 104 A.L.R. 979.

Guardian's purchase from corporation of which he is officer or stockholder as voidable or as ground for surcharging his account, 105 A.L.R. 449.

Ownership of stock in corporation in which guardian holds stock in fiduciary capacity, by guardian in his own right, 106 A.L.R. 220, 161 A.L.R. 1039.

Power of guardian to sell ward's property without order of court, 108 A.L.R. 936.

Guardianship of incompetent or infant as affecting venue of action, 111 A.L.R. 167.

Guardian's power to make election under option in insurance policy, 112 A.L.R. 1063, 127 A.L.R. 454, 136 A.L.R. 1045.

Priority in event of incompetent's death of claims incurred during guardianship over other claims against estate, 113 A.L.R. 402.

Liability of trustee, guardian, executor or administrator for loss of funds, as affected by failure to obtain order of court authorizing investment, in absence of mandatory statute, 116 A.L.R. 437.

Guardian's sale of ward's property initiated before, but not finally concluded until after, ward's attainment of majority, 141 A.L.R. 1022.

Transaction with affiliated corporation by corporate guardian as violation of rule against self-dealing, 151 A.L.R. 905.

Power of guardian as to compromise of liquidated contract claim or money judgment, 155 A.L.R. 196.

Guardian's contract employing attorney as binding upon ward or his estate, 171 A.L.R. 468.

Power of guardian of incompetent to change beneficiaries in ward's life insurance policy, 21 A.L.R.2d 1191.

Liability of incompetent's estate for torts committed by guardian, committee or trustee in managing estate, 40 A.L.R.2d 1103.

Validity and enforceability of agreement to drop or compromise will contest or withdraw objections to probate, or of agreement to induce others to do so, 42 A.L.R.2d 1319.

Power of court to confirm sale of ward's property over objection of guardian, 43 A.L.R.2d 1445.

Power of guardian, committee or trustee of mental incompetent, after latter's death, to pay debts and obligations, 60 A.L.R.2d 963.

Effect of incompetency of joint depositor upon status and ownership of bank account, 62 A.L.R.2d 1091.

Waiver of privilege by personal representative or heir of deceased client or by guardian of incompetent, 67 A.L.R.2d 1268.

Guardian's liability for interest on ward's funds, 72 A.L.R.2d 757.

Capacity of guardian to sue or be sued outside state where appointed, 94 A.L.R.2d 162.

Power to make charitable gifts from estate of incompetent, 99 A.L.R.2d 946.

Factors considered in making election for incompetent to take under or against will, 3 A.L.R.3d 6.

Time within which election must be made for incompetent to take under or against will, 3 A.L.R.3d 119.

Who may make election for incompetent to take under or against will, 21 A.L.R.3d 320.

Power of court or guardian to make noncharitable gifts or allowances out of funds of incompetent ward, 24 A.L.R.3d 863.

Right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without approval by court, 63 A.L.R.3d 780.

Guardian's authority, without seeking court approval, to exercise ward's right to revoke trust, 53 A.L.R.4th 1297.

Ademption or revocation of specific devise or bequest by guardian, committee, conservator or trustee of mentally or physically incompetent testator, 84 A.L.R.4th 462.

Propriety of surgically ivading incompetent or minor for benefit of third party, 4 A.L.R.5th 1000.

Power of incompetent spouse's guardian or representative to sue for granting or vacation of divorce or annulment of marriage, or to make compromise or settlement in such suit, 32 A.L.R.5th 673.

14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 69 to 144; 49 C.J.S. Insane Persons §§ 49, 78.

45-5-425. Distributive duties and powers of conservator.

A. A conservator may expend or distribute income or principal of the estate without court authorization or confirmation for the protected person and his dependents in accordance with the following principles:

(1) the conservator is to consider recommendations relating to the appropriate standard of support, care, education or benefit for the protected person made by a parent, guardian or custodian, if any. He may not be surcharged for sums paid to persons or organizations actually furnishing support, education or care to the protected person pursuant to such recommendations of a parent or guardian of the protected person unless he knows that the parent, guardian or custodian is deriving personal financial benefit therefrom, including relief from any personal duty of support, or unless such recommendations are clearly not in the best interests of the protected person;

(2) the conservator is to expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person with due regard to:

(a) the size of the estate, the probable duration of the conservatorship and the likelihood that the protected person, at some future time, may be fully able to manage his affairs and the estate which has been conserved for him;

(b) the accustomed standard of living of the protected person and members of his household; and

(c) other funds or sources used for the support of the protected person;

(3) the conservator may expend funds of the estate for the support of persons legally dependent on the protected person and others who are members of the protected person's household who are unable to support themselves, and who are in need of support;

(4) funds expended under this subsection may be paid by the conservator to any person, including the protected person, to reimburse for expenditures which the conservator might have made, or in advance for services to be rendered to the protected person when it is reasonable to expect that such services will be performed and where advance payments are customary or reasonably necessary under the circumstances.

B. If the estate is ample to provide for the purposes implicit in the distributions authorized by Subsection A of this section, a conservator for the protected person other than a minor has power to make gifts to charity and other persons as the protected person might have been expected to make, in amounts which do not exceed in total for any year twenty percent of the income from the estate.

C. When a minor who has not been adjudged disabled under Subsection B of Section 5-401 [45-5-401 NMSA 1978] attains his majority, his conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

D. When the conservator is satisfied that a protected person's disability (other than minority) has ceased, the conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

E. If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into his possession, inform the personal representative or a beneficiary named therein that he has done so, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto. If, after forty days from the death of the protected person, no other person has been appointed personal representative and no application or petition for appointment has been filed, the conservator may apply to exercise the powers and duties of a personal representative so that he may proceed to administer and distribute the decedent's estate without additional or further appointment. Upon request for an order granting the powers of a personal representative to a conservator, after notice to any person demanding notice under Section 3-204 [45-3-204 NMSA 1978] and to any person nominated personal representative in any will of which the applicant is aware, the court may order the conferral of the power upon determining that there is no objection, and endorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative. The making and entry of an order under this section shall have the effect of an order of appointment of a personal representative as provided in Sections 3-101

through 3-1204 [45-3-101 through 45-3-1204 NMSA 1978] except that the estate in the name of the conservator, after administration, may be distributed to the decedent's successors without prior retransfer to the conservator as personal representative.

History: 1953 Comp., § 32A-5-425, enacted by Laws 1975, ch. 257, § 5-425.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of guardian to expend principal of ward's estate for support and maintenance, 5 A.L.R. 632.

Guardian's liability for interest on ward's funds, 72 A.L.R.2d 757.

Power to make charitable gifts from estate of incompetent, 99 A.L.R.2d 946.

Power of court or guardian to make noncharitable gifts or allowances out of funds of incompetent ward, 24 A.L.R.3d 863.

Ademption or revocation of specific devise or bequest by guardian, committee, conservator or trustee of mentally or physically incompetent testator, 84 A.L.R.4th 462.

14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 61 to 66, 72, 80 to 85, 145, 159; 49 C.J.S. Insane Persons § 85.

45-5-426. Consent to conservatorship; applicable laws.

All the procedures contained in Chapter 45, Article 5 NMSA 1978 pursuant to the appointment of a conservator for a person under conservatorship shall apply. The person for whom a conservatorship is sought shall not be allowed to consent to the appointment of a conservator by the court.

History: 1978 Comp., § 45-5-426, enacted by Laws 1989, ch. 252, § 27.

ANNOTATIONS

Repeals and reenactments. — Laws 1989, ch. 252, § 27, repealed former 45-5-426 NMSA 1978, as enacted by Laws 1975, ch. 257, § 5-426, relating to enlargement or limitation of powers of conservator, and enacted a new section, effective June 16, 1989.

45-5-427. Preservation of estate plan.

In investing the estate, and in selecting assets of the estate for distribution under Subsection A of Section 5-425 [45-5-425 NMSA 1978], and in utilizing powers of revocation or withdrawal available for the support of the protected person, and exercisable by the conservator or the court, and in exercising any other powers vested in them, the conservator or the court should take into account any known estate plan of

the protected person, including his will; any revocable trust of which he is settlor; and any contract, transfer or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated. The conservator may examine the will of the protected person.

History: 1953 Comp., § 32A-5-427, enacted by Laws 1975, ch. 257, § 5-427.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 88 to 90; 49 C.J.S. Insane Persons § 85.

45-5-428. Claims against protected person; enforcement.

A. A conservator must pay from the estate all just claims against the estate and against the protected person arising before or after the conservatorship upon their presentation and allowance. A claim may be presented by either of the following methods:

(1) the claimant may deliver or mail to the conservator a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed; or

(2) the claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court and deliver or mail a copy of the statement to the conservator.

A claim is deemed presented upon receipt of the written statement of claim by the conservator, or the filing of the claim with district court, whichever occurs first. A presented claim is allowed, if it is not disallowed by written statement mailed by the conservator to the claimant within sixty days after its presentation. The presentation of a claim tolls any statute of limitation relating to the claim until thirty days after its disallowance.

B. A claimant whose claim has not been paid may petition the court for determination of his claim at any time before it is barred by the applicable statute of limitation, and, upon due proof, procure an order for its allowance and payment from the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party must give notice of the proceeding to the conservator if the outcome is to constitute a claim against the estate.

C. If it appears that the estate in conservatorship is likely to be exhausted before all claims and expenses of administration are paid, such claims and expenses shall be paid in the following order of priority:

(1) expenses of administration, including fees for the conservator and his attorney;

(2) tax claims with preference under federal law;

(3) claims for the support, education or care of the protected person or his dependents, on a pro rata basis;

(4) tax claims with preference under state law; and

(5) all other claims on a pro rata basis.

History: 1953 Comp., § 32A-5-428, enacted by Laws 1975, ch. 257, § 5-428; 1976 (S.S.), ch. 37, § 15.

ANNOTATIONS

Reasonableness of attorneys' fees. — Award of $150, rather than requested $1,150, to an attorney for services rendered in behalf of the incompetent at the request of one of the incompentent's guardians, would be affirmed upon evidence that attorney's services were required due to guardian's neglect of guardian's duties; any additional compensation should be sought from guardian, not from ward's estate. In re Boyd's Guardianship, 37 N.M. 83, 18 P.2d 658 (1933).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Power of guardian as to compromise of liquidated contract claim or money judgment, 155 A.L.R. 196.

Right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without approval of court, 63 A.L.R.3d 780.

14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward § 108; 49 C.J.S. Insane Persons § 88.

45-5-429. Individual liability of conservator.

A. Unless otherwise provided in the contract, a conservator is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

B. The conservator is individually liable for obligations arising from ownership or control of property of the estate, or for torts committed in the course of administration of the estate, only if he is personally at fault.

C. Claims based on contracts entered into by a conservator in his fiduciary capacity on obligations arising from ownership or control of the estate, or on torts committed in the course of administration of the estate, may be asserted against the estate by proceeding against the conservator in his fiduciary capacity, whether or not the conservator is individually liable therefor.

D. Any question of liability, between the estate and the conservator individually, may be determined in a proceeding for accounting, surcharge or indemnification, or other appropriate proceeding or action.

History: 1953 Comp., § 32A-5-429, enacted by Laws 1975, ch. 257, § 5-429.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability in absence of mandatory statute, of guardian for loss of funds as affected by failure to obtain court order authorizing investment, 116 A.L.R. 437.

Transaction with affiliated corporation, by corporate guardian as violation of rule against self-dealing, 151 A.L.R. 905.

Liability of incompetent's estate for torts committed by guardian, committee or trustee in managing estate, 40 A.L.R.2d 1103.

Guardian's liability for interest on ward's funds, 72 A.L.R.2d 757.

17A C.J.S. Contracts § 347; 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward § 93; 49 C.J.S. Insane Persons § 86.

45-5-430. Termination of proceeding.

The protected person, his personal representative, the conservator or any other person interested in the welfare of a person for whom a conservator has been appointed may petition the court to terminate the conservatorship. A protected person seeking termination is entitled to the same rights and procedures as in an original proceeding for a protective order. The court, upon finding after notice and hearing that the minority or disability of the protected person has ceased, may terminate the conservatorship. Upon termination, title to assets of the estate passes to the former protected person or to his successors, subject to provision in the order for expenses of administration or to conveyances from the conservator to the former protected person or his successors, to evidence the transfer.

History: 1953 Comp., § 32A-5-430, enacted by Laws 1975, ch. 257, § 5-430.

ANNOTATIONS

Compiler's notes. — This section includes within its scope some of the functions of former 32-2-9, 1953 Comp.

Cross references. — For definition of "disability", *see* 45-5-101 NMSA 1978.

For age of majority, *see* 12-2A-3 and 28-6-1 NMSA 1978.

Protected person's change of will. — A conservator who believes the protected person legitimately wants to change the protected person's will, is not required to either: (1) petition to terminate the conservatorship under 45-5-430 NMSA 1978; or (2) seek instruction from the appointing court pursuant to 45-5-416 NMSA 1978; while either of these may be a legitimate procedure, neither is required by the Uniform Probate Code before a person whose property is under a conservatorship is entitled to execute a will. Lucero v. Lucero, 118 N.M. 636, 884 P.2d 527 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward §§ 49 to 52; 49 C.J.S. Insane Persons § 45.

45-5-431. Payment of debt and delivery of property to foreign conservator without local proceedings.

A. Any person indebted to a protected person, or having possession of property or of an instrument evidencing a debt, stock or chose in action belonging to a protected person, may pay or deliver to a conservator, guardian of the estate or other like fiduciary appointed by a court of the state of residence of the protected person, upon being presented with proof of his appointment and an affidavit made by him stating that:

(1) no protective proceeding relating to the protected person is pending in New Mexico; and

(2) the foreign conservator is entitled to payment or to receive delivery.

B. If the person to whom the affidavit is presented pursuant to Subsection A of this section is not aware of any protective proceeding pending in New Mexico, payment or delivery in response to the demand and affidavit discharges the debtor or possessor.

History: 1953 Comp., § 32A-5-431, enacted by Laws 1975, ch. 257, § 5-431.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 C.J.S. Chemical Dependents § 4; 39 C.J.S. Guardian and Ward § 187; 49 C.J.S. Insane Persons § 154.

45-5-432. Repealed.

ANNOTATIONS

Repeals. — Laws 2011, ch. 124, § 97 repealed 45-5-432 NMSA 1978, as enacted by Laws 1975, ch. 257, § 5-432, relating to foreign conservators, effective January 1, 2012. For provisions of former section, *see* the 2010 NMSA 1978 on *NMONESOURCE.COM*.

45-5-433. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 301, § 28 repealed 45-5-433 NMSA 1978, as enacted by Laws 1989, ch. 252, § 28, relating to exemptions for veterans, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMONESOURCE.COM*.

45-5-434. Registration of guardianship orders.

If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in New Mexico, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in New Mexico by filing as a foreign judgment in a district court, in any appropriate county of New Mexico, certified copies of the order and letters of office.

History: 1978 Comp., § 45-5-434, enacted by Laws 2011, ch. 124, § 59.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 105 made Laws 2011, ch. 124, § 59 effective January 1, 2012.

45-5-435. Registration of protective orders.

If a conservator has been appointed in another state and a petition for a protective order is not pending in New Mexico, the conservator appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in New Mexico by filing as a foreign judgment in a district court in New Mexico, in any county in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond.

History: 1978 Comp., § 45-5-434, enacted by Laws 2011, ch. 124, § 60.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 105 made Laws 2011, ch. 124, § 60 effective January 1, 2012.

45-5-436. Effect of registration.

A. Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in New Mexico all powers authorized in the order of appointment except as prohibited under the laws of New Mexico, including maintaining actions and proceedings in New Mexico and, if the guardian or conservator is not a resident of New Mexico, subject to any conditions imposed upon nonresident parties.

B. A court of New Mexico may grant any relief available under Chapter 45, Article 5 NMSA 1978 and other law of this state to enforce a registered order.

History: 1978 Comp., § 45-5-436, enacted by Laws 2011, ch. 124, § 61.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 105 made Laws 2011, ch. 124, § 61 effective January 1, 2012.

PART 5
POWERS OF ATTORNEY

45-5-501. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-501 NMSA 1978, being Laws 1995, ch. 210, § 58, relating to powers of attorney, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-502. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-502 NMSA 1978, being Laws 1995, ch. 210, § 59, relating to powers of attorney, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-503. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-503 NMSA 1978, being Laws 1995, ch. 210, § 60, relating to powers of attorney, effective July 1, 2007. For provisions

of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-504. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-504 NMSA 1978, being Laws 1995, ch. 210, § 61, relating to powers of attorney, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-505. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-505 NMSA 1978, being Laws 1995, ch. 210, § 62, relating to powers of attorney, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

PART 6
UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT

45-5-601. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-601 NMSA 1978, as enacted by Laws 1995, ch. 210, § 63, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-602. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-602 NMSA 1978, as enacted by Laws 1995, ch. 210, § 64, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-603. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-603 NMSA 1978, as enacted by Laws 1995, ch. 210, § 65, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-604. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-604 NMSA 1978, as enacted by Laws 1995, ch. 210, § 66, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-605. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-605 NMSA 1978, as enacted by Laws 1995, ch. 210, § 67, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-606. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-606 NMSA 1978, as enacted by Laws 1995, ch. 210, § 68, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-607. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-607 NMSA 1978, as enacted by Laws 1995, ch. 210, § 69, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-608. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-608 NMSA 1978, as enacted by Laws 1995, ch. 210, § 70, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-609. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-609 NMSA 1978, as enacted by Laws 1995, ch. 210, § 71, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-610. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-610 NMSA 1978, as enacted by Laws 1995, ch. 210, § 72, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-611. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-611 NMSA 1978, as enacted by Laws 1995, ch. 210, § 73, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-612. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-612 NMSA 1978, as enacted by Laws 1995, ch. 210, § 74, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-613. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-613 NMSA 1978, as enacted by Laws 1995, ch. 210, § 75, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-614. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-614 NMSA 1978, as enacted by Laws 1995, ch. 210, § 76, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-615. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-615 NMSA 1978, as enacted by Laws 1995, ch. 210, § 77, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-616. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-616 NMSA 1978, as enacted by Laws 1995, ch. 210, § 78, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

45-5-617. Repealed.

ANNOTATIONS

Repeals. — Laws 2007, ch. 135, § 404 repealed 45-5-617 NMSA 1978, as enacted by Laws 1995, ch. 210, § 79, the Uniform Statutory Form Power of Attorney Act, effective July 1, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMONESOURCE.COM*. For current law, *see* the Uniform Power of Attorney Act, 45-5B-101 through 45-5B-403 NMSA 1978.

ARTICLE 5A
Uniform Adult Guardianship and Protective Proceedings Jurisdiction

PART 1
GENERAL PROVISIONS

45-5A-101. Short title.

Chapter 45, Article 5A NMSA 1978 may be cited as the "Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act".

History: 1978 Comp., § 45-5A-101, enacted by Laws 2011, ch. 124, § 62.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 105 made Laws 2011, ch. 124, § 62 effective January 1, 2012.

45-5A-102. Definitions.

As used in the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act:

A. "adult" means an individual who has attained eighteen years of age;

B. "conservator" means a person appointed by the court to administer the property of an adult, as provided in Chapter 45, Article 5 NMSA 1978;

C. "court" means the district court;

D. "guardian" means a person appointed by the court to make decisions regarding the person of an adult, as provided in Chapter 45, Article 5 NMSA 1978;

E. "guardianship order" means an order appointing a guardian;

F. "guardianship proceeding" means a judicial proceeding in which an order for the appointment of a guardian is sought or has been issued;

G. "incapacitated person" means an adult for whom a guardian has been appointed;

H. "party" means the respondent, petitioner, guardian, conservator or any other person allowed by the court to participate in a guardianship or protective proceeding;

I. "protected person" means an adult for whom a protective order has been issued;

J. "protective order" means an order appointing a conservator or other order related to management of an adult's property;

K. "protective proceeding" means a judicial proceeding in which a protective order is sought or has been issued; and

L. "respondent" means an adult for whom a protective order or the appointment of a guardian is sought.

History: 1978 Comp., § 45-5A-102, enacted by Laws 2011, ch. 124, § 63.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 105 made Laws 2011, ch. 124, § 63 effective January 1, 2012.

45-5A-103. International application of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

A New Mexico court may treat a foreign country as if it were a state for the purpose of applying Parts 1, 2, 3 and 5 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

History: 1978 Comp., § 45-5A-103, enacted by Laws 2011, ch. 124, § 64.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 105 made Laws 2011, ch. 124, § 64 effective January 1, 2012.

45-5A-104. Communication between courts.

A. A New Mexico court may communicate with a court in another state concerning a proceeding arising pursuant to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. The court may allow the parties to participate in the communication. Except as otherwise provided in Subsection B of this section and except as otherwise provided by rules adopted by the New Mexico supreme court, the court shall make a record of the communication. The record may be limited to the fact that the communication occurred.

B. Except as otherwise provided by rules adopted by the New Mexico supreme court, courts may communicate concerning schedules, calendars, court records and other administrative matters without making a record.

History: 1978 Comp., § 45-5A-104, enacted by Laws 2011, ch. 124, § 65.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 105 made Laws 2011, ch. 124, § 65 effective January 1, 2012.

45-5A-105. Cooperation between courts.

A. Except as otherwise provided by rules adopted by the New Mexico supreme court, in a guardianship or protective proceeding in New Mexico, a New Mexico court may request the appropriate court of another state to do any of the following:

(1) hold an evidentiary hearing;

(2) order a person in that state to produce evidence or give testimony pursuant to procedures of that state;

(3) order that an evaluation or assessment be made of the respondent;

(4) order any appropriate investigation of a person involved in a proceeding;

(5) forward to the New Mexico court a certified copy of the transcript or other record of a hearing pursuant to Paragraph (1) of this subsection or any other proceeding, any evidence otherwise produced pursuant to Paragraph (2) of this subsection and any evaluation or assessment prepared in compliance with an order pursuant to Paragraph (3) or (4) of this subsection;

(6) issue any order necessary to assure the appearance in the proceeding of a person whose presence is necessary for the court to make a determination, including the respondent or the incapacitated or protected person; and

(7) issue an order authorizing the release of medical, financial, criminal or other relevant information in that state, including protected health information as defined in 45 C.F.R. Section 164.504, as amended.

B. If a court of another state in which a guardianship or protective proceeding is pending requests assistance of the kind provided in Subsection A of this section, a New Mexico court has jurisdiction for the limited purpose of granting the request or making reasonable efforts to comply with the request.

History: 1978 Comp., § 45-5A-105, enacted by Laws 2011, ch. 124, § 66.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 105 made Laws 2011, ch. 124, § 66 effective January 1, 2012.

45-5A-106. Taking testimony in another state.

A. In a guardianship or protective proceeding, in addition to other procedures that may be available, testimony of a witness who is located in another state may be offered by deposition or other means allowable in New Mexico for testimony taken in another state. The court on its own motion may order that the testimony of a witness be taken in another state and may prescribe the manner in which, and the terms upon which, the testimony is to be taken.

B. In a guardianship or protective proceeding, a New Mexico court may permit a witness located in another state to be deposed or to testify by telephone or audiovisual or other electronic means. A New Mexico court shall cooperate with the court of the other state in designating an appropriate location for the deposition or testimony.

C. Except as otherwise provided by rules adopted by the New Mexico supreme court, documentary evidence transmitted from another state to a New Mexico court by technological means that do not produce an original writing shall not be excluded from evidence on an objection based on the best evidence rule.

History: 1978 Comp., § 45-5A-106, enacted by Laws 2011, ch. 124, § 67.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 67 effective January 1, 2012.

PART 2
JURISDICTION

45-5A-201. Definitions; significant-connection factors.

A. As used in Part 2 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act:

(1) "emergency" means a circumstance that likely will result in substantial harm to a respondent's health, safety or welfare and for which the appointment of a guardian is necessary because no other person has authority and is willing to act on the respondent's behalf;

(2) "home state" means the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or, if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition; and

(3) "significant-connection state" means a state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.

B. In determining pursuant to Section 45-5A-203 and Subsection E of Section 45-5A-301 NMSA 1978 whether a respondent has a significant connection with a particular state, the court shall consider:

(1) the location of the respondent's family and other persons required to be notified of the guardianship or protective proceeding;

(2) the length of time the respondent at any time was physically present in the state and the duration of any absence;

(3) the location of the respondent's property; and

(4) the extent to which the respondent has ties to the state, such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship and receipt of services.

History: 1978 Comp., § 45-5A-201, enacted by Laws 2011, ch. 124, § 68.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 68 effective January 1, 2012.

45-5A-202. Exclusive basis.

Part 2 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act provides the exclusive jurisdictional basis for a New Mexico court to appoint a guardian or issue a protective order for an adult.

History: 1978 Comp., § 45-5A-202, enacted by Laws 2011, ch. 124, § 69.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 69 effective January 1, 2012.

45-5A-203. Jurisdiction.

A New Mexico court has jurisdiction to appoint a guardian or issue a protective order for a respondent if:

A. New Mexico is the respondent's home state;

B. on the date the petition is filed, New Mexico is a significant-connection state and:

(1) the respondent does not have a home state or a court of the respondent's home state has declined to exercise jurisdiction because New Mexico is a more appropriate forum; or

(2) the respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state and, before the court makes the appointment or issues the order:

(a) a petition for an appointment or order is not filed in the respondent's home state;

(b) an objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding; and

(c) the court in New Mexico concludes that it is an appropriate forum pursuant to the factors set forth in Section 45-5A-206 NMSA 1978;

C. New Mexico does not have jurisdiction pursuant either to Subsection A or B of this section, the respondent's home state and all significant-connection states have declined to exercise jurisdiction because New Mexico is the more appropriate forum and

jurisdiction in New Mexico is consistent with the constitutions of New Mexico and the United States; or

D. the requirements for special jurisdiction pursuant to Section 45-5A-204 NMSA 1978 are met.

History: 1978 Comp., § 45-5A-203, enacted by Laws 2011, ch. 124, § 70.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 70 effective January 1, 2012.

45-5A-204. Special jurisdiction.

A. A New Mexico court lacking jurisdiction pursuant to Section 45-5A-203 NMSA 1978 has special jurisdiction to do any of the following:

(1) appoint a guardian in an emergency for a term not exceeding ninety days for a respondent who is physically present in New Mexico;

(2) issue a protective order with respect to real or tangible personal property located in New Mexico; and

(3) appoint a guardian or conservator for an incapacitated or protected person for whom a provisional order to transfer the proceeding from another state has been issued pursuant to procedures similar to Section 45-5A-301 NMSA 1978.

B. If a petition for the appointment of a guardian in an emergency is brought in New Mexico and New Mexico was not the respondent's home state on the date the petition was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment.

History: 1978 Comp., § 45-5A-204, enacted by Laws 2011, ch. 124, § 71.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 71 effective January 1, 2012.

45-5A-205. Exclusive and continuing jurisdiction.

Except as otherwise provided in Section 45-5A-204 NMSA 1978, a court that has appointed a guardian or issued a protective order consistent with the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act has exclusive and continuing

jurisdiction over the proceeding until it is terminated by the court or the appointment or order expires by its own terms.

History: 1978 Comp., § 45-5A-205, enacted by Laws 2011, ch. 124, § 72.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 72 effective January 1, 2012.

45-5A-206. Appropriate forum.

A. A New Mexico court having jurisdiction pursuant to Section 45-5A-203 NMSA 1978 to appoint a guardian or issue a protective order may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum.

B. If a New Mexico court declines to exercise its jurisdiction pursuant to Subsection A of this section, it shall either dismiss or stay the proceeding. The court may impose any condition the court considers just and proper, including the condition that a petition for the appointment of a guardian or issuance of a protective order be filed promptly in another state.

C. In determining whether it is an appropriate forum, the court shall consider all relevant factors, including:

(1) any expressed preference of the respondent;

(2) whether abuse, neglect or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect or exploitation;

(3) the length of time the respondent was physically present in or was a legal resident of New Mexico or another state;

(4) the distance of the respondent from the court in each state;

(5) the financial circumstances of the respondent's estate;

(6) the nature and location of the evidence;

(7) the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;

(8) the familiarity of the court of each state with the facts and issues in the proceeding; and

(9) if an appointment of a guardian or conservator were to be made, the court's ability to monitor the conduct of the guardian or conservator.

History: 1978 Comp., § 45-5A-206, enacted by Laws 2011, ch. 124, § 73.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 73 effective January 1, 2012.

45-5A-207. Jurisdiction declined by reason of conduct.

A. If at any time a New Mexico court determines that it acquired jurisdiction to appoint a guardian or issue a protective order because of unjustifiable conduct, the court may:

(1) decline to exercise jurisdiction;

(2) exercise jurisdiction for the limited purpose of fashioning an appropriate remedy to:

(a) ensure the health, safety and welfare of the respondent or the protection of the respondent's property; or

(b) prevent a repetition of the unjustifiable conduct, including staying the proceeding until a petition for the appointment of a guardian or issuance of a protective order is filed in a court of another state having jurisdiction; or

(3) continue to exercise jurisdiction after considering:

(a) the extent to which the respondent and all persons required to be notified of the proceedings have acquiesced in the exercise of the court's jurisdiction;

(b) whether it is a more appropriate forum than the court of any other state pursuant to the factors set forth in Subsection C of Section 45-5A-206 NMSA 1978; and

(c) whether the court of any other state would have jurisdiction under factual circumstances in substantial conformity with the jurisdictional standards of Section 45-5A-203 NMSA 1978.

B. If a New Mexico court determines that it acquired jurisdiction to appoint a guardian or to issue a protective order because a party seeking to invoke its jurisdiction engaged in unjustifiable conduct, it may assess against that party necessary and reasonable expenses, including attorney fees, investigative fees, court costs, communication expenses, witness fees and expenses and travel expenses. The court shall not assess fees, costs or expenses of any kind against New Mexico or a

governmental subdivision, agency or instrumentality of New Mexico unless authorized by law other than the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

History: 1978 Comp., § 45-5A-207, enacted by Laws 2011, ch. 124, § 74.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 74 effective January 1, 2012.

45-5A-208. Notice of proceeding.

If a petition for the appointment of a guardian or issuance of a protective order is brought in New Mexico and New Mexico was not the respondent's home state on the date the petition was filed, in addition to complying with the notice requirements of New Mexico, notice of the petition shall be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the respondent's home state. The notice shall be given in the same manner as notice is required to be given in New Mexico.

History: 1978 Comp., § 45-5A-208, enacted by Laws 2011, ch. 124, § 75.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 75 effective January 1, 2012.

45-5A-209. Proceedings in more than one state.

Except for a petition for the appointment of a guardian in an emergency or issuance of a protective order limited to property located in New Mexico pursuant to Paragraph (1) or (2) of Subsection A of Section 45-5A-204 NMSA 1978, if a petition for the appointment of a guardian or issuance of a protective order is filed in New Mexico and in another state and neither petition has been dismissed or withdrawn, the following rules apply:

A. if the New Mexico court has jurisdiction pursuant to Section 45-5A-203 NMSA 1978, it may proceed with the case unless a court in another state acquires jurisdiction pursuant to provisions similar to Section 45-5A-203 NMSA 1978 before the appointment of the guardian or issuance of the protective order; and

B. if the New Mexico court does not have jurisdiction pursuant to Section 45-5A-203 NMSA 1978, whether at the time the petition is filed or at any time before the appointment of the guardian or issuance of the protective order, the court shall stay the proceeding and communicate with the court in the other state. If the court in the other

state has jurisdiction, the New Mexico court shall dismiss the petition unless the court in the other state determines that the New Mexico court is a more appropriate forum.

History: 1978 Comp., § 45-5A-209, enacted by Laws 2011, ch. 124, § 76.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 76 effective January 1, 2012.

PART 3
TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP

45-5A-301. Transfer of guardianship or conservatorship to another state.

A. A guardian or conservator appointed in New Mexico may petition the court to transfer the guardianship or conservatorship to another state.

B. Notice of a petition pursuant to Subsection A of this section shall be given to the persons that would be entitled to notice of a petition in New Mexico for the appointment of a guardian or conservator.

C. On the court's own motion, or on request of the guardian or conservator, the incapacitated or protected person or other person required to be notified of the petition, the court shall hold a hearing on a petition filed pursuant to Subsection A of this section.

D. The court shall issue an order provisionally granting a petition to transfer a guardianship and shall direct the guardian to petition for guardianship in the other state if the court is satisfied that the guardianship will be accepted by the court in the other state and the court finds that:

(1) the incapacitated person is physically present in or is reasonably expected to move permanently to the other state;

(2) an objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the incapacitated person; and

(3) plans for care and services for the incapacitated person in the other state are reasonable and sufficient.

E. The court shall issue a provisional order granting a petition to transfer a conservatorship and shall direct the conservator to petition for conservatorship in the other state if the court is satisfied that the conservatorship will be accepted by the court of the other state and the court finds that:

(1) the protected person is physically present in or is reasonably expected to move permanently to the other state, or the protected person has a significant connection to the other state considering the factors set forth in Subsection B of Section 45-5A-201 NMSA 1978;

(2) an objection to the transfer has not been made or, if an objection has been made, the objector has not established that the transfer would be contrary to the interests of the protected person; and

(3) adequate arrangements will be made for management of the protected person's property.

F. The court shall issue a final order confirming the transfer and terminating the guardianship or conservatorship upon its receipt of:

(1) a provisional order accepting the proceeding from the court to which the proceeding is to be transferred that is issued pursuant to provisions similar to those set forth in Section 45-5A-302 NMSA 1978; and

(2) the documents required to terminate a guardianship or conservatorship in New Mexico.

History: 1978 Comp., § 45-5A-301, enacted by Laws 2011, ch. 124, § 77.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 77 effective January 1, 2012.

45-5A-302. Accepting guardianship or conservatorship transferred from another state.

A. To confirm transfer of a guardianship or conservatorship transferred to New Mexico pursuant to provisions similar to Section 45-5A-301 NMSA 1978, the guardian or conservator shall petition the New Mexico court to accept the guardianship or conservatorship. The petition shall include a certified copy of the other state's provisional order of transfer.

B. Notice of a petition pursuant to Subsection A of this section shall be given to those persons that would be entitled to notice if the petition were a petition for the appointment of a guardian or issuance of a protective order in both the transferring state

and New Mexico. The notice shall be given in the same manner as notice is required to be given in New Mexico.

C. On the court's own motion, or on request of the guardian or conservator, the incapacitated or protected person or other person required to be notified of the proceeding, the court shall hold a hearing on a petition filed pursuant to Subsection A of this section.

D. The court shall issue an order provisionally granting a petition filed pursuant to Subsection A of this section unless:

(1) an objection is made and the objector establishes that transfer of the proceeding would be contrary to the interests of the incapacitated or protected person; or

(2) the guardian or conservator is ineligible for appointment in New Mexico.

E. The court shall issue a final order accepting the proceeding and appointing the guardian or conservator as guardian or conservator in New Mexico upon its receipt from the court from which the proceeding is being transferred of a final order issued pursuant to provisions similar to Section 45-5A-301 NMSA 1978 transferring the proceeding to New Mexico.

F. Not later than ninety days after issuance of a final order accepting transfer of a guardianship or conservatorship, the court shall determine whether the guardianship or conservatorship needs to be modified to conform to the laws of New Mexico.

G. In granting a petition pursuant to this section, the court shall recognize a guardianship or conservatorship order from the other state, including the determination of the incapacitated or protected person's incapacity and the appointment of the guardian or conservator.

H. The denial by a New Mexico court of a petition to accept a guardianship or conservatorship transferred from another state does not affect the ability of the guardian or conservator to seek appointment as guardian or conservator in New Mexico pursuant to Sections 45-5-301 and 45-5-401 NMSA 1978 if the court has jurisdiction to make an appointment other than by reason of the provisional order of transfer.

History: 1978 Comp., § 45-5A-302, enacted by Laws 2011, ch. 124, § 78.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 78 effective January 1, 2012.

PART 4
REGISTRATION AND RECOGNITION OF ORDERS FROM OTHER STATES

45-5A-401. Registration of guardianship orders.

If a guardian has been appointed in another state and a petition for the appointment of a guardian is not pending in New Mexico, the guardian appointed in the other state, after giving notice to the appointing court of an intent to register, may register the guardianship order in New Mexico by filing as a foreign judgment in a court, in any appropriate county of New Mexico, certified copies of the order and letters of office.

History: 1978 Comp., § 45-5A-401, enacted by Laws 2011, ch. 124, § 79.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 79 effective January 1, 2012.

45-5A-402. Registration of protective orders.

If a conservator has been appointed in another state and a petition for a protective order is not pending in New Mexico, the conservator appointed in the other state, after giving notice to the appointing court of an intent to register, may register the protective order in New Mexico by filing as a foreign judgment in a New Mexico court, in any county in which property belonging to the protected person is located, certified copies of the order and letters of office and of any bond.

History: 1978 Comp., § 45-5A-402, enacted by Laws 2011, ch. 124, § 80.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 80 effective January 1, 2012.

45-5A-403. Effect of registration.

A. Upon registration of a guardianship or protective order from another state, the guardian or conservator may exercise in New Mexico all powers authorized in the order of appointment except as prohibited pursuant to the laws of New Mexico, including maintaining actions and proceedings in New Mexico and, if the guardian or conservator is not a resident of New Mexico, subject to any conditions imposed upon nonresident parties.

B. A New Mexico court may grant any relief available pursuant to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act and other law of New Mexico to enforce a registered order.

History: 1978 Comp., § 45-5A-403, enacted by Laws 2011, ch. 124, § 81.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 81 effective January 1, 2012.

PART 5
MISCELLANEOUS PROVISIONS

45-5A-501. Relation to Electronic Signatures In Global and National Commerce Act.

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

History: 1978 Comp., § 45-5A-501, enacted by Laws 2011, ch. 124, § 82.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 82 effective January 1, 2012.

45-5A-502. Transitional provision.

A. Parts 1, 3 and 4 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act and Section 45-5A-501 NMSA 1978 apply to proceedings begun before January 1, 2012, regardless of whether a guardianship or protective order has been issued.

B. The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act applies to guardianship and protective proceedings begun on or after January 1, 2012.

History: 1978 Comp., § 45-5A-502, enacted by Laws 2011, ch. 124, § 83.

ANNOTATIONS

Effective dates. — Laws 2011, ch. 124, § 106 made Laws 2011, ch. 124, § 83 effective January 1, 2012.

ARTICLE 5B
Uniform Power of Attorney

PART 1

45-5B-101. Short title.

This act [45-5B-101 through 45-5B-403 NMSA 1978] may be cited as the "Uniform Power of Attorney Act".

History: Laws 2007, ch. 135, § 101; 1978 Comp., § 46B-1-101 recompiled as § 45-5B-101 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-101 NMSA 1978 as 45-5B-101 NMSA 1978, effective January 1, 2012.

45-5B-102. Definitions.

As used in the Uniform Power of Attorney Act:

A. "agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact or otherwise. The term includes an original agent, co-agent, successor agent and a person to which an agent's authority is delegated;

B. "durable", with respect to a power of attorney, means not terminated by the principal's incapacity;

C. "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities;

D. "good faith" means honesty in fact;

E. "incapacity" means inability of an individual to manage the individual's estate or financial affairs, or both, because:

(1) of gross mismanagement, as evidenced by recent behavior, of the individual's income and resources or the individual's medical inability to manage the

individual's income and resources that has led, or is likely in the near future to lead, to financial vulnerability; or

(2) the individual is:

(a) missing;

(b) detained, including incarcerated in a penal system; or

(c) outside the United States and unable to return;

F. "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality or any other legal or commercial entity;

G. "power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term "power of attorney" is used;

H. "presently exercisable general power of appointment", with respect to property or a property interest subject to a power of appointment, means power exercisable at the time in question to vest absolute ownership in the principal individually, the principal's estate, the principal's creditors or the creditors of the principal's estate. The term includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard or the passage of a specified period only after the occurrence of the specified event, the satisfaction of the ascertainable standard or the passage of the specified period. The term does not include a power exercisable in a fiduciary capacity or only by will;

I. "principal" means an individual who grants authority to an agent in a power of attorney;

J. "property" means anything that may be the subject of ownership, whether real or personal, or legal or equitable, or any interest or right therein;

K. "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

L. "sign" means with present intent to authenticate or adopt a record:

(1) to execute or adopt a tangible symbol; or

(2) to attach to or logically associate with the record an electronic sound, symbol or process;

M. "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States; and

N. "stocks and bonds" means stocks, bonds, mutual funds and all other types of securities and financial instruments, whether held directly, indirectly or in any other manner. The term does not include commodity futures contracts and call or put options on stocks or stock indexes.

History: Laws 2007, ch. 135, § 102; 1978 Comp., § 46B-1-102 recompiled as § 45-5B-102 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-102 NMSA 1978 as 45-5B-102 NMSA 1978, effective January 1, 2012.

Power to be granted during period of competency. — Although this section allows the exercise of a power of attorney during a period of incompetency, if the writing conferring the power expressly provided therefor, the initial granting of the power must be during a period of competency. Roybal v. Morris, 100 N.M. 305, 669 P.2d 1100 (Ct. App. 1983) (decided under former law).

Effect of insanity on power of attorney. — A power of attorney is revoked by operation of law upon an adjudication of insanity, unless the power is irrevocable; if the agent's authority is "coupled with an interest," the principal's insanity does not terminate the agency. Poppe v. Taute, 94 N.M. 656, 615 P.2d 271 (Ct. App. 1980) (decided under former law).

Power granted to wife to act "without limitation" for husband are "similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding later disability or incapacity of the principal." Poppe v. Taute, 94 N.M. 656, 615 P.2d 271 (Ct. App. 1980) (decided under former law).

45-5B-103. Applicability.

The Uniform Power of Attorney Act applies to all powers of attorney except:

A. a power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;

B. a power to make health care decisions;

C. a proxy or other delegation to exercise voting rights or management rights with respect to an entity; and

D. a power created on a form prescribed by a government or governmental subdivision, agency or instrumentality for a governmental purpose.

History: Laws 2007, ch. 135, § 103; 1978 Comp., § 46B-1-103 recompiled as § 45-5B-103 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-103 NMSA 1978 as 45-5B-103 NMSA 1978, effective January 1, 2012.

45-5B-104. Power of attorney is durable.

A power of attorney created under the Uniform Power of Attorney Act is durable unless it expressly provides that it is terminated by the incapacity of the principal.

History: Laws 2007, ch. 135, § 104; 1978 Comp., § 46B-1-104 recompiled as § 45-5B-104 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-104 NMSA 1978 as 45-5B-104 NMSA 1978, effective January 1, 2012.

45-5B-105. Execution of power of attorney.

A power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.

History: Laws 2007, ch. 135, § 105; 1978 Comp., § 46B-1-105 recompiled as § 45-5B-105 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-105 NMSA 1978 as 45-5B-105 NMSA 1978, effective January 1, 2012.

45-5B-106. Validity of power of attorney.

A. A power of attorney executed in this state on or after July 1, 2007 is valid if its execution complies with Section 105 [45-5B-105 NMSA 1978] of the Uniform Power of Attorney Act.

B. A power of attorney executed in this state before July 1, 2007 is valid if its execution complied with the law of this state as it existed at the time of execution.

C. A power of attorney executed other than in this state is valid in this state if, when the power of attorney was executed, the execution complied with:

(1) the law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to Section 107 [45-5B-107 NMSA 1978] of the Uniform Power of Attorney Act; or

(2) the requirements for a military power of attorney pursuant to 10 U.S.C. Section 1044b, as amended.

D. Except as otherwise provided by statute other than the Uniform Power of Attorney Act, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

History: Laws 2007, ch. 135, § 106; 1978 Comp., § 46B-1-106 recompiled as § 45-5B-106 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-106 NMSA 1978 as 45-5B-106 NMSA 1978, effective January 1, 2012.

45-5B-107. Meaning and effect of power of attorney.

The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

History: Laws 2007, ch. 135, § 107; 1978 Comp., § 46B-1-107 recompiled as § 45-5B-107 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-107 NMSA 1978 as 45-5B-107 NMSA 1978, effective January 1, 2012.

45-5B-108. Nomination of conservator or guardian; relation of agent to court-appointed fiduciary.

A. In a power of attorney, a principal may nominate a conservator of the principal's estate or guardian of the principal's person for consideration by the court if protective proceedings for the principal's estate or person are begun after the principal executes

the power of attorney. Except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination.

B. If, after a principal executes a power of attorney, a court appoints a conservator of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. The power of attorney is not terminated and the agent's authority continues unless limited, suspended or terminated by the court after notice to, and an opportunity to be heard by, the agent and the principal.

History: Laws 2007, ch. 135, § 108; 1978 Comp., § 46B-1-108 recompiled as § 45-5B-108 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-108 NMSA 1978 as 45-5B-108 NMSA 1978, effective January 1, 2012.

Cross references. — For the Uniform Health Care Decisions Act, *see* Chapter 24, Article 7A NMSA 1978.

45-5B-109. When power of attorney effective.

A. A power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.

B. If a power of attorney becomes effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

C. If a power of attorney becomes effective upon the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated, or the person authorized is unable or unwilling to make the determination, the power of attorney becomes effective upon a determination in a writing or other record by:

(1) a physician or licensed psychologist that the principal is incapacitated within the meaning of Paragraph (1) of Subsection E of Section 102 [45-5B-102 NMSA 1978] of the Uniform Power of Attorney Act; or

(2) an attorney at law, a judge or an appropriate governmental official that the principal is incapacitated within the meaning of Paragraph (2) of Subsection E of Section 102 of the Uniform Power of Attorney Act.

D. A person authorized by the principal in the power of attorney to determine that the principal is incapacitated may act as the principal's personal representative pursuant to the federal Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, as amended, and applicable regulations to obtain access to the principal's health care information and communicate with the principal's health care provider.

History: Laws 2007, ch. 135, § 109; 1978 Comp., § 46B-1-109 recompiled as § 45-5B-109 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-109 NMSA 1978 as 45-5B-109 NMSA 1978, effective January 1, 2012.

Cross references. — For the federal Health Insurance Portability and Accountability Act of 1996, *see* 42 U.S.C. 300gg.

45-5B-110. Termination of power of attorney or agent's authority.

A. A power of attorney terminates when:

(1) the principal dies;

(2) the principal becomes incapacitated, if the power of attorney is not durable;

(3) the principal revokes the power of attorney;

(4) the power of attorney provides that it terminates;

(5) the purpose of the power of attorney is accomplished; or

(6) the principal revokes the agent's authority or the agent dies, becomes incapacitated or resigns and the power of attorney does not provide for another agent to act under the power of attorney.

B. An agent's authority terminates when:

(1) the principal revokes the authority;

(2) the agent dies, becomes incapacitated or resigns;

(3) an action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; or

(4) the power of attorney terminates.

C. Unless the power of attorney otherwise provides, an agent's authority is exercisable until the authority terminates under Subsection B of this section, notwithstanding a lapse of time since the execution of the power of attorney.

D. Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

E. Incapacity of the principal of a power of attorney that is not durable does not revoke or terminate the power of attorney as to an agent or other person that, without actual knowledge of the incapacity, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

F. The execution of a power of attorney does not revoke a power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other powers of attorney are revoked.

History: Laws 2007, ch. 135, § 110; 1978 Comp., § 46B-1-110 recompiled as § 45-5B-110 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-110 NMSA 1978 as 45-5B-110 NMSA 1978, effective January 1, 2012.

45-5B-111. Co-agents and successor agents.

A. A principal may designate two or more persons to act as co-agents. Unless the power of attorney otherwise provides, each co-agent may exercise its authority independently.

B. A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve or declines to serve. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office or function. Unless the power of attorney otherwise provides, a successor agent:

(1) has the same authority as that granted to the original agent; and

(2) may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve or have declined to serve.

C. Except as otherwise provided in the power of attorney and Subsection D of this section, an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.

D. An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent that fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.

History: Laws 2007, ch. 135, § 111; 1978 Comp., § 46B-1-111 recompiled as § 45-5B-111 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-111 NMSA 1978 as 45-5B-111 NMSA 1978, effective January 1, 2012.

45-5B-112. Reimbursement and compensation of agent.

Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances.

History: Laws 2007, ch. 135, § 112; 1978 Comp., § 46B-1-112 recompiled as § 45-5B-112 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-112 NMSA 1978 as 45-5B-112 NMSA 1978, effective January 1, 2012.

45-5B-113. Agent's acceptance.

Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.

History: Laws 2007, ch. 135, § 113; 1978 Comp., § 46B-1-113 recompiled as § 45-5B-113 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-113 NMSA 1978 as 45-5B-113 NMSA 1978, effective January 1, 2012.

45-5B-114. Agent's duties.

A. Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:

(1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;

(2) act in good faith; and

(3) act only within the scope of authority granted in the power of attorney.

B. Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

(1) act loyally for the principal's benefit;

(2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(3) act with the care, competence and diligence ordinarily exercised by agents in similar circumstances;

(4) keep a record of all receipts, disbursements and transactions made on behalf of the principal;

(5) cooperate with a person that has authority to make health care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and otherwise act in the principal's best interest; and

(6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

(a) the value and nature of the principal's property;

(b) the principal's foreseeable obligations and need for maintenance;

(c) minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes; and

(d) eligibility for a benefit, a program or assistance under a statute or regulation.

C An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

D. An agent that acts with care, competence and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

E. If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence and diligence under the circumstances.

F. Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

G. An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment or default of that person if the agent exercises care, competence and diligence in selecting and monitoring the person.

H. Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, and unless a shorter period of time is required by a law other than the Uniform Power of Attorney Act, within thirty days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional thirty days.

History: Laws 2007, ch. 135, § 114; 1978 Comp., § 46B-1-114 recompiled as § 45-5B-114 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-114 NMSA 1978 as 45-5B-114 NMSA 1978, effective January 1, 2012.

45-5B-115. Exoneration of agent.

A provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal's successors in interest except to the extent the provision:

A. relieves the agent of liability for breach of duty committed dishonestly, with an improper motive or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or

B. was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

History: Laws 2007, ch. 135, § 115; 1978 Comp., § 46B-1-115 recompiled as § 45-5B-115 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-115 NMSA 1978 as 45-5B-115 NMSA 1978, effective January 1, 2012.

45-5B-116. Judicial relief.

A. The following persons may petition a court to construe a power of attorney or review the agent's conduct and grant appropriate relief:

(1) the principal or the agent;

(2) a guardian, conservator or other fiduciary acting for the principal;

(3) a person authorized to make health care decisions for the principal;

(4) the principal's spouse, parent or descendant;

(5) an individual who would qualify as a presumptive heir of the principal;

(6) a person named as a beneficiary to receive any property, benefit or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;

(7) a governmental agency having regulatory authority to protect the welfare of the principal;

(8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

(9) a person asked to accept the power of attorney.

B. Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

History: Laws 2007, ch. 135, § 116; 1978 Comp., § 46B-1-116 recompiled as § 45-5B-116 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-116 NMSA 1978 as 45-5B-116 NMSA 1978, effective January 1, 2012.

45-5B-117. Agent's liability.

An agent that violates the Uniform Power of Attorney Act is liable to the principal or the principal's successors in interest for the amount required to:

A. restore the value of the principal's property to what it would have been had the violation not occurred; and

B. reimburse the principal or the principal's successors in interest for the attorney fees and costs paid on the agent's behalf.

History: Laws 2007, ch. 135, § 117; 1978 Comp., § 46B-1-117 recompiled as § 45-5B-117 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-117 NMSA 1978 as 45-5B-117 NMSA 1978, effective January 1, 2012.

45-5B-118. Agent's resignation; notice.

Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal and, if the principal is incapacitated:

(1) to the conservator or guardian, if one has been appointed for the principal, and a co-agent or successor agent; or

(2) if there is no person described in Paragraph (1) of this subsection, to:

(a) the principal's caregiver;

(b) another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or

(c) a governmental agency having authority to protect the welfare of the principal.

History: Laws 2007, ch. 135, § 118; 1978 Comp., § 46B-1-118 recompiled as § 45-5B-118 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-118 NMSA 1978 as 45-5B-118 NMSA 1978, effective January 1, 2012.

45-5B-119. Acceptance of and reliance upon acknowledged power of attorney.

A. For purposes of this section and Section 120 [45-5B-120 NMSA 1978] of the Uniform Power of Attorney Act, "acknowledged" means purportedly verified before a notary public or other individual authorized to take acknowledgments.

B. A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the signature is not genuine may rely upon the presumption under Section 105 [45-5B-105 NMSA 1978] of the Uniform Power of Attorney Act that the signature is genuine.

C. A person that in good faith accepts an acknowledged power of attorney without actual knowledge that the power of attorney is void, invalid or terminated that the purported agent's authority is void, invalid or terminated or that the agent is exceeding or improperly exercising the agent's authority may rely upon the power of attorney as if the power of attorney were genuine, valid and still in effect, the agent's authority were genuine, valid and still in effect and the agent had not exceeded and had properly exercised the authority.

D. A person that is asked to accept an acknowledged power of attorney may request, and rely upon, without further investigation:

(1) an agent's certification under penalty of perjury of any factual matter concerning the principal, agent or power of attorney;

(2) an English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English; and

(3) an opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in a writing or other record the reason for the request.

E. An English translation or an opinion of counsel requested under this section must be provided at the principal's expense unless the request is made more than seven business days after the power of attorney is presented for acceptance.

F. For purposes of this section and Section 120 [45-5B-120 NMSA 1978] of the Uniform Power of Attorney Act, a person that conducts activities through employees is without actual knowledge of a fact relating to a power of attorney, a principal or an agent if the employee conducting the transaction involving the power of attorney is without actual knowledge of the fact.

History: Laws 2007, ch. 135, § 119; 1978 Comp., § 46B-1-119 recompiled as § 45-5B-119 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-119 NMSA 1978 as 45-5B-119 NMSA 1978, effective January 1, 2012.

45-5B-120. Liability for refusal to accept acknowledged power of attorney.

A. As used in this section, "statutory form power of attorney" means a power of attorney substantially in the form provided in Section 301 [45-5B-301 NMSA 1978] of the Uniform Power of Attorney Act or that meets the requirements for a military power of attorney pursuant to 10 U.S.C. Section 1046, as amended.

B. Except as otherwise provided in Subsection C of this section:

(1) a person shall either accept an acknowledged statutory form power of attorney or request a certification, a translation or an opinion of counsel under Subsection B of Section 119 [45-5B-119 NMSA 1978] of the Uniform Power of Attorney Act no later than seven business days after presentation of the power of attorney for acceptance;

(2) if a person requests a certification, a translation or an opinion of counsel under Subsection D of Section 119 of the Uniform Power of Attorney Act, the person shall accept the statutory form power of attorney no later than five business days after receipt of the certification, the translation or an opinion of counsel; and

(3) a person shall not require an additional or different form of power of attorney for authority granted in the statutory form power of attorney presented.

C. A person is not required to accept an acknowledged statutory form power of attorney if:

(1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances;

(2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law;

(3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power;

(4) a request for a certification, a translation or an opinion of counsel under Subsection D of Section 119 of the Uniform Power of Attorney Act is refused;

(5) the person in good faith believes that the power of attorney is not valid or that the agent does not have the authority to perform the act requested, whether or not a certification, a translation or an opinion of counsel under Subsection D of Section 119 of the Uniform Power of Attorney Act has been requested or provided; or

(6) the person makes, or has actual knowledge that another person has made, a report to the adult protective services division of the aging and long-term services department stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the agent or a person acting for or with the agent.

D. A person that refuses in violation of this section to accept an acknowledged statutory form power of attorney is subject to:

(1) a court order mandating acceptance of the power of attorney; and

(2) liability for reasonable attorney fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.

History: Laws 2007, ch. 135, § 120; 1978 Comp., § 46B-1-120 recompiled as § 45-5B-120 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-120 NMSA 1978 as 45-5B-120 NMSA 1978, effective January 1, 2012.

45-5B-121. Principles of law and equity.

Unless displaced by a provision of the Uniform Power of Attorney Act, the principles of law and equity supplement that act.

History: Laws 2007, ch. 135, § 121; 1978 Comp., § 46B-1-121 recompiled as § 45-5B-121 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-121 NMSA 1978 as 45-5B-121 NMSA 1978, effective January 1, 2012.

45-5B-122. Laws applicable to financial institutions and entities.

The Uniform Power of Attorney Act does not supersede any other law applicable to financial institutions or other entities, and the other law controls if inconsistent with that act.

History: Laws 2007, ch. 135, § 122; 1978 Comp., § 46B-1-122 recompiled as § 45-5B-122 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-122 NMSA 1978 as 45-5B-122 NMSA 1978, effective January 1, 2012.

45-5B-123. Remedies under other law.

The remedies under the Uniform Power of Attorney Act are not exclusive and do not abrogate any right or remedy under the law of this state other than that act.

History: Laws 2007, ch. 135, § 123; 1978 Comp., § 46B-1-123 recompiled as § 45-5B-123 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-123 NMSA 1978 as 45-5B-123 NMSA 1978, effective January 1, 2012.

PART 2

45-5B-201. Authority that requires specific grant; grant of general authority.

A. An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

(1) create, amend, revoke or terminate an inter vivos trust;

(2) make a gift;

(3) create or change rights of survivorship;

(4) create or change a beneficiary designation;

(5) delegate authority granted under the power of attorney;

(6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;

(7) exercise fiduciary powers that the principal has authority to delegate; or

(8) disclaim property, including a power of appointment.

B. Notwithstanding a grant of authority to do an act described in Subsection A of this section, unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse or descendant of the principal shall not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer or otherwise.

C. Subject to Subsections A, B, D and E of this section, if a power of attorney grants to an agent authority to do all acts that a principal could do, the agent has the general authority described in Sections 204 through 216 [45-5B-204 through 45-5B-216 NMSA 1978] of the Uniform Power of Attorney Act.

D. Unless the power of attorney otherwise provides, a grant of authority to make a gift is subject to the provisions of Section 217 [45-5B-217 NMSA 1978] of the Uniform Power of Attorney Act.

E. Subject to Subsections A, B and D of this section, if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

F. Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

G. An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.

History: Laws 2007, ch. 135, § 201; 1978 Comp., § 46B-1-201 recompiled as § 45-5B-201 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-201 NMSA 1978 as 45-5B-201 NMSA 1978, effective January 1, 2012.

45-5B-202. Incorporation of authority.

A. An agent has authority described in this article if the power of attorney refers to general authority with respect to the descriptive term for the subjects stated in Sections 204 through 217 [45-5B-204 through 45-5B-217 NMSA 1978] of the Uniform Power of Attorney Act or cites the section in which the authority is described.

B. A reference in a power of attorney to general authority with respect to the descriptive term for a subject in Sections 204 through 217 of the Uniform Power of Attorney Act or a citation to a section of Sections 204 through 217 of that act incorporates the entire section as if it were set out in full in the power of attorney.

C. A principal may modify authority incorporated by reference.

History: Laws 2007, ch. 135, § 202; 1978 Comp., § 46B-1-202 recompiled as § 45-5B-202 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-202 NMSA 1978 as 45-5B-202 NMSA 1978, effective January 1, 2012.

45-5B-203. Construction of authority generally.

Except as otherwise provided in the power of attorney, by executing a power of attorney that incorporates by reference a subject described in Sections 204 through 217 [45-5B-204 through 45-5B-217 NMSA 1978] of the Uniform Power of Attorney Act or that grants to an agent authority to do all acts that a principal could do pursuant to Subsection C of Section 201 [45-5B-201 NMSA 1978] of that act, a principal authorizes the agent, with respect to that subject, to:

A. demand, receive and obtain by litigation or otherwise, money or another thing of value to which the principal is, may become or claims to be entitled, and conserve, invest, disburse or use anything so received or obtained for the purposes intended;

B. contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction and perform, rescind, cancel, terminate, reform, restate, release or modify the contract or another contract made by or on behalf of the principal;

C. execute, acknowledge, seal, deliver, file or record any instrument or communication the agent considers desirable to accomplish a purpose of a transaction, including creating at any time a schedule listing some or all of the principal's property and attaching it to the power of attorney;

D. initiate, participate in, submit to alternative dispute resolution, settle, oppose or propose or accept a compromise with respect to a claim existing in favor of or against the principal or intervene in litigation relating to the claim;

E. seek on the principal's behalf the assistance of a court or other governmental agency to carry out an act authorized in the power of attorney;

F. engage, compensate and discharge an attorney, accountant, discretionary investment manager, expert witness or other advisor;

G. prepare, execute and file a record, report or other document to safeguard or promote the principal's interest under a statute or regulation;

H. communicate with any representative or employee of a government or governmental subdivision, agency or instrumentality on behalf of the principal;

I. access communications intended for and communicate on behalf of the principal, whether by mail, electronic transmission, telephone or other means; and

J. do any lawful act with respect to the subject and all property related to the subject.

History: Laws 2007, ch. 135, § 203; 1978 Comp., § 46B-1-203 recompiled as § 45-5B-203 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-203 NMSA 1978 as 45-5B-203 NMSA 1978, effective January 1, 2012.

45-5B-204. Real property.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to real property authorizes the agent to:

A. demand, buy, lease, receive, accept as a gift or as security for an extension of credit or otherwise acquire or reject an interest in real property or a right incident to real property;

B. sell, exchange, convey with or without covenants, representations or warranties, quitclaim, release, surrender, retain title for security, encumber, partition, consent to partitioning, subject to an easement or covenant, subdivide, apply for zoning or other governmental permits, plat or consent to platting, develop, grant an option concerning, lease, sublease, contribute to an entity in exchange for an interest in that entity or otherwise grant or dispose of an interest in real property or a right incident to real property;

C. pledge or mortgage an interest in real property or a right incident to real property as security to borrow money or pay, renew or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

D. release, assign, satisfy or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien or other claim to real property that exists or is asserted;

E. manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including:

(1) insuring against liability or casualty or other loss;

(2) obtaining or regaining possession of or protecting the interest or right by litigation or otherwise;

(3) paying, assessing, compromising or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments; and

(4) purchasing supplies, hiring assistance or labor and making repairs or alterations to the real property;

F. use, develop, alter, replace, remove, erect or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;

G. participate in a reorganization with respect to real property or an entity that owns an interest in real property or a right incident to real property and receive, hold and act with respect to stocks and bonds or other property received in a plan of reorganization, including:

(1) selling or otherwise disposing of them;

(2) exercising or selling an option, right of conversion or similar right with respect to them; and

(3) exercising any voting rights in person or by proxy;

H. change the form of title of an interest in real property or a right incident to real property; and

I. dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest.

History: Laws 2007, ch. 135, § 204.; 1978 Comp., § 46B-1-204 recompiled as § 45-5B-204 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-204 NMSA 1978 as 45-5B-204 NMSA 1978, effective January 1, 2012.

45-5B-205. Tangible personal property.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to tangible personal property authorizes the agent to:

A. demand, buy, receive, accept as a gift or as security for an extension of credit or otherwise acquire or reject ownership or possession of tangible personal property or an interest in tangible personal property;

B. sell, exchange, convey with or without covenants, representations or warranties, quitclaim, release, surrender, create a security interest in, grant options concerning, lease, sublease or otherwise dispose of tangible personal property or an interest in tangible personal property;

C. grant a security interest in tangible personal property or an interest in tangible personal property as security to borrow money or pay, renew or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

D. release, assign, satisfy or enforce by litigation or otherwise a security interest, lien or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property;

E. manage or conserve tangible personal property or an interest in tangible personal property on behalf of the principal, including:

(1) insuring against liability or casualty or other loss;

(2) obtaining or regaining possession of or protecting the property or interest, by litigation or otherwise;

(3) paying, assessing, compromising or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments;

(4) moving the property from place to place;

(5) storing the property for hire or on a gratuitous bailment; and

(6) using and making repairs, alterations or improvements to the property; and

F. change the form of title of an interest in tangible personal property.

History: Laws 2007, ch. 135, § 205; 1978 Comp., § 46B-1-205 recompiled as § 45-5B-205 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-205 NMSA 1978 as 45-5B-205 NMSA 1978, effective January 1, 2012.

45-5B-206. Stocks and bonds.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to stocks and bonds authorizes the agent to:

A. buy, sell and exchange stocks and bonds;

B. establish, continue, modify or terminate an account with respect to stocks and bonds;

C. pledge stocks and bonds as security to borrow, pay, renew or extend the time of payment of a debt of the principal;

D. receive certificates and other evidences of ownership with respect to stocks and bonds; and

E. exercise voting rights with respect to stocks and bonds in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

History: Laws 2007, ch. 135, § 206; 1978 Comp., § 46B-1-206 recompiled as § 45-5B-206 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-206 NMSA 1978 as 45-5B-206 NMSA 1978, effective January 1, 2012.

45-5B-207. Commodities and options.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to commodities and options authorizes the agent to:

A. buy, sell, exchange, assign, settle and exercise commodity futures contracts and call or put options on stocks or stock indexes traded on a regulated option exchange; and

B. establish, continue, modify and terminate option accounts.

History: Laws 2007, ch. 135, § 207; 1978 Comp., § 46B-1-207 recompiled as § 45-5B-207 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-207 NMSA 1978 as 45-5B-207 NMSA 1978, effective January 1, 2012.

45-5B-208. Banks and other financial institutions.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to banks and other financial institutions authorizes the agent to:

A. continue, modify and terminate an account or other banking arrangement made by or on behalf of the principal;

B. establish, modify and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm or other financial institution selected by the agent;

C. contract for services available from a financial institution, including renting a safe deposit box or space in a vault;

D. withdraw, by check, order, electronic funds transfer or otherwise, money or property of the principal deposited with or left in the custody of a financial institution;

E. receive statements of account, vouchers, notices and similar documents from a financial institution and act with respect to them;

F. enter a safe deposit box or vault and withdraw or add to the contents;

G. borrow money and pledge as security personal property of the principal necessary to borrow money or to pay, renew or extend the time of payment of a debt of the principal or of a debt guaranteed by the principal;

H. make, assign, draw, endorse, discount, guarantee and negotiate promissory notes, checks, drafts and other negotiable or nonnegotiable paper of the principal or payable to the principal or the principal's order, transfer money, receive the cash or other proceeds of those transactions and accept a draft drawn by a person upon the principal and pay it when due;

I. receive for the principal and act upon a sight draft, warehouse receipt or other document of title, whether tangible or electronic, or other negotiable or nonnegotiable instrument;

J. apply for, receive and use letters of credit, credit and debit cards, electronic transaction authorizations and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and

K. consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

History: Laws 2007, ch. 135, § 208; 1978 Comp., § 46B-1-208 recompiled as § 45-5B-208 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-208 NMSA 1978 as 45-5B-208 NMSA 1978, effective January 1, 2012.

45-5B-209. Operation of entity or business.

Subject to the terms of a document or an agreement governing an entity or an entity ownership interest, and unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to operation of an entity or business authorizes the agent to:

A. operate, buy, sell, enlarge, reduce or terminate an ownership interest;

B. perform a duty or discharge a liability and exercise in person or by proxy a right, power, privilege or option that the principal has, may have or claims to have;

C. enforce the terms of an ownership agreement;

D. initiate, participate in and submit to alternative dispute resolution; settle; and oppose, propose or accept a compromise with respect to litigation to which the principal is a party because of an ownership interest;

E. exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege or option the principal has or claims to have as the holder of stocks and bonds;

F. initiate, participate in, submit to alternative dispute resolution, settle, oppose or propose or accept a compromise with respect to litigation to which the principal is a party concerning stocks and bonds;

G. with respect to an entity or business owned solely by the principal:

(1) continue, modify, renegotiate, extend and terminate a contract made by or on behalf of the principal with respect to the entity or business before execution of the power of attorney;

(2) determine:

(a) the location of its operation;

(b) the nature and extent of its business;

(c) the methods of manufacturing, selling, merchandising, financing, accounting and advertising employed in its operation;

(d) the amount and types of insurance carried; and

(e) the mode of engaging, compensating and dealing with its employees and accountants, attorneys or other advisors;

(3) change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business; and

(4) demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;

H. put additional capital into an entity or business in which the principal has an interest;

I. join in a plan of reorganization, consolidation, conversion, domestication or merger of the entity or business;

J. sell or liquidate all or part of an entity or business;

K. establish the value of an entity or business under a buy-out agreement to which the principal is a party;

L. prepare, sign, file and deliver reports, compilations of information, returns or other papers with respect to an entity or business and make related payments; and

M. pay, compromise or contest taxes, assessments, fines or penalties and perform any other act to protect the principal from illegal or unnecessary taxation, assessments, fines or penalties, with respect to an entity or business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

History: Laws 2007, ch. 135, § 209; 1978 Comp., § 46B-1-209 recompiled as § 45-5B-209 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-209 NMSA 1978 as 45-5B-209 NMSA 1978, effective January 1, 2012.

45-5B-210. Insurance and annuities.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to insurance and annuities authorizes the agent to:

A. continue, pay the premium or make a contribution on, modify, exchange, rescind, release or terminate a contract procured by or on behalf of the principal that insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract;

B. procure new, different and additional contracts of insurance and annuities for the principal and the principal's spouse, children and other dependents and select the amount, type of insurance or annuity and mode of payment;

C. pay the premium or make a contribution on, modify, exchange, rescind, release or terminate a contract of insurance or annuity procured by the agent;

D. apply for and receive a loan secured by a contract of insurance or annuity;

E. surrender and receive the cash surrender value on a contract of insurance or annuity;

F. exercise an election;

G. exercise investment powers available under a contract of insurance or annuity;

H. change the manner of paying premiums on a contract of insurance or annuity;

I. change or convert the type of insurance or annuity with respect to which the principal has or claims to have authority described in this section;

J. apply for and procure a benefit or assistance under a statute or regulation to guarantee or pay premiums of a contract of insurance on the life of the principal;

K. collect, sell, assign, hypothecate, borrow against or pledge the interest of the principal in a contract of insurance or annuity;

L. select the form and timing of the payment of proceeds from a contract of insurance or annuity; and

M. pay, from proceeds or otherwise, compromise or contest and apply for refunds in connection with a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

History: Laws 2007, ch. 135, § 210; 1978 Comp., § 46B-1-210 recompiled as § 45-5B-210 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-210 NMSA 1978 as 45-5B-210 NMSA 1978, effective January 1, 2012.

45-5B-211. Estates, trusts and other beneficial interests.

A. As used in this section, "estates, trusts and other beneficial interests" means a trust, probate estate, guardianship, conservatorship, escrow or custodianship or a fund from which the principal is, may become, or claims to be entitled to a share or payment.

B. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to estates, trusts and other beneficial interests authorizes the agent to:

(1) accept, receive, receipt for, sell, assign, pledge or exchange a share in or payment from the fund;

(2) demand or obtain money or another thing of value to which the principal is, may become or claims to be entitled by reason of the fund, by litigation or otherwise;

(3) exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal;

(4) initiate, participate in, submit to alternative dispute resolution, settle, oppose or propose or accept a compromise with respect to litigation to ascertain the meaning, validity or effect of a deed, will, declaration of trust or other instrument or transaction affecting the interest of the principal;

(5) initiate, participate in, submit to alternative dispute resolution, settle, oppose or propose or accept a compromise with respect to litigation to remove, substitute or surcharge a fiduciary;

(6) conserve, invest, disburse or use anything received for an authorized purpose; and

(7) transfer an interest of the principal in real property, stocks and bonds, accounts with financial institutions or securities intermediaries, insurance, annuities and other property to the trustee of a revocable trust created by the principal as settlor.

History: Laws 2007, ch. 135, § 211; 1978 Comp., § 46B-1-211 recompiled as § 45-5B-211 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-211 NMSA 1978 as 45-5B-211 NMSA 1978, effective January 1, 2012.

45-5B-212. Claims and litigation.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to:

A. assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment or defense, including an action to recover property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability or seek an injunction, specific performance or other relief;

B. bring an action to determine adverse claims or intervene or otherwise participate in litigation;

C. seek an attachment, garnishment, order of arrest or other preliminary, provisional or intermediate relief and use an available procedure to effect or satisfy a judgment, order or decree;

D. make or accept a tender, offer of judgment or admission of facts, submit a controversy on an agreed statement of facts, consent to examination and bind the principal in litigation;

E. submit to alternative dispute resolution, settle and propose or accept a compromise;

F. waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon which process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs and receive, execute and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement or other instrument in connection with the prosecution, settlement or defense of a claim or litigation;

G. act for the principal with respect to bankruptcy or insolvency, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization, receivership or application for the appointment of a receiver or trustee that affects an interest of the principal in property or other thing of value;

H. pay a judgment, award or order against the principal or a settlement made in connection with a claim or litigation; and

I. receive money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

History: Laws 2007, ch. 135, § 212; 1978 Comp., § 46B-1-212 recompiled as § 45-5B-212 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-212 NMSA 1978 as 45-5B-212 NMSA 1978, effective January 1, 2012.

45-5B-213. Personal and family maintenance.

A. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to personal and family maintenance authorizes the agent to:

(1) perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse and the following individuals, whether living when the power of attorney is executed or later born:

(a) the principal's children;

(b) other individuals legally entitled to be supported by the principal; and

(c) the individuals whom the principal has customarily supported or indicated the intent to support;

(2) make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;

(3) provide living quarters for the individuals described in Paragraph (1) of this subsection by:

(a) purchase, lease or other contract; or

(b) paying the operating costs, including interest, amortization payments, repairs, improvements and taxes, for premises owned by the principal or occupied by those individuals;

(4) provide normal domestic help, usual vacations and travel expenses and funds for shelter, clothing, food, appropriate education, including post-secondary and vocational education, and other current living costs for the individuals described in Paragraph (1) of this subsection;

(5) pay expenses for necessary health care and custodial care on behalf of the individuals described in Paragraph (1) of this subsection;

(6) act as the principal's personal representative pursuant to the federal Health Insurance Portability and Accountability Act, Sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, as amended, and applicable regulations, in making decisions related to the past, present or future payment for the provision of health care consented to by the principal or anyone authorized under the law of this state to consent to health care on behalf of the principal;

(7) continue any provision made by the principal for automobiles or other means of transportation, including registering, licensing, insuring and replacing them, for the individuals described in Paragraph (1) of this subsection;

(8) maintain credit and debit accounts for the convenience of the individuals described in Paragraph (1) of this subsection and open new accounts; and

(9) continue payments incidental to the membership or affiliation of the principal in a religious institution, club, society, order or other organization or continue contributions to those organizations.

B. Authority with respect to personal and family maintenance is neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under the Uniform Power of Attorney Act.

History: Laws 2007, ch. 135, § 213; 1978 Comp., § 46B-1-213 recompiled as § 45-5B-213 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-213 NMSA 1978 as 45-5B-213 NMSA 1978, effective January 1, 2012.

Cross references. — For the federal Health Insurance Portability and Accountability Act of 1996, *see* 42 U.S.C. 300gg.

45-5B-214. Benefits from governmental programs or civil or military service.

A. As used in this section, "benefits from governmental programs or civil or military service" means any benefit, program or assistance provided under a statute or regulation, including social security, medicare and medicaid.

B. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to benefits from governmental programs or civil or military service authorizes the agent to:

(1) execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in Paragraph (1) of Subsection A of Section 213 [45-5B-213 NMSA 1978] of the Uniform Power of Attorney Act, and for shipment of their household effects;

(2) take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate or other instrument for that purpose;

(3) enroll in, apply for, select, reject, change, amend or discontinue, on the principal's behalf, a benefit or program;

(4) prepare, file and maintain a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal may be entitled under a statute or regulation;

(5) initiate, participate in, submit to alternative dispute resolution, settle, oppose or propose or accept a compromise with respect to litigation concerning any benefit or assistance the principal may be entitled to receive under a statute or regulation; and

(6) receive the financial proceeds of a claim described in Paragraph (4) of this subsection and conserve, invest, disburse or use for a lawful purpose anything so received.

History: Laws 2007, ch. 135, § 214; 1978 Comp., § 46B-1-214 recompiled as § 45-5B-214 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-214 NMSA 1978 as 45-5B-214 NMSA 1978, effective January 1, 2012.

45-5B-215. Retirement plans.

A. As used in this section, "retirement plan" means a plan or account created by an employer, the principal or another individual to provide retirement benefits or deferred compensation of which the principal is a participant, beneficiary or owner, including a plan or account under the following sections of the Internal Revenue Code:

(1) an individual retirement account under Section 408 of the Internal Revenue Code of 1986, as amended;

(2) a Roth individual retirement account under Section 408A of the Internal Revenue Code of 1986, as amended;

(3) a deemed individual retirement account under Section 408(q) of the Internal Revenue Code of 1986, as amended;

(4) an annuity or mutual fund custodial account under Section 403(b) of the Internal Revenue Code of 1986, as amended;

(5) a pension, profit-sharing, stock bonus or other retirement plan qualified under Section 401(a) of the Internal Revenue Code of 1986, as amended;

(6) a plan under Section 457(b) of the Internal Revenue Code of 1986, as amended; and

(7) a nonqualified deferred compensation plan under Section 409A of the Internal Revenue Code of 1986, as amended.

B. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to retirement plans authorizes the agent to:

(1) select the form and timing of payments under a retirement plan and withdraw benefits from a plan;

(2) make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another;

(3) establish a retirement plan in the principal's name;

(4) make contributions to a retirement plan;

(5) exercise investment powers available under a retirement plan; and

(6) borrow from, sell assets to or purchase assets from a retirement plan.

History: Laws 2007, ch. 135, § 215; 1978 Comp., § 46B-1-215 recompiled as § 45-5B-215 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-215 NMSA 1978 as 45-5B-215 NMSA 1978, effective January 1, 2012.

45-5B-216. Taxes.

Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to taxes authorizes the agent to:

A. prepare, sign and file federal, state, local and foreign income, gift, payroll, property, Federal Insurance Contributions Act and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters and any other tax-related documents, including receipts, offers, waivers, consents, including consents and agreements under Section 2032A of the Internal Revenue Code of 1986, as amended, closing agreements and any power of attorney required by the internal revenue service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and the following twenty-five tax years;

B. pay taxes due, collect refunds, post bonds, receive confidential information and contest deficiencies determined by the internal revenue service or other taxing authority;

C. exercise any election available to the principal under federal, state, local or foreign tax law; and

D. act for the principal in all tax matters for all periods before the internal revenue service or other taxing authority.

History: Laws 2007, ch. 135, § 216; 1978 Comp., § 46B-1-216 recompiled as § 45-5B-216 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-216 NMSA 1978 as 45-5B-216 NMSA 1978, effective January 1, 2012.

45-5B-217. Gifts.

A. As used in this section, a gift "for the benefit of" a person includes a gift to a trust, an account under the Uniform Transfers to Minors Act [46-7-11 through 46-7-34 NMSA 1978] and a tuition savings account or prepaid tuition plan as defined under Section 529 of the Internal Revenue Code of 1986, as amended.

B. Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to gifts authorizes the agent only to:

(1) make outright to or for the benefit of a person a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the annual dollar limits of the federal gift tax exclusion under Section 2503(b) of the Internal Revenue Code of 1986, as amended, without regard to whether the federal gift tax exclusion applies to the gift, or if the principal's spouse agrees to consent to a split gift pursuant to Section 2513 of the Internal Revenue Code of 1986, as amended, in an amount per donee not to exceed twice the annual federal gift tax exclusion limit; and

(2) consent, pursuant to Section 2513 of the Internal Revenue Code of 1986, as amended, to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.

C. An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors, including:

(1) the value and nature of the principal's property;

(2) the principal's foreseeable obligations and need for maintenance;

(3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer and gift taxes;

(4) eligibility for a benefit, a program or assistance under a statute or regulation; and

(5) the principal's personal history of making or joining in making gifts.

History: Laws 2007, ch. 135, § 217; 1978 Comp., § 46B-1-217 recompiled as § 45-5B-217 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-217 NMSA 1978 as 45-5B-217 NMSA 1978, effective January 1, 2012.

PART 3

45-5B-301. Statutory form power of attorney.

A document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed by the Uniform Power of Attorney Act:

"NEW MEXICO

STATUTORY FORM POWER OF ATTORNEY

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the Uniform Power of Attorney Act.

This power of attorney does not authorize the agent to make health care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the Special Instructions.

This form provides for designation of one agent. If you wish to name more than one agent, you may name a co-agent in the Special Instructions. Co-agents are not required to act together unless you include that requirement in the Special Instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I, _____,

(Your Name)

name the following person as my agent:

Name of Agent: _____

Agent's Address: _____

Agent's Telephone Number: _____

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of Successor Agent: _____

Successor Agent's Address: _____

Successor Agent's Telephone Number: _____

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of Second Successor Agent: _____

Second Successor Agent's Address: _____

Second Successor Agent's Telephone Number: _____

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Uniform Power of Attorney Act:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects, you may initial "All Preceding Subjects" instead of initialing each subject.)

(___) Real Property

(___) Tangible Personal Property

(___) Stocks and Bonds

(___) Commodities and Options

(___) Banks and Other Financial Institutions

(___) Operation of Entity or Business

(___) Insurance and Annuities

(___) Estates, Trusts and Other Beneficial Interests

(___) Claims and Litigation

(___) Personal and Family Maintenance

(___) Benefits from Governmental Programs or Civil or Military Service

(___) Retirement Plans

(___) Taxes

(___) All Preceding Subjects

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

(___) Create, amend, revoke or terminate an inter vivos trust

(___) Make a gift, subject to the limitations of Section 217 of the Uniform Power of Attorney Act and any special instructions in this power of attorney

(___) Create or change rights of survivorship

(___) Create or change a beneficiary designation

(___) Authorize another person to exercise the authority granted under this power of attorney

(___) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan

(___) Exercise fiduciary powers that the principal has authority to delegate

(___) Disclaim or refuse an interest in property, including a power of appointment

LIMITATION ON AGENT'S AUTHORITY

An agent that is not my ancestor, spouse or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines:

_____
_____
_____
_____
_____

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

NOMINATION OF CONSERVATOR OR GUARDIAN (OPTIONAL)

If it becomes necessary for a court to appoint a conservator or guardian of my estate or guardian of my person, I nominate the following person(s) for appointment:

Name of Nominee for conservator of my estate:
_____

Nominee's Address: _____

Nominee's Telephone Number: _____

Name of Nominee for guardian of my person: _____

Nominee's Address: _____

Nominee's Telephone Number: _____

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

SIGNATURE AND ACKNOWLEDGMENT

Your Signature: _____

Date: _____

Your Name Printed: _____

Your Address: _____

Your Telephone Number: _____

State of _____

(County) of _____

This instrument was acknowledged before me on _____,
_____ (Date) by_____
(Name of Principal).

(Seal, if any)

Signature of notarial officer: _____

My commission expires: _____

IMPORTANT INFORMATION FOR AGENT

Agent's Duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

1. do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;

2. act in good faith;

3. do nothing beyond the authority granted in this power of attorney; and

4. disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

_____ by _____ as Agent

(Principal's Name) (Your Signature)

Unless the Special Instructions in this power of attorney state otherwise, you must also:

1. act loyally for the principal's benefit;

2. avoid conflicts that would impair your ability to act in the principal's best interest;

3. act with care, competence and diligence;

4. keep a record of all receipts, disbursements and transactions made on behalf of the principal;

5. cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and

6. attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

1. death of the principal;

2. the principal's revocation of the power of attorney or your authority;

3. the occurrence of a termination event stated in the power of attorney;

4. the purpose of the power of attorney is fully accomplished; or

5. if you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

Liability of Agent

The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act. If you violate the Uniform Power of Attorney Act or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice."

History: Laws 2007, ch. 135, § 301; 1978 Comp., § 46B-1-301 recompiled as § 45-5B-301 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-301 NMSA 1978 as 45-5B-301 NMSA 1978, effective January 1, 2012.

Cross references. — For power of attorney for health care decisions, *see* 24-7A-4 NMSA 1978.

45-5B-302. Agent's certification.

The following optional form may be used by an agent to certify facts concerning a power of attorney:

"AGENT'S CERTIFICATION AS TO THE VALIDITY OF

POWER OF ATTORNEY AND AGENT'S AUTHORITY

State of _____

(County) of _____

I, _____ (Name of Agent), certify under penalty of perjury that _____ (Name of Principal) granted me authority as an agent or successor agent in a power of attorney dated _____. I further certify that to my knowledge:

(1) the Principal is alive and has not revoked the Power of Attorney or my authority to act under the Power of Attorney and the Power of Attorney and my authority to act under the Power of Attorney have not terminated;

(2) if the Power of Attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;

(3) if I was named as a successor agent, the prior agent is no longer able or willing to serve; and

(4) _____
_____

_____
_____
_____
_____
_____
_____
_____
_____

(Insert other relevant statements)

SIGNATURE AND ACKNOWLEDGMENT

Agent's Signature: _____ _____ (Date)

Agent's Name Printed: _____

Agent's Address: _____

_____

Agent's Telephone Number: _____

This instrument was acknowledged before me on _____ (Date)

by _____ (Name of Agent).

Signature of notarial officer: _____

(Seal, if any)

My commission expires: _____.".

History: Laws 2007, ch. 135, § 302; 1978 Comp., § 46B-1-302 recompiled as § 45-5B-302 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-302 NMSA 1978 as 45-5B-302 NMSA 1978, effective January 1, 2012.

PART 4

45-5B-401. Uniformity of application and construction.

In applying and construing the Uniform Power of Attorney Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

History: Laws 2007, ch. 135, § 401; 1978 Comp., § 46B-1-401 recompiled as § 45-5B-401 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-401 NMSA 1978 as 45-5B-401 NMSA 1978, effective January 1, 2012.

45-5B-402. Relation to Electronic Signatures in Global and National Commerce Act.

The Uniform Power of Attorney Act modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

History: Laws 2007, ch. 135, § 402; 1978 Comp., § 46B-1-402 recompiled as § 45-5B-402 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-402 NMSA 1978 as 45-5B-402 NMSA 1978, effective January 1, 2012.

45-5B-403. Effect on existing powers of attorney.

Except as otherwise provided in the Uniform Power of Attorney Act, on July 1, 2007:

A. the Uniform Power of Attorney Act applies to a power of attorney created before, on or after July 1, 2007;

B. the Uniform Power of Attorney Act applies to a judicial proceeding concerning a power of attorney commenced on or after July 1, 2007;

C. the Uniform Power of Attorney Act applies to a judicial proceeding concerning a power of attorney commenced before July 1, 2007 unless the court finds that application of a provision of that act would substantially interfere with the effective conduct of the judicial proceeding or prejudice the rights of a party, in which case that provision does not apply and the superseded law applies; and

D. an act done before July 1, 2007 is not affected by the Uniform Power of Attorney Act.

History: Laws 2007, ch. 135, § 403; 1978 Comp., § 46B-1-403 recompiled as § 45-5B-403 by Laws 2011, ch. 124, § 102.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 102 recompiled former 46B-1-403 NMSA 1978 as 45-5B-403 NMSA 1978, effective January 1, 2012.

ARTICLE 6
Nonprobate Transfers

PART 1
PROVISIONS RELATING TO EFFECT OF DEATH

45-6-101. Nonprobate transfers on death.

A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement or other written instrument of a similar nature is nontestamentary. This section includes a written provision that:

A. money or other benefits due to, controlled by or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later;

B. money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or

C. any property controlled by or owned by the decedent before death that is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

History: 1978 Comp., § 45-6-101, enacted by Laws 1992, ch. 66, § 17; 2005, ch. 143, § 2.

ANNOTATIONS

Compiler's notes. — Laws 1992, ch. 66, § 71 repealed former 45-6-101 NMSA 1978, as enacted by Laws 1975, ch. 257, § 6-101, relating to definitions relevant to multiple-party accounts, effective July 1, 1992. Laws 1992, ch. 66, § 17 enacted a new version of this section, effective July 1, 1992. For present comparable provisions, *see* 45-6-201 NMSA 1978.

The 2005 amendment, effective July 1, 2005, deleted former Subsection B that provided that this section does not limit right of creditors under other laws of the state.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Deeds: effect of Uniform Probate Code § 6-201, providing that certain instruments attempting to pass property at death shall be deemed nontestamentary, 81 A.L.R.4th 1122.

94 C.J.S. Wills § 136.

45-6-101.1. Recompiled.

ANNOTATIONS

Compiler's notes. — Laws 2001, ch. 236, § 1, relating to real property; transfer on death deed, was erroneously compiled as 45-6-101.1 NMSA 1978. It should have been compiled as 45-6-401 NMSA 1978 and now appears at that location.

45-6-102. Liability of nonprobate transferees for creditor claims and statutory allowances.

A. In this section, "nonprobate transfer" means a valid transfer effective at death, other than a transfer of a survivorship interest in a joint tenancy of real estate, by a transferor whose last domicile was in this state to the extent that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor's probate estate.

B. Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against the decedent's probate estate and statutory allowances to the decedent's spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.

C. Nonprobate transferees are liable for the insufficiency described in Subsection B of this section in the following order of priority:

(1) a transferee designated in the decedent's will or any other governing instrument, as provided in the instrument;

(2) the trustee of a trust serving as the principal nonprobate instrument in the decedent's estate plan as shown by its designation as devisee of the decedent's residuary estate or by other facts or circumstances, to the extent of the value of the nonprobate transfer received or controlled; and

(3) other nonprobate transferees, in proportion to the values received.

D. Unless otherwise provided by the trust instrument, interests of beneficiaries in all trusts incurring liabilities under this section abate as necessary to satisfy the liability, as if all of the trust instruments were a single will and the interests were devises under it.

E. A provision made in one instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument. If a provision in one instrument conflicts with a provision in another, the later one prevails.

F. Upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this state, whether or not the transferee is located in this state.

G. A proceeding under this section may not be commenced unless the personal representative of the decedent's estate has received a written demand for the proceeding from the surviving spouse or a child, to the extent that statutory allowances are affected, or a creditor. If the personal representative declines or fails to commence a proceeding after demand, a person making demand may commence the proceeding in the name of the decedent's estate, at the expense of the person making the demand and not of the estate. A personal representative who declines in good faith to commence a requested proceeding incurs no personal liability for declining.

H. A proceeding under this section must be commenced within one year after the decedent's death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within sixty days after final allowance of the claim.

I. Unless a written notice asserting that a decedent's probate estate is nonexistent or insufficient to pay allowed claims and statutory allowances has been received from the decedent's personal representative, the following rules apply:

(1) payment or delivery of assets by a financial institution, registrar or other obligor to a nonprobate transferee in accordance with the terms of the governing instrument controlling the transfer releases the obligor from all claims for amounts paid or assets delivered; and

(2) a trustee receiving or controlling a nonprobate transfer is released from liability under this section with respect to any assets distributed to the trust's

beneficiaries. Each beneficiary to the extent of the distribution received becomes liable for the amount of the trustee's liability attributable to assets received by the beneficiary.

History: Laws 2005, ch. 143, § 3.

ANNOTATIONS

Repeals. — Laws 1992, ch. 66, § 71 repealed former 45-6-102 NMSA 1978, as enacted by Laws 1975, ch. 257, § 6-102, relating to multiple-party accounts, effective July 1, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMONESOURCE.COM*.

Effective dates. — Laws 2005, ch. 143, § 20 made this section effective July 1, 2005.

45-6-103. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 66, § 71 repealed 45-6-103 NMSA 1978, as enacted by Laws 1975, ch. 257, § 6-103, relating to multiple-party accounts, effective July 1, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMONESOURCE.COM*. For present comparable provisions, *see* 45-6-201 to 45-6-227 NMSA 1978.

45-6-104. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 66, § 71 repealed 45-6-104 NMSA 1978, as enacted by Laws 1975, ch. 257, § 6-104, relating to multiple-party accounts, effective July 1, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMONESOURCE.COM*. For present comparable provisions, *see* 45-6-201 to 45-6-227 NMSA 1978.

45-6-105. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 66, § 71 repealed 45-6-105 NMSA 1978, as enacted by Laws 1975, ch. 257, § 6-105, relating to multiple-party accounts, effective July 1, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMONESOURCE.COM*. For present comparable provisions, *see* 45-6-201 to 45-6-227 NMSA 1978.

45-6-106. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 66, § 71 repealed 45-6-106 NMSA 1978, as enacted by Laws 1975, ch. 257, § 6-106, relating to multiple-party accounts, effective July 1, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMONESOURCE.COM*. For present comparable provisions, *see* 45-6-201 to 45-6-227 NMSA 1978.

45-6-107. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 66, § 71 repealed 45-6-107 NMSA 1978, as enacted by Laws 1975, ch. 257, § 6-107, relating to multiple-party accounts, effective July 1, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMONESOURCE.COM*. For present comparable provisions, *see* 45-6-201 to 45-6-227 NMSA 1978.

45-6-108. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 66, § 71 repealed 45-6-108 NMSA 1978, as enacted by Laws 1975, ch. 257, § 6-108, relating to multiple-party accounts, effective July 1, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMONESOURCE.COM*. For present comparable provisions, *see* 45-6-201 to 45-6-227 NMSA 1978.

45-6-109. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 66, § 71 repealed 45-6-109 NMSA 1978, as enacted by Laws 1975, ch. 257, § 6-109, relating to multiple-party accounts, effective July 1, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMONESOURCE.COM*. For present comparable provisions, *see* 45-6-201 to 45-6-227 NMSA 1978.

45-6-110. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 66, § 71 repealed 45-6-110 NMSA 1978, as enacted by Laws 1975, ch. 257, § 6-110, relating to multiple-party accounts, effective July 1, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMONESOURCE.COM*. For present comparable provisions, *see* 45-6-201 to 45-6-227 NMSA 1978.

45-6-111. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 66, § 71 repealed 45-6-111 NMSA 1978, as enacted by Laws 1975, ch. 257, § 6-111, relating to multiple-party accounts, effective July 1, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMONESOURCE.COM*. For present comparable provisions, *see* 45-6-201 to 45-6-227 NMSA 1978.

45-6-112. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 66, § 71 repealed 45-6-112 NMSA 1978, as enacted by Laws 1975, ch. 257, § 6-112, relating to multiple-party accounts, effective July 1, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMONESOURCE.COM*. For present comparable provisions, *see* 45-6-201 to 45-6-227 NMSA 1978.

45-6-113. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 66, § 71 repealed 45-6-113 NMSA 1978, as enacted by Laws 1975, ch. 257, § 6-113, relating to multiple-party accounts, effective July 1, 1992. For provisions of former section, *see* the 1991 NMSA 1978 on *NMONESOURCE.COM*. For present comparable provisions, *see* 45-6-201 to 45-6-227 NMSA 1978.

PART 2
MULTIPLE-PERSON ACCOUNTS

SUBPART 1. Definitions And General Provisions

45-6-201. Definitions.

As used in Sections 45-6-201 through 45-6-227 NMSA 1978:

A. "account" means a contract of deposit between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit and share account;

B. "agent" means a person authorized to make account transactions for a party;

C. "beneficiary" means a person named as one to whom sums on deposit in an account are payable on request after death of all parties or for whom a party is named as trustee;

D. "financial institution" means an organization authorized to do business under state or federal laws relating to financial institutions, and includes a bank, trust

company, savings bank, building and loan association, savings and loan company or association and credit union;

E. "multiple-party account" means an account payable on request to one or more of two or more parties, whether or not a right of survivorship is mentioned;

F. "party" means a person who, by the terms of an account, has a present right, subject to request, to payment from the account other than as a beneficiary or agent;

G. "payment" of sums on deposit includes withdrawal, payment to a party or third person pursuant to check or other request and a pledge of sums on deposit by a party, or a set-off, reduction or other disposition of all or part of an account pursuant to a pledge;

H. "POD designation" means the designation of:

(1) a beneficiary in an account payable on request to one party during the party's lifetime and on the party's death to one or more beneficiaries, or to one or more parties during their lifetimes and on death of all of them to one or more beneficiaries; or

(2) a beneficiary in an account in the name of one or more parties as trustee for one or more beneficiaries if the relationship is established by the terms of the account and there is no subject of the trust other than the sums on deposit in the account, whether or not payment to the beneficiary is mentioned;

I. "receive", as it relates to notice to a financial institution, means receipt in the office or branch office of the financial institution in which the account is established, but if the terms of the account require notice at a particular place, in the place required;

J. "request" means a request for payment complying with all terms of the account, including special requirements concerning necessary signatures and regulations of the financial institution; but, for purposes of Sections 45-6-201 through 45-6-227 NMSA 1978, if terms of the account condition payment on advance notice, a request for payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for payment;

K. "sums on deposit" means the balance payable on an account, including interest and dividends earned, whether or not included in the current balance, and any deposit life insurance proceeds added to the account by reason of death of a party; and

L. "terms of the account" includes the deposit agreement and other terms and conditions, including the form, of the contract of deposit.

History: 1978 Comp., § 45-6-201, enacted by Laws 1992, ch. 66, § 18.

ANNOTATIONS

Compiler's notes. — Laws 1992, ch. 66, § 71 repealed former 45-6-201 NMSA 1978, as enacted by Laws 1975, ch. 257, § 6-201, relating to provisions for payment or transfer at death, effective July 1, 1992. Laws 1992, ch. 66, § 18 enacted a new section, effective July 1, 1992. For present comparable provisions, *see* 45-6-101 NMSA 1978.

Cross references. — For definition of "POD", *see* 45-6-305 NMSA 1978.

Beneficiary mistakenly paid money must reimburse bank. — A POD (paid on death) beneficiary of a joint (now multiple-party) account who was mistakenly paid the money in the account upon the death of one of the two joint tenants was unjustly enriched. Although the bank may have been negligent in disbursing the funds, its negligence caused no harm to anyone except itself and the surviving joint tenant - certainly not to the POD beneficiary, who benefited at the bank's expense and had to make restitution. Sunwest Bank, N.A. v. Colucci, 117 N.M. 373, 872 P.2d 346 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Manner and sufficiency of revocation of tentative ("Totten") trust of savings bank account, 38 A.L.R.2d 1243, 64 A.L.R.3d 221.

Payment of check drawn by one depositor after stop-payment order by a joint depositor, 55 A.L.R.2d 975.

Incompetency of joint depositor as affecting status and ownership of bank account, 62 A.L.R.2d 1091.

Fingerprints as signature, 72 A.L.R.2d 1267.

Bank's right to apply or set off deposit against debt of depositor not due at time of his death, 7 A.L.R.3d 908.

Bank's right to apply third person's funds, deposited in debtor's name, on debtor's obligation, 8 A.L.R.3d 235.

Joint bank account as subject to attachment, garnishment or execution by creditor of one of the joint depositors, 11 A.L.R.3d 1465.

Creation of joint savings account or savings certificate as gift to survivor, 43 A.L.R.3d 971.

Revocation of tentative ("Totten") trusts of savings bank account by inter vivos declaration or will, 46 A.L.R.3d 487.

Inclusion of funds in savings bank ("Totten") trust in determining surviving spouse's interest in decedent's estate, 64 A.L.R.3d 187.

Death of beneficiary as terminating or revoking trust of savings bank account over which settlor retains rights of withdrawal or revocation, 64 A.L.R.3d 221.

Revocation of tentative ("Totten") trust by pledging or otherwise employing account as collateral or security, 10 A.L.R.4th 1229.

Liability of bank to joint depositor of savings account for amounts withdrawn by other joint depositor without presentation of passbook, 35 A.L.R.4th 1094.

Payable-on-death savings account or certificate of deposit as will, 50 A.L.R.4th 272.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one joint depositor, 86 A.L.R.5th 527.

9 C.J.S. Banks and Banking §§ 280, 332; 48A C.J.S. Joint Tenancy § 2.

45-6-202. Limitation on scope.

Sections 45-6-201 through 45-6-227 NMSA 1978 do not apply to:

A. an account established for a partnership, joint venture or other organization for a business purpose;

B. an account controlled by one or more persons as an agent or trustee for a corporation, unincorporated association, or charitable or civic organization; or

C. a fiduciary or trust account in which the relationship is established other than by the terms of the account.

History: 1978 Comp., § 45-6-202, enacted by Laws 1992, ch. 66, § 19.

45-6-203. Types of account; existing accounts.

A. An account may be for a single party or multiple parties. A multiple-party account may be with or without a right of survivorship between the parties. Subject to Subsection C of Section 45-6-212 NMSA 1978, either a single-party account or a multiple-party account may have a POD designation, an agency designation or both.

B. An account established before, on or after the effective date of Sections 45-6-201 through 45-6-227 NMSA 1978, whether in the form prescribed in Section 45-6-204 NMSA 1978 or in any other form, is either a single-party account or a multiple-party account, with or without right of survivorship, and with or without a POD designation or an agency designation, within the meaning of, and governed by Sections 45-6-201 through 45-6-227 NMSA 1978.

History: 1978 Comp., § 45-6-203, enacted by Laws 1992, ch. 66, § 20.

45-6-204. Forms.

A. A contract of deposit that contains provisions in substantially the following form establishes the type of account provided, and the account is governed by the provisions of Sections 45-6-201 through 45-6-227 NMSA 1978 applicable to an account of that type:

UNIFORM SINGLE- OR MULTIPLE-PARTY ACCOUNT FORM PARTIES
(Name One or More Parties):

_____
_____

OWNERSHIP (Select One And Initial):

SINGLE-PARTY ACCOUNT

____ MULTIPLE-PARTY ACCOUNT

____ Parties own account in proportion to net contributions unless there is clear

____ and convincing evidence of a different intent.

RIGHTS AT DEATH (Select One And Initial):

____ SINGLE-PARTY ACCOUNT

At death of party, ownership passes as part of party's estate.

____ SINGLE-PARTY ACCOUNT WITH POD (PAY ON DEATH) DESIGNATION

(Name One or More Beneficiaries):

_____
_____

At death of party ownership passes to POD beneficiaries and is not part of party's estate.

MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP

____ At death of party, ownership passes to surviving parties.

MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND POD (PAY ON DEATH) DESIGNATION

(Name One or More Beneficiaries):

_____

____ _____

At death of last surviving party, ownership passes to POD beneficiaries and is not part of last surviving party's estate.

MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP

At death of party, deceased party's ownership passes as part of deceased

____ party's estate.

AGENCY (POWER OF ATTORNEY) DESIGNATION (Optional)

Agents may make account transactions for parties but have no ownership or rights at death unless named as POD beneficiaries.

(To Add Agency Designation To Account, Name One or More Agents):

_____

_____

(Select One and Initial):

____ AGENCY DESIGNATION SURVIVES DISABILITY OR INCAPACITY OF PARTIES

____ AGENCY DESIGNATION TERMINATES ON DISABILITY OR INCAPACITY OF PARTIES.

B. A contract of deposit that does not contain provisions in substantially the form provided in Subsection A of this section is governed by the provisions of Sections 45-6-201 through 45-6-227 NMSA 1978 applicable to the type of account that most nearly conforms to the depositor's intent.

History: 1978 Comp., § 45-6-204, enacted by Laws 1992, ch. 66, § 21.

45-6-205. Designation of agent.

A. By a writing signed by all parties, the parties may designate as agent of all parties on an account a person other than a party.

B. Unless the terms of an agency designation provide that the authority of the agent terminates on disability or incapacity of a party, the agent's authority survives disability and incapacity. The agent may act for a disabled or incapacitated party until the authority of the agent is terminated.

C. Death of the sole party or last surviving party terminates the authority of an agent.

History: 1978 Comp., § 45-6-205, enacted by Laws 1992, ch. 66, § 22; 2011, ch. 124, § 84.

ANNOTATIONS

The 2011 amendment, effective January 1, 2012, provided that the death of the sole party or last surviving party to a writing terminates the authority of an agent.

45-6-206. Applicability.

The provisions of Sections 45-6-211 through 45-6-216 NMSA 1978 concerning beneficial ownership as between parties or as between parties and beneficiaries apply only to controversies between those persons and their creditors and other successors, and do not apply to the right of those persons to payment as determined by the terms of

the account. Sections 45-6-221 through 45-6-227 NMSA 1978 govern the liability and set-off rights of financial institutions that make payments pursuant to those sections.

History: 1978 Comp., § 45-6-206, enacted by Laws 1992, ch. 66, § 23.

SUBPART 2. Ownership As Between PartiesAnd Others

45-6-211. Ownership during lifetime.

A. As used in this section, "net contribution" of a party means the sum of all deposits to an account made by or for the party, less all payments from the account made to or for the party which have not been paid to or applied to the use of another party and a proportionate share of any charges deducted from the account, plus a proportionate share of any interest or dividends earned, whether or not included in the current balance. The term includes deposit life insurance proceeds added to the account by reason of death of the party whose net contribution is in question.

B. During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent. As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount.

C. A beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party.

D. An agent in an account with an agency designation has no beneficial right to sums on deposit.

History: 1978 Comp., § 45-6-211, enacted by Laws 1992, ch. 66, § 24.

45-6-212. Rights at death.

A. Except as otherwise provided in this part, on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 45-6-211 NMSA 1978 belongs to the surviving spouse. If two or more parties survive and none is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 45-6-211 NMSA 1978 belongs to the surviving parties in equal shares, and augments the proportion to which each survivor, immediately before the decedent's death, was beneficially entitled under Section 45-6-211 NMSA 1978, and the right of survivorship continues between the surviving parties.

B. In an account with a POD designation:

(1) on death of one of two or more parties, the rights in sums on deposit are governed by Subsection A of this section; and

(2) on death of the sole party or the last survivor of two or more parties, sums on deposit belong to the surviving beneficiary or beneficiaries; if two or more beneficiaries survive, sums on deposit belong to them in equal and undivided shares, and there is no right of survivorship in the event of death of a beneficiary thereafter; if no beneficiary survives, sums on deposit belong to the estate of the last surviving party.

C. Sums on deposit in a single-party account without a POD designation, or in a multiple-party account that, by the terms of the account, is without right of survivorship, are not affected by death of a party, but the amount to which the decedent, immediately before death, was beneficially entitled under Section 45-6-211 NMSA 1978 is transferred as part of the decedent's estate. A POD designation in a multiple-party account without right of survivorship is ineffective. For purposes of this section, designation of an account as a tenancy in common establishes that the account is without right of survivorship.

D. The ownership right of surviving party or beneficiary, or of the decedent's estate, in sums on deposit is subject to requests for payment made by a party before the party's death, whether paid by the financial institution before or after death, or unpaid. The surviving party or beneficiary, or the decedent's estate, is liable to the payee of an unpaid request for payment. The liability is limited to a proportionate share of the amount transferred under this section, to the extent necessary to discharge the request for payment.

History: 1978 Comp., § 45-6-212, enacted by Laws 1992, ch. 66, § 25.

ANNOTATIONS

Presumption of survivorship for joint account. — With a joint account, the law presumes a right of survivorship in the surviving party. Barham v. Jones, 98 N.M. 195, 647 P.2d 397 (1982).

Survivorship limited by terms of joint will. — A valid contractual, joint and mutual will, which named certain parties as the sole beneficiaries, could not be defeated by the survivor's creation of certificates of deposit which named other parties as payable-on-death beneficiaries. Foulds v. First Nat'l Bank, 103 N.M. 361, 707 P.2d 1171 (1985).

Rights governed by ownership interests. — Because the named party to a joint account had no ownership interest in the joint account during the lifetime of the original co-owners, when one co-owner withdrew the funds upon the other co-owner's death, the named party lost her right to the funds. Johnston v. Sunwest Bank, 116 N.M. 422, 863 P.2d 1043 (1993).

Beneficiary mistakenly paid money must reimburse bank. — A POD (paid on death) beneficiary of a joint (now multiple-party) account who was mistakenly paid the money in the account upon the death of one of the two joint tenants was unjustly enriched. Although the bank may have been negligent in disbursing the funds, its negligence caused no harm to anyone except itself and the surviving joint tenant - certainly not to the POD beneficiary, who benefited at the bank's expense and had to make restitution. Sunwest Bank, N.A. v. Colucci, 117 N.M. 373, 872 P.2d 346 (1994).

Law reviews. — For annual survey of New Mexico law of estates and trusts, 19 N.M.L. Rev. 669 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 48A C.J.S. Joint Tenancy §§ 3, 4.

45-6-213. Alteration of rights.

A. Rights at death under Section 45-6-212 NMSA 1978 are determined by the terms of the account at the death of a party. The terms of the account may be altered by written notice given by a party to the financial institution to change the terms of the account or stop or vary payment under the terms of the account. The notice must be signed by a party and received by the financial institution during the party's lifetime.

B. A right of survivorship arising from the express terms of the account, Section 45-6-212 NMSA 1978 or a POD designation, may not be altered by will.

History: 1978 Comp., § 45-6-213, enacted by Laws 1992, ch. 66, § 26; 1995, ch. 210, § 80.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, substituted "terms of the account" for "type of account" in three places in Subsection A.

45-6-214. Accounts and transfers nontestamentary.

Except as a consequence of, and to the extent directed by, Section 45-6-215 NMSA 1978, a transfer resulting from the application of Section 45-6-212 NMSA 1978 is effective by reason of the terms of the account involved and Sections 45-6-201 through 45-6-227 NMSA 1978 and is not testamentary or subject to Chapter 45, Articles 1 through 4 NMSA 1978.

History: 1978 Comp., § 45-6-214, enacted by Laws 1992, ch. 66, § 27.

45-6-215. Repealed.

ANNOTATIONS

Repeals. — Laws 2005, ch. 143, § 18 repealed 45-6-215 NMSA 1978, as enacted by Laws 1992, ch. 66, § 28, relating to rights of creditors, effective July 1, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMONESOURCE.COM*.

45-6-216. Community property.

A. A deposit of community property in an account does not alter the community character of the property or community rights in the property, if any, but a right of survivorship between parties married to each other arising from the express terms of the account or Section 45-6-212 NMSA 1978 may not be altered by will or other governing instrument.

B. This section does not affect or limit the right of a financial institution to make payments pursuant to Sections 45-6-211 through 45-6-227 NMSA 1978 and the deposit agreement.

History: 1978 Comp., § 45-6-216, enacted by Laws 1992, ch. 66, § 29; 1993, ch. 174, § 83; 2011, ch. 124, § 85.

ANNOTATIONS

The 2011 amendment, effective January 1, 2012, provided that this section does not limit the right of a financial institution to make payments.

The 1993 amendment, effective July 1, 1993, deleted "and tenancy by the entireties" at the end of the section heading; deleted the subsection designation "A"; and deleted former Subsection B which read "Section 45-6-201 through 45-6-227 NMSA 1978 do not affect the law governing tenancy by the entireties."

SUBPART 3. Protection Of Financial Institutions

45-6-221. Authority of financial institution.

A financial institution may enter into a contract of deposit for a multiple-party account to the same extent it may enter into a contract of deposit for a single-party account, and may provide for a POD designation and an agency designation in either a single-party account or a multiple-party account. A financial institution need not inquire as to the source of a deposit to an account or as to the proposed application of a payment from an account.

History: 1978 Comp., § 45-6-221, enacted by Laws 1992, ch. 66, § 30.

45-6-222. Payment on multiple-party account.

A financial institution, on request, may pay sums on deposit in a multiple-party account to:

A. one or more of the parties, whether or not another party is disabled, incapacitated or deceased when payment is requested and whether or not the party making the request survives another party; or

B. the personal representative, if any, or, if there is none, the heirs or devisees of a deceased party if proof of death is presented to the financial institution showing that the deceased party was the survivor of all other persons named on the account either as a party or beneficiary, unless the account is without right of survivorship under Section 45-6-212 NMSA 1978.

History: 1978 Comp., § 45-6-222, enacted by Laws 1992, ch. 66, § 31.

45-6-223. Payment on POD designation.

A financial institution, on request, may pay sums on deposit in an account with a POD designation to:

A. one or more of the parties, whether or not another party is disabled, incapacitated or deceased when the payment is requested and whether or not a party survives another party;

B. the beneficiary or beneficiaries, if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as parties; or

C. the personal representative, if any, or, if there is none, the heirs or devisees of a deceased party, if proof of death is presented to the financial institution showing that the deceased party was the survivor of all other persons named on the account either as a party or beneficiary.

History: 1978 Comp., § 45-6-223, enacted by Laws 1992, ch. 66, § 32.

45-6-224. Payment to designated agent.

A financial institution, on request of an agent under an agency designation for an account, may pay to the agent sums on deposit in the account, whether or not a party is disabled, incapacitated or deceased when the request is made or received, and whether or not the authority of the agent terminates on the disability or incapacity of a party.

History: 1978 Comp., § 45-6-224, enacted by Laws 1992, ch. 66, § 33.

45-6-225. Payment to minor.

If a financial institution is required or permitted to make payment pursuant to Sections 45-6-201 through 45-6-227 NMSA 1978 to a minor designated as a beneficiary, payment may be made pursuant to the Uniform Transfers to Minors Act [46-7-11 through 46-7-34 NMSA 1978].

History: 1978 Comp., § 45-6-225, enacted by Laws 1992, ch. 66, § 34.

45-6-226. Discharge.

A. Payment made pursuant to Sections 45-6-201 through 45-6-227 NMSA 1978 in accordance with the terms of the account discharges the financial institution from all claims for amounts so paid, whether or not the payment is consistent with the beneficial ownership of the account as between parties, beneficiaries or their successors. Payment may be made whether or not a party, beneficiary or agent is disabled, incapacitated or deceased when payment is requested, received or made.

B. Protection under this section does not extend to payments made after a financial institution has received written notice from a party, or from the personal representative, surviving spouse or heir or devisee of a deceased party, to the effect that payments in accordance with the terms of the account, including one having an agency designation, should not be permitted, and the financial institution has had a reasonable opportunity to act on it when the payment is made. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in a request for payment if the financial institution is to be protected under this section. Unless a financial institution has been served with process in an action or proceeding, no other notice or other information shown to have been available to the financial institution affects its right to protection under this section.

C. A financial institution that receives written notice pursuant to this section or otherwise has reason to believe that a dispute exists as to the rights of the parties may refuse, without liability, to make payments in accordance with the terms of the account.

D. Protection of a financial institution under this section does not affect the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of sums on deposit in accounts or payments made from accounts.

History: 1978 Comp., § 45-6-226, enacted by Laws 1992, ch. 66, § 35; 1995, ch. 210, § 81.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, substituted "terms of the account" for "type of account" in the first sentence in Subsection A.

45-6-227. Set-off.

Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party is indebted to a financial institution, the financial institution has a right to set-off against the account. The amount of the account subject to set-off is the proportion to which the party is, or immediately before death was, beneficially entitled under Section 45-6-211 NMSA 1978 or, in the absence of proof of that proportion, an equal share with all parties.

History: 1978 Comp., § 45-6-227, enacted by Laws 1992, ch. 66, § 36.

PART 3
TOD SECURITY REGISTRATION

45-6-301. Definitions.

As used in Sections 45-6-301 through 45-6-311 NMSA 1978:

A. "beneficiary form" means a registration of a security that indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner;

B. "register", including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities;

C. "registering entity" means a person who originates or transfers a security title by registration, and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities;

D. "security" means a share, participation or other interest in property, in a business or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security and a security account; and

E. "security account" means:

(1) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings or dividends earned or declared on a security in an account, a reinvestment account or a brokerage account, whether or not credited to the account before the owner's death;

(2) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death; or

(3) a natural person's investment, management or custody account with a trust company or bank with trust powers, including securities in the account, a cash

balance in the account and cash, cash equivalents, interest, earnings or dividends earned or declared on a security in the account, whether or not credited to the account before the owner's death. Nothing in this paragraph affects interests in real property.

History: 1978 Comp., § 45-6-301, enacted by Laws 1992, ch. 66, § 37; 2008, ch. 8, § 1.

ANNOTATIONS

The 2008 amendment, effective May 14, 2008, added Paragraph (3) of Subsection E.

45-6-302. Registration in beneficiary form; sole or joint tenancy ownership.

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties or as owners of community property held in survivorship form, and not as tenants in common.

History: 1978 Comp., § 45-6-302, enacted by Laws 1992, ch. 66, § 38.

45-6-303. Registration in beneficiary form; applicable law.

A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration or by this or a similar statute of the law of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

History: 1978 Comp., § 45-6-303, enacted by Laws 1992, ch. 66, § 39.

45-6-304. Origination of registration in beneficiary form.

A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

History: 1978 Comp., § 45-6-304, enacted by Laws 1992, ch. 66, § 40.

45-6-305. Form of registration in beneficiary form.

Registration in beneficiary form may be shown by the words "transfer on death" or the abbreviation "TOD", or by the words "pay on death" or the abbreviation "POD", after the name of the registered owner and before the name of a beneficiary.

History: 1978 Comp., § 45-6-305, enacted by Laws 1992, ch. 66, § 41.

45-6-306. Effect of registration in beneficiary form.

The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.

History: 1978 Comp., § 45-6-306, enacted by Laws 1992, ch. 66, § 42.

45-6-307. Ownership of [on] death of owner.

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

History: 1978 Comp., § 45-6-307, enacted by Laws 1992, ch. 66, § 43.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

45-6-308. Protection of registering entity.

A. A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by Sections 45-6-301 through 45-6-311 NMSA 1978.

B. By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in Sections 45-6-301 through 45-6-311 NMSA 1978.

C. A registering entity is discharged from all claims to a security by the estate, creditors, heirs or devisees of a deceased owner if it registers a transfer of the security in accordance with Section 45-6-307 NMSA 1978 and does so in good faith reliance on:

(1) the registration;

(2) Sections 45-6-301 through 45-6-311 NMSA 1978; and

(3) information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representative or by the surviving beneficiary's representatives, or other information available to the registering entity.

D. The protections of Sections 45-6-301 through 45-6-311 NMSA 1978 do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under Sections 45-6-301 through 45-6-311 NMSA 1978.

E. The protection provided by Sections 45-6-301 through 45-6-311 NMSA 1978 to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

History: 1978 Comp., § 45-6-308, enacted by Laws 1992, ch. 66, § 44.

45-6-309. Nontestamentary transfer on death.

A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and Sections 45-6-301 through 45-6-311 NMSA 1978 and is not testamentary.

History: 1978 Comp., § 45-6-309, enacted by Laws 1992, ch. 66, § 45; 2005, ch. 143, § 4.

ANNOTATIONS

The 2005 amendment, effective July 1, 2005, deleted former Subparagraph B that provided that Sections 45-6-301 to 45-6-311 NMSA 1978 do not limit the rights of creditors of security owners against beneficiaries and other transferees.

45-6-310. Terms, conditions and forms for registration.

A. A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests for:

(1) registrations in beneficiary form; and

(2) implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary.

B. The terms and conditions established under Subsection A of this section may provide for proving death, avoiding or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may be indicated by appending to the name of the primary beneficiary the letters LDPS, standing for "lineal descendants per stirpes". This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

C. The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(1) sole owner-sole beneficiary: John S. Brown TOD (or POD) John S. Brown Jr.;

(2) multiple owners-sole beneficiary: John S. Brown Mary B. Brown JT TEN TOD John S. Brown Jr.; and

(3) multiple owners-primary and secondary (substituted) beneficiaries: John S. Brown Mary B. Brown JT TEN TOD John S. Brown Jr. SUB BENE Peter Q. Brown or John S. Brown Mary B. Brown JT TEN TOD John S. Brown Jr. LDPS.

History: 1978 Comp., § 45-6-310, enacted by Laws 1992, ch. 66, § 46.

45-6-311. Applicability.

Sections 45-6-301 through 45-6-311 NMSA 1978 apply to registrations of securities in beneficiary form made before or after July 1, 1992, by decedents dying on or after July 1, 1992.

History: 1978 Comp., § 45-6-311, enacted by Laws 1992, ch. 66, § 47.

PART 4
UNIFORM REAL PROPERTY TRANSFER ON DEATH

45-6-401. Short title.

Sections 45-6-401 through 45-6-417 NMSA 1978 may be cited as the "Uniform Real Property Transfer on Death Act".

History: Laws 2001, ch. 236, § 1; repealed and reenacted by Laws 2013, ch. 38, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 2013, ch. 38, § 1 repealed former 45-6-401 NMSA 1978, as enacted by Laws 2001, ch. 236, § 1, relating to real property, transfer on death deed, and enacted a new section effective January 1, 2014. For provisions of former section, *see* the 2013 NMSA 1978 on *NMONESOURCE.COM*.

45-6-402. Definitions.

As used in the Uniform Real Property Transfer on Death Act:

A. "beneficiary" means a person that receives property under a transfer on death deed;

B. "designated beneficiary" means a person designated to receive property in a transfer on death deed;

C. "essential elements" means the names of the grantor and the grantee, a clause transferring title, a description of the property transferred, the grantor's signature and acknowledgment by the grantor in the presence of a notary public or in the presence of another individual authorized by law to take acknowledgments;

D. "joint owner" means an individual who owns property concurrently with one or more other individuals with a right of survivorship. "Joint owner" includes a joint tenant but does not include a tenant in common;

E. "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity;

F. "property" means an interest in real property located in New Mexico that is transferable on the death of the owner;

G. "transfer on death deed" means a deed authorized under the Uniform Real Property Transfer on Death Act; and

H. "transferor" means an individual who makes a transfer on death deed.

History: 1978 Comp., § 45-6-402, enacted by Laws 2013, ch. 38, § 2.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 2 was effective January 1, 2014.

45-6-403. Applicability.

The Uniform Real Property Transfer on Death Act applies to a transfer on death deed made before, on or after January 1, 2014 by a transferor dying on or after January 1, 2014.

History: 1978 Comp., § 45-6-403, enacted by Laws 2013, ch. 38, § 3.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 3 was effective January 1, 2014.

45-6-404. Nonexclusivity.

The Uniform Real Property Transfer on Death Act does not affect any method of transferring property otherwise permitted under the laws of New Mexico.

History: 1978 Comp., § 45-6-404, enacted by Laws 2013, ch. 38, § 4.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 4 was effective January 1, 2014.

45-6-405. Transfer on death deed authorized.

An individual may transfer property to one or more beneficiaries effective at the transferor's death by a transfer on death deed.

History: 1978 Comp., § 45-6-405, enacted by Laws 2013, ch. 38, § 5.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 5 was effective January 1, 2014.

45-6-406. Transfer on death deed revocable.

A transfer on death deed is revocable even if the deed or another instrument contains a contrary provision.

History: 1978 Comp., § 45-6-406, enacted by Laws 2013, ch. 38, § 6.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 6 was effective January 1, 2014.

45-6-407. Transfer on death deed nontestamentary.

A transfer on death deed is nontestamentary.

History: 1978 Comp., § 45-6-407, enacted by Laws 2013, ch. 38, § 7.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 7 was effective January 1, 2014.

45-6-408. Capacity of transferor.

The capacity required to make or revoke a transfer on death deed is the same as the capacity required to make a will.

History: 1978 Comp., § 45-6-408, enacted by Laws 2013, ch. 38, § 8.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 8 was effective January 1, 2014.

45-6-409. Requirements.

A transfer on death deed shall:

A. contain the essential elements and formalities of a properly recordable inter vivos deed;

B. state that the transfer to the designated beneficiary is to occur at the transferor's death; and

C. be recorded before the transferor's death in the public records in the office of the county clerk for the county where the property is located.

History: 1978 Comp., § 45-6-409, enacted by Laws 2013, ch. 38, § 9.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 9 was effective January 1, 2014.

45-6-410. Notice, delivery, acceptance or consideration not required.

A transfer on death deed does not require:

A. notice or delivery to or acceptance by the designated beneficiary during the transferor's life; or

B. consideration.

History: 1978 Comp., § 45-6-410, enacted by Laws 2013, ch. 38, § 10.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 10 was effective January 1, 2014.

45-6-411. Revocation by instrument authorized; revocation by act not permitted.

A. Subject to Subsection B of this section, an instrument is effective to revoke a recorded transfer on death deed, or any part of it, only if the instrument:

(1) is acknowledged by the transferor after the acknowledgment of the deed being revoked;

(2) is recorded before the transferor's death in the public records in the office of the county clerk for the county in which the deed is recorded; and

(3) is:

(a) a transfer on death deed that revokes the deed or part of the deed expressly or by inconsistency;

(b) an instrument of revocation that expressly revokes the deed or part of the deed; or

(c) an inter vivos deed that expressly revokes the transfer on death deed or part of the deed.

B. If a transfer on death deed is made by more than one transferor:

(1) revocation by a transferor does not affect the deed as to the interest of another transferor; and

(2) a deed of joint owners is revoked only if it is revoked by all of the living joint owners.

C. After a transfer on death deed is recorded, it may not be revoked by a revocatory act on the deed.

D. This section does not limit the effect of an inter vivos transfer of the property.

History: 1978 Comp., § 45-6-411, enacted by Laws 2013, ch. 38, § 11.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 11 was effective January 1, 2014.

45-6-412. Effect of transfer on death deed during transferor’s life.

During a transferor's life, a transfer on death deed does not:

A. affect an interest or right of the transferor or any other owner, including the right to transfer or encumber the property;

B. affect an interest or right of a transferee, even if the transferee has actual or constructive notice of the deed;

C. affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed;

D. affect the transferor's or designated beneficiary's eligibility for any form of public assistance;

E. create a legal or equitable interest in favor of the designated beneficiary; or

F. subject the property to claims or process of a creditor of the designated beneficiary.

History: 1978 Comp., § 45-6-412, enacted by Laws 2013, ch. 38, § 12.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 12 was effective January 1, 2014.

45-6-413. Effect of transfer on death deed at transferor's death.

A. Except as otherwise provided in the transfer on death deed or in Subsection B, C or D of this section or in Section 45-2-603, 45-2-702, 45-2-706, 45-2-707, 45-2-802, 45-2-803 or 45-2-804 NMSA 1978, on the death of the transferor, the following rules apply to property that is the subject of a transfer on death deed and owned by the transferor at death:

(1) provided that the designated beneficiary survives the transferor, the interest in the property is transferred to the designated beneficiary in accordance with the deed;

(2) the interest of a designated beneficiary that fails to survive the transferor lapses;

(3) subject to Paragraph (4) of this subsection, concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship; and

(4) if the transferor has identified two or more designated beneficiaries to receive concurrent interests in the property, the share of one that lapses or fails for any reason is transferred to the other, or to the others in proportion to the interest of each in the remaining part of the property held concurrently.

B. Subject to Chapter 14, Article 9 NMSA 1978, a beneficiary takes the property subject to all recorded conveyances, encumbrances, assignments, contracts, mortgages, liens and other recorded interests to which the property is subject at the transferor's death. For purposes of this subsection and Chapter 14, Article 9 NMSA 1978, the recording of the transfer on death deed is deemed to have occurred at the transferor's death.

C. If a transferor is a joint owner and is:

(1) survived by one or more other joint owners, the property that is the subject of a transfer on death deed belongs to the surviving joint owner or owners with right of survivorship; or

(2) the last surviving joint owner, the transfer on death deed is effective.

D. A transfer on death deed transfers property without covenant or warranty of title even if the deed contains a contrary provision.

History: 1978 Comp., § 45-6-413, enacted by Laws 2013, ch. 38, § 13.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 13 was effective January 1, 2014.

45-6-414. Disclaimer.

A beneficiary may disclaim all or part of the beneficiary's interest as provided by the Uniform Disclaimer of Property Interests Act [Chapter 45, Article 2, Part 11 NMSA 1978].

History: 1978 Comp., § 45-6-414, enacted by Laws 2013, ch. 38, § 14.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 14 was effective January 1, 2014.

45-6-415. Liability for creditor claims and statutory allowances.

A beneficiary of a transfer on death deed is liable for an allowed claim against the transferor's probate estate and statutory allowances to a surviving spouse and children to the extent provided in Section 45-6-102 NMSA 1978.

History: 1978 Comp., § 45-6-415, enacted by Laws 2013, ch. 38, § 15.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 15 was effective January 1, 2014.

45-6-416. Optional form of transfer on death deed.

The following form may be used to create a transfer on death deed. The provisions of the Uniform Real Property Transfer on Death Act govern the effect of this or any other instrument used to create a transfer on death deed:

(front of form)

"REVOCABLE TRANSFER ON DEATH DEED

NOTICE TO OWNER

You should carefully read all information on the other side of this form. You may want to consult a lawyer before using this form.

This form must be recorded before your death or it will not be effective.

IDENTIFYING INFORMATION

Owner or Owners Making This Deed:

_____ _____

Printed name Mailing address

_____ _____

Printed name Mailing address

Legal description of the property:

_____

_____

PRIMARY BENEFICIARY

I designate the following beneficiary if the beneficiary survives me.

_____ _____

Printed name Mailing address, if available

ALTERNATE BENEFICIARY - Optional

If my primary beneficiary does not survive me, I designate the following alternate beneficiary if that beneficiary survives me.

_____ _____

Printed name Mailing address, if available

TRANSFER ON DEATH

At my death, I transfer my interest in the described property to the beneficiaries as designated above.

Before my death, I have the right to revoke this deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS DEED

_____ _____

Signature Date

_____ _____

Signature Date

ACKNOWLEDGMENT

(insert acknowledgment for deed here)"

(back of form)

"COMMON QUESTIONS ABOUT THE USE OF THIS FORM

What does the Transfer on Death (TOD) deed do? When you die, this deed transfers the described property, subject to any liens or mortgages (or other encumbrances) on the property at your death. Probate is not required. The TOD deed has no effect until you die. You can revoke it at any time. You are also free to transfer the property to someone else during your lifetime. If you do not own any interest in the property when you die, this deed will have no effect.

How do I make a TOD deed? Complete this form. Have it acknowledged before a notary public or other individual authorized by law to take acknowledgments. Record the form in each county where any part of the property is located. The form has no effect unless it is acknowledged and recorded before your death.

Is the "legal description" of the property necessary? Yes.

How do I find the "legal description" of the property? This information may be on the deed you received when you became an owner of the property. This information may also be available in the office of the county clerk for the county where the property is located. If you are not absolutely sure, consult a lawyer.

Can I change my mind before I record the TOD deed? Yes. If you have not yet recorded the deed and want to change your mind, simply tear up or otherwise destroy the deed.

How do I "record" the TOD deed? Take the completed and acknowledged form to the office of the county clerk of the county where the property is located. Follow the instructions given by the county clerk to make the form part of the official property records. If the property is in more than one county, you should record the deed in each county.

Can I later revoke the TOD deed if I change my mind? Yes. You can revoke the TOD deed. No one, including the beneficiaries, can prevent you from revoking the deed.

How do I revoke the TOD deed after it is recorded? There are three ways to revoke a recorded TOD deed: (1) Complete and acknowledge a revocation form, and record it in each county where the property is located. (2) Complete and acknowledge a new TOD deed that disposes of the same property, and record it in each county where the property is located. (3) Transfer the property to someone else during your lifetime by a recorded deed that expressly revokes the TOD deed. You may not revoke the TOD deed by will.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend or lawyer.

Do I need to tell the beneficiaries about the TOD deed? No, but it is recommended. Secrecy can cause later complications and might make it easier for others to commit fraud.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, you are encouraged to consult a lawyer."

History: 1978 Comp., § 45-6-416, enacted by Laws 2013, ch. 38, § 16.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 16 was effective January 1, 2014.

45-6-417. Optional form of revocation.

The following form may be used to create an instrument of revocation under the Uniform Real Property Transfer on Death Act. The provisions of the Uniform Real Property Transfer on Death Act govern the effect of this or any other instrument used to revoke a transfer on death deed.

(front of form)

"REVOCATION OF TRANSFER ON DEATH DEED

NOTICE TO OWNER

This revocation must be recorded before you die or it will not be effective. This revocation is effective only as to the interests in the property of owners who sign this revocation.

IDENTIFYING INFORMATION

Owner or Owners of Property Making This Revocation:

_____	_____
Printed name	Mailing address
_____	_____
Printed name	Mailing address

Legal description of the property:

_____

REVOCATION

I revoke all my previous transfers of this property by transfer on death deed.

_____	_____

Signature Date

_____ _____

Signature Date

ACKNOWLEDGMENT

(insert acknowledgment here)"

(back of form)

"COMMON QUESTIONS ABOUT THE USE OF THIS FORM

How do I use this form to revoke a Transfer on Death (TOD) deed? Complete this form. Have it acknowledged before a notary public or other individual authorized to take acknowledgments. Record the form in the public records in the office of the county clerk of each county where the property is located. The form must be acknowledged and recorded before your death or it has no effect.

How do I find the "legal description" of the property? This information may be on the TOD deed. It may also be available in the office of the county clerk for the county where the property is located. If you are not absolutely sure, consult a lawyer.

How do I "record" the form? Take the completed and acknowledged form to the office of the county clerk of the county where the property is located. Follow the instructions given by the county clerk to make the form part of the official property records. If the property is located in more than one county, you should record the form in each of those counties.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend or lawyer.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, consult a lawyer."

History: 1978 Comp., § 45-6-417, enacted by Laws 2013, ch. 38, § 17.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 38, § 18 provided that Laws 2013, ch. 38, § 17 was effective January 1, 2014.

ARTICLE 7
Trust Administration

PART 1
Principal Place Of Administration

45-7-101

45-7-101 to 45-7-104. Repealed.

ANNOTATIONS

Repeals. — Laws 2003, ch. 122, § 11-1105 repealed 45-7-101 to 45-7-104 NMSA 1978, as enacted by Laws 1975, ch. 257, §§ 7-101 to 7-104, relating to the principal place of administration, effective July 1, 2003. For provisions of former sections, *see* the 2002 NMSA 1978 on *NMONESOURCE.COM*.

45-7-105. Registration; qualification of foreign trustee.

A. A foreign corporate trustee is required to qualify as a foreign corporation doing business in New Mexico if it maintains the principal place of administration of any trust within the state. A foreign corporate cotrustee is not required to qualify in New Mexico solely because its cotrustee maintains the principal place of administration in New Mexico. Unless otherwise doing business in New Mexico, local qualification by a foreign trustee, corporate or individual, is not required in order for the trustee to receive distribution from a local estate or to hold, invest in, manage or acquire property located in this state, or maintain litigation.

B. Nothing in this section affects a determination of what other acts require qualification as doing business in New Mexico.

History: 1953 Comp., § 32A-7-105, enacted by Laws 1975, ch. 257, § 7-105.

ANNOTATIONS

Cross references. — For application for certificate of authority for foreign corporation to do business in state, *see* 53-17-5 NMSA 1978.

For transacting business without certificate of authority, *see* 53-17-20 NMSA 1978.

Law reviews. — For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Trusts §§ 324, 329.

90 C.J.S. Trusts §§ 204 to 210.

PART 2
Jurisdiction Of Court Concerning Trusts

45-7-201 to 45-7-206. Repealed.

ANNOTATIONS

Repeals. — Laws 2003, ch. 122, § 11-1105 repealed 45-7-201 to 45-7-206 NMSA 1978, as enacted by Laws 1975, ch. 257, §§ 7-201 to 7-206, relating to jurisdiction of court concerning trusts, effective July 1, 2003. For provisions of former sections, *see* the 2002 NMSA 1978 on *NMONESOURCE.COM*.

PART 3
Duties And Liabilities Of Trustees

45-7-301 to 45-7-307. Repealed.

ANNOTATIONS

Repeals. — Laws 2003, ch. 122, § 11-1105 repealed 45-7-301 to 45-7-307 NMSA 1978, as enacted by Laws 1975, ch. 257, §§ 7-301 to 7-307, relating to duties and liabilities of trustees, effective July 1, 2003. For provisions of former sections, *see* the 2002 NMSA 1978 on *NMONESOURCE.COM*.

PART 4
Powers Of Trustees

45-7-401. Repealed.

ANNOTATIONS

Repeals. — Laws 2003, ch. 122, § 11-1105 repealed 45-7-401 NMSA 1978, as enacted by Laws 1975, ch. 257, § 7-401, relating to powers of trustees, effective July 1, 2003. For provisions of former section, *see* the 2002 NMSA 1978 on *NMONESOURCE.COM*.

PART 5
Custodial Trusts

45-7-501. Short title.

Sections 45-7-501 through 45-7-522 NMSA 1978 may be cited as the "Uniform Custodial Trust Act".

History: 1978 Comp., § 45-7-501, enacted by Laws 1992, ch. 66, § 48.

ANNOTATIONS

For article, "The New Mexico Uniform Trust Code," see 34 N.M.L. Rev. 1 (2004).

45-7-502. Definitions.

As used in the Uniform Custodial Trust Act [45-7-501 through 45-7-522 NMSA 1978]:

A. "adult" means an individual who is at least eighteen years of age;

B. "beneficiary" means an individual for whom property has been transferred to or held under a declaration of trust by a custodial trustee for the individual's use and benefit under the Uniform Custodial Trust Act;

C. "conservator" means a person appointed or qualified by a court to manage the estate of an individual or a person legally authorized to perform substantially the same functions;

D. "court" means the district court of this state;

E. "custodial trust property" means an interest in property transferred to or held under a declaration of trust by a custodial trustee under the Uniform Custodial Trust Act and the income from and proceeds of that interest;

F. "custodial trustee" means a person designated as trustee of a custodial trust under the Uniform Custodial Trust Act or a substitute or successor to the person designated;

G. "guardian" means a person appointed or qualified by a court as a guardian of an individual, including a limited guardian, but not a person who is only a guardian ad litem;

H. "incapacitated" means lacking the ability to manage property and business affairs effectively by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, disappearance, minority or other disabling cause;

I. "legal representative" means a personal representative or conservator;

J. "member of the beneficiary's family" means a beneficiary's spouse, descendant, stepchild, parent, stepparent, grandparent, brother, sister, uncle or aunt, whether of the whole or half blood or by adoption;

K. "person" means an individual, corporation, business trust, estate, trust, partnership, joint venture, association or any other legal or commercial entity;

L. "personal representative" means an executor, administrator or special administrator of a decedent's estate, a person legally authorized to perform substantially the same functions or a successor to any of them;

M. "state" means a state, territory or possession of the United States, the district of Columbia or the commonwealth of Puerto Rico;

N. "transferor" means a person who creates a custodial trust by transfer or declaration; and

O. "trust company" means a financial institution, corporation or other legal entity authorized to exercise general trust powers.

History: 1978 Comp., § 45-7-502, enacted by Laws 1992, ch. 66, § 49.

45-7-503. Custodial trust; general.

A. A person may create a custodial trust of property by a written transfer of the property to another person, evidenced by registration or by other instrument of transfer, executed in any lawful manner, naming as beneficiary an individual who may be the transferor, in which the transferee is designated, in substance, as custodial trustee under the Uniform Custodial Trust Act [45-7-501 through 45-7-522 NMSA 1978].

B. A person may create a custodial trust of property by a written declaration, evidenced by registration of the property or by other instrument of declaration executed in any lawful manner, describing the property and naming as beneficiary an individual other than the declarant, in which the declarant as titleholder is designated, in substance, as custodial trustee under the Uniform Custodial Trust Act. A registration or other declaration of trust for the sole benefit of the declarant is not a custodial trust under that act.

C. Title to custodial trust property is in the custodial trustee and the beneficial interest is in the beneficiary.

D. Except as provided in Subsection E of this section, a transferor may not terminate a custodial trust.

E. The beneficiary, if not incapacitated, or the conservator of an incapacitated beneficiary, may terminate a custodial trust by delivering to the custodial trustee a

writing signed by the beneficiary or conservator declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary.

F. Any person may augment existing custodial trust property by the addition of other property pursuant to the Uniform Custodial Trust Act.

G. The transferor may designate, or authorize the designation of, a successor custodial trustee in the trust instrument.

H. The Uniform Custodial Trust Act does not displace or restrict other means of creating trusts. A trust whose terms do not conform to that act may be enforceable according to its terms under other law.

History: 1978 Comp., § 45-7-503, enacted by Laws 1992, ch. 66, § 50.

45-7-504. Custodial trustee for future payment or transfer.

A. A person having the right to designate the recipient of property payable or transferable upon a future event may create a custodial trust upon the occurrence of the future event by designating in writing the recipient, followed in substance by: "as custodial trustee for _____ (name of beneficiary) under the Uniform Custodial Trust Act".

B. Persons may be designated as substitute or successor custodial trustees to whom the property must be paid or transferred in the order named if the first designated custodial trustee is unable or unwilling to serve.

C. A designation under this section may be made in a will, a trust, a deed, a multiple-party account, an insurance policy, an instrument exercising a power of appointment or a writing designating a beneficiary of contractual rights. Otherwise, to be effective, the designation must be registered with or delivered to the fiduciary, payor, issuer or obligor of the future right.

History: 1978 Comp., § 45-7-504, enacted by Laws 1992, ch. 66, § 51.

45-7-505. Form and effect of receipt and acceptance by custodial trustee; jurisdiction.

A. Obligations of a custodial trustee, including the obligation to follow directions of the beneficiary, arise under the Uniform Custodial Trust Act [45-7-501 through 45-7-522 NMSA 1978] upon the custodial trustee's acceptance, express or implied, of the custodial trust property.

B. The custodial trustee's acceptance may be evidenced by writing stating in substance:

"CUSTODIAL TRUSTEE'S RECEIPT AND ACCEPTANCE

I, _____ (name of custodial trustee) acknowledge receipt of the custodial trust property described below or in the attached instrument and accept the custodial trust as custodial trustee for _____ (name of beneficiary) under the Uniform Custodial Trust Act. I undertake to administer and distribute the custodial trust property pursuant to the Uniform Custodial Trust Act. My obligations as custodial trustee are subject to the directions of the beneficiary unless the beneficiary is designated as, is or becomes incapacitated. The custodial trust property consists of _____.

(Dated:)_____

_____
_____ ".

(Signature of Custodial Trustee)

C. Upon accepting custodial trust property, a person designated as custodial trustee under the Uniform Custodial Trust Act is subject to personal jurisdiction of the court with respect to any matter relating to the custodial trust.

History: 1978 Comp., § 45-7-505, enacted by Laws 1992, ch. 66, § 52.

45-7-506. Transfer to custodial trustee by fiduciary or obligor; facility of payment.

A. Unless otherwise directed by an instrument designating a custodial trustee pursuant to Section 45-7-504 NMSA 1978, a person, including a fiduciary other than a custodial trustee, who holds property of or owes a debt to an incapacitated individual not having a conservator may make a transfer to an adult member of the beneficiary's family or to a trust company as custodial trustee for the use and benefit of the incapacitated individual. If the value of the property or the debt exceeds twenty thousand dollars ($20,000), the transfer is not effective unless authorized by the court.

B. A written acknowledgment of delivery, signed by a custodial trustee, is a sufficient receipt and discharge for property transferred to the custodial trustee pursuant to this section.

History: 1978 Comp., § 45-7-506, enacted by Laws 1992, ch. 66, § 53.

45-7-507. Multiple beneficiaries; separate custodial trusts; survivorship.

A. Beneficial interests in a custodial trust created for multiple beneficiaries are deemed to be separate custodial trusts of equal undivided interests for each beneficiary.

Except in a transfer or declaration for use and benefit of husband and wife, for whom survivorship is presumed, a right of survivorship does not exist unless the instrument creating the custodial trust specifically provides for survivorship.

B. Custodial trust property held under the Uniform Custodial Trust Act [45-7-501 through 45-7-522 NMSA 1978] by the same custodial trustee for the use and benefit of the same beneficiary may be administered as a single custodial trust.

C. A custodial trustee of custodial trust property held for more than one beneficiary shall separately account to each beneficiary pursuant to Sections 45-7-508 and 45-7-516 NMSA 1978 for the administration of the custodial trust.

History: 1978 Comp., § 45-7-507, enacted by Laws 1992, ch. 66, § 54.

45-7-508. General duties of custodial trustee.

A. If appropriate, a custodial trustee shall register or record the instrument vesting title to custodial trust property.

B. If the beneficiary is not incapacitated, a custodial trustee shall follow the directions of the beneficiary in the management, control, investment or retention of the custodial trust property. In the absence of effective contrary direction by the beneficiary while not incapacitated, the custodial trustee shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other law restricting investments by fiduciaries. However, a custodial trustee, in the custodial trustee's discretion, may retain any custodial trust property received from the transferor. If a custodial trustee has a special skill or expertise or is named custodial trustee on the basis of representation of a special skill or expertise, the custodial trustee shall use that skill or expertise.

C. Subject to Subsection B of this section, a custodial trustee shall take control of and collect, hold, manage, invest and reinvest custodial trust property.

D. A custodial trustee at all times shall keep custodial trust property of which the custodial trustee has control separate from all other property in a manner sufficient to identify it clearly as custodial trust property of the beneficiary. Custodial trust property, the title to which is subject to recordation, is so identified if an appropriate instrument so identifying the property is recorded, and custodial trust property subject to registration is so identified if it is registered, or held in an account in the name of the custodial trustee, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the Uniform Custodial Trust Act".

E. A custodial trustee shall keep records of all transactions with respect to custodial trust property, including information necessary for the preparation of tax returns, and shall make the records and information available at reasonable times to the beneficiary or legal representative of the beneficiary.

F. The exercise of a durable power of attorney for an incapacitated beneficiary is not effective to terminate or direct the administration or distribution of a custodial trust.

History: 1978 Comp., § 45-7-508, enacted by Laws 1992, ch. 66, § 55.

45-7-509. General powers of custodial trustee.

A. A custodial trustee, acting in a fiduciary capacity, has all the rights and powers over custodial trust property that an unmarried adult owner has over individually owned property, but a custodial trustee may exercise those rights and powers in a fudiciary [fiduciary] capacity only.

B. This section does not relieve a custodial trustee from liability for a violation of Section 45-7-508 NMSA 1978.

History: 1978 Comp., § 45-7-509, enacted by Laws 1992, ch. 66, § 56.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

45-7-510. Use of custodial trust property.

A. A custodial trustee shall pay to the beneficiary or expend for the beneficiary's use and benefit so much or all of the custodial trust property as the beneficiary while not incapacitated may direct from time to time.

B. If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of the beneficiary and individuals who were supported by the beneficiary when the beneficiary became incapacitated, or who are legally entitled to support by the beneficiary. Expenditures may be made in the manner, when, and to the extent that the custodial trustee determines suitable and proper, without court order and without regard to other support, income or property of the beneficiary.

C. A custodial trustee may establish checking, savings or other similar accounts of reasonable amounts under which either the custodial trustee or the beneficiary may withdraw funds from, or draw checks against, the accounts. Funds withdrawn from, or checks written against, the account by the beneficiary are distributions of custodial trust property by the custodial trustee to the beneficiary.

History: 1978 Comp., § 45-7-510, enacted by Laws 1992, ch. 66, § 57.

45-7-511. Determination of incapacity; effect.

A. The custodial trustee shall administer the custodial trust as for an incapacitated beneficiary if:

(1) the custodial trust was created under Section 45-7-506 NMSA 1978;

(2) the transferor has so directed in the instrument creating the custodial trust; or

(3) the custodial trustee has determined that the beneficiary is incapacitated.

B. A custodial trustee may determine that the beneficiary is incapacitated in reliance upon:

(1) previous direction or authority given by the beneficiary while not incapacitated, including direction or authority pursuant to a durable power of attorney;

(2) the certificate of the beneficiary's physician; or

(3) other persuasive evidence.

C. If a custodial trustee for an incapacitated beneficiary reasonably concludes that the beneficiary's incapacity has ceased, or that circumstances concerning the beneficiary's ability to manage property and business affairs have changed since the creation of a custodial trust directing administration as for an incapacitated beneficiary, the custodial trustee may administer the trust as for a beneficiary who is not incapacitated.

D. On petition of the beneficiary, the custodial trustee or other person interested in the custodial trust property or the welfare of the beneficiary, the court shall determine whether the beneficiary is incapacitated.

E. Absent determination of incapacity of the beneficiary under Subsection B or D of this section, a custodial trustee who has reason to believe that the beneficiary is incapacitated shall administer the custodial trust in accordance with the provisions of the Uniform Custodial Trust Act [45-7-501 through 45-7-522 NMSA 1978] applicable to an incapacitated beneficiary.

F. Incapacity of a beneficiary does not terminate:

(1) the custodial trust;

(2) any designation of a successor custodial trustee;

(3) rights or powers of the custodial trustee; or

(4) any immunities of third persons acting on instructions of the custodial trustee.

History: 1978 Comp., § 45-7-511, enacted by Laws 1992, ch. 66, § 58.

45-7-512. Exemption of third person from liability.

A third person in good faith and without a court order may act on instructions of, or otherwise deal with, a person purporting to make a transfer as, or purporting to act in the capacity of, a custodial trustee. In the absence of knowledge to the contrary, the third person is not responsible for determining:

A. the validity of the purported custodial trustee's designation;

B. the propriety of, or the authority under the Uniform Custodial Trust Act [45-7-501 through 45-7-522 NMSA 1978] for, any action of the purported custodial trustee;

C. the validity or propriety of an instrument executed or instruction given pursuant to the Uniform Custodial Trust Act either by the person purporting to make a transfer or declaration or by the purported custodial trustee; or

D. the propriety of the application of property vested in the purported custodial trustee.

History: 1978 Comp., § 45-7-512, enacted by Laws 1992, ch. 66, § 59.

45-7-513. Liability to third person.

A. A claim based on a contract entered into by a custodial trustee acting in a fiduciary capacity, an obligation arising from the ownership or control of custodial trust property or a tort committed in the course of administering the custodial trust, may be asserted by a third person against the custodial trust property by proceeding against the custodial trustee in a fiduciary capacity, whether or not the custodial trustee or the beneficiary is personally liable.

B. A custodial trustee is not personally liable to a third person:

(1) on a contract properly entered into in a fiduciary capacity unless the custodial trustee fails to reveal that capacity or to identify the custodial trust in the contract; or

(2) for an obligation arising from control of custodial trust property or for a tort committed in the course of the administration of the custodial trust unless the custodial trustee is personally at fault.

C. A beneficiary is not personally liable to a third person for an obligation arising from beneficial ownership of custodial trust property or for a tort committed in the course of administration of the custodial trust unless the beneficiary is personally in possession of the custodial trust property giving rise to the liability or is personally at fault.

D. Subsections B and C of this section do not preclude actions or proceedings to establish liability of the custodial trustee or beneficiary to the extent the person sued is protected as the insured by liability insurance.

History: 1978 Comp., § 45-7-513, enacted by Laws 1992, ch. 66, § 60.

45-7-514. Declination, resignation, incapacity, death or removal of custodial trustee; designation of successor custodial trustee.

A. Before accepting the custodial trust property, a person designated as custodial trustee may decline to serve by notifying the person who made the designation, the transferor or the transferor's legal representative. If an event giving rise to a transfer has not occurred, the substitute custodial trustee designated under Section 45-7-504 NMSA 1978 becomes the custodial trustee, or, if a substitute custodial trustee has not been designated, the person who made the designation may designate a substitute custodial trustee pursuant to Section 45-7-504 NMSA 1978. In other cases, the transferor or the transferor's legal representative may designate a substitute custodial trustee.

B. A custodial trustee who has accepted the custodial trust property may resign by:

(1) delivering written notice to a successor custodial trustee, if any, the beneficiary and, if the beneficiary is incapacitated, to the beneficiary's conservator, if any; and

(2) transferring or registering, or recording an appropriate instrument relating to, the custodial trust property, in the name of, and delivering the records to, the successor custodial trustee identified under Subsection C of this section.

C. If a custodial trustee or successor custodial trustee is ineligible, resigns, dies or becomes incapacitated, the successor designated under Subsection G of Section 45-7-503 NMSA 1978 or Section 45-7-504 NMSA 1978 becomes custodial trustee. If there is no effective provision for a successor, the beneficiary, if not incapacitated, may designate a successor custodial trustee. If the beneficiary is incapacitated, or fails to act within ninety days after the ineligibility, resignation, death or incapacity of the custodial trustee, the beneficiary's conservator becomes successor custodial trustee. If the beneficiary does not have a conservator or the conservator fails to act, the resigning custodial trustee may designate a successor custodial trustee.

D. If a successor custodial trustee is not designated pursuant to Subsection C of this section, the transferor, the legal representative of the transferor or of the custodial trustee, an adult member of the beneficiary's family, the guardian of the beneficiary, a

person interested in the custodial trust property or a person interested in the welfare of the beneficiary, may petition the court to designate a successor custodial trustee.

E. A custodial trustee who declines to serve or resigns, or the legal representative of a deceased or incapacitated custodial trustee, as soon as practicable, shall put the custodial trust property and records in the possession and control of the successor custodial trustee. The successor custodial trustee may enforce the obligation to deliver custodial trust property and records and becomes responsible for each item as received.

F. A beneficiary, the beneficiary's conservator, an adult member of the beneficiary's family, a guardian of the person of the beneficiary, a person interested in the custodial trust property or a person interested in the welfare of the beneficiary may petition the court to remove the custodial trustee for cause and designate a successor custodial trustee, to require the custodial trustee to furnish a bond or other security for the faithful performance of fiduciary duties, or for other appropriate relief.

History: 1978 Comp., § 45-7-514, enacted by Laws 1992, ch. 66, § 61.

45-7-515. Expenses, compensation and bond of custodial trustee.

Except as otherwise provided in the instrument creating the custodial trust, in an agreement with the beneficiary or by court order, a custodial trustee:

A. is entitled to reimbursement from custodial trust property for reasonable expenses incurred in the performance of fiduciary services;

B. has a noncumulative election, to be made no later than six months after the end of each calendar year, to charge a reasonable compensation for fiduciary services performed during that year; and

C. need not furnish a bond or other security for the faithful performance of fiduciary duties.

History: 1978 Comp., § 45-7-515, enacted by Laws 1992, ch. 66, § 62.

45-7-516. Reporting and accounting by custodial trustee; determination of liability of custodial trustee.

A. Upon the acceptance of custodial trust property, the custodial trustee shall provide a written statement describing the custodial trust property and shall thereafter provide a written statement of the administration of the custodial trust property:

(1) once each year;

(2) upon request at reasonable times by the beneficiary or the beneficiary's legal representative;

(3) upon resignation or removal of the custodial trustee; and

(4) upon termination of the custodial trust.

The statements must be provided to the beneficiary or to the beneficiary's legal representative, if any. Upon termination of the beneficiary's interest, the custodial trustee shall furnish a current statement to the person to whom the custodial trust property is to be delivered.

B. A beneficiary, the beneficiary's legal representative, an adult member of the beneficiary's family, a person interested in the custodial trust property or a person interested in the welfare of the beneficiary may petition the court for an accounting by the custodial trustee or the custodial trustee's legal representative.

C. A successor custodial trustee may petition the court for an accounting by a predecessor custodial trustee.

D. In an action or proceeding under the Uniform Custodial Trust Act [45-7-501 through 45-7-522 NMSA 1978] or in any other proceeding, the court may require or permit the custodial trustee or the custodial trustee's legal representative to account. The custodial trustee or the custodial trustee's legal representative may petition the court for approval of final accounts.

E. If a custodial trustee is removed, the court shall require an accounting and order delivery of the custodial trust property and records to the successor custodial trustee and the execution of all instruments required for transfer of the custodial trust property.

F. On petition of the custodial trustee or any person who could petition for an accounting, the court, after notice to interested persons, may issue instructions to the custodial trustee or review the propriety of the acts of a custodial trustee or the reasonableness of compensation determined by the custodial trustee for the services of the custodial trustee or others.

History: 1978 Comp., § 45-7-516, enacted by Laws 1992, ch. 66, § 63.

45-7-517. Limitations of action against custodial trustee.

A. Except as provided in Subsection C of this section, unless previously barred by adjudication, consent or limitation, a claim for relief against a custodial trustee for accounting or breach of duty is barred as to a beneficiary, a person to whom custodial trust property is to be paid or delivered or the legal representative of an incapacitated or deceased beneficiary or payee:

(1) who has received a final account or statement fully disclosing the matter unless an action or proceeding to assert the claim is commenced within two years after receipt of the final account or statement; or

(2) who has not received a final account or statement fully disclosing the matter unless an action or proceeding to assert the claim is commenced within three years after the termination of the custodial trust.

B. Except as provided in Subsection C of this section, a claim for relief to recover from a custodial trustee for fraud, misrepresentation or concealment related to the final settlement of the custodial trust or concealment of the existence of the custodial trust, is barred unless an action or proceeding to assert the claim is commenced within five years after the termination of the custodial trust.

C. A claim for relief is not barred by this section if the claimant:

(1) is a minor, until the earlier of two years after the claimant becomes an adult or dies;

(2) is an incapacitated adult, until the earliest of two years after:

(a) the appointment of a conservator;

(b) the removal of the incapacity; or

(c) the death of the claimant; or

(3) was an adult, now deceased, who was not incapacitated, until two years after the claimant's death.

History: 1978 Comp., § 45-7-517, enacted by Laws 1992, ch. 66, § 64.

45-7-518. Distribution on termination.

A. Upon termination of a custodial trust, the custodial trustee shall transfer the unexpended custodial trust property:

(1) to the beneficiary, if not incapacitated or deceased;

(2) to the conservator or other recipient designated by the court for an incapacitated beneficiary; or

(3) upon the beneficiary's death, in the following order:

(a) as last directed in a writing signed by the deceased beneficiary while not incapacitated and received by the custodial trustee during the life of the deceased beneficiary;

(b) to the survivor of multiple beneficiaries if survivorship is provided for pursuant to Section 45-7-507 NMSA 1978;

(c) as designated in the instrument creating the custodial trust; or

(d) to the estate of the deceased beneficiary.

B. If, when the custodial trust would otherwise terminate, the distributee is incapacitated, the custodial trust continues for the use and benefit of the distributee as beneficiary until the incapacity is removed or the custodial trust is otherwise terminated.

C. Death of a beneficiary does not terminate the power of the custodial trustee to discharge obligations of the custodial trustee or beneficiary incurred before the termination of the custodial trust.

History: 1978 Comp., § 45-7-518, enacted by Laws 1992, ch. 66, § 65.

45-7-519. Methods and forms for creating custodial trusts.

A. If a transaction, including a declaration with respect to or a transfer of specific property, otherwise satisfies applicable law, the criteria of Section 45-7-503 NMSA 1978 are satisfied by:

(1) the execution and either delivery to the custodial trustee or recording of an instrument in substantially the following form:

"TRANSFER UNDER THE UNIFORM CUSTODIAL TRUST ACT

I, _____ (name of transferor or name and representative capacity if a fiduciary), transfer to _____ (name of trustee other than transferor), as custodial trustee for

_____ (name of beneficiary) as beneficiary and _____ as distributee on termination of the trust in absence of direction by the beneficiary under the Uniform Custodial Trust Act, the following: (Insert a description of the custodial trust property legally sufficient to identify and transfer each item of property).

Dated:_____

_____

"; or

(Signature)

(2) the execution and the recording or giving notice of its execution to the beneficiary of an instrument in substantially the following form:

"DECLARATION OF TRUST UNDER THE UNIFORM

CUSTODIAL TRUST ACT

I, _____ (name of owner of property), declare that henceforth I hold as custodial trustee for _____ (name of beneficiary other than transferor) as beneficiary and _____ as distributee on termination of the trust in absence of direction by the beneficiary under the Uniform Custodial Trust Act, the following: (Insert a description of the custodial trust property legally sufficient to identify and transfer each item of property).

Date: _____

_____
__ ".

(Signature)

B. Customary methods of transferring or evidencing ownership of property may be used to create a custodial trust, including any of the following:

(1) registration of a security in the name of a trust company, an adult other than the transferor or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the Uniform Custodial Trust Act";

(2) delivery of a certificated security, or a document necessary for the transfer of an uncertificated security, together with any necessary endorsement, to an adult other than the transferor or to a trust company as custodial trustee, accompanied by an instrument in substantially the form prescribed in Paragraph (1) of Subsection A of this section;

(3) payment of money or transfer of a security held in the name of a broker or a financial institution or its nominee to a broker or financial institution for credit to an account in the name of a trust company, an adult other than the transferor or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the Uniform Custodial Trust Act";

(4) registration of ownership of a life or endowment insurance policy or annuity contract with the issuer in the name of a trust company, an adult other than the

transferor or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the Uniform Custodial Trust Act";

(5) delivery of a written assignment to an adult other than the transferor or to a trust company whose name in the assignment is designated in substance by the words: "as custodial trustee for _____ (name of beneficiary) under the Uniform Custodial Trust Act";

(6) irrevocable exercise of a power of appointment, pursuant to its terms, in favor of a trust company, an adult other than the donee of the power of the donee who holds the power if the beneficiary is other than the donee, whose name in the appointment is designated in substance: "as custodial trustee for _____ (name of beneficiary) under the Uniform Custodial Trust Act";

(7) delivery of a written notification or assignment of a right to future payment under a contract to an obligor that transfers the right under the contract to a trust company, an adult other than the transferor or the transferor if the beneficiary is other than the transferor, whose name in the notification or assignment is designated in substance: "as custodial trustee for _____ (name of beneficiary) under the Uniform Custodial Trust Act";

(8) execution, delivery and recordation of a conveyance of an interest in real property in the name of a trust company, an adult other than the transferor or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the Uniform Custodial Trust Act";

(9) issuance of a certificate of title by an agency of a state or of the United States that evidences title to tangible personal property:

(a) issued in the name of a trust company, an adult other than the transferor or the transferor if the beneficiary is other than the transferor, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the Uniform Custodial Trust Act"; or

(b) delivered to a trust company or an adult other than the transferor or endorsed by the transferor to that person, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the Uniform Custodial Trust Act"; or

(10) execution and delivery of an instrument of gift to a trust company or an adult other than the transferor, designated in substance: "as custodial trustee for _____ (name of beneficiary) under the Uniform Custodial Trust Act".

History: 1978 Comp., § 45-7-519, enacted by Laws 1992, ch. 66, § 66.

45-7-520. Applicable law.

A. The Uniform Custodial Trust Act [45-7-501 through 45-7-522 NMSA 1978] applies to a transfer or declaration creating a custodial trust that refers to that act if, at the time of the transfer or declaration, the transferor, beneficiary or custodial trustee is a resident of or has its principal place of business in this state or custodial trust property is located in this state. The custodial trust remains subject to that act despite a later change in residence or principal place of business of the transferor, beneficiary or custodial trustee, or removal of the custodial trust property from this state.

B. A transfer made pursuant to an act of another state substantially similar to the Uniform Custodial Trust Act is governed by the law of that state and may be enforced in this state.

History: 1978 Comp., § 45-7-520, enacted by Laws 1992, ch. 66, § 67.

45-7-521. Uniformity of application and construction.

The Uniform Custodial Trust Act [45-7-501 through 45-7-522 NMSA 1978] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of that act among states enacting it.

History: 1978 Comp., § 45-7-521, enacted by Laws 1992, ch. 66, § 68.

45-7-522. Severability.

If any provision of the Uniform Custodial Trust Act [45-7-501 through 45-7-522 NMSA 1978] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of that act that can be given effect without the invalid provision or application, and to this end the provisions of that act are severable.

History: 1978 Comp., § 45-7-522, enacted by Laws 1992, ch. 66, § 69.

PART 6
Uniform Prudent Investor Act

45-7-601. Short title.

Sections 45-7-601 through 45-7-612 NMSA 1978 may be cited as the "Uniform Prudent Investor Act".

History: 1978 Comp., § 45-7-601, enacted by Laws 1995, ch. 210, § 82.

ANNOTATIONS

Cross references. — For fiduciaries and trusts, *see* Chapter 46 NMSA 1978.

Effective dates. — Laws 1995, ch. 210, § 94 made the Uniform Prudent Investor Act effective July 1, 1995.

Law reviews. — For article, "The New Mexico Uniform Trust Code," see 34 N.M.L. Rev. 1 (2004).

For student article, "New Mexico's Land Grant and Severance Tax Permanent Funds: Renewable Wealth from Non-Renewable Resources," see 48 Nat. Resources J. 719 (2008).

45-7-602. Prudent investor rule.

A. Except as otherwise provided in Subsection B of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in the Uniform Prudent Investor Act [45-7-601 through 45-7-612 NMSA 1978].

B. The prudent investor rule, a default rule, may be expanded, restricted, eliminated or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

History: 1978 Comp., § 45-7-602, enacted by Laws 1995, ch. 210, § 83.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the Uniform Prudent Investor Act effective July 1, 1995.

45-7-603. Standard of care; portfolio strategy; risk and return objectives.

A. A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.

B. A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

C. Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

(1) general economic conditions;

(2) the possible effect of inflation or deflation;

(3) the expected tax consequences of investment decisions or strategies;

(4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interest in closely held enterprises, tangible and intangible personal property and real property;

(5) the expected total return from income and the appreciation of capital;

(6) other resources of the beneficiaries;

(7) needs for liquidity, regularity of income and preservation or appreciation of capital; and

(8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

D. A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

E. A trustee may invest in any kind of property or type of investment consistent with the standards of the Uniform Prudent Investor Act [45-7-601 through 45-7-612 NMSA 1978].

F. A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

History: 1978 Comp., § 45-7-603, enacted by Laws 1995, ch. 210, § 84.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the Uniform Prudent Investor Act effective July 1, 1995.

45-7-604. Diversification.

A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

History: 1978 Comp., § 45-7-604, enacted by Laws 1995, ch. 210, § 85.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the Uniform Prudent Investor Act effective July 1, 1995.

45-7-605. Duties at inception of trusteeship.

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements and other circumstances of the trust, and with the requirements of the Uniform Prudent Investor Act [45-7-601 through 45-7-612 NMSA 1978].

History: 1978 Comp., § 45-7-605, enacted by Laws 1995, ch. 210, § 86.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the Uniform Prudent Investor Act effective July 1, 1995.

45-7-606. Loyalty.

A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

History: 1978 Comp., § 45-7-606, enacted by Laws 1995, ch. 210, § 87.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the Uniform Prudent Investor Act effective July 1, 1995.

45-7-607. Impartiality.

If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

History: 1978 Comp., § 45-7-607, enacted by Laws 1995, ch. 210, § 88.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the Uniform Prudent Investor Act effective July 1, 1995.

45-7-608. Investment costs.

In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust and the skills of the trustee.

History: 1978 Comp., § 45-7-608, enacted by Laws 1995, ch. 210, § 89.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the Uniform Prudent Investor Act effective July 1, 1995.

45-7-609. Reviewing compliance.

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

History: 1978 Comp., § 45-7-609, enacted by Laws 1995, ch. 210, § 90.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the Uniform Prudent Investor Act effective July 1, 1995.

45-7-610. Delegation of investment and management functions.

A. A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill and caution in:

(1) selecting an agent;

(2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

B. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

C. A trustee who complies with the requirements of Subsection A of this section is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

D. By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

History: 1978 Comp., § 45-7-610, enacted by Laws 1995, ch. 210, § 91.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the Uniform Prudent Investor Act effective July 1, 1995.

45-7-611. Language invoking standard.

The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under the Uniform Prudent Investor Act [45-7-601 through 45-7-612 NMSA 1978]: "investments permissible by law for investment of trust funds", "legal investments", "authorized investments", "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital", "prudent man rule", "prudent trustee rule", "prudent person rule" and "prudent investor rule".

History: 1978 Comp., § 45-7-611, enacted by Laws 1995, ch. 210, § 92.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the Uniform Prudent Investor Act effective July 1, 1995.

45-7-612. Application to existing trusts.

The Uniform Prudent Investor Act [45-7-601 through 45-7-612 NMSA 1978] applies to trusts existing on and created after its effective date. As applied to trusts existing on its effective date, the Uniform Prudent Investor Act governs only decisions or actions occurring after that date.

History: 1978 Comp., § 45-7-612, enacted by Laws 1995, ch. 210, § 93.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 210, § 94 made the Uniform Prudent Investor Act effective July 1, 1995.

ARTICLE 8
Simultaneous Death Act

(Repealed and Recompiled by Laws 1993, ch. 174, §§ 65 and 84.)

45-8-1

45-8-1 to 45-8-8. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 174, § 84 repealed 45-8-1 to 45-8-8 NMSA 1978, as enacted by Laws 1959, ch. 172, §§ 1 to 8, the Simultaneous Death Act, effective July 1, 1993. For provisions of former sections, *see* the 1992 NMSA 1978 on *NMONESOURCE.COM*. For present similar provisions, *see* 45-1-201A(47), 45-2-104, and 45-2-702 NMSA 1978.

45-8-9. Recompiled.

ANNOTATIONS

Recompilations. — Laws 1993, ch. 174, § 65 recompiled former 45-8-9 NMSA 1978, as enacted by Laws 1973, ch. 276, § 8, relating to the validity and effect of wills executed by a wife prior to July 1, 1973, as 45-2-806 NMSA 1978, effective July 1, 1993. Laws 2011, ch. 124, § 33 recompiled former 45-2-806 NMSA 1978 as 45-2-808 NMSA 1978, effective January 1, 2012.

ARTICLE 9A
Uniform Estate Tax Apportionment Act

45-9A-1. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-1 NMSA 1978 as 45-3-920 NMSA 1978, effective January 1, 2012.

45-9A-2. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-2 NMSA 1978 as 45-3-921 NMSA 1978, effective January 1, 2012.

45-9A-3. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-3 NMSA 1978 as 45-3-922 NMSA 1978, effective January 1, 2012.

45-9A-4. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-4 NMSA 1978 as 45-3-923 NMSA 1978, effective January 1, 2012.

45-9A-5. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-5 NMSA 1978 as 45-3-924 NMSA 1978, effective January 1, 2012.

45-9A-6. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-6 NMSA 1978 as 45-3-925 NMSA 1978, effective January 1, 2012.

45-9A-7. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-7 NMSA 1978 as 45-3-926 NMSA 1978, effective January 1, 2012.

45-9A-8. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-8 NMSA 1978 as 45-3-927 NMSA 1978, effective January 1, 2012.

45-9A-9. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-9 NMSA 1978 as 45-3-928 NMSA 1978, effective January 1, 2012.

45-9A-10. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-10 NMSA 1978 as 45-3-929 NMSA 1978, effective January 1, 2012.

45-9A-11. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2011, ch. 124, § 99 recompiled former 45-9A-11 NMSA 1978 as 45-3-930 NMSA 1978, effective January 1, 2012.

45-9A-12. Repealed.

ANNOTATIONS

Repeals. — Laws 2011, ch. 124, § 97 repealed 45-9A-12 NMSA 1978, as enacted by Laws 2005, ch. 143, § 16, relating to uniformity of application and construction of the Uniform Estate Tax Apportionment Act, effective January 1, 2012. For provisions of former section, *see* the 2011 NMSA 1978 on *NMONESOURCE.COM*.

45-9A-13. Repealed.

ANNOTATIONS

Repeals. — Laws 2011, ch. 124, § 97 repealed 45-9A-13 NMSA 1978, as enacted by Laws 2005, ch. 143, § 17, relating to severability, effective January 1, 2012. For provisions of former section, *see* the 2011 NMSA 1978 on *NMONESOURCE.COM*.