

# Chapter 45

## Probate Code, Simultaneous Death Act

### Article 1

#### Probate Code-General Provisions

##### Part 1

##### Short Title, Construction And General Provisions

###### Sec.

- 45-1-101. Short title.
- 45-1-102. Rule of construction; purposes of act.
- 45-1-103. Supplementary general principles of law applicable.
- 45-1-104. Severability.
- 45-1-105. Construction against implied repeal, amendment or expansion.
- 45-1-106. Effect of fraud and evasion.
- 45-1-107. Evidence; proof of death or status.
- 45-1-108. Acts by holder of general power.
- 45-1-109. Security interests not affected.

##### Part 2

##### Definitions

- 45-1-201. General definitions.

##### Part 3

##### Scope, Jurisdictions and Courts

- 45-1-301. Application.
- 45-1-302. Subject matter jurisdiction of district and probate courts.
- 45-1-302.1. Concurrent jurisdiction.
- 45-1-303. Venue; multiple proceedings; transfer.
- 45-1-304. Civil practice.
- 45-1-305. Records and certified copies.
- 45-1-306. Jury trial.
- 45-1-307. Probate court; powers.
- 45-1-308. Appeals from district court.

- 45-1-309. Reserved.  
45-1-310. Oath or affirmation on filed documents.

#### Part 4

#### Notice, Parties And Representation In Estate Litigation And Other Matters

- 45-1-401. Notice; method and time of giving.  
45-1-402. Notice; waiver.  
45-1-403. Pleadings; when parties bound by others; notice.  
45-1-404. Real property outside county of administration; notice required; contents; effect.

#### Part 1

### **SHORT TITLE, CONSTRUCTION AND GENERAL PROVISIONS**

#### **§ 45-1-101. Short title.**

This act may be cited as the "Probate Code".

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

Cross-references. - As to estate taxes, see 7-7-1 to 7-7-12 NMSA 1978. As to disposition of unclaimed property, see Chapter 7, Article 8 NMSA 1978. As to probate courts, see 34-7-1 NMSA 1978 et seq. As to additional record or docket of decedents' estates, see 34-7-20 NMSA 1978. As to record of bonds and wills, see 34-7-21 NMSA 1978.

Meaning of "this act". - The term "this act", referred to in this section, refers to Laws 1975, ch. 257, which is compiled as 45-1-101 to 45-2-607, 45-2-609 to 45-3-718, 45-3-801 to 45-3-1204, 45-4-101 to 45-4-302 and 45-5-101 to 45-7-401 NMSA 1978.

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).

### **§ 45-1-102. Rule of construction; purposes of act.**

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

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

(1) to simplify and clarify 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 his property;

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

(4) to facilitate use and enforcement of certain trusts.

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

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

### **§ 45-1-103. Supplementary general principles of law applicable.**

The principles of law and equity supplement the 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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Supplemental award of attorney's fees. - An exception to the general rule that attorney's fees may not be awarded in the absence of a statute or rule of court, wherein an award is authorized for services rendered which confer a benefit upon the estate, supplements the Probate Code's provisions concerning an award of attorney's fees because the

doctrine is not specifically displaced by code provisions. Price v. Foster, 102 N.M. 707, 699 P.2d 638 (Ct. App. 1985).

### **§ 45-1-104. Severability.**

If any part or application of the Probate Code is held invalid, the remainder, or its application to other situations or persons, shall not be affected.

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

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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

The 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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

### **§ 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 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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Where 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).

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; 46 Am. Jur. 2d Judgments § 828; 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; proof of death or status.**

In proceedings under the Probate Code the rules of evidence in courts of general jurisdiction, including any rules relating to simultaneous deaths, are applicable unless specifically displaced by the code. In addition, the following rules relating to determination of death and status are applicable:

A. a certified or 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 proof of the fact, place, date and time of death and the identity of the decedent; or

B. a certified or authenticated copy of any record or report of a governmental agency,

domestic or foreign, that a person is missing, detained, dead or alive is prima facie proof of the status and of the dates, circumstances and places disclosed by the record or report; or

C. a person who has left his usual place of residence, and has not been seen or heard from, by his relatives or other persons reasonably expected to hear from him, for a continuous period of five years, shall be presumed to have died at the end of such period unless there is sufficient evidence for determining that death occurred earlier.

History: 1953 Comp., § 32A-1-107, enacted by Laws 1975, ch. 257, § 1-107.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22A Am. Jur. 2d Death §§ 462, 546, 551, 553; 29 Am. Jur. 2d Evidence §§ 241, 471; 30 Am. Jur. 2d Evidence §§ 975, 1009, 1113, 1114; 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; 45 C.J.S. Insurance §§ 1067, 1071; 46 C.J.S. Insurance § 1337.

### **§ 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 62 Am. Jur. 2d Powers of Appointment and Alienation §§ 1, 2, 11 et seq.

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 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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Creditors' Bills § 39.  
21 C.J.S. Creditors' Suits § 12.

### **Part 2**

#### **DEFINITIONS**

### **§ 45-1-201. General definitions.**

A. As used in the Probate Code and unless the context otherwise requires:

(1) "application" means a written request to the probate court for an order of informal probate or appointment under Sections 45-3-301 through 45-3-311 NMSA 1978;

(2) "beneficiary", as it relates to trust beneficiaries, 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 and, as it relates to a charitable trust, includes any person entitled to enforce the trust;

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

(4) "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 which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, demands or disputes regarding title of a decedent or incapacitated person or minor ward to specific assets alleged to be included in the estate;

(5) "conservator" means a person who is appointed by a court to manage the property or financial affairs or both of an incapacitated person or a minor ward;

(6) "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;

(7) "devisee" means any person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees;

(8) "distributee" means any person who has received property of a decedent from his 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 his 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 purposes of this subsection, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets;

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

(10) "general letters" means letters issued to a general personal representative;

(11) "fiduciary" includes personal representative, guardian, conservator or trustee;

(12) "foreign personal representative" means a personal representative of another jurisdiction;

(13) "formal proceeding" means one conducted before the district court with notice to interested persons;

(14) "general personal representative" includes an executor, administrator, successor personal representative and persons who perform substantially the same function under the law governing their status. The term does not include a special administrator;

(15) "guardian" means a person who has qualified to have the care, custody or control of the person of a minor or incapacitated person pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem;

(16) "heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent;

(17) "incapacitated person" is as defined in Section 45-5-101 NMSA 1978;

(18) "informal proceedings" means those conducted without notice to interested persons, except as provided for in Section 45-3-306 NMSA 1978, before the probate



court for probate of a will or appointment of a personal representative;

(19) "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, minor ward or incapacitated person which may be affected by the proceeding. It also includes personal representatives or, if not yet appointed, persons having priority for appointment as a personal representative and other fiduciaries representing interested persons. This definition does not apply to Sections 45-5-101 through 45-5-502 NMSA 1978;

(20) "issue" means all of a person's lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in the Probate Code;

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

(22) "limited guardian" is as defined in Section 45-5-101;

(23) "minor" means a person who has not reached the age of majority;

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

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

(26) "organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal entity;

(27) "parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under the 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;

(28) "person" includes an individual, a corporation, an organization or any other legal entity;

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

(30) "petition" means a written request to the district court for an order after notice;

(31) "property" includes both real and personal property or any interest therein and

means anything that may be the subject of ownership;

(32) "protected person" is as defined in Section 45-5-101 NMSA 1978;

(33) "protective proceeding" is as defined in Section 45-5-101 NMSA 1978;

(34) "security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, 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;

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

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

(37) "state" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico or any territory or possession subject to the legislative authority of the United States;

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

(39) "successors" means those persons, other than creditors, who are entitled to property of a decedent under his will or the Probate Code;

(40) "supervised administration" refers to the proceedings described in Sections 45-3-501 through 45-3-505 NMSA 1978;

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

(42) "trust" includes any express trust, private or charitable, with additions thereto, wherever and however created. It 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 it excludes resulting trusts, conservatorships, personal representatives, trust accounts, custodial arrangements including those created under the Uniform Gifts to Minors Act, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts and 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;

(43) "trustee" includes an original, additional or successor trustee, whether or not

appointed or confirmed by court;

(44) "ward" is as defined in Section 45-5-101 NMSA 1978;

(45) "will" includes codicil and a testamentary instrument which merely appoints an executor or revokes or revises another will, and excludes holographic wills; and

(46) "guardian ad litem" means a person appointed by the district court before litigation to represent and protect the interests of the minor or incapacitated person.

B. The definitions found in Subsection A of this section are made subject to additional definitions contained in subsequent articles which are applicable to specific articles.

History: 1953 Comp., § 32A-1-201, enacted by Laws 1975, ch. 257, § 1-201; 1983, ch. 194, § 1; 1989, ch. 252, § 2.

Cross-references. - For additional definition of "child," see 45-2-109 NMSA 1978.

The 1989 amendment, effective June 16, 1989, substituted "45-3-311" for "45-3-310" in Subsection A(1); in Subsection A(4) substituted "incapacitated person or minor ward" for "protected person" in the second sentence; substituted all of the present language of Subsection A(5) beginning with "property" for "estate of a protected person"; deleted former Subsection A(8), which read: "'disability' means cause for a protective order"; redesignated former Subsections A(9) through A(22) as present Subsections A(8) through A(21); in Subsection A(19) substituted "minor ward or incapacitated person" for "ward or protected person" in the first sentence and added the last sentence; added present Subsection A(22); and deleted "or during the course of" following "before" in Subsection A(46).

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Uniform Gifts to Minors Act. - The Uniform Gifts to Minors Act, referred to in Subsection A(42), was repealed by Laws 1989, ch. 357, § 26. For present comparable provisions, see the Uniform Transfers to Minors Act, 46-7-11 to 46-7-34 NMSA 1978.

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).

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 Probate Code. In re Estate of Hilton, 98 N.M. 420, 649 P.2d 488 (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 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.

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, JURISDICTIONS AND COURTS**

### **§ 45-1-301. Application.**

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

A. the affairs and estates of decedents, missing persons and protected persons, domiciled in New Mexico;

B. 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;

C. incapacitated persons and minors in New Mexico;

D. survivorship and related accounts in New Mexico; and

E. trusts subject to administration in New Mexico.

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

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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 § 280; 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; 44 C.J.S. Insane Persons §§ 10, 79, 154; 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; and

(4) trusts.

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 which 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.

Cross-references. - For jurisdiction and powers of probate courts, see N.M. Const., art. VI, § 23. For juries in probate courts, see Rule 1-048.

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).

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 §§ 32, 47, 104; 46 Am. Jur. 2d Judgments § 47.

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.

Rights to contest will or attack its validity, 28 A.L.R.2d 116.

Exclusiveness of jurisdiction of probate court under doctrine of custodia legis, precluding replevin or similar possessory action, 42 A.L.R.2d 451.

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 §§ 298 to 304; 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.

Cross-references. - For jurisdiction and powers of district courts, see N.M. Const., art. VI, § 13. As to jurisdiction and powers of probate court, see N.M. Const., art. VI, § 23.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 20 Am. Jur. 2d Courts § 106.  
30 C.J.S. Equity § 61.

### **§ 45-1-303. Venue; multiple proceedings; transfer.**

A. Subject to the provisions of Section 3-201 [45-3-201 NMSA 1978], where a proceeding under the 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, ward or trust are commenced in more than one court of New Mexico, the court 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, and if the ruling court determines that venue is properly in another court, 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, 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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Transfer of proceeding to another court rests within discretion of trial court. *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 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.

Cross-references. - For Rules of Civil Procedure in the District Courts, see Judicial Pamphlet 1.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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 clerks of the district court and of the probate court shall each keep a record for each decedent, ward, protected person or trust involved in any document which may be filed with their respective court under the Probate Code, including petitions and applications, demands for notices or bonds and any orders by the respective courts, and any responses relating thereto, and shall establish and maintain a system for indexing, filing or recording which is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law, the clerk must 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 must 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 must 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 his 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 such 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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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.

Cross-references. - For Rules of Civil Procedure in the District Courts, see Judicial Pamphlet 1.

Right to jury trial. - 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).

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

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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 20 Am. Jur. 2d Courts § 32; 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.

Cross-references. - For the Rules of Appellate Procedure, see Judicial Pamphlet 12.

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.  
5 C.J.S. Appeal and Error § 1456.

### **§ 45-1-309. Reserved.**

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 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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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.

Cross-references. - For service of summons and copy of complaint, see Paragraph E of Rule 1-004.

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 §§ 3, 4, 14; 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 him and filed in the proceeding, or by appearance in the proceeding.

History: 1953 Comp., § 32A-1-402, enacted by Laws 1975, ch. 257, § 1-402.

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

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

B. persons are bound by orders binding others in the following cases:

(1) orders 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, bind 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) orders binding a conservator bind the person whose estate he controls;

(b) orders binding a guardian bind the ward if no conservator of his estate has been

appointed;

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

(d) orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate. If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent his minor child;

(3) an unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding;

C. notice is required as follows:

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

(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;

D. 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 set out 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.

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.

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

## Sec.

- 45-2-101. Intestate estate.
- 45-2-102. Share of the spouse.
- 45-2-103. Share of heirs other than surviving spouse.
- 45-2-104. Requirement that heir survive decedent by one hundred twenty hours.
- 45-2-105. No taker.
- 45-2-106. Representation.
- 45-2-107. Kindred of half blood.
- 45-2-108. Afterborn children.
- 45-2-109. Meaning of child and related terms.
- 45-2-110. Advancements.
- 45-2-111. Debts to decedent.
- 45-2-112. Aliens.
- 45-2-113. Curtesy and dower abolished.

## Part 2

### Reserved

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

## Part 3

### Spouse And Children Unprovided For In Wills

- 45-2-301. Omitted spouse.
- 45-2-302. Pretermitted children.

## Part 4

### Allowances

- 45-2-401. Family allowance.
- 45-2-402. Personal property allowance.
- 45-2-403. Reserved.
- 45-2-404. Source, determination and documentation.
- 45-2-405. Modification of exemptions.

## Part 5

### Wills

- 45-2-501. Who may make a will.
- 45-2-502. Execution.
- 45-2-503. Reserved.
- 45-2-504. Self-proved will.
- 45-2-505. Who may witness.
- 45-2-506. Choice of law as to execution.
- 45-2-507. Revocation by writing or by act.
- 45-2-508. Revocation by divorce; no revocation by other changes of circumstances.
- 45-2-509. Revival of revoked will.
- 45-2-510. Incorporation by reference.
- 45-2-511. Testamentary additions to trusts.
- 45-2-512. Events of independent significance.
- 45-2-513. Separate writing identifying bequest of tangible property.

## Part 6

### Rules Of Construction

- 45-2-601. Requirement that devisee survive testator by one hundred twenty hours.
- 45-2-602. Reserved.
- 45-2-603. Rules of construction and intention.
- 45-2-604. Construction that will passes all property; after-acquired property.
- 45-2-605. Anti-lapse; deceased devisee; class gifts.
- 45-2-606. Failure of testamentary provision.
- 45-2-607. Change in securities; accessions; nonademption.
- 45-2-608. Nonademption of specific devises in certain cases; unpaid proceeds of sale; condemnation or insurance; sale by conservator.
- 45-2-609. Nonexoneration.
- 45-2-610. Exercise of power of appointment.
- 45-2-611. Construction of generic terms to accord with relationships as defined for intestate succession.
- 45-2-612. Ademption by satisfaction.

## Part 7

### Contractual Arrangements Relating To Death

- 45-2-701. Contracts concerning succession.

## Part 8

### General Provisions



- 45-2-801. Renunciation of succession.  
45-2-802. Effect of divorce, annulment and decree of separation.  
45-2-803. Effect of homicide on intestate succession, wills, joint assets, life insurance and beneficiary designations.  
45-2-804. Death of spouse; community property.

## Part 9

### Custody And Deposit Of Wills

- 45-2-901. Deposit of will with court in testator's lifetime.  
45-2-902. Duty of custodian of will; liability.

## Part 1

### INTESTATE SUCCESSION

#### **§ 45-2-101. Intestate estate.**

Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in Sections 2-101 through 2-113 [45-2-101 to 45-2-113 NMSA 1978] of the Probate Code.

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

Cross-references. - As to 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. As to partial intestacy, see 45-3-411 NMSA 1978.

Probate Code. - See 45-2-101 NMSA 1978 and notes thereto.

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.

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.

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

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.

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).

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).

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).

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. 296.

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. - Sons of deceased father do not obtain fee simple title to real estate by deed which is not legally delivered where it was not grantor's intention to divest himself of title during his lifetime. The sons own an undivided interest along with widow of decedent and six other children. *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).

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).

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.

26A C.J.S. Descent and Distribution §§ 48 to 60; 41 C.J.S. Husband and Wife §§ 105, 489; 42 C.J.S. Husband and Wife §§ 581 to 583.

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

The part of the intestate estate not passing to the surviving spouse under Section 45-2-102 NMSA 1978, or the entire intestate estate if there is no surviving spouse, passes as follows:

A. to the issue of the decedent; if they are all of the same degree of kinship to the decedent, they take equally, but if of unequal degree, then those of more remote degree take by representation;

B. if there is no surviving issue, to the decedent's parent or parents equally;

C. if there is no surviving issue or parent, to the issue of the parents or either of them by representation; and

D. if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree, those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there is no surviving grandparent or issue of grandparent on either the paternal or maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

History: 1953 Comp., § 32A-2-103, enacted by Laws 1975, ch. 257, § 2-103; 1977, ch. 121, § 3.

Compiler's notes. - This section includes within its scope some of the functions of former 29-1-10, 29-1-13 to 29-1-15, 1953 Comp.

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." *In re Vigil's Estate*, 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.). *In re Vigil's Estate*, 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 her 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. - The fiction that illegitimate children have no inheritable blood does not apply in New Mexico. An illegitimate child inherits from its mother as if lawfully begotten, may inherit from its mother's uncle having no other blood relatives, and the father and heirs of the father may inherit from the illegitimate child under certain circumstances. *State v. Chavez*, 42 N.M. 569, 82 P.2d 900 (1938).

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 that heir survive decedent by one hundred twenty hours.**

For purposes of family allowance, personal property allowance and intestate succession, any person who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent and the decedent's heirs are determined

accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by one hundred twenty hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state of New Mexico 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.

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 Sections 2-101 through 2-902 [45-2-101 to 45-2-902 NMSA 1978] of the Probate Code, the intestate estate passes to the state.

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

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

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

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. 173.

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. - 27 Am. Jur. 2d Escheat §§ 1, 2, 21, 24, 37, 38.

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.

Escheat of estate of illegitimate, 48 A.L.R.2d 778.

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 §§ 2 to 4.

## **§ 45-2-106. Representation.**

If representation is called for by the Probate Code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship, and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

History: 1953 Comp., § 32A-2-106, enacted by Laws 1975, ch. 257, § 2-106.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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.

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. Afterborn children.**

Children of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.

History: 1953 Comp., § 32A-2-108, enacted by Laws 1975, ch. 257, § 2-108.

Cross-references. - For definition of child, see 45-1-201A(3) NMSA 1978. As to intestate succession, see 45-2-109 NMSA 1978. For child omitted from will to take intestate share, see 45-2-302 NMSA 1978. For definition of child for testate succession, see 45-2-611 NMSA 1978.

Compiler's notes. - This section is similar to former 29-1-16, 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. - 23 Am. Jur. 2d Descent and Distribution §§ 94 to 96.

26A C.J.S. Descent and Distribution §§ 35, 45, 63.

### **§ 45-2-109. Meaning of child and related terms.**

If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through or from a person:

A. an adopted person is the child of an adopting parent and not of the natural parents, and in the event of the death of the adopted child, his estate shall pass as provided by law for natural born children of the same family, all to the exclusion of the natural parents of such child; provided, however, the adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural



parent; and

B. in cases not covered by Subsection A of this section, a person born out of wedlock is a child of the mother. That person is also a child of the father, if:

(1) the natural parents participated in a marriage ceremony before or after the birth of child, even though the attempted marriage is void;

(2) the reputed father has recognized the child in writing by an instrument signed by him, which shows upon its face that it was so signed with the intent of recognizing the child as an heir. In event of loss or destruction of such an instrument, declarations of deceased persons shall be admissible to prove such loss or destruction, as well as the existence and contents thereof, whether or not lost or destroyed, and the genuineness of such an instrument. Such declarations shall be corroborated by proof of general and notorious recognition of such child by the father; or

(3) the paternity is established by an adjudication before the death of the father or is established thereafter by a preponderance of the evidence. However, the paternity established under this paragraph is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child.

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

Cross-references. - For definition of child, see 45-1-201A(3) NMSA 1978. For purposes of testate succession, see 45-2-611 NMSA 1978.

Compiler's notes. - This section includes within its scope some of the functions of former 29-1-17 and 29-1-18, 1953 Comp.

Child born in wedlock presumed legitimate. - See *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), rev'd on other grounds, 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).

Clear meaning of section is that 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).

Thus, child adopted by stepfather may not inherit from paternal grandmother. - Where child was adopted by mother's husband (child's stepfather) after her 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). *In re Gossett's Estate*, 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. *Ex parte Wallace*, 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. - In New Mexico, the public policy is to treat adopted children the same as natural children. *Delaney v. First Nat'l Bank*, 73 N.M. 192, 386 P.2d 711 (1963).

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

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

## **§ 45-2-110. Advancements.**

If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against such heir's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For the purpose of this section, the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment provides otherwise.

History: 1953 Comp., § 32A-2-110, enacted by Laws 1975, ch. 257, § 2-110.

Cross-references. - For definition of heirs, see 45-1-201A(16) NMSA 1978. As to 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.  
26A C.J.S. Descent and Distribution §§ 91 to 115.

### **§ 45-2-111. Debts to decedent.**

A debt owed to the decedent is not charged against the intestate share of any person 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 issue.

History: 1953 Comp., § 32A-2-111, enacted by Laws 1975, ch. 257, § 2-111; 1977, ch. 121, § 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. - 26A C.J.S. Descent and Distribution § 71.

### **§ 45-2-112. Aliens.**

Aliens shall have full power and authority to acquire or hold real estate by deed, will, inheritance or otherwise, when the same may be acquired in good faith and in due form of law, and also to alienate, sell, assign and transfer the same to their heirs or other persons, whether such heirs or other persons are, or are not, citizens of the United States. When an alien having title or interest in any lands or estate dies, such lands or estate shall descend and vest in the same manner as if such alien were a citizen of the United States, and such circumstance shall not be an impediment to any person holding an interest in said estate, although not a citizen of the United States, for all said persons shall have the same rights and resources and shall, in all respects, be treated on the same footing as native citizens of the United States with respect to the personal estate of an alien dying intestate, and all persons interested in said estate, under the laws of this state, whether aliens or not.

History: 1953 Comp., § 32A-2-112, enacted by Laws 1975, ch. 257, § 2-112.

Cross-references. - For alien landownership, see N.M. Const., art. II, § 22.

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

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. 11 (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. 81-6.

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.

Declaratory judgment as to aliens, 19 A.L.R. 1137; 50 A.L.R. 42; 68 A.L.R. 110; 87 A.L.R. 1205; 114 A.L.R. 1361.

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.

### **§ 45-2-113. Curtesy and dower abolished.**

No estate is allowed the husband as tenant by curtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband.

History: 1953 Comp., § 32A-2-113, enacted by Laws 1975, ch. 257, § 2-113.

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, 38 to 43, 45, 46, 89.

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

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

### **Part 2**

## **RESERVED**

§§ 45-2-201 to 45-2-207. Reserved.

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. Omitted spouse.**

A. If a testator fails to provide by will for the surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional, or 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 statements of the testator or from the amount of the transfer or other evidence.

B. In satisfying a share provided by this section, the devises made by the will 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.

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. *In re Estate of 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. - This section is still applicable where a postmarriage will is procured as a result of the undue influence of a surviving spouse. 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).

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).

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. Pretermitted children.**

A. If a testator fails to name or provide in his will for any of his children born or adopted before or after the execution of his will, the omitted child or his issue receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

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

(2) when the will was executed, the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

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



B. 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 receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

C. In satisfying a share provided by this section, the devises made by the will abate as provided in Section 45-3-902 NMSA 1978.

History: 1953 Comp., § 32A-2-302, enacted by Laws 1975, ch. 257, § 2-302; 1977, ch. 121, § 6.

Cross-references. - For inheritance of afterborn children unprovided for in will, see 45-2-108 NMSA 1978. As to omitted spouse, see 45-2-301 NMSA 1978.

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

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).

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. *In re Gossett's Estate*, 46 N.M. 344, 129 P.2d 56 (1942).

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); *Price v. Johnson*, 78 N.M. 123, 428 P.2d 978 (1967), *aff'd sub nom. Price v. Atlantic Ref. Co.*, 79 N.M. 629, 447 P.2d 509 (1968).

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).

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).

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).

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).

Such as 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).

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 Probate Code. *In re Estate of Hilton*, 98 N.M. 420, 649 P.2d 488 (Ct. App. 1982).

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).

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).

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. *In re Will of Padilla*, 91 N.M. 160, 571 P.2d 817 (1977).

"It appears from the will," in Subdivision 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).

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).

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).

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), aff'd sub nom. Price v. Atlantic Ref. Co., 79 N.M. 629, 447 P.2d 509 (1968).

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).

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).

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 pretermittance 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.  
95 C.J.S. Wills § 317; 96 C.J.S. Wills §§ 1159, 1166.

#### **Part 4**

### **ALLOWANCES**

#### **§ 45-2-401. Family allowance.**

A. If the decedent was domiciled in New Mexico, the surviving spouse is entitled to a family allowance of ten thousand dollars (\$10,000). If there is no surviving spouse, each minor or dependent child is entitled to a similar allowance of ten thousand dollars (\$10,000) divided by the number of minor and dependent children of the decedent. The family allowance shall be exempt from and have priority over all claims against the estate.

B. The family allowance is in addition to any share passing to the surviving spouse or any minor or dependent children of the decedent either by intestate succession, or by the will of the decedent unless the will provides otherwise.

History: 1953 Comp., § 32-2-401, enacted by Laws 1975, ch. 257, § 2-401.

Cross-references. - For allowance of claims by court, after petition or proceedings, see 45-3-806C and D NMSA 1978.

Compiler's notes. - This section includes within its scope some of the functions of former 31-4-1, 1953 Comp.

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. - 97 C.J.S. Wills §§ 1262, 1287, 1280.

#### **§ 45-2-402. Personal property allowance.**

A. In addition to the family allowance, the surviving spouse of a decedent who was domiciled in New Mexico is entitled to receive from the estate personal property, not exceeding in value three thousand five hundred dollars (\$3,500) in excess of any security interest therein, in the form of household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, the minor or dependent children of decedent are entitled jointly to the same value.

B. If encumbered chattels are selected and the value in excess of security interests is

less than three thousand five hundred dollars (\$3,500) or if there is not sufficient property in the estate to make up the three thousand five hundred dollars (\$3,500) value, the surviving spouse or minor dependent children are entitled to other assets of the estate to the extent necessary to make up the three thousand five hundred dollars (\$3,500) value. Rights to specific property under the personal property allowance and assets required to make up any deficiency in the property shall have priority over all claims against the estate except that the right to any assets to make up a deficiency shall abate as necessary to permit prior payment of the family allowance.

C. The personal property allowance provided for in this section is in addition to any benefit or share passing to the surviving spouse or children by intestate succession, or by the will of the decedent unless the will provides otherwise.

History: 1953 Comp., § 32A-2-402, enacted by Laws 1975, ch. 257, § 2-402.

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.

### **§ 45-2-403. Reserved.**

Compiler's notes. - Laws 1975, ch. 257, § 2-403, contained this section number, but no accompanying text.

### **§ 45-2-404. Source, determination and documentation.**

A. If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to family allowance and personal property allowance. Subject to this restriction, the surviving spouse, guardians of minor children, or dependent children who are adults, may select property of the estate in satisfaction of such allowances. The personal representative may make these selections if the surviving spouse is unable or fails to do so within a reasonable time. 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. He may disburse funds of the estate in payment of the family allowance in lump sum or in periodic installments.

B. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment or failure to act under Subsection A of this section may petition the district court for appropriate relief from said action or proposed action.

History: 1953 Comp., § 32A-2-404, enacted by Laws 1975, ch. 257, § 2-404.

Cross-references. - For family allowance, see 45-2-401 NMSA 1978. As to personal property allowance, see 45-2-402 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 94 C.J.S. Wills § 167; 97 C.J.S. Wills §§ 1287, 1288.

## **§ 45-2-405. Modification of exemptions.**

With respect to the estate of a decedent, the allowances granted pursuant to Sections 2-401 and 2-402 [45-2-401 and 45-2-402 NMSA 1978] are in lieu of the exemptions provided in Sections 42-10-1 through 42-10-12 NMSA 1978.

History: 1953 Comp., § 32A-2-405, enacted by Laws 1975, ch. 257, § 2-405.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 96 C.J.S. Wills § 760; 97 C.J.S. Wills § 1262.

## **Part 5**

### **WILLS**

## **§ 45-2-501. Who may make a will.**

Any person who has reached the age of majority and is of sound mind may make a will.

History: 1953 Comp., § 32A-2-501, enacted by Laws 1975, ch. 257, § 2-501.

Cross-references. - As to age of majority, see 12-2-2 and 28-6-1 NMSA 1978.

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

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).

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).

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.

May parts of will be upheld notwithstanding failure of other parts for lack of testamentary capacity or undue influence, 69 A.L.R. 1129; 64 A.L.R.3d 261.

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.

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.

94 C.J.S. Wills § 150; 95 C.J.S. Wills § 462.

## **§ 45-2-502. Execution.**

Except for writings within Section 2-513 [45-2-513 NMSA 1978], and wills within Section 2-506 [45-2-506 NMSA 1978]:

A. every will shall be in writing, signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and attested in the presence of the testator by two or more credible witnesses; and

B. the witnesses to a will must be present, see the testator sign the will, or one sign it for him at his request as and for his last will and testament, and must sign as witnesses in his presence and in the presence of each other.

History: 1953 Comp., § 32A-2-502, enacted by Laws 1975, ch. 257, § 2-502.

Cross-references. - For who may witness, see 45-2-505 NMSA 1978. For general rule of competency of witnesses, see Rule 11-601.

Compiler's notes. - This section is similar to former 30-1-4, 1953 Comp.

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).

But 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. Perea v. Barela, 5 N.M. 458, 23 P. 766 (1890), aff'd sub nom. Garcia 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, aff'd, 44 N.M. 578, 106 P.2d 847 (1940).

Revocability during lifetime, intent that disposition effective after death, 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 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).

And must indicate to witnesses that instrument signed is his will. - The requirement of publication necessitates that the testator indicate to the witnesses, at the time of their subscribing, that the instrument signed is his will. In order to satisfy this provision, however, no particular form of publication is required. Mills v. Kelly, 99 N.M. 482, 660 P.2d 124 (Ct. App. 1983).



But one 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).

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).

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. Harvey*," 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.

94 C.J.S. Wills §§ 152, 177, 182, 183.

### **§ 45-2-503. Reserved.**

Compiler's notes. - Laws 1975, ch. 257, § 2-503, contained this section number, but no accompanying text.

**§ 45-2-504. Self-proved will.**

An attested will may, at the time of its execution, or at any subsequent date, be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each before an officer authorized to administer oaths under the laws of this state, or under the laws of the state where execution occurs, and evidenced by the officer's certificate, under official seal, attached or annexed to the will in form and content substantially as follows:

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

"STATE OF NEW MEXICO  
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 his last will and that he signed willingly, or 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 saw the testator sign or another sign for him at his direction and, in the presence of the testator and in the presence of each other, signed the will as witness and that to the best of his knowledge the testator had reached the age of majority, was of sound mind and was 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 ..... day of  
.....

.....  
(SEAL)  
(Signed)  
.....

.....  
(Official capacity of officer)."

History: 1953 Comp., § 32A-2-504, enacted by Laws 1975, ch. 257, § 2-504.

Cross-references. - As to age of majority, see 12-2-2 and 28-6-1 NMSA 1978.

Compiler's notes. - This section is similar to former 30-2-8.2, 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. - 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.

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. Any person generally competent to be a witness may act as a witness to a will.

B. A will or any provision thereof is not invalid because the will is signed by an interested witness.

History: 1953 Comp., § 32A-2-505, enacted by Laws 1975, ch. 257, § 2-505.

Compiler's notes. - This section is different from former 30-1-5, 1953 Comp., relating to disqualifications of witnesses.

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).

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 2-502 [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 the testator is domiciled at the time of execution or at the time of death.

History: 1953 Comp., § 32A-2-506, enacted by Laws 1975, ch. 257, § 2-506.

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 will or any part thereof is revoked by:

A. an instrument in writing, executed and attested in the same manner as is required by law for the execution and attestation of a will, by which instrument the maker distinctly refers to the will and declares that he revokes it;

B. a subsequent will which revokes the prior will or part thereof, expressly or by inconsistency; or

C. being burned, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

History: 1953 Comp., § 32A-2-507, enacted by Laws 1975, ch. 257, § 2-507.

Cross-references. - For execution of will, see 45-2-502 NMSA 1978. As to contracts concerning succession, see 45-2-701 NMSA 1978.

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.

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).

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).

A 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); *In re Estate of Teopfer*, 12 N.M. 372, 78 P. 53 (1904).

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).

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).

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 deemed from the operation of the will. *Gregg v. Gardner*, 73 N.M. 347, 388 P.2d 68 (1963).

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).

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).

Declaration of 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).

Mere intention not sufficient. - 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).

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).

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).

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 operate 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).

Where 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).

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).

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).

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).

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.

95 C.J.S. Wills §§ 271, 274, 296, 297.

## **§ 45-2-508. Revocation by divorce; no revocation by other changes of circumstances.**

A. If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power or appointment on the former spouse, and any nomination of the former spouse as personal

representative, trustee, conservator or guardian, unless the will expressly provides otherwise.

B. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent.

C. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse.

D. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of Subsection B of Section 2-802 [45-2-802 NMSA 1978]. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.

E. No change of circumstances other than as described in this section revokes a will.

History: 1953 Comp., § 32A-2-508, enacted by Laws 1975, ch. 257, § 2-508.

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.**



If a person having made a will, makes a subsequent will, revoking the prior will, and afterwards revokes the subsequent will, the prior will is not thereby made valid, unless the validity of the prior will is acknowledged in writing.

History: 1953 Comp., § 32A-2-509, enacted by Laws 1975, ch. 257, § 2-509.

Cross-references. - For revocation by writing or act, see 45-2-507 NMSA 1978.

Compiler's notes. - This section is similar to former 30-1-9, 1953 Comp.

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).

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.**

Any 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.

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 trusts.**

The validity of testamentary additions to trusts shall be governed by the provisions of Sections 46-5-1 through 46-5-3 NMSA 1978.

History: 1953 Comp., § 32A-2-511, enacted by Laws 1975, ch. 257, § 2-511.

### **§ 45-2-512. Events of independent significance.**

A will may dispose of property by reference to acts and events which 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 a will of another person is such an event.

History: 1953 Comp., § 32A-2-512, enacted by Laws 1975, ch. 257, § 2-512.

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 divorce, see 45-2-508 NMSA 1978.

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 bequest of tangible 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, evidences of indebtedness, documents of title and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him 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 which has no significance apart from its effect upon the dispositions made by the will.

History: 1953 Comp., § 32A-2-513, enacted by Laws 1975, ch. 257, § 2-513.

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).

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.

## **Part 6**

### **RULES OF CONSTRUCTION**

#### **§ 45-2-601. Requirement that devisee survive testator by one hundred twenty hours.**

A devisee who does not survive the testator by one hundred twenty hours is treated as if he predeceased the testator, unless the will of decedent contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will.

History: 1953 Comp., § 32A-2-601, enacted by Laws 1975, ch. 257, § 2-601; 1976 (S.S.), ch. 37, § 3.

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.

#### **§ 45-2-602. Reserved.**

Compiler's notes. - Laws 1975, ch. 257, § 2-602, contained this section number, but no accompanying text.

#### **§ 45-2-603. Rules of construction and intention.**

The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in Sections 2-604 through 2-612 [45-2-604 to 45-2-612 NMSA 1978] apply unless a contrary intention is indicated by the will.

History: 1953 Comp., § 32A-2-603, enacted by Laws 1975, ch. 257, § 2-603.

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).

Will as a whole to be considered. - 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. Haney*, 97 N.M. 771, 643 P.2d 857 (1982).

Duty of court to ascertain testator's desire. - The court's foremost duty in a proceeding contesting a personal representative's denial of a claim against an estate is to ascertain the desire of the testator, as he has expressed it, and to carry it to fulfillment, unless prohibited by public policy or general rules of law. *Shadden v. Shadden*, 93 N.M. 274, 599 P.2d 1071 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).

But 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 not allowed where words in will not disputed. - Where there is no dispute as to what words are written in the will, it is a fundamental principle that the 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).

When technical rules or canons of construction used. - Technical rules or canons of construction should be resorted to only if the language of the will is ambiguous or

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. *In re Will of Williams*, 71 N.M. 39, 376 P.2d 3 (1962).

Where presumption of undue influence imposed. - 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. But 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. *In re Will of McDowell*, 81 N.M. 562, 469 P.2d 711 (1970).

Wills must be construed in harmony with public policy, here, 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).

Declared intention to make will does not revoke existing one. *In re Will of Williams*, 71 N.M. 39, 376 P.2d 3 (1962).

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

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. - 80 Am. Jur. 2d Wills §§ 1128, 1140.

Admissibility of extrinsic evidence upon issue of testamentary intent, 21 A.L.R.2d 319.

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.

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.  
95 C.J.S. Wills §§ 587, 672.

### **§ 45-2-604. Construction that will passes all property; after-acquired property.**

Subject to the provisions of Section 2-101 [45-2-101 NMSA 1978], a will is construed to pass all property which the testator owns at his death including property acquired after the execution of the will.

History: 1953 Comp., § 32A-2-604, enacted by Laws 1975, ch. 257, § 2-604.

Cross-references. - For definition of property, see 45-1-201A(31) NMSA 1978.

Where estate of surviving widow 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 widow, even where she had remarried and was also beneficiary of predeceased second husband's estate. In re Will of McDowell, 81 N.M. 562, 469 P.2d 711 (1970) (decided under former law).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 80 Am. Jur. 2d Wills §§ 1357, 1358. Extent of rights of surviving spouse who elects to take against will in profits of or increase in value of estate accruing after testator's death, 7 A.L.R.4th 989. 95 C.J.S. Wills § 615; 96 C.J.S. Wills §§ 756, 821.

### **§ 45-2-605. Anti-lapse; deceased devisee; class gifts.**

If a devisee, who is related to the testator by kinship, is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by one hundred twenty hours take in place of the deceased devisee, and if they are all of the same degree of kinship

to the devisee, they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

History: 1953 Comp., § 32A-2-605, enacted by Laws 1975, ch. 257, § 2-605; 1976 (S.S.), ch. 37, § 4.

Cross-references. - For construction of generic terms to accord with relationships as defined for intestate succession, see 45-2-611 NMSA 1978.

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).

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.

## **§ 45-2-606. Failure of testamentary provision.**

A. Except as provided in Section 2-605 [45-2-605 NMSA 1978], if a devise other than a residuary devise fails for any reason, it becomes a part of the residue.

B. Except as provided in Section 2-605, if the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.

History: 1953 Comp., § 32A-2-606, enacted by Laws 1975, ch. 257, § 2-606.

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.

### **§ 45-2-607. Change in securities; accessions; nonademption.**

A. If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

(1) as much of the devised securities as is a part of the estate at time of the testator's death;

(2) any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity and directly affecting the specifically devised securities excluding any acquired by exercise of purchase options;

(3) securities of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity; and

(4) any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company.

B. Distributions prior to death with respect to a specifically devised security not provided for in Subsection A of this section are not part of the specific devise.

History: 1953 Comp., § 32A-2-607, enacted by Laws 1975, ch. 257, § 2-607.

Cross-references. - For distribution in kind, see 45-3-906 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 80 Am. Jur. 2d Wills §§ 1701, 1716.  
96 C.J.S. Wills §§ 756, 1172.

### **§ 45-2-608. Nonademption of specific devises in certain cases; unpaid proceeds of sale; condemnation or insurance; sale by conservator.**

A. A specified devisee has the right to the remaining specifically devised property and:

(1) any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at 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 the property;

(4) property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation; and

(5) any rights of redemption in specifically devised property taken from a testator by a creditor.

B. If specifically devised property is sold by a conservator, or if a condemnation award or insurance proceeds are paid to a conservator as a result of condemnation, fire or casualty, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the condemnation award or the insurance proceeds. This subsection does not apply if, subsequent to the sale, condemnation or casualty, it is adjudicated that the disability of the testator has ceased. The right of the specific devisee, under this subsection is reduced by any right he has under Subsection A of this section.

History: 1953 Comp., § 32A-2-608, enacted by Laws 1976 (S.S.), ch. 37, § 5.

Cross-references. - As to sale of specifically devised or bequeathed property to pay proportionate amount of estate taxes, see 7-7-11 NMSA 1978. As to ademption by satisfaction, see 45-2-612 NMSA 1978. As to distribution in kind, see 45-3-906 NMSA 1978.

Repeals and reenactments. - Laws 1976 (S.S.), ch. 37, § 5, repeals 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 enacts the above 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. - 80 Am. Jur. 2d Wills §§ 1701, 1703, 1707, 1710, 1714.

Property purchased with proceeds of sale of subject of devise or bequest as passing thereunder, 3 A.L.R. 1497.

Ademption of bequest of debt or balance on debt, 25 A.L.R.4th 88.  
96 C.J.S. Wills § 1172.

## **§ 45-2-609. Nonexoneration.**

A specific devise passes subject to any mortgage, pledge, lien or other security 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-2-609, enacted by Laws 1975, ch. 257, § 2-609.

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.

### **§ 45-2-610. Exercise of power of appointment.**

A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other written indication of intention to include the property subject to the power.

History: 1953 Comp., § 32A-2-610, enacted by Laws 1975, ch. 257, § 2-610.

Cross-references. - For rules of construction and intention, see 45-2-603 NMSA 1978.

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. - Disposition of all or residue of testator's property, without referring to power of appointment, as constituting sufficient manifestation of intention to exercise power, in absence of statute, 15 A.L.R.3d 346.

Marriage of testator or birth of testator's child as revoking will previously made in exercise of power of appointment, 92 A.L.R.3d 1244.

Sufficiency of exercise of power specifying that it can be exercised only by specific or direct reference thereto, 15 A.L.R.4th 810.

Validity of testamentary exercise of power of appointment by donee sane when will was executed but insane thereafter, 19 A.L.R.4th 1002.

72 C.J.S. Powers § 40.

### **§ 45-2-611. Construction of generic terms to accord with relationships as defined for intestate succession.**

Halfbloods, adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining

relationships for purposes of intestate succession. However, a person born out of wedlock is not treated as the child of the father unless the person qualifies as a child of the father pursuant to Subsection B of Section 2-109 [45-2-109 NMSA 1978].

History: 1953 Comp., § 32A-2-611, enacted by Laws 1975, ch. 257, § 2-611.

Cross-references. - For rights of halfblood to intestate succession, see 45-2-107 NMSA 1978. As to afterborn children, see 45-2-108 NMSA 1978. For effect of adoption, see 45-2-109A NMSA 1978. For anti-lapse of class gift, see 45-2-605 NMSA 1978.

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. - 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.

Right of illegitimate to take under testamentary gift to "heirs," 27 A.L.R.2d 1232.

Testamentary gift to class or group of specified relationship as including those of half blood, 49 A.L.R.2d 1362.

When is a gift by will one to a class, 61 A.L.R.2d 212.

Adopted child as within class in testamentary gift, 86 A.L.R.2d 12.

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.

Adoption as precluding testamentary gift under natural relative's will, 71 A.L.R.4th 374. 95 C.J.S. Wills § 643.

## **§ 45-2-612. Ademption by satisfaction.**

A. Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part only if the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction.

B. For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

History: 1953 Comp., § 32A-2-612, enacted by Laws 1975, ch. 257, § 2-612.

Cross-references. - For rules of construction and intention, see 45-2-603 NMSA 1978. For nonademption of specific devises, see 45-2-607, 45-2-608 NMSA 1978.

Definition of ademption by satisfaction. - Ademption by satisfaction is the reduction or payment of a general legacy by actions of the testator subsequent to the will, by paying

money or transferring property to the legatee or for the benefit of the legatee with the intent that the benefit conferred shall be applied on or substituted for the legacy. In re Will of Williams, 71 N.M. 39, 376 P.2d 3 (1962).

Scope of doctrine. - The doctrine of ademption by satisfaction applies only to the ademption of a bequest or legacy of personal property, by a gift made by testator during his life, to such legatee, as a satisfaction of such legacy. If it is shown that testator intended that such gift should satisfy the legacy, or if such intention is presumed from the relationship of the parties, the legacy is adeemed. In re Will of Williams, 71 N.M. 39, 376 P.2d 3 (1962).

Intent of doctrine. - The doctrine of ademption by satisfaction is intended primarily to give effect to the intention of the testator, and not to secure the interests of other beneficiaries as against the wishes of the testator. In re Will of Williams, 71 N.M. 39, 376 P.2d 3 (1962).

Payment to third person immaterial. - It is immaterial for an ademption by satisfaction that the payment be made to some third person, as in this case, the spouses and children of the nieces and nephews. In re Will of Williams, 71 N.M. 39, 376 P.2d 3 (1962).

Where error in striking evidence of intent to adeem satisfaction. - Trial court erred in striking unimpeached and uncontradicted evidence tending to show the intention of the testator to adeem satisfaction. In re Will of Williams, 71 N.M. 39, 376 P.2d 3 (1962).

Admissibility of parol evidence. - Parol evidence is admissible to rebut presumptions, whether in favor of ademption or against ademption. It is not admissible to contradict the intention of testator as manifest upon the face of the will. If the will shows testator's intention as to future payments, extrinsic evidence is admissible to show that testator had changed his intention. In re Will of Williams, 71 N.M. 39, 376 P.2d 3 (1962).

Testator's intention when giving determines whether gifts constitute ademption. - Whether or not the gifts constituted an ademption of the legacy depends upon the testator's intention at the time the gifts were made. In re Will of Williams, 71 N.M. 39, 376 P.2d 3 (1962).

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 §§ 1721, 1724, 1728, 1732.  
96 C.J.S. Wills § 1178.

## **Part 7**

### **CONTRACTUAL ARRANGEMENTS RELATING TO DEATH**

## **§ 45-2-701. 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 the Probate Code, can 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; or
- (3) a writing signed by the decedent evidencing the contract.

B. The execution of a joint will or contemporaneously executed wills does not create a presumption of a contract not to revoke the will or wills, unless otherwise expressed in both the joint will or the contemporaneously executed wills.

History: 1953 Comp., § 32A-2-701, enacted by Laws 1975, ch. 257, § 2-701.

Effective date of the Probate Code. - The phrase "effective date of the Probate Code", referred to in Subsection A, means July 1, 1976, the effective date of Laws 1975, ch. 257.

Section creates mini-statute of frauds for contracts to make wills and adds a writing requirement to the common-law rule that a contract to make a will must be clearly established and be certain and unambiguous in its terms. In re Estate of Vincioni, 102 N.M. 576, 698 P.2d 446 (Ct. App. 1985).

Essential terms may be in more than one document. - The essential terms of a contract to make a will may be contained in more than one document. In re Estate of Vincioni, 102 N.M. 576, 698 P.2d 446 (Ct. App. 1985).

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).

Acceptance of benefits binds survivor. - 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).

Effect of forbearing assertion of unenforceable claim believed valid. - An agreement to forbear assertion of a claim honestly believed to be valid would constitute consideration for agreement to devise even if in fact plaintiff had no enforceable claim, provided the

position was taken in good faith. Aragon v. Boyd, 80 N.M. 14, 450 P.2d 614 (1969) (decided under former law).

Validity of promise to transfer house in exchange for work. - Evidence that plaintiff gave of her 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 his letter to plaintiff that the will that he had shown her 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) (decided under former law).

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.

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.

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.

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.

94 C.J.S. Wills § 111.

## **Part 8**

### **GENERAL PROVISIONS**

#### **§ 45-2-801. Renunciation of succession.**

A. A person or his personal representative who is an heir, devisee, person succeeding to a renounced interest, beneficiary under a testamentary instrument or person designated to take pursuant to a power of appointment exercised by a testamentary instrument may renounce in whole or in part the succession to any property or interest therein, including but not limited to specific powers of invasion, powers of appointment and fee estates in favor of life estates, by filing a written instrument within the time and the place as provided in this section. The instrument shall:

- (1) describe the power, property or part thereof or interest therein renounced;
- (2) be signed by the person renouncing; and
- (3) declare the renunciation and the extent thereof.

B. The writing specified in Subsection A of this section must be filed within nine months after the death of the decedent or the donee of the power or, if the taker of the property is not then finally ascertained, not later than nine months after the event by which the taker or the interest is finally ascertained. The writing must be filed in the court of the county where proceedings concerning the decedent's estate are pending, or in the district court of the county where they would be pending if commenced, and a copy of the writing also shall be delivered in person to the personal representative of the decedent.

C. Unless the decedent or donee of the power has otherwise indicated by his will, the interest renounced, and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest renounced, passes as if the person renouncing had predeceased the decedent, or, if the person renouncing is one designated to take pursuant to a power of appointment exercised by a testamentary instrument, as if the person renouncing had predeceased the donee of the power. In every case, the renunciation relates back for all purposes to the date of death of the decedent or the donee, as the case may be.

D. Any of the following made before the expiration of the period in which a person is permitted to renounce bars the right to renounce as to the property:

(1) assignment, conveyance, encumbrance, pledge or transfer of property therein or any contract therefor;

(2) written waiver of the right to renounce or any acceptance of property by an heir, devisee, person succeeding to a renounced interest, beneficiary or person designated to take pursuant to a power of appointment exercised by testamentary instrument; or

(3) sale or other disposition of property pursuant to judicial process.

E. The right to renounce granted by this section exists irrespective of any limitation on the interest of the person renouncing in the nature of a spendthrift provision or similar restriction.

F. This section does not abridge the right of any person to assign, convey, release or renounce any property arising under any other section of the Probate Code or other statute.

G. Any interest in property which exists on the effective date of this section but which has not then become indefeasibly fixed both in quality and quantity, or the taker of which has not then become finally ascertained, may be renounced after the effective date of this section as provided herein. An interest which has arisen prior to the effective date of this section in any person other than the person renouncing is not destroyed or diminished by any action of the person renouncing taken under this section.



History: 1953 Comp., § 32A-2-801, enacted by Laws 1975, ch. 257, § 2-801; 1979, ch. 149, § 1; 1983, ch. 194, § 3.

Cross-references. - For court power to renounce protected person's interests, see 45-5-408C, D NMSA 1978.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 12, 133.

Creditor's right to prevent debtor's renunciation of benefit under will or debtor's election to take under will, 39 A.L.R.4th 633.

96 C.J.S. Wills §§ 1148, 1150, 1151.

## **§ 45-2-802. Effect of divorce, annulment and decree of separation.**

A. A person 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 which does not terminate the status of husband and wife is not a divorce for purposes of this section.

B. For purposes of Sections 2-101 through 2-404 [45-2-101 to 45-2-404 NMSA 1978], and of Section 3-203 [45-3-203 NMSA 1978], a surviving spouse does not include:

(1) a person who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, and the decree or judgment is not recognized as valid in New Mexico, unless:

(a) they subsequently participate in a marriage ceremony purporting to marry each to the other; or

(b) they are living together as man and wife at the time of decedent's death;

(2) a person who, following a decree or judgment of divorce or annulment obtained by the decedent, which decree or judgment is not recognized as valid in New Mexico, participates in a marriage ceremony with a third person; or

(3) a person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

History: 1953 Comp., § 32A-2-802, enacted by Laws 1975, ch. 257, § 2-802.

Cross-references. - For annulment of prohibited marriages, restrictions, see 40-1-9 NMSA 1978. As to extent of alteration of legal relations by separation decree, see 40-2-

8 NMSA 1978. As to failure to divide property on divorce, property unaffected, subsequent division, see 40-4-20 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 15, 24.

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, joint assets, life insurance and beneficiary designations.**

A. A surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under Sections 2-101 through 2-902 [45-2-101 to 45-2-902 NMSA 1978], and the estate of decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

B. Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies in real and personal property, joint accounts in banks, savings and loan associations, credit unions and other institutions and any other form of coownership with survivorship incidents.

C. A named beneficiary of a bond, life insurance policy or other contractual arrangement who feloniously and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent.

D. Any other acquisition of property or interest by the killer shall be treated in accordance with the principles of this section.

E. A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this section. In the absence of a conviction of felonious and intentional killing, the court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this section.

F. This section does not affect the rights of any person who, before rights under this section have been adjudicated, purchases from the killer for value and without notice property which the killer would have acquired except for this section, but the killer is liable for the amount of the proceeds or the value of the property. Any insurance company, bank or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a possible claim under this section signed by a person interested in the estate.

History: 1953 Comp., § 32A-2-803, enacted by Laws 1975, ch. 257, § 2-803.

Cross-references. - For murderer not to profit from wrongdoing, see 30-2-9 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 13.

Homicide as precluding taking under will or by intestacy, 25 A.L.R.4th 787.

26A C.J.S. Descent and Distribution § 47; 46 C.J.S. Insurance § 1190; 48A C.J.S. Joint Tenancy §§ 3, 17; 94 C.J.S. Wills § 104.

#### **§ 45-2-804. 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.

Cross-references. - As to status of missing persons, see 45-1-107B NMSA 1978. As to death presumed by absence, see 45-1-107C NMSA 1978. As to intestate survivorship requirements, see 45-2-104 NMSA 1978. For testate requirements, see 45-2-601, 45-2-605 NMSA 1978.

Compiler's notes. - This section includes within its scope some of the functions of former 29-1-8 and 29-1-9, 1953 Comp.

The 1984 amendments referred to in Subsection C are those effected by Laws 1984, ch. 122, § 2 which added the exception at the end of Subsection A and added Subsection C. Those amendments are effective March 6, 1984.

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).

Where 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.), *cert. denied*, 364 U.S. 816, 81 S. Ct. 46, 5 L. Ed. 2d 47 (1960).

Purpose of Subsection B, 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).

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).

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 \$100.00 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. There was no substitution of a new party plaintiff who was not in existence at time of trial since widow remained plaintiff and, as to her community property interest, might be a proper party, although not the real party, in interest. *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.), 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.

## **Part 9**

### **CUSTODY AND DEPOSIT OF WILLS**

#### **§ 45-2-901. 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, under rules of such 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: 1953 Comp., § 32A-2-901, enacted by Laws 1975, ch. 257, § 2-901.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 79 Am. Jur. 2d Wills § 5.  
95 C.J.S. Wills § 305.

## **§ 45-2-902. 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 such will to a person able to secure its probate and if none is known, to an appropriate court.

B. If any person having the custody of a will fails to produce such 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 which 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: 1953 Comp., § 32A-2-902, enacted by Laws 1975, ch. 257, § 2-902.

Compiler's notes. - This section is similar to former 30-2-1, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 79 Am. Jur. 2d Wills § 832.  
95 C.J.S. Wills § 306.

## **Article 3**

### **Probate of Wills and Administration**

#### Part 1

##### General Provisions

##### Sec.

- 45-3-101. Devolution of estate at death; administration on deaths of husband and wife.
- 45-3-102. Necessity of order of probate for will.
- 45-3-103. Necessity of appointment for administration.
- 45-3-104. Claims against decedent; necessity of administration.
- 45-3-105. Proceedings affecting devolution and administration.
- 45-3-105.1. Repealed.
- 45-3-106. Proceedings before district court; service; jurisdiction over persons.
- 45-3-107. Scope of proceedings; proceedings independent; exception.
- 45-3-108. Probate, testacy and appointment proceedings; ultimate time limit.
- 45-3-109. Statutes of limitation on decedent's claim for relief.

#### 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.
- 45-3-202. Appointment or testacy proceedings; conflicting claim of domicile in another state.
- 45-3-203. Priority among persons seeking appointment as personal representative.
- 45-3-204. Demand for notice of order or filing concerning decedent's estate.

### Part 3

#### Informal Probate and Appointment Proceedings

- 45-3-301. Informal probate or appointment proceedings; application; contents.
- 45-3-302. Informal probate; duty of court; effect of informal probate.
- 45-3-303. Informal probate; proof and findings required.
- 45-3-304. Reserved.
- 45-3-305. Informal probate; court not satisfied.
- 45-3-306. Informal probate; notice requirements.
- 45-3-307. Informal appointment proceedings; delay in order; duty of court; effect of appointment.
- 45-3-308. Informal appointment proceedings; proof and findings required.
- 45-3-309. Informal appointment proceedings; court not satisfied.
- 45-3-310. Informal appointment proceedings; notice requirements.
- 45-3-311. Informal appointment unavailable in certain cases.

### Part 4

#### Formal Testacy and Appointment Proceedings

- 45-3-401. Formal testacy proceedings; nature; when commenced.
- 45-3-402. Formal testacy or appointment proceedings; petition; contents.
- 45-3-403. Formal testacy proceeding; notice of hearing on petition.
- 45-3-404. Formal testacy proceedings; written objections to probate.
- 45-3-405. Formal testacy proceedings; uncontested cases; hearings and proof.
- 45-3-406. Formal testacy proceedings; contested cases; testimony of attesting witnesses.
- 45-3-407. Formal testacy proceedings; burdens in contested cases.
- 45-3-408. Formal testacy proceedings; will construction; effect of final order in another jurisdiction.
- 45-3-409. Formal testacy proceedings; order; foreign will.
- 45-3-410. Formal testacy proceedings; probate of more than one instrument.
- 45-3-411. Formal testacy proceedings; partial intestacy.
- 45-3-412. Formal testacy proceedings; effect of order; vacation.

- 45-3-413. Formal testacy proceedings; vacation of order for other cause.
- 45-3-414. Formal proceedings concerning appointment of personal representative.

## Part 5

### Supervised Administration

- 45-3-501. Supervised administration; nature of proceeding.
- 45-3-502. Supervised administration; petition; order.
- 45-3-503. Supervised administration; effect on other proceedings.
- 45-3-504. Supervised administration; powers of personal representative.
- 45-3-505. Supervised administration; interim orders; distribution and closing orders.

## Part 6

### Personal Representative; Appointment, Control and Termination of Authority

- 45-3-601. Qualification.
- 45-3-602. Acceptance of appointment; consent to jurisdiction.
- 45-3-603. Bond requirements.
- 45-3-604. Bond amount; security; procedure; reduction.
- 45-3-605. Demand for bond by interested person.
- 45-3-606. Terms and conditions of bonds.
- 45-3-607. Order restraining personal representative.
- 45-3-608. Termination of appointment; general.
- 45-3-609. Termination of appointment; death or disability.
- 45-3-610. Termination of appointment; voluntary.
- 45-3-611. Termination of appointment by removal; cause; procedure.
- 45-3-612. Termination of appointment; change of testacy status.
- 45-3-613. Successor personal representative.
- 45-3-614. Special administrator; appointment.
- 45-3-615. Special administrator; who may be appointed.
- 45-3-616. Special administrator; appointed informally; powers and duties.
- 45-3-617. Special administrator; formal proceedings; powers and duties.
- 45-3-618. Termination of appointment; special administrator.

## Part 7

### Duties and Powers of Personal Representatives

- 45-3-701. Time of accrual of duties and powers.
- 45-3-702. Priority among different letters.
- 45-3-703. General duties; relation and liability to persons interested in estate;



standing to sue.

- 45-3-704. Personal representative to proceed without court order; exception.
- 45-3-705. Duty of personal representative; notice to heirs and devisees.
- 45-3-706. Duty of personal representative; inventory and appraisement.
- 45-3-707. Reserved.
- 45-3-708. Duty of personal representative; supplementary inventory.
- 45-3-709. Duty of personal representative; possession of estate.
- 45-3-710. Power to avoid transfers.
- 45-3-711. Powers of personal representatives; in general.
- 45-3-712. Improper exercise of power; breach of fiduciary duty.
- 45-3-713. Sale, encumbrance or transaction involving conflict of interest; voidable; exceptions.
- 45-3-714. Persons dealing with personal representative; protection.
- 45-3-715. Transactions authorized for personal representatives; exceptions.
- 45-3-716. Powers and duties of successor personal representative.
- 45-3-717. Co-representatives; when joint action required.
- 45-3-718. Powers of surviving personal representative.
- 45-3-719. Compensation for personal representatives.
- 45-3-720. Compensation for attorneys for personal representatives.

## Part 8

### Creditors' Claims

- 45-3-801. Notice to creditors.
- 45-3-802. Statutes of limitations.
- 45-3-803. Limitations on presentation of claims.
- 45-3-804. Manner of presentation of claims.
- 45-3-805. Classification of claims.
- 45-3-806. Allowance of claims.
- 45-3-807. Payment of claims.
- 45-3-808. Individual liability of personal representative.
- 45-3-809. Secured claims.
- 45-3-810. Claims not due and contingent or unliquidated claims.
- 45-3-811. Counterclaims.
- 45-3-812. Execution and levies prohibited.
- 45-3-813. Compromise of claims.
- 45-3-814. Encumbered assets.
- 45-3-815. Administration in more than one state; duty of personal representative.
- 45-3-816. Final distribution to domiciliary representative.

## Part 9

### Special Provisions Relating to Distribution

- 45-3-901. Successors' rights if no administration.
- 45-3-902. Distribution; order in which assets appropriated; abatement.
- 45-3-903. Successor's indebtedness offset against interest; defenses.
- 45-3-904. Interest on general pecuniary devise.
- 45-3-905. Reserved.
- 45-3-906. Distribution in kind; valuation; method.
- 45-3-907. Distribution in kind; evidence.
- 45-3-908. Distribution; right or title of distributee.
- 45-3-909. Improper distribution; liability of distributee.
- 45-3-910. Purchasers from distributees protected.
- 45-3-911. Partition for purpose of distribution.
- 45-3-912. Private agreements among successors to decedent binding on personal representative.
- 45-3-913. Distributions to trustee.
- 45-3-914. Disposition of unclaimed assets.
- 45-3-915. Distribution to person under disability.
- 45-3-916. Apportionment of estate taxes.

## Part 10

### Closing Estates

- 45-3-1001. Formal proceedings terminating administration; testate or intestate; order of general protection.
- 45-3-1002. Formal proceedings terminating testate administration; order construing will without adjudicating testacy.
- 45-3-1003. Closing estates; by sworn statement of personal representative.
- 45-3-1004. Liability of distributees to claimants.
- 45-3-1005. Limitations on proceedings against personal representative.
- 45-3-1006. Limitations on actions and proceedings against distributees.
- 45-3-1007. Certificate discharging liens securing fiduciary performance.
- 45-3-1008. Subsequent administration.

## Part 11

### Compromise of Controversies

- 45-3-1101. Effect of approval of agreements involving trusts, inalienable interests or interests of third persons.
- 45-3-1102. Procedure for securing court approval of compromise.

## Part 12

## Collection of Personal Property by Affidavit and Summary Administration Procedure for Small Estates

- 45-3-1201. Collection of personal property by affidavit.
- 45-3-1202. Effect of affidavit.
- 45-3-1203. Small estates; summary administrative procedure.
- 45-3-1204. Small estates; closing by sworn statement of personal representative.
- 45-3-1205. Small estates; transfer of title to homestead to surviving spouse by affidavit.
- 45-3-1206. Effect of affidavit.

### Part 13

#### Payment of Earnings, etc., to Surviving Spouse

- 45-3-1301. Collection of employee's final payment without administration.
- 45-3-1302. Affidavit showing death of employee; payment.

### 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 his property are subject to the restrictions and limitations contained in Sections 3-101 through 3-1204 [45-3-101 to 45-3-1204 NMSA 1978] to facilitate the prompt settlement of estates.

B. Upon the death of a person, his separate property and his share of community property devolves:

(1) to the persons to whom the property is devised by his last will;

(2) to those indicated as substitutes for them in cases involving lapse, renunciation or other circumstances pursuant to Sections 2-508 and 2-601 through 2-803 [45-2-508, 45-2-601 to 45-2-803 NMSA 1978] affecting the devolution of testate estates; or

(3) in the absence of testamentary disposition, to his heirs or to those indicated as substitutes for them in cases involving renunciation or other circumstances pursuant to Sections 2-301 through 2-405 [45-2-301 to 45-2-405 NMSA 1978] affecting the devolution of intestate estates.

C. The devolution of separate property and 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 Sections 3-101 through 3-1204 [45-3-101 to 45-3-1204 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.

Cross-references. - For notice to creditors, see 45-3-801 NMSA 1978. As to statutes of limitations, see 45-3-802 NMSA 1978. As to distribution to person under disability, see 45-3-915 NMSA 1978.

Comparison of probate and English testamentary proceedings. - Proceedings for (now informal) probate of a will are in rem, comparable to proceedings to prove testaments in the "common form" under the practice of English Ecclesiastical Courts, which proceeded ex parte and without notice to interested persons. *de Baca v. Baca*, 73 N.M. 387, 388 P.2d 392 (1964).

Status of equitable interest in real estate resulting from sale. - In equity a contract for sale of real estate results in the purchaser acquiring an equitable interest in the land which he may devise by will and in case of intestacy the same passes to his heirs and not to his administrator. *Gregg v. Gardner*, 73 N.M. 347, 388 P.2d 68 (1963).

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).

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; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 1, 34.

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.

42 C.J.S. Husband and Wife § 559; 94 C.J.S. Wills § 3.

## **§ 45-3-102. Necessity of order of probate for will.**

Except as provided in Section 3-1201 [45-3-1201 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. However, a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if no court proceeding concerning the succession or administration of the estate has occurred, and either the devisee or his successors and assigns possessed the property devised in accordance with the provisions of the will, or the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.

History: 1953 Comp., § 32A-3-102, enacted by Laws 1975, ch. 257, § 3-102.

Cross-references. - For execution and formalities of attested wills, see 45-2-502 NMSA 1978. As to self-proved wills, see 45-2-504 NMSA 1978.

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 to 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.

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.

Compiler's notes. - This section is similar to former 31-1-2, 1953 Comp.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 35.

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 to 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.

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. As to 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 35.

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 to 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.

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. As to protective proceedings, see 45-5-406 NMSA 1978. As to bond for conservator, see 45-5-416 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 35.

21 C.J.S. Courts §§ 305, 306, 487.

### **§ 45-3-105.1. Repealed.**

Repeals. - Laws 1978, ch. 159, § 15, repeals 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. For provisions of former section, see 1978 Original Pamphlet.

### **§ 45-3-106. Proceedings before district court; service; jurisdiction over persons.**

In proceedings before the district court where notice is required by the Probate Code or by rule, 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 1-401 [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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 36, 139.

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 §§ 305, 487.

### **§ 45-3-107. Scope of proceedings; proceedings independent; exception.**

Unless supervised administration as described in Sections 3-501 through 3-505 [45-3-501 to 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 to 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 40, 44.

21 C.J.S. Courts § 305.

### **§ 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 prior to 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; and

(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.

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. In cases under Paragraphs (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 Probate Code which relate to the date of death.

History: 1953 Comp., § 32A-3-108, enacted by Laws 1975, ch. 257, § 3-108.

Cross-references. - For waiver and suspension of statute of limitations, see 45-3-802 NMSA 1978.

Compiler's notes. - This section includes within its scope some of the functions of former 31-8-3, 31-8-4, 1953 Comp.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 38, 51, 54, 144, 146.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 39.

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.

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.

Compiler's notes. - This section is similar to former 31-1-3, 31-5-1, 1953 Comp.

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 under liability insurance policy constitutes an asset of a decedent's estate. *Miller v. Stiff*, 62 N.M. 383, 310 P.2d 1039 (1957).

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 (now 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. *In re Estate of Owens*, 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. In re Estate of Reilly, 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 \$8,000.00 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; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 37, 154, 156.  
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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 41, 154.

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 can 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 exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the court, on petition of creditors, may appoint any qualified person;
- (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 his age of majority and who might be entitled to letters but for his age, may nominate a qualified person to act as personal representative and thereby confer his relative priority for appointment on his nominee. Any person who has reached his age of majority may renounce his right to nominate or to an appointment by appropriate writing filed with the court. When two or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them, or in applying for appointment.

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 or ward 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 must 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.

Cross-references. - For priority for appointment as a special administrator, see 45-3-615 NMSA 1978. As to appointment of administrator on application of revenue division of

department of taxation and revenue, see 7-7-9 NMSA 1978. As to age of majority, see 12-2-2, 28-6-1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31 Am. Jur. 2d Executors and Administrators §§ 162 to 194; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 42, 47, 48, 51, 55, 154, 161.

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.

Public administrator, power to contest appointment of administrator, 56 A.L.R.2d 1191.

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.

Cross-references. - As to method of giving notice, see 45-1-401A NMSA 1978. For waiver of notice, see 45-1-402 NMSA 1978. For notice to represented interests, see 45-1-403 NMSA 1978. As to informal probate, see 45-3-306 NMSA 1978. As to formal testacy proceedings, see 45-3-403 NMSA 1978. As to 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.

Compiler's notes. - This section is similar to former 31-5-2, 1953 Comp.

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. In re Will of Hickok, 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; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 43, 46, 47, 52, 84, 220.

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.

Cross-references. - For notice requirements, see 45-3-204, 45-3-306 NMSA 1978. For oath that statements are true, see 45-3-303A(2) NMSA 1978. As to 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; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 45, 50, 51.

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.

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) [(19)] 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.

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.

Compiler's notes. - The reference in Subsection A(3) of this section seemingly should be to Paragraph (19), and not Paragraph (2), of Subsection A of 45-1-201 NMSA 1978.

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.**

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.

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.**

The applicant must give notice as described by Section 1-401 [45-1-401 NMSA 1978] of his application for informal probate to any person demanding it pursuant to Section 3-204 [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.

History: 1953 Comp., § 32A-3-306, enacted by Laws 1975, ch. 257, § 3-306.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 44, 48, 154.

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) [(19)] 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.

Compiler's notes. - The reference in Subsection A(3) of this section seemingly should be to Paragraph (19), and not Paragraph (20), of Subsection A of 45-1-201 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 47, 48, 154, 220.

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 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 48.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 46.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 47, 48.  
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.

Cross-references. - As to right to jury trial in formal testacy proceeding, see 45-1-306 NMSA 1978.

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).

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; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 49, 61, 66, 98. Probate of will or proceedings subsequent thereto as affecting right to probate later codicil or will, and rights and remedies of parties thereunder, 107 A.L.R. 249; 157 A.L.R. 1351.

Estoppel to offer for probate or to claim under will because of prior claim based upon deceased's alleged intestacy or another purported will, 135 A.L.R. 1222.

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 § 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.

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; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 49, 50.

Establishment of will lost before testator's death, 34 A.L.R. 1304.

Action for damages for destruction or spoliation of a will, 65 A.L.R. 1119.

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.

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 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 whereabouts 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.

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; Am. Jur. 2d New Topic Service, Uniform Probate Code § 52. 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.

Cross-references. - For general provisions concerning fraud, see 45-1-106 NMSA 1978. As to fraud in closing statement, see 45-3-1005 NMSA 1978.

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; Am. Jur. 2d New Topic Service, Uniform Probate Code § 53.

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.

Right to contest will or attack its validity, 28 A.L.R.2d 116.

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.

What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary, 49 A.L.R.2d 198.

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. 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.

Cross-references. - As to 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; Am. Jur. 2d New Topic Service, Uniform Probate Code § 53. 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.

Cross-references. - As to general provisions concerning fraud, see 45-1-106 NMSA 1978.

Compiler's notes. - This section includes within its scope some of the functions of former 30-2-9, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 80 Am. Jur. 2d Wills § 1008; Am. Jur. 2d New Topic Service, Uniform Probate Code § 53.

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 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.

Time of interlineations and changes appearing on face of will, testimony of attesting witnesses as to, 34 A.L.R.2d 662.

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.

What constitutes contest or attempt to defeat will within provision thereof forfeiting share of contesting beneficiary, 49 A.L.R.2d 198.

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, 69 A.L.R.3d 261.

Liability in damages for interference with expected inheritance or gift, 22 A.L.R.4th 1229.

95 C.J.S. Wills §§ 384, 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.

Cross-references. - As to proof of death or status, see 45-1-107 NMSA 1978. As to proof of self-proved and preproved 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 45-5-502 NMSA 1978.

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 by contestant. - 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 giving rise to 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).

And 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).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 80 Am. Jur. 2d Wills §§ 952, 953; Am. Jur. 2d New Topic Service, Uniform Probate Code § 53.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 57, 154.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 79 Am. Jur. 2d Wills § 842; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 53, 54, 56, 144.  
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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 79 Am. Jur. 2d Wills §§ 824, 842; Am. Jur. 2d New Topic Service, Uniform Probate Code § 56.  
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.

Cross-references. - As to 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; Am. Jur. 2d New Topic Service, Uniform Probate Code § 54.

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 3-413 [45-3-413 NMSA 1978], a formal testacy order under Sections 3-409 through 3-411 [45-3-409 to 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 its existence at the time of the earlier proceeding or were unaware of 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 unaware of their relationship to the decedent, were unaware of his death or were given no notice of any proceeding concerning his estate, except by publication;

(3) a petition for vacation under either Paragraphs (1) or (2) of this subsection must 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 3-108 [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;

(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 3-403 [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.

Rule not inconsistent with section. - The provisions of Rule 60(b)(1), N.M.R. Civ. P. (now 1-060B(1)), 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).

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; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 56, 144. 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.

History: 1953 Comp., § 32A-3-413, enacted by Laws 1975, ch. 257, § 3-413.

Rules of procedure. - The Rules Governing Appeals to the Supreme Court and Court of Appeals and Original Proceedings in the Supreme Court, referred to in this section, were recompiled in 1986 and now appear as the Rules of Appellate Procedure in Judicial Pamphlet 12.

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; Am. Jur. 2d New Topic Service, Uniform Probate Code § 56. 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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 49, 51, 55.  
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 to 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.

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; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 58, 62. 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.

Cross-references. - For definition of interested person, see 45-1-201A(19) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 51, 59, 60.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 61.

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 Probate Code [45-1-101 to 45-7-401 NMSA 1978], 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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Cross-references. - As to general fiduciary duties of personal representative, see 45-3-703 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 62, 78.  
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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 62, 63, 140.  
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.

Cross-references. - For bond requirements, see 45-3-603 NMSA 1978.

Compiler's notes. - This section includes within its scope some of the functions of former 31-1-17, 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 such was waived by the testator. *Amberson v. Candler*, 17 N.M. 455, 130 P. 255 (1913) (decided under former law).

Where oath subsequent to grant of letters. - Where letters of administration are granted to an executrix conditioned 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; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 55, 64, 65.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 65, 141, 154, 161, 183.

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.

Compiler's notes. - This section includes within its scope some of the functions of former 31-1-18, 1953 Comp.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 51, 68, 69, 207.  
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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 68 to 70.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 51, 68, 69.

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 to 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 71.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 66, 97, 145.

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 to 45-3-612 NMSA 1978]. Termination ends the right and power pertaining to the office of personal representative as conferred by the Probate Code [45-1-101 to 45-7-401 NMSA 1978] 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.

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. A cause of action for conversion, breach of fiduciary duty and right of replevin does not arise until the time of the representative's 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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 44, 94, 96, 99, 102.  
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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 96, 99.

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.

Compiler's notes. - This section includes within its scope some of the functions of former 31-1-29, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 48, 94, 95, 141.

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.

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); *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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 55, 97, 154.

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.

Compromise of claim due estate as ground of removal of executor or administrator, 72 A.L.R.2d 222.

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.

Compiler's notes. - This section is similar to former 31-1-25, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 48, 54, 98.

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 to 45-3-311 NMSA 1978] and 3-401 through 3-414 [45-3-401 to 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 67.

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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 48, 54, 99, 101, 185.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 100.

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 Probate Code [45-1-101 to 45-7-401 NMSA 1978] necessary to perform his duties.

History: 1953 Comp., § 32A-3-616, enacted by Laws 1975, ch. 257, § 3-616.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 101.

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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 101.

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 to 45-3-611 NMSA 1978].

History: 1953 Comp., § 32A-3-618, enacted by Laws 1975, ch. 257, § 3-618.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 102, 185.

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.

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; Am. Jur. 2d New Topic Service, Uniform Probate Code § 73.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 74.

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 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 Probate Code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by the Probate Code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

B. A personal representative shall 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 is authority 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, is authority 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 his appointment or fitness to continue; or
- (4) a supervised administration proceeding.

D. Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse, any minor and dependent children and any pretermitted child of the decedent.

E. Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in New Mexico at his death has the same standing to sue and be sued in the courts of New Mexico and the courts of any other jurisdiction as his decedent had immediately prior to death.

History: 1953 Comp., § 32A-3-703, enacted by Laws 1975, ch. 257, § 3-703.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 44, 80, 81, 127, 141.

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 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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 83.

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 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.

D. 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 82.

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.

Compiler's notes. - This section is similar to former 31-3-2, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 84.

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. Reserved.**

Compiler's notes. - Laws 1975, ch. 257, § 3-707, contained this section number, but no accompanying text.

### **§ 45-3-708. Duty of personal representative; supplementary inventory.**

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 appraisal showing the estimated value as of the date of the decedent's death of the new item or the revised estimated value or descriptions, and file it with the district court, and furnish copies thereof to interested persons who requested copies of the original inventory.

History: 1953 Comp., § 32A-3-708, enacted by Laws 1975, ch. 257, § 3-708.

Compiler's notes. - This section is similar to former 31-3-6, 1953 Comp.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 86.

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.

Cross-references. - As to recovery of probate estate for estate taxes, see 45-3-916D, G, H NMSA 1978. As to recovery of nontestamentary transfers at death, see 45-6-201 NMSA 1978.

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. A cause of action for conversion, breach of fiduciary duty and right of replevin does not arise until the time of the representative's 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. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 87.

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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 90.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 88.

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.

Cause of action arises upon termination of appointment. - 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. 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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 79.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 76 Am. Jur. 2d Trusts § 317; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 77, 79, 88.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 78, 79, 88.

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 3-902 [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) 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;

(5) 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;

(6) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, raze existing or erect new party walls or buildings;

(7) subdivide, develop or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; or adjust differences in valuation on exchange or partition by giving or receiving considerations; or dedicate easements to public use without consideration;

(8) 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;

(9) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(10) 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;

(11) vote stocks or other securities in person or by general or limited proxy;

(12) pay calls, assessments and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims;

(13) 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;

(14) insure the assets of the estate against damage, loss and liability and himself against liability as to third persons;

(15) 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;

(16) 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 thereof in satisfaction of the indebtedness secured by lien;

(17) pay taxes, assessments, compensation of the personal representative and other expenses incident to the administration of the estate;

(18) sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprise;

(19) allocate items of income or expense to either estate income or principal, as permitted or provided by law;

(20) 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;

(21) 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;

(22) sell, transfer, exchange or otherwise dispose of the estate or any interest therein 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;

(23) 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;

(24) incorporate any business or venture in which the decedent was engaged at the time of his death;

(25) provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate; and

(26) satisfy and settle claims and distribute the estate as provided in the Probate Code.

B. The powers granted in Subsection A of this section are given subject to those limitations contained in other sections of the Probate Code.

History: 1953 Comp., § 32A-3-715, enacted by Laws 1975, ch. 257, § 3-715.

Cross-references. - As to power to sell to pay estate taxes, see 7-7-11 NMSA 1978.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 89.

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 easement implied from power to sell, 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, unmaturing 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 67.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 75.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 76.

34 C.J.S. Executors and Administrators § 1047.

### **§ 45-3-719. Compensation for personal representatives.**

Unless otherwise ordered by the court, a personal representative shall be entitled to a compensation of not more than ten percent on the first three thousand dollars (\$3,000) and of not more than five percent on all amounts in excess of the first three thousand dollars (\$3,000) upon property at its estimated value which shall come into his possession in his capacity as personal representative. However, if the property consists of the proceeds of life insurance policies, or cash, including checking accounts, time deposits, certificates of deposit, savings accounts, postal savings certificates and all United States government bonds, then the personal representative's compensation shall not exceed five percent of the first five thousand dollars (\$5,000) and not exceed one percent on all amounts in excess of the first five thousand dollars (\$5,000). No



compensation or commission shall be paid on account of any real property, except such amount as may be allowed by the court upon proper cause being shown.

History: 1953 Comp., § 32A-3-719, enacted by Laws 1976 (S.S.), ch. 37, § 10.

Compiler's notes. - This section is similar to former 31-10-1, 1953 Comp.

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. 4671.

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. In re Hildebrand's Estate, 57 N.M. 778, 264 P.2d 674 (1953).

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. In re Hildebrand's Estate, 57 N.M. 778, 264 P.2d 674 (1953).

Amount allowed executrix proper where statutory allowance. - 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 Agrl. College v. Lavenson, 55 N.M. 583, 237 P.2d 925 (1951).

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).

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).

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).

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).

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. In *re Hildebrand's Estate*, 57 N.M. 778, 264 P.2d 674 (1953).

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. In *re Will of Hoxsey*, 67 N.M. 77, 352 P.2d 652 (1960).

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. In *re Hildebrand's Estate*, 57 N.M. 778, 264 P.2d 674 (1953).

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. In *re Will of Hoxsey*, 67 N.M. 77, 352 P.2d 652 (1960).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 91.

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. Compensation for attorneys for personal representatives.**

Attorneys for personal representatives of decedents' estates shall be allowed out of such estates, as fees for representing such personal representatives in the conducting

of ordinary probate proceedings, the same amounts as are fixed by Section 45-3-719 NMSA 1978 as compensation for personal representatives for their own services, unless the attorneys' fees are otherwise fixed by the court upon showing proper cause.

History: 1953 Comp., § 32A-3-720, enacted by Laws 1976 (S.S.), ch. 37, § 11.

Compiler's notes. - This section is similar to former 31-10-4, 1953 Comp.

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).

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. *In re Will of Hoxsey*, 67 N.M. 77, 352 P.2d 652 (1960).

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. *In re Winston's Will*, 40 N.M. 348, 59 P.2d 904 (1936).

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).

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. *In re Winston's Will*, 40 N.M. 348, 59 P.2d 904 (1936).

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. *In re Hildebrand's Estate*, 57 N.M. 778, 264 P.2d 674 (1953).

However, they 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. *In re Keel's Estate*, 37 N.M. 569, 25 P.2d 806 (1933).

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. In re Will of Hoxsey, 67 N.M. 77, 352 P.2d 652 (1960).

But no fee thereafter. - An attorney for an estate is not entitled to an allowance for work performed after discharge. In re Will of Hoxsey, 67 N.M. 77, 352 P.2d 652 (1960).

Trial court may set attorneys' fees. - The trial court may, with due regard for the circumstances of the particular case, set the attorneys' fees. In re Will of Hoxsey, 67 N.M. 77, 352 P.2d 652 (1960).

Which will be disturbed only if abuse of discretion shown. - The discretion of the trial court in fixing attorneys' fees in 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. In re Hildebrand's Estate, 57 N.M. 778, 264 P.2d 674 (1953).

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).

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 71.

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.

## **Part 8**

### **CREDITORS' CLAIMS**

#### **§ 45-3-801. Notice to creditors.**

Unless notice has already been given under this section, a personal representative, within a reasonable time after his appointment, shall publish a notice once a week for two successive weeks in a newspaper of general circulation in the county announcing his appointment and address; 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.

History: 1953 Comp., § 32A-3-801, enacted by Laws 1975, ch. 257, § 3-801.

Cross-references. - For publication of notice of litigation in the district courts, see 14-11-10 NMSA 1978.

Compiler's notes. - The United States supreme court has declared partially unconstitutional a provision of the Uniform Probate Code, as adopted in Oklahoma, which is virtually identical to this section. In *Tulsa Professional Collection Servs., Inc. v. Pope*, U.S. , 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), the court held violative of the due process clause a provision of the Oklahoma statute which, like this section, provided that newly appointed personal representatives were required to give notice by newspaper publication that all creditors were required to file claims against the estate within two months or the claims would be forever barred. According to the court, actual notice, as by mail service, is an inexpensive and efficient mechanism which is not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31 Am. Jur. 2d Executors and Administrators § 596 et seq.; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 103, 104, 141.

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, may waive any defense of limitations available to the estate. If the defense is not waived, no claim which was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid. The running of any statute of limitations measured from some event other than death and advertisement for claims against a decedent is suspended during the four months following the decedent's death but resumes thereafter as to claims not barred by other sections of the Probate Code.

B. For purposes of any statute of limitations, the proper presentation of a claim under Section 3-804 [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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 109.

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 which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort or other legal basis, if not barred earlier by other statutes of limitations, are barred against the estate, the personal representative and the heirs and devisees of the decedent, unless presented as follows:

(1) within two months after the date of the first publication of notice to creditors if notice is given in compliance with Section 3-801 [45-3-801 NMSA 1978], except that claims barred by the nonclaim statute at the decedent's domicile, before the first publication for claims in this state, are also barred in this state; or

(2) within three years after the decedent's death, if notice to creditors has not been published.

B. All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, 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; and

(2) any other claim, within four months after it arises.

C. Nothing in this section affects or prevents:

(1) any proceeding to enforce any mortgage, pledge or other lien upon property of the estate; or

(2) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance.

History: 1953 Comp., § 32A-3-803, enacted by Laws 1975, ch. 257, § 3-803.

Compiler's notes. - This section includes within its scope some of the functions of former 31-8-3, 1953 Comp.

Constitutionality of former section limiting actions. - Contention that former 31-8-3, 1953 Comp., violated N.M. Const., art. IV, § 16, due to its failure to state notice of hearing requirement in title of statute was without merit since title to legislative enactment need only give notice of subject matter of legislation. In re Estate of Welch, 80 N.M. 448, 457 P.2d 380 (1969).

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. In re Landers' Estate, 34 N.M. 431, 283 P. 49 (1929).

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).

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. Ross v. Lewis, 23 N.M. 524, 169 P. 468 (1917).

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. Such 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 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 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 Subsection C2, "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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 110, 113, 154.

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.

Time for filing claim based on promise not to make a will, 32 A.L.R.2d 380.

Claim of government or subdivision thereof as within provision of nonclaim statute, 34 A.L.R.2d 1003.

Necessity of compliance with nonclaim statute before bringing suit in replevin against personal representative, 42 A.L.R.2d 443.

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.

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).

Subsection C of this section is consistent and harmonious with 45-3-806A 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).

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).

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 109, 111 to 113.

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, compensation of personal representatives and of attorneys;

(2) reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation for professional medical services of persons attending him;

(3) reasonable funeral expenses;

(4) debts and taxes with preference under federal law;

(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.

Compiler's notes. - This section includes within its scope some of the functions of former 31-8-10, 31-8-11, 1953 Comp.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 119.

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 reintering 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.

Duties of public administrator as to payment of claims, 56 A.L.R.2d 1201.

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 3-804 [45-3-804 NMSA 1978] within the time limit prescribed in Section 3-803 [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 which 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. 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 or claims 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.

C. 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.

D. 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.

Compiler's notes. - This section includes within its scope some of the functions of former 31-8-5, 1953 Comp.

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).

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).

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).

Section 45-3-804C NMSA 1978 is consistent and harmonious with Subsection A of this section, if the extension authorized by 45-3-804C 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) 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).

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 his estate, obviates the necessity to present a claim to the executor or administrator. *Romero v. Hopewell*, 28 N.M. 259, 210 P. 231 (1922).

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).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 113, 114, 115, 117.

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.

34 C.J.S. Executors and Administrators § 426.

### **§ 45-3-807. Payment of claims.**

A. Upon the expiration of two months from the date of the first publication of the notice to creditors, 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 which have not yet been allowed or whose allowance has been appealed, and for unbarred claims which 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 as provided herein may secure an order directing the personal representative to pay the claim to the extent that funds of the estate are available for the payment.

B. The personal representative at any time may pay any just claim which 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 such payment if:

(1) the 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) the payment was made, due to the negligence or willful act of the personal representative, in such manner as to deprive the injured claimant of his priority.

History: 1953 Comp., § 32A-3-807, enacted by Laws 1975, ch. 257, § 3-807.

Cross-references. - For classification of claims, see 45-3-805 NMSA 1978. For allowance of claims, see 45-3-806 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 118, 143.

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.

Cross-references. - For liability for failure to pay or secure payment of estate taxes before distribution or delivery, see 7-7-12 NMSA 1978.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 122.

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.

Cross-references. - For compromise of claim, see 45-3-813 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 120.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 121.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 116.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 107.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 105.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 106.

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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 108, 154.

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 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.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 136, 154.

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 administration [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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31 Am. Jur. 2d Executors and Administrators § 1012 et. seq.; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 123, 128.

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 devisees;
- (3) general devisees; and
- (4) specific devisees.

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 2-804 [45-2-804 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.

Cross-references. - As to sale of specifically devised or bequeathed property to pay proportionate amount of estate taxes, see 7-7-11 NMSA 1978.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 89, 129.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 130.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 131.

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.**

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 2-402 [45-2-402 NMSA 1978] shall receive the items selected;

(2) any family allowance, personal property allowance or devise payable in money may be satisfied by value 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 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.

B. For the purpose of valuation under 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 which 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 124.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 125, 128.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 126.  
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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 127.  
34 C.J.S. Executors and Administrators §§ 502, 504, 510.

### **§ 45-3-910. Purchasers from distributees protected.**

If property distributed in kind or a security interest therein is acquired for value by a purchaser, or lender, from a distributee who has received an instrument or deed of distribution from the personal representative, such purchaser or lender takes title free of any claims of the estate and incurs no personal liability to the estate, whether or not the distribution was proper. To be protected under this section, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind.

History: 1953 Comp., § 32A-3-910, enacted by Laws 1975, ch. 257, § 3-910.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 127, 128.  
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.

Where the 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).

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).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 132.

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.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 132, 133.

Validity of agreement between beneficiaries as affected by provision for post-mortem payment or performance, 1 A.L.R.2d 1270.

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. 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 he apprehends that distribution might jeopardize the interests of persons who are not able to protect themselves, and he may withhold distribution until the court has acted.

B. No inference of negligence on the part of the personal representative shall be drawn from his failure to exercise the authority conferred by Subsection A of this section.

History: 1953 Comp., § 32A-3-913, enacted by Laws 1975, ch. 257, § 3-913.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 134.

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 Disposition of Unclaimed



Property Act, Sections 7-8-1 through 7-8-34 NMSA 1978 [now the Uniform Unclaimed Property Act, Chapter 7, Article 8 NMSA 1978].

History: 1953 Comp., § 32A-3-914, enacted by Laws 1975, ch. 257, § 3-914.

Escheat to state under former law. - In the event of 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. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 138.

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.

Escheat of estate of illegitimate, 48 A.L.R.2d 778.

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 § 3.

### **§ 45-3-915. Distribution to person under disability.**

A personal representative may discharge his obligation to distribute to any minor or person under disability by distributing to his conservator or any other person authorized by the Probate Code or otherwise to give a valid receipt and discharge for the distribution.

History: 1953 Comp., § 32A-3-915, enacted by Laws 1975, ch. 257, § 3-915.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 135.

34 C.J.S. Executors and Administrators § 497.

### **§ 45-3-916. Apportionment of estate taxes.**

A. For purposes of this section:

(1) "estate" means the gross estate of a decedent as determined for the purpose of federal estate tax and any death taxes payable to New Mexico;

(2) "person" means any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency or local governmental agency;

(3) "person interested in the estate" means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent, any property or interest therein included in the decedent's estate. It includes a personal representative, conservator and trustee;

(4) "state" means any state, territory or possession of the United States, the District of Columbia, and the commonwealth of Puerto Rico;

(5) "tax" means the federal estate tax and any death taxes imposed by New Mexico and interest and penalties imposed in addition to the tax; and

(6) "fiduciary" means personal representative or trustee.

B. Unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment is to be made in the proportion that the value of the interest, subject to tax of each such person interested in the estate, bears to the total value of the interests, subject to tax of all such persons interested in the estate. The values used in determining the tax are to be used for that purpose. If the decedent's will directs a method of apportionment of tax different from the method described in the Probate Code, the method described in the will controls.

C. The district court in which venue lies for the administration of the estate of a decedent, on petition for such purpose, may determine the apportionment of the tax. If the district court finds that it is inequitable to apportion interest and penalties in the manner provided in Subsection B of this section, it may direct equitable apportionment thereof. If the district court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the fiduciary, the district court may charge him with the amount of the assessed penalties and interest.

D. The personal representative or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to him, the amount of tax attributable to his interest. If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax

may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this section. If property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

E. Under the provisions of this section:

(1) in making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate and for any deductions and credits allowed by the law imposing the tax;

(2) any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift inures to the benefit of the person bearing such relationship or receiving the gift; but if an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal;

(3) any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate inures to the proportionate benefit of all persons liable to apportionment;

(4) any credit for inheritance, succession or estate taxes or taxes in the nature thereof applicable to property or interests includable in the estate, inures to the benefit of the persons or interests chargeable with the payment thereof to the extent proportionately that the credit reduces the tax; and

(5) to the extent that property passing to or in trust for a surviving spouse or any charitable, public or similar gift or devisee is not an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property is not included in the computation provided for in Subsection B of this section and to that extent no apportionment is made against the property. The provisions of this paragraph do not apply to any case if the result would be to deprive the estate of a deduction otherwise allowable under Subsection D of Section 2053 of the Internal Revenue Code of 1954, as amended, of the United States, relating to deduction for state death taxes on transfers for public, charitable or religious uses.

F. No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

G. Neither the personal representative nor other person required to pay the tax is under any duty to institute any action to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the three months next following final determination of the tax. A personal representative or other person required to pay the tax who institutes the action within a reasonable time after the three months' period is not subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectable at a time following the death of the decedent but thereafter became uncollectable. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate who are subject to apportionment.

H. A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of New Mexico and may recover a proportionate amount of the federal tax, of an estate tax payable to another state or of a death duty due by a decedent's estate to another state, from a person interested in the estate who is either domiciled in New Mexico or who owns property in New Mexico subject to attachment or execution. For the purpose of the action the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct.

History: 1953 Comp., § 32A-3-916, enacted by Laws 1975, ch. 257, § 3-916.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Internal Revenue Code. - Subsection D of Section 2053 of the Internal Revenue Code of 1954, as amended, referred to in Subsection E(5), is compiled as 26 U.S.C. § 2053(d).

Public policy to treat adopted children same as natural children. - An adopted child is grouped with lineal descendants in determining the amount of the decedent's estate which is exempt from inheritance tax, and where an inheritance tax is imposed upon estates passing to parent or parents, husband, wife, lineal descendants or legally adopted child. *Delaney v. First Nat'l Bank*, 73 N.M. 192, 386 P.2d 711 (1963) (opinion rendered under former law).

Apportionment applies unless testator expresses clear intent otherwise. - Under Subsection B, apportionment of estate taxes applies unless the testator expresses a clear and unambiguous intent in his will to transfer legacies and devisees without deductions for taxes. *Rounds v. Arnold*, 103 N.M. 2, 701 P.2d 1022 (Ct. App. 1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 42 Am. Jur. 2d Inheritance, Estate, and Gift Taxes § 341 et seq.; Am. Jur. 2d New Topic Service, Uniform Probate Code § 137. 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.

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.

## **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.

Cross-references. - As to necessity for certificate as to estate taxes to allow final settlement, see 7-7-8 NMSA 1978.

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.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31 Am. Jur. 2d Executors and Administrators §§ 1002 to 1011; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 63, 94, 134, 136, 139 to 141, 143, 144.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 94, 134, 139 to 141, 143, 144, 153.  
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, after the time for presenting claims which arose prior to the death of the decedent has expired, a verified statement stating that he or a prior personal representative whom he has succeeded has:

(1) 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;

(2) fully administered the estate of the decedent by making payment, settlement or other disposition of all claims which 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 which have been made to accommodate outstanding liabilities; and

(3) sent a copy thereof 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 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 94, 141.  
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 3-1006 [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 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 shall have failed 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 35, 141, 142, 153.  
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.



Compiler's notes. - This section is similar to former 31-12-13, 1953 Comp.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 35, 141, 143, 144.

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 any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is forever barred at the later of three years after the decedent's death, or one year after the time of distribution. 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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 142, 144.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 145.

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 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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 144, 146.

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 probated will;

(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.

Cross-references. - As to private agreements amongst successors to decedent binding on personal representative, see 45-3-912 NMSA 1978.

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; Am. Jur. 2d New Topic Service, Uniform Probate Code § 147.

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 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 the 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.

Cross-references. - As to private agreements amongst successors to decedent binding on personal representative, see 45-3-912 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 80 Am. Jur. 2d Wills §§ 1098 to 1101, 1104; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 147, 148. 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 twenty thousand dollars (\$20,000);

(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.

Cross-references. - As to collection of employee's final payment for wages, etc., by surviving spouse without administration, see 45-3-1301 NMSA 1978.

Compiler's notes. - This section includes within its scope some of the functions of former 31-13-1 and 31-13-2, 1953 Comp.

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; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 149, 150.

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.

Cross-references. - As to effect of affidavit on collection of employee's final payment for wages, etc., by surviving spouse, see 45-3-1302 NMSA 1978.

Compiler's notes. - This section includes within its scope some of the functions of 31-13-2, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 151.

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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 104, 152, 153.

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.

Compiler's notes. - This section includes within its scope some of the functions of former 31-1A-3, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 152, 153.

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 their will devise their 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 in a certified copy of the death certificate attached to the affidavit;

(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 which 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 value of this property for property taxation purposes does not exceed one hundred thousand dollars (\$100,000).

History: 1978 Comp., § 45-3-1205, enacted by Laws 1985, ch. 12, § 1; 1985, ch. 132, § 1.

Applicability. - Laws 1985, ch. 132, § 3, makes the provisions of §§ 1 and 2 of the act applicable to affidavits recorded pursuant to 45-3-1205 NMSA 1978 on or after April 2, 1985.

Compiler's notes. - This section was first enacted by Laws 1985, ch. 12, § 1, approved March 13, 1985, and was subsequently enacted in identical form by Laws 1985, ch. 132, § 1, approved April 2, 1985. The section is set out as enacted by Laws 1985, ch. 132, § 1. See 12-1-8 NMSA 1978.

### **§ 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.



Compiler's notes. - This section was first enacted by Laws 1985, ch. 12, § 2, approved March 13, 1985, and was subsequently enacted in identical form by Laws 1985, ch. 132, § 2, approved April 2, 1985. The section is 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.

Cross-references. - As to 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.

Cross-references. - As to 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

Sec.

45-4-101. Definitions.

## 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.

45-4-202. Payment or delivery discharges.

45-4-203. Resident creditor notice.

45-4-204. Proof of authority; bond.

45-4-205. Powers.

45-4-206. Power of representatives in transition.

45-4-207. Ancillary and other local administrations; provisions governing.

## Part 3

### Jurisdiction Over Foreign Personal Representatives

45-4-301. Jurisdiction by act of foreign personal representative.

45-4-302. Jurisdiction by act of decedent.

45-4-303. Notice to a foreign personal representative.

## Part 4

Reserved.

## Part 1

### DEFINITIONS

#### **§ 45-4-101. Definitions.**

In Sections 4-101 through 4-401 [45-4-101 to 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 to 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 to 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31 Am. Jur. 2d Executors and Administrators § 1169; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 1, 154, 155.

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.

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. In re Armijo's Will, 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; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 154, 156, 157, 160, 161.

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.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 154, 158.

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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 154, 159, 161.

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.

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 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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 154, 159, 160.  
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 [45-4-205 NMSA 1978], 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 160.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 154.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 161, 162.

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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 154, 162.  
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 1978, ch. 159, § 14.

Repeals and reenactments. - Laws 1978, ch. 159, § 14, repeals former 32A-4-303, 1953 Comp. (45-4-303 NMSA 1978), as amended by Laws 1977, ch. 121, § 8, relating to service on foreign personal representative, and enacts the above section. For provisions of former section, see the 1978 Original Pamphlet.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 154, 163.  
34 C.J.S. Executors and Administrators § 1012.

#### **Part 4**

#### **RESERVED**

### **§ 45-4-401. Reserved.**

Compiler's notes. - Laws 1975, ch. 257, § 4-401, contained this section number, but no accompanying text.

## **Article 5**

### **Protection of Persons Under Disability and Their Property**

#### **Part 1**

#### **General Provisions**

#### **Sec.**

- 45-5-101. Definitions and use of terms.
- 45-5-102. Jurisdiction of subject matter; consolidation of proceedings.
- 45-5-103. Facility of payment or delivery.
- 45-5-104. Delegation of powers by parent or guardian.

## Part 2

### Guardian of Minors

- 45-5-201. Status of guardian of minor; general.
- 45-5-202. Testamentary appointment of guardian of minor; notice.
- 45-5-203. Objection by minor of fourteen or older to testamentary appointment.
- 45-5-204. Court appointment of guardian of minor; conditions for appointment.
- 45-5-205. Court appointment of guardian of minor; venue.
- 45-5-206. Court appointment of guardian of minor; qualifications; priority of minor's nominee.
- 45-5-207. Court appointment of guardian of minor; notice; procedure.
- 45-5-208. Consent to service by acceptance of appointment; notice.
- 45-5-209. Powers and duties of guardian of minor.
- 45-5-210. Termination of appointment of guardian; general.
- 45-5-211. Proceedings subsequent to appointment; venue.
- 45-5-212. Resignation or removal proceedings.

## Part 3

### Guardians of Incapacitated Persons

- 45-5-301. Testamentary appointment of guardian for incapacitated person; notice.
- 45-5-301.1. When guardianship is to be used.
- 45-5-302. Venue.
- 45-5-303. Procedure for court appointment of a guardian of an incapacitated person.
- 45-5-303.1. Duties of guardian ad litem.
- 45-5-304. Findings; order of appointment.
- 45-5-305. Acceptance of appointment; consent to jurisdiction.
- 45-5-306. Termination of guardianship for incapacitated person.
- 45-5-307. Removal or resignation of guardian; termination of incapacity.
- 45-5-308. Letters of guardianship.
- 45-5-309. Notices in guardianship proceedings; waiver; guardian ad litem.
- 45-5-310. Temporary guardians.
- 45-5-311. Who may be guardian; priorities.
- 45-5-312. General powers and duties of the limited guardian and guardian.
- 45-5-313. Proceedings subsequent to appointment; venue.
- 45-5-314. Annual report.
- 45-5-315. Consent to guardianship not permitted.

## Part 4

### Protection of Property of Persons Under Disability and Minors

- 45-5-401. Conservatorship proceedings.
- 45-5-402. Protective proceedings; jurisdiction of affairs of protected persons.
- 45-5-403. Venue.
- 45-5-404. Original petition for appointment of conservator.
- 45-5-404.1. Duties of guardian ad litem.
- 45-5-405. Notice of petition; waivers.
- 45-5-406. Protective proceedings; request for notice; interested person.
- 45-5-407. Procedure concerning hearing and order on original petition.
- 45-5-408. Temporary conservators.
- 45-5-409. Annual report.
- 45-5-410. Who may be appointed conservator; priorities.
- 45-5-411. Bond.
- 45-5-412. Reserved.
- 45-5-413. Acceptance of appointment; consent to jurisdiction.
- 45-5-414. Compensation and expenses.
- 45-5-415. Death, resignation or removal of conservator; termination of conservatorship.
- 45-5-416. Petitions for orders subsequent to appointment.
- 45-5-417. General duty of conservator.
- 45-5-418. Inventory and records.
- 45-5-419. Accounts.
- 45-5-420. Conservators; title by appointment.
- 45-5-421. Recording of conservator's letters.
- 45-5-421.1. Letters of conservatorship.
- 45-5-422. Sale, encumbrance or transaction involving conflict of interest; voidable; exceptions.
- 45-5-423. Persons dealing with conservators; protection.
- 45-5-424. Powers of conservator in administration.
- 45-5-425. Distributive duties and powers of conservator.
- 45-5-426. Consent to conservatorship; applicable laws.
- 45-5-427. Preservation of estate plan.
- 45-5-428. Claims against protected person; enforcement.
- 45-5-429. Individual liability of conservator.
- 45-5-430. Termination of proceeding.
- 45-5-431. Payment of debt and delivery of property to foreign conservator without local proceedings.
- 45-5-432. Foreign conservator; proof of authority; bond; powers.
- 45-5-433. Exemption.

## Part 5

## Powers of Attorney

45-5-501. When power of attorney not affected by incapacity.

45-5-502. Other powers of attorney not revoked until notice of death or disability.

### Part 1

## GENERAL PROVISIONS

### § 45-5-101. Definitions and use of terms.

Unless otherwise apparent from the context, in the Probate Code:

A. "conservator" is as defined in Section 45-1-201 NMSA 1978;

B. "court", for purposes of Sections 45-5-101 through 45-5-502 NMSA 1978, means the district court or the children's or family divisions of the district court where such jurisdiction is conferred by the Children's Code;

C. "functional impairment" means an impairment which is measured by a person's inability to manage his personal care or the person's inability to manage his property or financial affairs or both;

D. "guardian" is as defined in Section 45-1-201 NMSA 1978;

E. "guardian ad litem" is as defined 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 he is unable to manage his personal affairs or he is unable to manage his property or financial affairs or both;

G. "inability to manage his 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 his property or financial affairs or both" means gross mismanagement, as evidenced by recent behavior, of one's income and resources which 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 under this article;

J. "least restrictive form of intervention" means that the guardianship or conservatorship imposed on the incapacitated person or minor ward represents only those limitations necessary to provide the needed care and rehabilitative services, and that the incapacitated person or minor ward shall enjoy the greatest amount of personal freedom and civil liberties;

K. "letters" is as defined in Section 45-1-201 NMSA 1978;

L. "limited conservator" means a person who has qualified to manage the property or financial affairs, or both, of an incapacitated person pursuant to a court appointment of a limited conservator;

M. "limited conservatorship" means the legal status of an incapacitated person who is subject to a conservator's exercise of some, but not all, of the powers enumerated in Subsection E of Section 45-5-407 NMSA 1978;

N. "limited guardian" means a person who has qualified to have the care, custody and control of an incapacitated person pursuant to a court appointment of a limited guardianship;

O. "limited guardianship" means the legal status of an incapacitated person who is subject to a guardian's exercise of some but not all of the powers enumerated in Subsection B of Section 45-5-312 NMSA 1978;

P. "minor" is as defined in Section 45-1-201 NMSA 1978;

Q. "minor ward" means a minor for whom a guardian or conservator has been appointed solely because of minority;

R. "protective proceeding" means a proceeding under the conservatorship proceedings pursuant to provisions of Section 45-5-401 NMSA 1978:

(1) to determine that a person cannot effectively manage his estate to necessary ends, either because he lacks the ability or is otherwise incapacitated or because he is a minor; and

(2) to secure administration of his estate by a conservator or other appropriate relief;

S. "protected person" means a minor or other person for whom a conservator has been appointed or other protective order has been made;

T. "qualified health care professional" means a physician or nurse practitioner whose training and expertise aid in the assessment of functional impairment;

U. "ward" means a person for whom a guardian has been appointed; 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, social worker, developmental incapacity professional, physical and occupational therapist, educator and rehabilitation workers.

History: 1953 Comp., § 32A-5-101, enacted by Laws 1975, ch. 257, § 5-101; 1987, ch. 12, § 1; 1989, ch. 252, § 3.

The 1989 amendment, effective June 16, 1989, made a minor stylistic change in Subsection B; substituted the present provisions of 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 present Subsections G through J; redesignated former Subsection G as present Subsection K; added present Subsections L through O; redesignated former Subsections H through K as present Subsections P through S; inserted "conservatorship proceedings pursuant to" in Subsection R; added Subsection T; redesignated former Subsections L and M as present 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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Children's Code. - See 32-1-1 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 1, 26, 164, 165.

Validity of guardianship proceeding based on brainwashing of subject by religious, political or social organization, 44 A.L.R.4th 1207.

28 C.J.S. Drunkards § 4; 39 C.J.S. Guardian and Ward § 2; 44 C.J.S. Insane Persons §§ 8, 35.

## **§ 45-5-102. Jurisdiction of subject matter; consolidation of proceedings.**

A. The court has exclusive jurisdiction over protective proceedings and guardianship proceedings.

B. 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 166.

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.

Ademption or revocation of specific devise or bequest by guardian, committee or conservator of mentally or physically incompetent testator, 51 A.L.R.2d 770.

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.

28 C.J.S. Drunkards §§ 9, 12; 39 C.J.S. Guardian and Ward § 11; 44 C.J.S. Insane Persons §§ 8, 35.

### **§ 45-5-103. Facility of payment or delivery.**

A. Any person under a duty to pay or deliver money or personal property to a minor may perform this duty, in amounts not exceeding five thousand dollars (\$5,000) per annum, by paying or delivering the money or property to:

(1) the minor, if he is married;

(2) any person having the care and custody of the minor with whom the minor resides;

(3) a guardian of the minor; or

(4) 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.

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 may 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 must be turned over to the minor when he attains majority. 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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 135, 167, 178.  
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 incapacitated person, by an acknowledged power of attorney, may delegate to another person, for a period not exceeding six months, any of his powers regarding care, custody or property of the minor child or ward, except his power to consent to marriage or adoption of a minor ward.

History: 1953 Comp., § 32A-5-104, enacted by Laws 1975, ch. 257, § 5-104.

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. Implicit in every such agreement is the right of the parties and the court to amend or abrogate such agreements when circumstances necessitate and the best interests and welfare of the child so require. *In re Doe*, 98 N.M. 340, 648 P.2d 798 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 168.  
28 C.J.S. Drunkards §§ 9, 12; 39 C.J.S. Guardian and Ward § 55; 44 C.J.S. Insane Persons § 60.

## **Part 2**

### **GUARDIAN OF MINORS**

#### **§ 45-5-201. Status of guardian of minor; general.**

A person becomes a guardian of a minor by acceptance of a testamentary 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 and minor ward.



History: 1953 Comp., § 32A-5-201, enacted by Laws 1975, ch. 257, § 5-201.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 169, 172.

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. Testamentary appointment of guardian of minor; notice.**

The parent of a minor may appoint by will a guardian of an unmarried minor. Subject to the right of the minor under Section 5-203 [45-5-203 NMSA 1978], a testamentary appointment becomes effective upon filing the guardian's acceptance in the court in which the will is probated, if, before acceptance, both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings. New Mexico recognizes a testamentary appointment effected by filing the guardian's acceptance under a will probated in the state of testator's domicile. Upon acceptance of appointment, written notice of acceptance must be given by the guardian to the minor and to the person having his care, or to his nearest adult relation.

History: 1953 Comp., § 32A-5-202, enacted by Laws 1975, ch. 257, § 5-202.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 172, 176.

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 testamentary appointment.**

A minor of fourteen or more years may prevent an appointment of his testamentary guardian from becoming effective, or may cause a previously accepted appointment to terminate, by filing with the court in which the will is probated a written objection to the appointment before it is accepted or within thirty days after notice of its acceptance pursuant to Section 45-5-202 NMSA 1978. An objection may be withdrawn. An objection does not prevent appointment by the court of the testamentary 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.

Cross-references. - For age of majority, see 12-2-2 and 28-6-1 NMSA 1978.

Compiler's notes. - This section includes within its scope some of the functions of former 32-1-41, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 172, 176, 177.

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 testamentary guardian, appointed as provided in Section 5-202 [45-5-202 NMSA 1978], whose appointment has not been prevented or terminated under Section 5-203 [45-5-203 NMSA 1978], has priority over any guardian who may be appointed by the court. However, such court may proceed with an appointment upon a finding that the testamentary guardian has failed to accept the testamentary appointment within thirty days after notice of the guardianship proceeding.

History: 1953 Comp., § 32A-5-204, enacted by Laws 1975, ch. 257, § 5-204.

Presumption that child should be in custody of natural parents. - In a custody dispute between a parent and a nonparent who has no permanent or legal right to custody, 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 parents 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).

Findings used to determine 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. Implicit in every such agreement is the right of the parties and the court to amend or abrogate such agreements when circumstances necessitate and the best interests and welfare of the child so require. *In re Doe*, 98 N.M. 340, 648 P.2d 798 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 172, 175.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 173.

39 C.J.S. Guardian and Ward § 20.

### **§ 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.

Compiler's notes. - This section is similar to former 32-1-41, 1953 Comp.

Generally, as to 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 Howard*, 66 N.M. 445, 349 P.2d 547 (1960).

Trial court is given very wide latitude in custody matters in the exercise of its discretion. In re 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 Howard, 66 N.M. 445, 349 P.2d 547 (1960).

The welfare of the minor is the paramount consideration in custody cases. In re Howard, 66 N.M. 445, 349 P.2d 547 (1960).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 174.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 172, 175.

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 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. Letters of guardianship must indicate whether the guardian was appointed by will or by court order.

History: 1953 Comp., § 32A-5-208, enacted by Laws 1975, ch. 257, § 5-208.

Trust imposed upon human services department. - Where a human services department representative accepts monies pursuant to a court's order and fails to contest either the terms of a trust, pursuant to which the monies were given to the department, or the court's jurisdiction to impose the terms of the trust upon the department, the department will be estopped from asserting the court's lack of jurisdiction to enforce the order three years later. *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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 169 to 171.

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 guardian of a minor has the same powers, rights and duties respecting his ward as a parent who has not been deprived of his unemancipated minor child, except that a guardian is not legally obligated to provide from his own funds for the ward and is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court.

A. He must take reasonable care of his ward's personal effects and commence protective proceedings if necessary to protect other property of the ward.

B. He may receive money for the support of the ward payable to the ward's parent, guardian or custodian under the terms of any statutory benefit or insurance system, or any private contract, devise, trust, conservatorship or custodianship. He also may receive money or property of the ward paid or delivered by virtue of Section 5-103 [45-5-103 NMSA 1978]. Any sums so received shall be applied to the ward's current needs for support, care and education. He must exercise due care to conserve any excess for the ward's future needs unless a conservator has been appointed for the estate of the ward, in which case the excess shall be paid over at least annually to the conservator. Sums so received by the guardian are not to be used for compensation for his services except as approved by order of the court or as determined by a conservator other than the guardian. A guardian may institute proceedings to compel the performance by any person of a duty to support the ward or to pay sums for the welfare of the ward.

C. The guardian is empowered to facilitate the ward's education, social or other activities and to authorize medical or other professional care, treatment or advice. A guardian is not liable for injury to the ward resulting from the negligence or acts of third persons unless the parent would have been so liable. A guardian may consent to the marriage or adoption of his ward.

D. A guardian must report the condition of his ward and of the ward's estate which has been subject to his possession or control, as ordered by the court on petition of any person interested in the minor's welfare or as required by the court.

History: 1953 Comp., § 32A-5-209, enacted by Laws 1975, ch. 257, § 5-209.

Compiler's notes. - This section includes within its scope some of the functions of former 32-1-17, 1953 Comp.

Continuing obligation to protect ward's assets. - A guardian has a continuing obligation to accept and protect assets belonging to its ward according to any terms attaching to those assets, until its guardianship had been terminated. *Guerra v. New Mexico Human Servs. Dep't*, 96 N.M. 608, 633 P.2d 716 (Ct. App. 1981).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 172, 178, 213.

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.

Estoppel of or waiver by parties or participants regarding irregularities or defects in judicial sale by guardian, 2 A.L.R.2d 187.

Guardian's authority to make agreement to drop or compromise will contest or withdraw objections to probate, 42 A.L.R.2d 1361.

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.

Power of parent, guardian or committee to consent to surgical invasion of ward's person for benefit of another, 35 A.L.R.3d 692.

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.

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, marriage or attainment of majority, but termination does not affect his liability for prior acts, nor his obligation to account for money and property of his ward. 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.

Cross-references. - For age of majority, see 12-2-2 and 28-6-1 NMSA 1978.

Compiler's notes. - This section includes within its scope the functions of former 32-1-42, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 179.

39 C.J.S. Guardian and Ward §§ 36 to 40, 48.

### **§ 45-5-211. Proceedings subsequent to appointment; venue.**

A. The court where the ward resides has concurrent jurisdiction with the court which 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 ward 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 ward. 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 170.

39 C.J.S. Guardian and Ward § 176.

### **§ 45-5-212. Resignation or removal proceedings.**

A. Any person, interested in the welfare of a ward, or the ward (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 ward. 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. After notice pursuant to Section 1-401 [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.

C. If, at any time in the proceeding, the court finds the ward 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 172, 178, 180.

39 C.J.S. Guardian and Ward §§ 48 to 52.

### **Part 3**

### **GUARDIANS OF INCAPACITATED PERSONS**

### **§ 45-5-301. Testamentary appointment of guardian for incapacitated person; notice.**

A. The parent of an incapacitated person may appoint by will a guardian of the incapacitated person. The appointment becomes effective when, after having given seven days' prior written notice of his 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, if prior thereto both parents are dead or the surviving parent has been adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.

B. The spouse of an incapacitated person may appoint by will a guardian of the incapacitated person. The appointment becomes effective when, after having given seven days' prior written notice of his 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. An effective appointment by a spouse has priority over an appointment by a parent unless it is terminated by the denial of probate in formal proceedings.

C. New Mexico shall recognize a testamentary appointment effected by filing acceptance under a will probated in the state of testator's domicile.

D. On the filing with the court in which the will was probated of written objection to the appointment by the person for whom a testamentary appointment of guardian has been made, the appointment is terminated. An objection does not prevent appointment by the court of the testamentary nominee or any other person upon an adjudication of incapacity in proceedings under Sections 5-302 through 5-313 [45-5-302 to 45-5-313 NMSA 1978].

History: 1953 Comp., § 32A-5-301, enacted by Laws 1975, ch. 257, § 5-301.

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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 189 to 191.

28 C.J.S. Drunkards §§ 9, 12; 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.

Effective dates. - Laws 1989, ch. 252 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

### **§ 45-5-302. Venue.**

The venue for guardianship proceedings for an incapacitated person is in the judicial district where the incapacitated person resides or is present. If the 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 184.

28 C.J.S. Drunkards §§ 9, 12; 49 C.J.S. Insane Persons § 12.

### **§ 45-5-303. Procedure for court appointment of a guardian of an incapacitated person.**

A. Any interested person may file a petition for the appointment of a person to serve as guardian for an alleged incapacitated person under the Probate Code. The petition shall state the following:

- (1) the name, age, 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 address of the proposed guardian;
- (6) 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 person for whom the guardian is sought to be appointed;
- (7) the name and address of the person or institution having the care and custody of the

person for whom the guardian is sought to be appointed;

(8) the names and addresses of any other incapacitated persons for whom the proposed guardian is acting if the proposed guardian is an individual;

(9) the reasons the appointment of a guardian is sought and the interest of the petitioner in the appointment;

(10) the steps taken to find less restrictive alternatives to the proposed guardianship; and

(11) the qualifications of the proposed guardian.

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, the court shall appoint an attorney to represent him. The attorney in the proceeding shall have the duties of a guardian ad litem. Such attorney shall visit the alleged incapacitated person prior to the hearing.

D. The person alleged to be incapacitated shall be examined by a qualified health care professional appointed by the court who shall submit his evaluation in writing to the court. The evaluation 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 recommendations, with supporting data, regarding:

(a) those aspects of his personal care that the alleged incapacitated person can manage without supervision or assistance;

(b) those aspects of his personal care that the alleged incapacitated person could manage with the supervision or assistance of support services and benefits; and

(c) those aspects of his personal care that the alleged incapacitated person is unable to manage without the supervision of a guardian.

E. The court shall also appoint a visitor who shall interview the person seeking appointment as guardian and, if feasible, visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made.

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:

(1) it is impossible for the alleged incapacitated person to be present at the hearing; or

(2) 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 shall 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 which 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 must be established by clear and convincing evidence.

I. A record of the proceedings shall be made if requested by the alleged incapacitated person or his attorney, or when ordered by the court. Records, reports and evidence submitted to the court or recorded by the court shall be confidential.

J. 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.

K. Upon request of the petitioner or alleged incapacitated person, the court shall schedule a jury trial.

History: 1978 Comp., § 45-5-303, enacted by Laws 1989, ch. 252, § 5.

Cross-references. - For involuntary commitment of developmentally disabled adults by Probate Code guardian, see 43-1-13 NMSA 1978. As to voluntary admission, see 43-1-14 NMSA 1978.

Repeals and reenactments. - Laws 1989, ch. 252, § 5 repeals 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 enacts the above section, effective June 16, 1989. For provisions of former section, see 1978 Original Pamphlet.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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 where the required

procedure is not followed in material respects are void and of no effect. *Blevins v. Cook*, 66 N.M. 381, 348 P.2d 742 (1960) (decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 165, 186, 190.

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.

28 C.J.S. Drunkards §§ 9, 12; 49 C.J.S. Insane Persons §§ 37, 40.

### **§ 45-5-303.1. Duties of guardian ad litem.**

A guardian ad litem appointed by the court pursuant to Subsection C of Section 45-5-303 NMSA 1978 shall:

- A. interview the alleged incapacitated person prior to the hearing;
- B. present the alleged incapacitated person's declared position to the court;
- C. interview the qualified health care professional, the visitor, the proposed guardian;
- D. review both the medical affidavit submitted by the qualified health care professional and the report by the visitor; and
- E. obtain independent medical or psychological assessments, or both, if necessary.

History: 1978 Comp., § 45-5-303.1, enacted by Laws 1989, ch. 252, § 6.

Effective dates. - Laws 1989, ch. 252 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

### **§ 45-5-304. Findings; order of appointment.**

A. The court, at the hearing on the petition for appointment for a guardian under this chapter, shall:

- (1) inquire into the nature and extent of the functional limitations of the alleged incapacitated person; and

(2) ascertain his capacity to care for himself.

B. If it is determined that the alleged incapacitated person possesses the capacity to care for himself, 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 which 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 and is willing to serve.

D. The court may dismiss the proceedings or 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 incapacitated person and his 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 his right to seek alteration or termination of the guardianship at any time.

History: 1978 Comp., § 45-5-304, enacted by Laws 1989, ch. 252, § 7.

Repeals and reenactments. - Laws 1989, ch. 252, § 7 repeals former 45-3-304 NMSA 1978, as enacted by Laws 1975, ch. 257, § 5-304, relating to findings and order of appointment, and enacts the above section, effective June 16, 1989. For provisions of former section, see 1978 Original Pamphlet.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 189, 201.  
28 C.J.S. Drunkards § 9, 12; 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 183, 189.

28 C.J.S. Drunkards §§ 9, 12; 49 C.J.S. Insane Persons § 41.

### **§ 45-5-306. Termination of guardianship for incapacitated person.**

The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation as provided in Section 5-307 [45-5-307 NMSA 1978]. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination does not affect his liability for prior acts nor his obligation to account for funds and assets of his ward.

History: 1953 Comp., § 32A-5-306, enacted by Laws 1975, ch. 257, § 5-306.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 193.

28 C.J.S. Drunkards §§ 9, 12; 49 C.J.S. Insane Persons § 45.

### **§ 45-5-307. Removal or resignation of guardian; termination of incapacity.**

A. On petition of the incapacitated person or any person interested in his welfare, the court may remove a guardian and appoint a successor if in the best interests of the incapacitated person.

B. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.

C. The incapacitated person or any person interested in his welfare may petition for an order that he 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. Upon ordering that an incapacitated person's incapacity has terminated, the court, following the same procedures to safeguard the rights of the incapacitated person as those that apply to a petition for appointment of a guardian, shall send a visitor to the residence of the present guardian and to the place where the incapacitated person resides or is detained to observe conditions and report in writing to the court. The court shall also appoint a qualified health care professional to examine the incapacitated person and to submit a written report to the court.

History: 1953 Comp., § 32A-5-307, enacted by Laws 1975, ch. 257, § 5-307; 1989, ch. 252, § 8.

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 "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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 193, 194.

28 C.J.S. Drunkards §§ 9, 12; 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.

Effective dates. - Laws 1989, ch. 252 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

### **§ 45-5-309. Notices in guardianship proceedings; waiver; guardian ad litem.**

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 which may have been entered shall be given to each of the following:

(1) the person alleged to be incapacitated;

(2) his spouse, parents and adult children or at least one of his closest adult relatives if any can be found; and

(3) any person who is serving as his guardian or conservator or who has his care and custody.

B. Notice shall be served personally on the alleged incapacitated person and his spouse and parents if they can be found within New Mexico. Notice to the spouse and parents, if they cannot be found within New Mexico, 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 should 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:

USE THE ZOOM COMMAND TO VIEW 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.

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; deleted former Subsection C, 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"; added present Subsection C; and deleted former Subsection D, which read "Representation of the alleged incapacitated person by a guardian ad litem is not necessary".

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 187, 194.

28 C.J.S. Drunkards §§ 9, 12; 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.

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 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 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.

The 1989 amendment, effective June 16, 1989, deleted former Subsection A, which read "If an incapacitated person has no guardian or if an appointed guardian is not effectively performing his duties and the court finds that the welfare of the incapacitated person requires immediate action, it may, with or without notice, appoint a temporary guardian for the incapacitated person for a specified period not to exceed six months"; added present Subsections A through C; redesignated former Subsection B as present Subsection D; in Subsection D substituted "alleged incapacitated person" for "ward" near the beginning of the first sentence and substituted all of the present language of that sentence following "suspended" for "so long as a temporary guardian has authority", and inserted "all" in the last sentence; and added Subsection E.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 185.

28 C.J.S. Drunkards §§ 9, 12; 49 C.J.S. Insane Persons §§ 37, 38.

### **§ 45-5-311. Who may be 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) the spouse of the incapacitated person;

(2) an adult child of the incapacitated person;

(3) a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

(4) any relative of the incapacitated person with whom he has resided for more than six months prior to the filing of the petition;

(5) a person nominated by the person who is caring for the incapacitated person or paying benefits to him; and

(6) 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, 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;

(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.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 188.

Priority and preferences in appointment of conservator or guardian for an incompetent, 65 A.L.R.3d 991.

28 C.J.S. Drunkards §§ 9, 12; 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 may appoint a limited guardian if it determines that the alleged incapacitated person is unable to manage some but not all aspects of his personal care. The court shall specify those powers that the limited guardian, as defined in Subsection M [N] of Section 45-5-101 NMSA 1978, shall have and may further restrict each power so as to permit the incapacitated person to care for himself commensurate with his ability to do so. A person for whom a limited guardian has been appointed retains all legal and civil rights except those which have been specifically granted to the limited guardian by the court. The limited guardian shall exercise his supervisory powers over the incapacitated person in a manner which 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 his unemancipated minor child except that a guardian is not legally obligated to provide from his 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 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, he 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, he shall make provision for the care, comfort and maintenance of the incapacitated person and, whenever appropriate, arrange for his training and education. He 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) 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. Such 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, 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;

(5) if the incapacitated person is certified as terminally ill or in an irreversible coma under the procedures described in Section 24-7-5 NMSA 1978, a guardian may consent to the physician removing or withholding maintenance medical treatment, as defined in Section 24-7-2 NMSA 1978, if the guardian concludes that the incapacitated person, if competent, would have chosen the termination of that treatment; and

(6) the guardian shall exercise his supervisory powers over the incapacitated person in a manner which is least restrictive of his personal freedom consistent with the need for supervision.

C. Any guardian of one 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 his service and for room and board furnished to the incapacitated person as agreed upon between him and the conservator, provided the amounts agreed upon are reasonable under the circumstances. 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.

The 1989 amendment, effective June 16, 1989, added present Subsection A; redesignated former Subsections A and B as present Subsections B and C; substituted "incapacitated person" for "ward" several times throughout the section; in the introductory paragraph of Subsection B substituted "guardianship" for "parental relationship" at the end of the first sentence; in Subsection B(2) deleted "Without regard to the custodial rights of the ward's person" at the beginning of the second sentence and substituted "conservatorship" for "protective" near the middle of that sentence; in Subsection B(3) rewrote the first sentence and added the second sentence; rewrote Subsection B(4); deleted former Subsections B(5) and B(6), relating to report of condition of ward and estate and to accounting by guardian to conservator for expended funds; redesignated former Subsection B(7) as present Subsection B(5); in Subsection B(5) substituted "certified as terminally ill or in an irreversible coma under the procedures described in Section 24-7-5 NMSA 1978" for "terminally ill or in an irreversible coma, as defined in Section 24-7-2 NMSA 1978" and "consent to the

physician removing or withholding" for "order the termination of"; and added Subsection B(6).

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 189, 192.

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.

Estoppel of or waiver by parties or participants regarding irregularities or defects in judicial sale by guardian, 2 A.L.R.2d 187.

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.

Guardian's authority to make agreement to drop or compromise will contest or withdraw objections to probate, 42 A.L.R.2d 1361.



Power of court to confirm sale of ward's property over objection of guardian, 43 A.L.R.2d 1445.

Ademption or revocation of specific devise or bequest by guardian, committee or conservator of mentally or physically incompetent testator, 51 A.L.R.2d 770.

Power of guardian, committee or trustee of mental incompetent, after latter's death, to pay debts and obligations, 60 A.L.R.2d 963.

Rights and powers of guardian with reference to joint bank deposit in name of incompetent and another, 62 A.L.R.2d 1093.

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.

Power of incompetent spouse's guardian, committee or next friend to sue for granting or vacation of divorce or annulment of marriage, or to make a compromise or settlement in such suit, 6 A.L.R.3d 681.

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.

Power of parent, guardian or committee to consent to surgical invasion of ward's person for benefit of another, 35 A.L.R.3d 692.

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.

28 C.J.S. Drunkards § 9, 12; 49 C.J.S. Insane Persons § 49.

### **§ 45-5-313. Proceedings subsequent to appointment; venue.**

A. The court where the ward resides has concurrent jurisdiction with the court which 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 ward 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 ward. 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 182.

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.

28 C.J.S. Drunkards §§ 9, 12; 49 C.J.S. Insane Persons § 137.

### **§ 45-5-314. Annual report.**

A. The guardian of an incapacitated person shall file an annual report with the appointing court within thirty days of the anniversary date of the guardian's appointment. The report shall include information concerning the progress and condition of the incapacitated person, including but not limited to his health, medical and dental care, residence, education, employment and habitation; a report on the manner in which the guardian carried out his powers and fulfilled his duties; and the guardian's opinion regarding the continued need for guardianship. The report shall be substantially in the following form:

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

"IN THE DISTRICT COURT

\_\_\_\_\_ COUNTY, STATE OF NEW MEXICO

In the matter of the ) No. \_\_\_\_\_

Guardianship of )

\_\_\_\_\_ )

(Enter Name of Incapacitated Person) )

An Incapacitated Person. )

GUARDIAN'S REPORT

\_\_\_\_\_  
Pursuant to Section 45-5-314 NMSA 1978, the undersigned duly appointed, qualified and acting guardian of the above-mentioned incapacitated 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 incapacitated person now resides are:

---

---

4. A description of the incapacitated person's place of residence and of programs, activities or services in which the incapacitated person is involved is as follows:

---

---

5. The name of the person primarily responsible for the care of the incapacitated person at such person's place of residence is:

---

---

6. The name and address of any hospital or other institution where the incapacitated person is now admitted on a temporary basis are:

---

---

7. A brief description of the incapacitated person's physical condition is:

---

---

8. A brief description of the incapacitated person's mental condition is:

---

---

9. A brief description of contracts made on behalf of the incapacitated person during the past year is:

---

---

10. A brief description of major decisions made on the incapacitated person's behalf during the past year is:

---

---

11. The reasons, if any, why the guardianship should continue are:

---

---

Signature of Guardian:

---

---

Date: \_\_\_\_\_ " .

B. The guardian may be fined five dollars 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 Probate Code.

C. 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.

History: 1978 Comp., § 45-5-314, enacted by Laws 1989, ch. 252, § 14.

Effective dates. - Laws 1989, ch. 252 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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.

Effective dates. - Laws 1989, ch. 252 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

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 Probate Code, the court may appoint a conservator as follows:

A. appointment of a conservator may be made in relation to the estate and affairs of a minor if the court determines that:

(1) a minor owns property that requires management or protection which cannot otherwise be provided;

(2) a minor has or may have business affairs which 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 property or financial affairs, or both, of a person if the court finds that:

(1) the person is incapacitated by the reason of his inability to manage his property or financial affairs, or both, as evidenced by gross mismanagement of his income and resources for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause; or

(2) the person is unable to manage his property and financial affairs effectively for reasons such as confinement, detention by a foreign power or disappearance; and

(3) the person has property which may be wasted or dissipated unless proper management is provided and that funds are needed for the support, care and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds.

History: 1953 Comp., § 32A-5-401, enacted by Laws 1975, ch. 257, § 5-401; 1987, ch. 12, § 2; 1989, ch. 252, § 16.

The 1989 amendment, effective June 16, 1989, substituted "Conservatorship" for "Protective" in the catchline; 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 present 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 present Paragraph (3) while substituting "and" for "or" near the middle of that paragraph.

Compiler's notes. - This section includes within its scope some of the functions of former 32-2-1 and 32-2-3, 1953 Comp.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 165, 195, 201, 209, 219.

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.

28 C.J.S. Drunkards §§ 9, 12; 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 176.

28 C.J.S. Drunkards §§ 9, 12; 39 C.J.S. Guardian and Ward § 11; 49 C.J.S. Insane Persons § 10.

## **§ 45-5-403. Venue.**

Venue for proceedings under Sections 5-401 through 5-432 [45-5-401 to 45-5-432 NMSA 1978] is:

A. in the judicial district in New Mexico where the person to be protected resides whether or not a guardian has been appointed in another judicial district; 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.

History: 1953 Comp., § 32A-5-403, enacted by Laws 1975, ch. 257, § 5-403.

Venue restrictions of section 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 38-3-1A 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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 184, 197.

28 C.J.S. Drunkards §§ 9, 12; 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.

The 1989 amendment, effective June 16, 1989, substituted "of conservator" for "or protective order" in the catchline; 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 the introductory paragraph of Subsection B substituted "state the following" for "set forth to the extent known"; substituted "for whom a conservator is sought" for "to be protected" in Subsections B(2) and B(3); rewrote former Subsection C so as to constitute present Subsections B(9) and B(10); and added Subsections B(11) and B(12).

Compiler's notes. - This section includes within its scope some of the functions of former 32-3-2, 1953 Comp.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 202.

28 C.J.S. Drunkards §§ 9, 12; 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 guardian ad litem appointed by the court pursuant to Subsection C of Section 45-5-404 NMSA 1978 [45-5-304 NMSA 1978] shall:

- A. interview the alleged incapacitated person prior to the hearing;
- B. present the alleged incapacitated person's declared position to the court;
- C. interview the qualified health care professional, the visitor, the proposed guardian and any other person who may have relevant information concerning the alleged incapacitated person;
- D. review both the medical affidavit submitted by the qualified health care professional and the report by the visitor; and
- E. obtain independent medical or psychological assessments, or both, if necessary.

History: 1978 Comp., § 45-5-404.1, enacted by Laws 1989, ch. 252, § 18.

Effective dates. - Laws 1989, ch. 252 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

Compiler's notes. - The bracketed reference in the introductory paragraph, was inserted by the compiler as the apparent intended reference.

### **§ 45-5-405. Notice of petition; waivers.**

- A. On a petition for appointment of a conservator the person for whom a conservator is sought and his spouse or, if none, his parents, guardian or custodian shall be served personally with notice of the proceeding and a copy of the petition and any interim orders that may have been entered at least fourteen days before the date of hearing if

they can be found within the state, or, if they cannot be found within the state, they shall be given notice in accordance with Section 45-1-401 NMSA 1978. Waiver of notice to a person for whom a conservator is sought is not permitted, unless minority is the reason for the proceeding or waiver is confirmed in an interview with the visitor appointed by the court.

B. 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 for whom a conservator is sought). 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 for whom a conservator is sought) needs to be protected by a conservator under New Mexico law.

If the court finds that (name of the person for whom a conservator is sought) 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 for whom a conservator is sought). 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 for whom a conservator is sought) to retain control over certain activities.

(Name of person for whom a conservator is sought) shall attend the hearing and be represented by an attorney. The petition may be heard and determined in the absence of (name of person for whom a conservator is sought) if the court determines that the presence of (name of person for whom a conservator is sought) is not required. If (name of person for whom a conservator is sought) attends the hearing and is not represented by an attorney, the court shall appoint an attorney to represent the person for whom a conservator is sought.

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

---

(signature of petitioner)".

C. 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.

The 1989 amendment, effective June 16, 1989, added "of petition; waivers" to the catchline; 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 present Subsection C, while deleting in the first sentence thereof "or other initial protective order" following "conservator"; and made minor stylistic changes throughout the section.

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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 203, 217, 225.  
28 C.J.S. Drunkards §§ 9, 12; 39 C.J.S. Guardian and Ward §§ 23, 24; 49 C.J.S. Insane Persons § 40.

**§ 45-5-406. Protective proceedings; request for notice; interested person.**

A. Any interested person who desires to be notified before any order is made in a protective proceeding may file with the clerk of the court a request for notice. The clerk shall mail a copy of the demand to the 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 his address, or that of his attorney, and 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 protective proceedings.

History: 1953 Comp., § 32A-5-406, enacted by Laws 1975, ch. 257, § 5-406.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 203, 204.

28 C.J.S. Drunkards §§ 9, 12; 39 C.J.S. Guardian and Ward § 22; 49 C.J.S. Insane Persons § 40.

### **§ 45-5-407. Procedure concerning hearing and order on original petition.**

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 for whom a conservator is sought is already represented by an attorney of his own choice, the court shall appoint an attorney to represent him in the proceeding who shall have the duties of a guardian ad litem. If the petition is for the appointment of a conservator based on the provisions set forth in Subsection B of Section 45-5-401 NMSA 1978, the person for whom a conservator is sought shall be examined both by a qualified health care professional and visitor appointed by the court who each shall submit his evaluation in writing to the court. The evaluation shall:

(1) describe the nature and degree of the incapacity as set forth in Paragraph (1) of Subsection B of Section 45-5-401 NMSA 1978 and the level of intellectual, developmental and social functioning of the person to be protected; and

(2) contain recommendations, with supporting data, regarding:

(a) those aspects of his financial affairs that the person for whom a conservator is sought can manage without supervision or assistance;

(b) those aspects of his financial affairs that the person for whom a conservator is sought could manage with the supervision or assistance of support services and benefits; and

(c) those aspects of his financial affairs that the person for whom a conservator is sought is unable to manage without the supervision of a conservator.

C. The person for whom a conservator is sought 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:

(1) it is impossible for the person for whom a conservator is sought to be present at the hearing; or

(2) 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 shall conduct hearings at the location of the person for whom a conservator is sought if he is unable to be present in court.

D. 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 for whom a conservator is sought; and

(2) ascertain his capacity to manage his financial affairs.

E. If it is determined that the person for whom a conservator is sought possesses the capacity to manage his property or financial affairs, or both, himself, the court shall dismiss the petition.

F. 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 for whom a conservator is sought 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 property or financial affairs, or both, of the person for whom a conservator is sought;

(3) there are not available alternative resources that enable the effective management

of property and financial affairs of the person for whom a conservator is sought;

(4) the conservatorship is appropriate as the least restrictive form of intervention consistent with the preservation of the property of the person for whom a conservator is sought; and

(5) the proposed conservator is both qualified and suitable and is willing to serve.

G. 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.

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 the Probate Code.

I. A record of the proceedings shall be made if requested by the person for whom a conservator is sought, his attorney or when ordered by the court. Records, reports and evidence submitted to the court or recorded by the court shall be confidential.

J. The issue of whether a conservator shall be appointed shall be determined by the court at a closed hearing unless the person for whom a conservator is sought requests otherwise.

K. Upon request of the petitioner or person for whom a conservator is sought, the court shall schedule a jury trial.

History: 1953 Comp., § 32A-5-407, enacted by Laws 1975, ch. 257, § 5-407; 1989, ch. 252, § 20.

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.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 206.

28 C.J.S. Drunkards §§ 9, 12; 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 immediate and irreparable harm to property or financial interests, or both, of the person for whom a conservator is sought, 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 for whom a conservator is sought and give notice as provided in Section 45-5-405 NMSA 1978. Upon a finding that serious and irreparable harm to the property and financial interests of the person for whom a conservator is sought 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 and irreparable harm to the property of the person for whom a conservator is sought. The duration of the temporary conservatorship shall not exceed sixty days.

C. A temporary conservator may be appointed without notice to the person for whom a conservator is sought only if it clearly appears from specific facts shown by affidavit or sworn testimony that immediate and irreparable harm will result to property of the person for whom a conservator is sought before a hearing on the appointment of a temporary conservator can be held. 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 for whom a conservator is sought or 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 for whom a conservator is sought. Appointment of a temporary conservator shall not be evidence of incapacity.

History: 1978 Comp., § 45-5-408, enacted by Laws 1989, ch. 252, § 21.

Repeals and reenactments. - Laws 1989, ch. 252, § 21, repeals former 45-5-408 NMSA 1978, as enacted by Laws 1975, ch. 257, § 5-408, relating to permissible court orders, and enacts the above section, effective June 16, 1989. For provisions of former section, see 1978 Original Pamphlet.

### **§ 45-5-409. Annual report.**

A. The conservator of a person shall file an annual report with the appointing court within thirty days of the anniversary date of the conservator's appointment. 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:

USE THE ZOOM COMMAND TO VIEW 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**

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 how all income was distributed, 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. The court shall not waive the requirement of an annual report under any circumstance, but may grant an extension of time.

C. The conservator may be fined five dollars 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 Probate Code.

History: 1978 Comp., § 45-5-409, enacted by Laws 1989, ch. 252, § 22.

Repeals and reenactments. - Laws 1989, ch. 252, § 22, repeals former 45-5-409 NMSA 1978, as enacted by Laws 1975, ch. 257, § 5-409, relating to protective arrangements

and single transactions authorized, and enacts the above section effective June 16, 1989. For provisions of former section, see 1978 Original Pamphlet.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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 person for whom a conservator is sought. 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 person for whom a conservator is sought resides;

(2) an individual or corporation nominated by the person for whom a conservator is sought 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;

(3) the spouse of the person for whom a conservator is sought;

(4) an adult child of the person for whom a conservator is sought;

(5) a parent of the person for whom a conservator is sought or a person nominated by the will of a deceased parent;

(6) any relative of the person for whom a conservator is sought with whom he 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 person for whom a conservator is sought or paying benefits to him; and

(8) any other person.

B. A person under the priorities of Paragraph (1), (3), (4), (5) or (6) 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 person for whom a conservator is sought;
- (2) geographic location of the proposed conservator;
- (3) the relationship of the proposed conservator to the person for whom a conservator is sought;
- (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 person for whom a conservator is sought and the proposed conservator.

History: 1953 Comp., § 32A-5-410, enacted by Laws 1975, ch. 257, § 5-410; 1989, ch. 252, § 23.

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, and "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".

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 200, 205.

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.

28 C.J.S. Drunkards §§ 9, 12; 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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 207, 208.

28 C.J.S. Drunkards §§ 9, 12; 39 C.J.S. Guardian and Ward § 31; 49 C.J.S. Insane Persons § 44.

### **§ 45-5-412. Reserved.**

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 198.

28 C.J.S. Drunkards §§ 9, 12; 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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 199.

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.

28 C.J.S. Drunkards §§ 9, 12; 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 person for whom a conservator has been appointed or any person interested in his welfare, the court may remove a conservator for good cause, upon notice and hearing.

B. Upon death, resignation or removal, the court may appoint another conservator. A conservator so appointed succeeds to the title and powers of his predecessor.

C. The person for whom a conservator has been appointed 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 ordering that a person no longer needs to be under a conservatorship, the court, following the same procedures to safeguard the rights of the person for whom a conservator has been appointed as those that apply to a petition for appointment of a

conservator, shall send a visitor to interview the person under conservatorship and assess his functional limitations. The court shall also appoint a health care professional to examine the person under conservatorship. Both the visitor and qualified health care professional shall submit a written report of their findings to the court.

History: 1953 Comp., § 32A-5-415, enacted by Laws 1975, ch. 257, § 5-415; 1989, ch. 252, § 24.

The 1989 amendment, effective June 16, 1989, added "termination of conservatorship" to the catchline, 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.

Compiler's notes. - This section includes within its scope some of the functions of former 32-1-39 and 33-4-4, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 201, 226.

28 C.J.S. Drunkards §§ 9, 12; 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 215, 219.

28 C.J.S. Drunkards §§ 9, 12; 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 his powers, a conservator shall act as a fiduciary and shall observe the standards of care applicable to trustees as described by Section 7-302 [45-7-302 NMSA 1978].

History: 1953 Comp., § 32A-5-417, enacted by Laws 1975, ch. 257, § 5-417.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 210.

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.

28 C.J.S. Drunkards §§ 9, 12; 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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 216.

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.

28 C.J.S. Drunkards §§ 9, 12; 39 C.J.S. Guardian and Ward §§ 74, 145; 49 C.J.S. Insane Persons § 87.

## **§ 45-5-419. Accounts.**

A. Every conservator shall file with the district court an account of his administration of the estate not less than annually and also on resignation or removal and on termination of the person under conservatorship's minority or incapacity.

B. 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.

C. 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 which has jurisdiction over the area is entitled to a copy of any account filed under Chapter 45, Article 5 NMSA 1978.

History: 1953 Comp., § 32A-5-419, enacted by Laws 1975, ch. 257, § 5-419; 1977, ch. 121, § 9; 1989, ch. 252, § 25.

The 1989 amendment, effective June 16, 1989, in Subsection A substituted "shall" for "must" in the first sentence and substituted all of the present language of that sentence beginning with "person" for "protected person's minority or disability", and deleted the former second sentence, which read "However, for good cause shown upon the application of an interested person, the court may by order relieve the conservator of filing annual or other accounts."; deleted former Subsection B, relating to order adjudication liabilities; redesignated former Subsection C as present Subsection B, while substituting therein "estate" for "property"; redesignated former Subsection D as present Subsection C; in Subsection C substituted "property" for "estate" near the beginning and "Chapter 45, Article 5 NMSA 1978" for "Sections 32A-5-401 through 32A-5-432 NMSA 1953" at the end, and deleted the former last two sentences, relating to submission of account to veterans administration office in years in which no account is filed with the court.



Compiler's notes. - This section includes within its scope some of the functions of former 32-2-5, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 217.

28 C.J.S. Drunkards §§ 9, 12; 39 C.J.S. Guardian and Ward § 145; 49 C.J.S. Insane Persons § 87.

## **§ 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 211.

28 C.J.S. Drunkards §§ 9, 12; 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 212, 225.

28 C.J.S. Drunkards §§ 9, 12; 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.

Effective dates. - Laws 1989, ch. 252 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

### **§ 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 218.

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.

28 C.J.S. Drunkards §§ 9, 12; 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 [45-5-408 NMSA 1978], 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.

Compiler's notes. - This section includes within its scope some of the functions of former 32-1-35, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 224.

28 C.J.S. Drunkards §§ 9, 12; 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.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 178, 213, 214.

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.

Estoppel of or waiver by parties or participants regarding irregularities or defects in judicial sale by guardian, 2 A.L.R.2d 187.

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.

Guardian's authority to make agreement to drop or compromise will contest or withdraw objections to probate, 42 A.L.R.2d 1361.

Power of court to confirm sale of ward's property over objection of guardian, 43 A.L.R.2d 1445.

Ademption or revocation of specific devise or bequest by guardian, committee or conservator of mentally or physically incompetent testator, 51 A.L.R.2d 770.  
Power of guardian, committee or trustee of mental incompetent, after latter's death, to pay debts and obligations, 60 A.L.R.2d 963.  
Rights and powers of guardian with reference to joint bank deposit in name of incompetent and another, 62 A.L.R.2d 1093.  
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.  
Power of incompetent spouse's guardian, committee or next friend to sue for granting or vacation of divorce or annulment of marriage, or to make a compromise or settlement in such suit, 6 A.L.R.3d 681.  
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.  
Power of parent, guardian or committee to consent to surgical invasion of ward's person for benefit of another, 35 A.L.R.3d 692.  
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.  
28 C.J.S. Drunkards §§ 9, 12; 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 to 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 214, 219, 220, 221.

Right of guardian to expend principal of ward's estate for support and maintenance, 5 A.L.R. 632.

Ademption or revocation of specific devise or bequest by guardian, committee or conservator of mentally or physically incompetent testator, 51 A.L.R.2d 770.

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.

28 C.J.S. Drunkards §§ 9, 12; 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.

Repeals and reenactments. - Laws 1989, ch. 252, § 27, repeals 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 enacts the above section, effective June 16, 1989. For provisions of former section see 1978 Original Pamphlet.

## **§ 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 221.

28 C.J.S. Drunkards §§ 9, 12; 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 196, 222.

Power of guardian as to compromise of liquidated contract claim or money judgment, 155 A.L.R. 196.

Power of incompetent spouse's guardian, committee or next friend to sue for granting or vacation of divorce or annulment of marriage, or to make a compromise or settlement in such suit, 6 A.L.R.3d 681.

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.

28 C.J.S. Drunkards §§ 9, 12; 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 223.

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; 28 C.J.S. Drunkards §§ 9, 12; 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.

Cross-references. - For definition of disability, see 45-5-101 NMSA 1978. As to age of majority, see 12-2-2 and 28-6-1 NMSA 1978.

Compiler's notes. - This section includes within its scope some of the functions of former 32-2-9, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 225.

28 C.J.S. Drunkards §§ 9, 12; 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 197, 200.

28 C.J.S. Drunkards §§ 9, 12; 39 C.J.S. Guardian and Ward § 187; 49 C.J.S. Insane Persons § 154.

### **§ 45-5-432. Foreign conservator; proof of authority; bond; powers.**

If no local conservator has been appointed or no petition therefor is pending in New Mexico, a domiciliary foreign conservator may file with the district court in the county in which property belonging to the protected person is located, authenticated copies of his appointment and of any official bond he has given. Thereafter, he may exercise as to assets in New Mexico all powers of a local conservator and may maintain actions and proceedings in New Mexico subject to any conditions imposed upon nonresident parties generally.

History: 1953 Comp., § 32A-5-432, enacted by Laws 1975, ch. 257, § 5-432.

### **§ 45-5-433. Exemption.**

The veterans administration and the New Mexico veterans service commission shall be exempted from Sections 45-5-401 through 45-5-432 NMSA 1978.

History: 1978 Comp., § 45-5-433, enacted by Laws 1989, ch. 252, § 28.

Effective dates. - Laws 1989, ch. 252 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

## **Part 5**

### **POWERS OF ATTORNEY**

#### **§ 45-5-501. When power of attorney not affected by incapacity.**

A. Whenever a principal designates another person as his attorney-in-fact or agent by a power of attorney in writing and the writing contains the words, "This power of attorney shall not be affected by incapacity of the principal", or "This power of attorney shall become effective upon the incapacity of the principal", or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his incapacity, the authority of the attorney-in-fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later incapacity or incapacity of the principal or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney-in-fact or agent pursuant to the power during any period of incapacity or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representatives as if the principal were alive and not incapacitated. If a conservator thereafter is appointed for the principal, the attorney-in-fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same powers with regard to a power of attorney which the principal would have had if he had not been incapacitated.

B. Whenever a principal designates another person as his attorney-in-fact or agent by a power of attorney in writing, the following forms may be used:

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

"THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THIS FORM, THE NEW MEXICO STATUTORY SHORT FORM UNDER SECTION 45-5-502 NMSA 1978, DOES NOT PROHIBIT THE USE OF ANY OTHER FORM.

POWER OF ATTORNEY

New Mexico Statutory Short Form

I, \_\_\_\_\_ reside in

---

\_\_\_\_\_,  
(Name)  
County, New Mexico. I appoint

---

\_\_\_\_\_  
(Name(s))  
to serve as my attorney(s)-in-fact.  
If any attorney-in-fact appointed above is unable to serve, then I appoint  
\_\_\_\_\_ to serve as successor attorney-in-fact in place of  
the person who is unable to serve.

---

---

CHECK AND INITIAL THE FOLLOWING PARAGRAPH ONLY IF MORE THAN ONE PERSON IS APPOINTED TO ACT ON YOUR BEHALF AND YOU WANT ANY ONE OF THEM TO HAVE THE POWER TO ACT ALONE WITHOUT THE SIGNATURE OF THE OTHER(S). IF YOU DO NOT CHECK AND INITIAL THE FOLLOWING PARAGRAPH AND MORE THAN ONE PERSON IS NAMED TO ACT ON YOUR BEHALF THEN THEY MUST ACT JOINTLY.

---

( ) If more than one person is appointed to serve as my \_\_\_\_\_ attorneys-in-fact then they may act severally, alone initials and independently of each other.  
My attorney(s)-in-fact shall have the power to act in my name, place and stead in any way which I myself could do with respect to the following matters to the extent permitted by law:

---

INITIAL IN THE OPPOSITE BOX EACH AUTHORIZATION WHICH YOU DESIRE TO GIVE TO YOUR ATTORNEY(S)-IN-FACT. YOUR ATTORNEY(S)-IN-FACT SHALL BE AUTHORIZED TO ENGAGE ONLY IN THOSE ACTIVITIES WHICH ARE INITIALED.

---

- 
1. real estate transactions;  
.....(\*)
  2. bond, share and commodity transactions;  
.....(\*)
  3. chattel and goods transactions;  
.....()
  4. banking transactions;





This power of attorney shall not be affected by my incapacity, but will terminate upon my death unless I have revoked it prior to my death.

---

CHECK AND INITIAL THE FOLLOWING PARAGRAPH IF YOU INTEND FOR THIS POWER OF ATTORNEY TO BECOME EFFECTIVE ONLY IF YOU BECOME INCAPACITATED. YOUR FAILURE TO DO SO WILL MEAN THAT YOUR ATTORNEY(S)-IN-FACT ARE EMPOWERED TO ACT ON YOUR BEHALF FROM THE TIME YOU SIGN THIS DOCUMENT UNTIL YOUR DEATH UNLESS YOU REVOKE THE POWER BEFORE YOUR DEATH.

---

( ) This power of attorney shall become effective only if I become incapacitated.

\_\_\_\_\_ My attorney(s)-in-fact shall be entitled to rely on notarized statements from \_\_\_\_\_ initials two qualified health care professionals as to my incapacity. By incapacity I mean that among other things, I am unable to effectively manage my personal care, property or financial affairs.

---

(Signature) \_\_\_\_\_

Dated: \_\_\_\_\_,

19 \_\_\_\_\_

ACKNOWLEDGEMENT  
STATE OF NEW MEXICO )

) ss.

COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_, by \_\_\_\_\_

---

Notary Public \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

\_\_\_\_\_"; and

"THIS AFFIDAVIT IS FOR THE USE OF YOUR ATTORNEY(S)-IN-FACT IF EVER YOUR ATTORNEY(S)-IN-FACT ACTS ON YOUR BEHALF UNDER YOUR WRITTEN POWER OF ATTORNEY. AFFIDAVIT AS TO POWER OF ATTORNEY BEING IN FULL FORCE STATE OF NEW MEXICO )

) ss.

COUNTY OF \_\_\_\_\_ )

I/we \_\_\_\_\_ being duly sworn, state:

1. \_\_\_\_\_ ("Principal") of \_\_\_\_\_ County, New Mexico, signed a written Power of Attorney on \_\_\_\_\_, 19 \_\_\_\_\_, appointing the undersigned as his/her attorney(s)-in-fact. (A true copy of the power of attorney is attached hereto and incorporated herein.)

2. As attorney(s)-in-fact and under and by virtue of the Power of Attorney, I/we have this date executed the following described instrument:

\_\_\_\_\_

3. At the time of executing the above described instrument I/we had no actual knowledge or actual notice of revocation or termination of the Power of Attorney by death or otherwise, or notice of any facts indicating the same.

4. I/we represent that the principal is now alive; has not, at any time, revoked or repudiated the power of attorney; and the power of attorney still is in full force and effect.

5. I/we make this affidavit for the purpose of inducing \_\_\_\_\_ to accept delivery of the above described instrument, as executed by mes in my/our capacity of attorney(s)-in-fact for the Principal.

\_\_\_\_\_

\_\_\_\_\_, Attorney-in-fact

\_\_\_\_\_

\_\_\_\_\_, Attorney-in-fact

Sworn to before me \_\_\_\_\_ this

day of \_\_\_\_\_, 19\_\_\_\_\_.

Notary Public

My commission expires:

\_\_\_\_\_".

History: 1953 Comp., § 32A-5-501, enacted by Laws 1975, ch. 257, § 5-501; 1989, ch. 252, § 29.

The 1989 amendment, effective June 16, 1989, designated the formerly undesignated provisions as Subsection A; in Subsection A inserted "person as" near the beginning of the first sentence, and substituted "incapacity" for "disability" in the first and second sentences and "incapacitated" for "disabled" at the end of the second and fourth sentences; and added Subsection B.

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).

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).

Power granted to wife to act for husband "without limitation" 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).

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 227, 228.  
2A C.J.S. Agency § 86.

## **§ 45-5-502. Other powers of attorney not revoked until notice of death or disability.**

A. The death or disability of any principal who has executed a power of attorney in writing other than a power as described by Section 5-501 [45-5-501 NMSA 1978], does not revoke or terminate the agency as to the attorney-in-fact, agent or other person who, without actual knowledge of the death or disability of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees and personal representatives.

B. An affidavit, executed by the attorney-in-fact or agent stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death or disability, is in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

C. This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

History: 1953 Comp., § 32A-5-502, enacted by Laws 1975, ch. 257, § 5-502.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 228.  
2A C.J.S. Agency § 86.

## **Article 6**

### **Nonprobate Transfers**

#### Part 1

##### Multiple-Party Accounts

###### Sec.

- 45-6-101. Definitions.
- 45-6-102. Ownership as between parties, and others; protection of financial institutions.
- 45-6-103. Ownership during lifetime.
- 45-6-104. Right of survivorship.
- 45-6-105. Effect of written notice to financial institution.
- 45-6-106. Accounts and transfers nontestamentary.
- 45-6-107. Rights of creditors.
- 45-6-108. Financial institution protection; payment on signature of one party.
- 45-6-109. Financial institution protection; payment after death or disability; joint account.
- 45-6-110. Financial institution protection; payment of P.O.D. account.
- 45-6-111. Financial institution protection; payment of trust account.
- 45-6-112. Financial institution protection; discharge.
- 45-6-113. Financial institution protection; set-off.

#### Part 2

##### Provisions Relating To Effect Of Death

- 45-6-201. Provisions for payment or transfer at death.

#### **Part 1**

### **MULTIPLE-PARTY ACCOUNTS**

#### **§ 45-6-101. Definitions.**

In Sections 6-101 through 6-201 [45-6-101 to 45-6-201 NMSA 1978] of the Probate Code, unless the context otherwise requires:

A. "account" means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account and other like arrangement;

B. "beneficiary" means a person named in a trust account as one for whom a party to the account is named as trustee;

C. "financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations and credit unions;

D. "joint account" means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship;

E. "multiple-party account" is any of the following types of account:

(1) a joint account;

(2) a P.O.D. account; or

(3) a trust account.

A multiple-party account does not include accounts established for deposit of funds of a partnership, joint venture or other association for business purposes, or accounts controlled by one or more persons as the duly authorized agent or trustee for an individual, a corporation, unincorporated association, charitable or civic organization or a regular fiduciary or trust account where the relationship is established other than by deposit agreement;

F. "net contribution" of a party to a joint account as of any given time is the sum of all deposits thereto made by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance. The term includes, in addition, any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question;

G. "original payee" means a person who has the present right to be paid the P.O.D. account upon request;

H. "party" means a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account. A P.O.D. payee or beneficiary of a trust account is a party only after the account becomes payable to him by reason of his surviving the original payee or trustee. Unless the context otherwise requires, it includes a guardian, conservator, personal representative or assignee, including an attaching

creditor, of a party. It also includes a person identified as a trustee of an account for another whether or not a beneficiary is named, but it does not include any named beneficiary unless he has a present right of withdrawal;

I. "payment" of sums on deposit includes withdrawal, payment on check or other directive of a party, and any pledge of sums on deposit by a party and any set-off, or reduction or other disposition of all or part of an account pursuant to a pledge;

J. "proof of death" includes a death certificate or record or report which is prima facie proof of death under Section 1-107 [45-1-107 NMSA 1978];

K. "P.O.D. account" means an account payable on request to one person during lifetime and on his death to one or more P.O.D. payees, or to one or more persons during their lifetimes and on the death of all of them, to one or more P.O.D. payees;

L. "P.O.D. payee" means a person designated on a P.O.D. account as one to whom the account is payable on request after the death of one or more persons;

M. "request" means a proper request for withdrawal, or a check or order for payment, which complies with all conditions of the account, including special requirements concerning necessary signatures and regulations of the financial institution. However, if the financial institution conditions withdrawal or payment on advance notice, for purposes of Sections 6-101 through 6-201 [45-6-101 to 45-6-201 NMSA 1978], the request for withdrawal or payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for withdrawal;

N. "sums on deposit" means the balance payable on a multiple-party account including interest, dividends and in addition any deposit life insurance proceeds added to the account by reason of the death of a party;

O. "trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. It is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client; and

P. "withdrawal" includes payment to a third person pursuant to check or other directive of a party.

History: 1953 Comp., § 32A-6-101, enacted by Laws 1975, ch. 257, § 6-101.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 1, 70, 229, 231.

Manner and sufficiency of revocation of tentative ("Totten") trust of savings bank account, 38 A.L.R.2d 1243.

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 on instrument purporting to create joint tenancy, 72 A.L.R.2d 1268.

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.

9 C.J.S. Banks and Banking § 285; 48A C.J.S. Joint Tenancy § 2.

## **§ 45-6-102. Ownership as between parties, and others; protection of financial institutions.**

A. The provisions of Sections 6-103 through 6-105 [45-6-103 to 45-6-105 NMSA 1978] concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of withdrawal of these persons as determined by the terms of account contracts.

B. The provisions of Sections 6-108 through 6-113 [45-6-108 to 45-6-113 NMSA 1978] govern the liability of financial institutions who make payments pursuant thereto, and their set-off rights.

History: 1953 Comp., § 32A-6-102, enacted by 1975, ch. 257, § 6-102.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 229.

9 C.J.S. Banks and Banking § 285; 48A C.J.S. Joint Tenancy §§ 2, 32.

### **§ 45-6-103. Ownership during lifetime.**

A. A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

B. A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees. If two or more parties are named as original payees, during their lifetimes, rights as between them are governed by Subsection A of this section.

C. Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime. If two or more parties are named as trustee on the account, during their lifetimes, beneficial rights as between them are governed by Subsection A of this section. If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

History: 1953 Comp., § 32A-6-103, enacted by Laws 1975, ch. 257, § 6-103.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 230, 231, 236, 240.

9 C.J.S. Banks and Banking § 285; 48 C.J.S. Joint Tenancy § 31.

### **§ 45-6-104. Right of survivorship.**

A. Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. If there are two or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under Section 6-103 [45-6-103 NMSA 1978] augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death. The right of survivorship continues between the surviving parties.

B. If the account is a P.O.D. account, on death of the original payee or of the survivor of two or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees, if surviving, or to the survivor of them if one or more die before the original payee. If two or more P.O.D. payees survive, there is no right of survivorship in event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.



C. If the account is a trust account, on death of the trustee or the survivor of two or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a contrary intent. If two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

D. In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate.

E. A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a trust account, or a P.O.D. payee designation, cannot be changed by will.

History: 1953 Comp., § 32A-6-104, enacted by Laws 1975, ch. 257, § 6-104.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 230 to 233, 236.  
48A C.J.S. Joint Tenancy §§ 3, 4.

### **§ 45-6-105. Effect of written notice to financial institution.**

The provisions of Section 6-104 [45-6-104 NMSA 1978] as to rights of survivorship are determined by the form of the account at the death of a party. This form may be altered by written order given by a party to the financial institution to change the form of the account or to stop or vary payment under the terms of the account. The order or request must be signed by a party, received by the financial institution during the party's lifetime and not countermanded by other written order of the same party during his lifetime.

History: 1953 Comp., § 32A-6-105, enacted by Laws 1975, ch. 257, § 6-105.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 232.

9 C.J.S. Banks and Banking § 285; 48 C.J.S. Joint Tenancy §§ 4, 20.

### **§ 45-6-106. Accounts and transfers nontestamentary.**

Any transfers resulting from the application of Section 6-104 [45-6-104 NMSA 1978] are effective by reason of the account contracts involved, and Sections 6-101 through 6-201 [45-6-101 to 45-6-201 NMSA 1978] are not to be considered as testamentary or subject to Sections 1-101 through 4-401 [45-1-101 to 45-4-401 NMSA 1978] of the Probate Code.

History: 1953 Comp., § 32A-6-106, enacted by Laws 1975, ch. 257, § 6-106.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 233.

94 C.J.S. Wills § 136.

### **§ 45-6-107. Rights of creditors.**

A. No multiple-party account will be effective against an estate of a deceased party to transfer to a survivor sums needed to pay debts, taxes and expenses of administration, including statutory allowances to the surviving spouse, minor children and dependent children, if other assets of the estate are insufficient.

B. A surviving party, P.O.D. payee or beneficiary who receives payment from a multiple-party account after the death of a deceased party shall be liable to account to the personal representative for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the claims and charges mentioned above remaining unpaid after application of the decedent's estate. No proceeding to assert this liability shall be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor or one acting for a minor or dependent child of the decedent, and no proceeding shall be commenced later than two years following the death of the decedent. Sums recovered by the personal representative shall be administered as part of the decedent's estate.

C. This section shall not affect the right of a financial institution to make payment on multiple-party accounts according to the terms thereof, or make it liable to the estate of a deceased party, unless, before payment, the institution has been served with process in a proceeding by the personal representative.

History: 1953 Comp., § 32A-6-107, enacted by Laws 1975, ch. 257, § 6-107.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 234.  
9 C.J.S. Banks and Banking § 285; 48 C.J.S. Joint Tenancy §§ 31, 32.

### **§ 45-6-108. Financial institution protection; payment on signature of one party.**

Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts. Any multiple-party account may be paid, on request, to any one or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account.

History: 1953 Comp., § 32A-6-108, enacted by Laws 1975, ch. 257, § 6-108.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 230, 231, 235.  
9 C.J.S. Banks and Banking §§ 285, 290.

### **§ 45-6-109. Financial institution protection; payment after death or disability; joint account.**

Any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded. However, payment may not be made to the personal representative or heirs of a deceased party unless proofs of death are presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship under Section 6-104 [45-6-104 NMSA 1978].

History: 1953 Comp., § 32A-6-109, enacted by Laws 1975, ch. 257, § 6-109.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 231, 236.  
9 C.J.S. Banks and Banking §§ 285, 290.

### **§ 45-6-110. Financial institution protection; payment of P.O.D. account.**

A. Any P.O.D. account may be paid, on request, to any original party to the account.

B. Payment may be made, on request, to the P.O.D. payee or to the personal representative or heirs of a deceased P.O.D. payee upon presentation to the financial

institution of proof of death showing that the P.O.D. payee survived all persons named as original payees.

C. Payment may be made to the personal representative or heirs of a deceased original payee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account either as an original payee or as P.O.D. payee.

History: 1953 Comp., § 32A-6-110, enacted by Laws 1975, ch. 257, § 6-110.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 237.  
9 C.J.S. Banks and Banking §§ 285, 290.

### **§ 45-6-111. Financial institution protection; payment of trust account.**

Any trust account may be paid, on request, to any trustee. Unless the financial institution has received written notice that the beneficiary has a vested interest not dependent upon his surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account either as trustee or beneficiary. Payment may be made, on request, to the beneficiary upon presentation to the financial institution of proof of death showing that the beneficiary or beneficiaries survived all persons named as trustees.

History: 1953 Comp., § 32A-6-111, enacted by Laws 1975, ch. 257, § 6-111.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 231, 238.  
9 C.J.S. Banks and Banking §§ 278, 290.

### **§ 45-6-112. Financial institution protection; discharge.**

Payment made pursuant to Sections 6-108 through 6-111 [45-6-108 to 45-6-111 NMSA 1978] 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, P.O.D. payees or beneficiaries, or their successors. The protection here given does not extend to payments made after a financial institution has received written notice from any party to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in any demand for withdrawal if the financial institution is to be protected by this section. No other notice or any other information shown to have been available to a financial institution shall affect its right to

the protection provided by this section. The protection here provided shall have no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts.

History: 1953 Comp., § 32A-6-112, enacted by Laws 1975, ch. 257, § 6-112.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 230, 231, 239.

9 C.J.S. Banks and Banking §§ 285, 290.

### **§ 45-6-113. Financial institution protection; set-off.**

Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to set-off against the account in which the party has or had immediately before his death a present right of withdrawal. The amount of the account subject to set-off is that proportion to which the debtor is, or was immediately before his death, beneficially entitled, and in the absence of proof of net contributions, to an equal share with all parties having present rights of withdrawal.

History: 1953 Comp., § 32A-6-113, enacted by Laws 1975, ch. 257, § 6-113.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 240.

9 C.J.S. Banks and Banking §§ 296, 304.

## **Part 2**

### **PROVISIONS RELATING TO EFFECT OF DEATH**

#### **§ 45-6-201. Provisions for payment or transfer at death.**

A. Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance, real estate contract or any other written instrument effective as a contract, gift, conveyance or trust are deemed to be nontestamentary, and the Probate Code does not invalidate the instrument or any provision:

(1) that money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(2) that any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promissor before payment or demand; or

(3) that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

B. Nothing in this section limits the rights of creditors under other laws of New Mexico.

History: 1953 Comp., § 32A-6-201, enacted by Laws 1975, ch. 257, § 6-201.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 241.  
94 C.J.S. Wills § 136.

## **Article 7**

### **Trust Administration**

#### Part 1

##### Principal Place Of Administration

Sec.

45-7-101. Place of administration.

45-7-102 to 45-7-104. Reserved.

45-7-105. Registration; qualification of foreign trustee.

#### Part 2

##### Jurisdiction Of Court Concerning Trusts

45-7-201. Court; exclusive jurisdiction of trusts.

45-7-202. Trust proceeding; venue.

45-7-203, 45-7-204. Reserved.

45-7-205. Proceedings for review of employment of agents and review of compensation of trustee and employees of trust.

45-7-206. Trust proceedings; initiation by notice; necessary parties.

#### Part 3

## Duties and Liabilities of Trustees

- 45-7-301. General duties not limited.
- 45-7-302. Trustee's standard of care and performance.
- 45-7-303. Duty to inform and account to beneficiaries.
- 45-7-304. Duty to provide bond.
- 45-7-305. Trustee's duties; appropriate place of administration; deviation.
- 45-7-306. Personal liability of trustee to third parties.
- 45-7-307. Limitations on proceedings against trustees after final account.

## Part 4

### Powers of Trustees

- 45-7-401. Powers of trustees.

## Part 1

### PRINCIPAL PLACE OF ADMINISTRATION

#### **§ 45-7-101. Place of administration.**

Unless otherwise designated in the trust instrument, the principal place of administration of a trust is the trustee's usual place of business or at the trustee's residence if the trustee has no such place of business. In the case of cotrustees, the principal place of administration, if not otherwise designated in the trust instrument, is:

- A. the usual place of business of the corporate trustee if there is but one corporate cotrustee; or
- B. the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate cotrustee; and otherwise
- C. the usual place of business or residence of any of the cotrustees as agreed upon by them.

History: 1953 Comp., § 32A-7-101, enacted by Laws 1975, ch. 257, § 7-101.

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 §§ 279, 282; Am. Jur. 2d New Topic Service, Uniform Probate Code § 1.  
90 C.J.S. Trusts §§ 204 to 210.

§§ 45-7-102 to 45-7-104. Reserved.

Compiler's notes. - Laws 1975, ch. 257, §§ 7-102 to 7-104, contained these section numbers, but no accompanying text.

## **§ 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.

Cross-references. - For application for certificate of authority for foreign corporation to do business in state, see 53-17-5 NMSA 1978. As to 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 §§ 279, 282.  
90 C.J.S. Trusts §§ 204 to 210.

### **Part 2**

## **JURISDICTION OF COURT CONCERNING TRUSTS**

### **§ 45-7-201. Court; exclusive jurisdiction of trusts.**

A. The district court has exclusive jurisdiction of proceedings initiated by interested persons concerning the internal affairs of trusts.



B. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts. These include proceedings to:

(1) appoint or remove a trustee;

(2) review trustees' fees and to review and settle interim or final accounts; and

(3) ascertain beneficiaries, determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, instruct trustees and determine the existence or nonexistence of any immunity, power, privilege, duty or right.

C. A proceeding under this section does not result in continuing supervisory proceedings. All aspects of the administration of a trust shall proceed expeditiously, consistent with the terms of the trust, free of judicial intervention and without order, approval or other action of any court, subject to the jurisdiction of the district court as invoked by interested persons or as otherwise exercised as provided by law.

History: 1953 Comp., § 32A-7-201, enacted by Laws 1975, ch. 257, § 7-201.

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 §§ 279, 282. 21 C.J.S. Courts § 486; 90 C.J.S. Trusts §§ 364, 454.

## **§ 45-7-202. Trust proceeding; venue.**

Venue for proceedings under Section 7-201 [45-7-201 NMSA 1978] is in the county where the trust has its principal place of administration, or as otherwise provided by the Rules of Civil Procedure.

History: 1953 Comp., § 32A-7-202, enacted by Laws 1975, ch. 257, § 7-202.

Cross-references. - For principal place of administration, see 45-7-101 NMSA 1978.

Rules of Civil Procedure. - The Rules of Civil Procedure for the District Courts are set out in Judicial Pamphlet 1.

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 §§ 279, 282.  
90 C.J.S. Trusts §§ 364, 455; 92 C.J.S. Venue § 39.

§§ 45-7-203, 45-7-204. Reserved.

Compiler's notes. - Laws 1975, ch. 257, §§ 7-203, 7-204, contained these section numbers, but no accompanying text.

### **§ 45-7-205. Proceedings for review of employment of agents and review of compensation of trustee and employees of trust.**

A. On petition of an interested person, after notice to all interested persons, the district court may review the propriety of employment of any person by a trustee including any attorney, auditor, investment advisor or other specialized agent or assistant, and the reasonableness of the compensation of any person so employed, and the reasonableness of the compensation determined by the trustee for his own services.

B. Any person who has received excessive compensation from a trust may be ordered to make appropriate refunds.

History: 1953 Comp., § 32A-7-205, enacted by Laws 1975, ch. 257, § 7-205.

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 §§ 279, 282.

Trustee's compensation in case of successive trusts, or in case of a single benefit of different persons in succession, 85 A.L.R. 163.

Right to commission in respect of debt of trustee himself to estate, 88 A.L.R. 189.

Compensation of testamentary trustee for conducting or taking active part in management of corporation business, 99 A.L.R. 961.

Loss or depreciation of assets for which trustee is not responsible as affecting the amount of his compensation, 110 A.L.R. 994.

Validity, construction and effect of provisions of will to effect that legacy or devise to trustee is made in consideration of, or in contemplation of, services to be rendered after testator's death, 116 A.L.R. 361.

Provision of trust instrument contemplating future agreement as to trustee's compensation as affecting right to compensation, 165 A.L.R. 772.

Right of trustee to compensation on corpus withdrawn from the trust, 18 A.L.R.2d 1379.

Fiduciary's compensation on estate assets distributed in kind, 32 A.L.R.2d 778.

Limiting effect of provision in contract, will or trust instrument fixing trustee's or executor's fees, 19 A.L.R.3d 520.

90 C.J.S. Trusts §§ 261, 357.

## **§ 45-7-206. Trust proceedings; initiation by notice; necessary parties.**

Proceedings under Section 7-201 [45-7-201 NMSA 1978] are initiated by filing a petition in the district court and giving notice pursuant to Section 1-401 [45-1-401 NMSA 1978] to interested persons. The district court may order notification to additional persons. A decree is valid as to all who are given notice of the proceeding though fewer than all interested persons are notified.

History: 1953 Comp., § 32A-7-206, enacted by Laws 1975, ch. 257, § 7-206.

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 §§ 279, 282.  
90 C.J.S. Trusts § 246.

### **Part 3**

## **DUTIES AND LIABILITIES OF TRUSTEES**

### **§ 45-7-301. General duties not limited.**

Except as specifically provided, the general duty of the trustee to administer a trust expeditiously for the benefit of the beneficiaries is not altered by the Probate Code.

History: 1953 Comp., § 32A-7-301, enacted by Laws 1975, ch. 257, § 7-301.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

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 § 310.

Standard of care required of trustee representing itself to have expert knowledge or skill, 91 A.L.R.3d 904.

Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

90 C.J.S. Trusts § 247.

### **§ 45-7-302. Trustee's standard of care and performance.**

Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another. If the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

History: 1953 Comp., § 32A-7-302, enacted by Laws 1975, ch. 257, § 7-302.

Reliance on others' advice held not violation of "prudent man" standard. - The fact that the trustee obtains advice from an accountant, an attorney and an appraiser, and relies on their advice without an independent investigation on his part, is not a violation of the "prudent man" standard. *C.B. & T. Co. v. Hefner*, 98 N.M. 594, 651 P.2d 1029 (Ct. App. 1982), cert. denied, 98 N.M. 590, 651 P.2d 636 (1982).

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 §§ 326, 329; Am. Jur. 2d New Topic Service, Uniform Probate Code §§ 81, 210.

Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

Right of trustee of land having interest therein to purchase on his own behalf in association with foreclosure by third-party lienor, in absence of express trust provision, 30 A.L.R.4th 732.

90 C.J.S. Trusts § 377.

### **§ 45-7-303. Duty to inform and account to beneficiaries.**

The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. In addition:

A. within thirty days after acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible, one or more persons who under Section 1-403 [45-1-403 NMSA 1978] may represent beneficiaries with future interests, of the trustee's name and address;

B. upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect the interest of the beneficiary and with relevant information about the assets of the trust and the particulars relating to the administration; and

C. upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

History: 1953 Comp., § 32A-7-303, enacted by Laws 1975, ch. 257, § 7-303.

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. - Am. Jur. 2d New Topic Service, Uniform Probate Code § 134.

Duty of testamentary trustee to account for rents and profits from real estate in another state or country at domicile of decedent, 99 A.L.R. 1135.

Right of owner of contingent or defeasible future interest in trust property to compel accounting by trustee, 144 A.L.R. 791.

Validity, construction and effect of provision of trust instrument relieving trustee from duty to account, 171 A.L.R. 630.

Conclusiveness of allowance of account of trustee as respects self-dealing in assets of trust estate, 1 A.L.R.2d 1060.

Accounting and settlement as affecting testamentary cotrustee's liability for defaults or wrongful acts of fiduciary in handling estate, 65 A.L.R.2d 1117.

Duty of personal representative of deceased trustee to render account, 36 A.L.R.3d 1071.

Standard of care required of trustee representing itself to have expert knowledge or skill, 91 A.L.R.3d 904.

Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

90 C.J.S. Trusts §§ 377, 378.

### **§ 45-7-304. Duty to provide bond.**

A. A trustee need not provide bond to secure performance of his duties unless required by the terms of the trust, reasonably requested by a beneficiary or found by the district court to be necessary to protect the interests of the beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.

B. On petition of the trustee or other interested person, the district court may:

(1) excuse a requirement of bond;

(2) reduce the amount of the bond;

(3) release the surety; or

(4) permit the substitution of another bond with the same or different sureties.

C. If bond is required, it shall be filed with the clerk of the district court in amounts and with sureties and liabilities as provided in Sections 45-3-604 and 45-3-606 NMSA 1978 relating to bonds of personal representatives.

History: 1953 Comp., § 32A-7-304, enacted by Laws 1975, ch. 257, § 7-304; 1977, ch. 121, § 10.

Severability clauses. - Laws 1977, ch. 121, § 12, provides for the severability of the act if any part or application thereof is held invalid.

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 § 550; Am. Jur. 2d New Topic Service, Uniform Probate Code § 134.

Rights and liabilities as between sureties on successive bonds, 76 A.L.R. 904.

Conflict of laws as to necessity of testamentary trustee giving bond, 115 A.L.R. 806.

Right of surety to terminate liability as regards future defaults of principal, 118 A.L.R. 1261; 150 A.L.R. 485.

Discretion or power of court, after bond of testamentary trustee has been given, to dispense with, discontinue or modify bond, 121 A.L.R. 951.

Official bond as covering appeal taken by trustee, 132 A.L.R. 1280.

Power of court, in absence of statute, to require corporate surety on fiduciary bond in probate proceeding, 82 A.L.R.2d 926.

90 C.J.S. Trusts § 224.

### **§ 45-7-305. Trustee's duties; appropriate place of administration; deviation.**

A. A trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management.

B. If the place of administration becomes inappropriate for any reason, the district court may enter any order furthering efficient administration and the interests of beneficiaries, including removal of the trustee and appointment of a trustee in another state. Trust provisions, relating to the place of administration and to changes in the place of administration or of trustee, control unless compliance would be contrary to efficient administration or the purposes of the trust. Views of adult beneficiaries shall be given weight in determining the suitability of the trustee and the place of administration.

History: 1953 Comp., § 32A-7-305, enacted by Laws 1975, ch. 257, § 7-305.

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 § 278.

90 C.J.S. Trusts § 246.

### **§ 45-7-306. Personal liability of trustee to third parties.**

A. Unless otherwise provided in the contract, a trustee is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his fiduciary capacity and identify the trust estate in the contract.

B. A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault.

C. Claims based on contracts entered into by a trustee in his fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration may be asserted against the trust estate by proceeding against the trustee in his fiduciary capacity, whether or not the trustee is personally liable therefor.

D. The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge, indemnification or other appropriate proceeding.

History: 1953 Comp., § 32A-7-306, enacted by Laws 1975, ch. 257, § 7-306.

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 §§ 304, 500.

Testamentary cotrustee's liability for defaults or wrongful acts of fiduciary in handling estate, 65 A.L.R.2d 1019.

Rights and remedies of one purchasing at trustee's sale where there was misrepresentation or mistake as to acreage or location of boundaries of tract sold, 69 A.L.R.2d 254.

Duty and liability of trustee to holders of bonds or other obligations secured thereby, 90 A.L.R.2d 501.

Standard of care required of trustee representing itself to have expert knowledge or skill, 91 A.L.R.3d 904.

Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

17A C.J.S. Contracts § 347; 90 C.J.S. Trusts § 275.

### **§ 45-7-307. Limitations on proceedings against trustees after final account.**

Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the

trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within six months after receipt of the final account or statement. In any event, and notwithstanding lack of full disclosure, a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his examination is protected after three years. If notice of the final account or statement has been given as provided in Section 1-401 [45-1-401 NMSA 1978], or as provided in Section 1-403 [45-1-403 NMSA 1978], and if the beneficiary is a minor or disabled person, then such beneficiary is conclusively presumed to have received the final account or statement.

History: 1953 Comp., § 32A-7-307, enacted by Laws 1975, ch. 257, § 7-307.

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 § 587.

Self-dealing in assets of trust estate, conclusiveness of allowance of account of trustee as respects, 1 A.L.R.2d 1060.

What constitutes sufficient repudiation of express trust by trustee to cause statute of limitations to run, 54 A.L.R.2d 13.

90 C.J.S. Trusts §§ 365, 416.

## **Part 4**

### **POWERS OF TRUSTEES**

#### **§ 45-7-401. Powers of trustees.**

A. A trustee has all of the powers conferred by the provisions of this section unless such powers are withheld or limited by the trust instrument.

B. From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust, including the powers specified in Subsection D of this section.

C. In the exercise of his powers, including the powers granted by the Probate Code, a trustee has a duty to act with due regard to his obligation as a fiduciary, including a duty not to exercise any power under the code in such a way as to deprive the trust of an otherwise available tax exemption, deduction or credit for tax purposes or deprive a donor of a trust asset of a tax exemption, deduction or credit or operate to impose a tax upon a donor or other person as owner of any portion of the trust. For purposes of this section, "tax" includes any federal, state or local income, gift, estate or inheritance tax.

D. A trustee has the power, subject to Subsections A, B and C of this section, to:



(1) collect, hold and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made. The assets may be retained even though they include an asset in which the trustee is personally interested;

(2) receive additions to the assets of the trust;

(3) continue or participate in the operation of any business or other enterprise and to effect incorporation, dissolution or other change in the form of the organization of the business or enterprise;

(4) acquire an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided interest;

(5) invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;

(6) deposit trust funds in a bank, including a bank operated by the trustee;

(7) acquire or dispose of an asset for cash or on credit at public or private sale and to manage, develop, improve, exchange, partition, change the character of or abandon a trust asset or any interest therein and encumber, mortgage or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;

(8) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, raze existing structures or erect new party walls or buildings;

(9) subdivide, develop or dedicate land to public use or make or obtain the vacation of plats and adjust boundaries or adjust differences in valuation on exchange or partition by giving or receiving consideration or 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 trust;

(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 a trust asset or 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 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;

(16) hold property in the name of a nominee or in other form without disclosure of the trust so that title to the property may pass by delivery. However, the trustee is liable for any act of the nominee in connection with the stock so held;

(17) insure the assets of the trust against damage or loss and the trustee against liability with respect to third persons;

(18) borrow money to be repaid from trust assets or otherwise or advance money for the protection of the trust and for all expenses, losses and liabilities sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances, with any interest, the trustee has a lien on the trust assets as against the beneficiary;

(19) pay or contest any claim, settle a claim by or against the trust by compromise, arbitration or otherwise and release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible;

(20) pay taxes, assessments, compensation of the trustee and other expenses incurred in the collection, care, administration and protection of the trust;

(21) create out of income reserves for depreciation, obsolescence or amortization or for depletion of mineral, timber or other natural resource properties;

(22) pay any sum distributable to a protected person, without liability to the trustee, by paying the sum directly to the protected person, by paying the sum for the use of the protected person or by paying the sum to a legal representative of the protected person appointed by a court or, if none, to a relative or other person with custody of his person;

(23) effect distribution of property and money in divided or undivided interests and adjust resulting differences in valuation;

(24) employ persons, including attorneys, auditors, investment advisors or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties and 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;

(25) prosecute or defend actions, claims or proceedings for the protection of trust assets and of the trustee in the performance of his duties;

(26) execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee; and

(27) invest in United States government obligations whenever a governing instrument or order directs, requires, authorizes or permits investment in such obligations, either directly or in the form of securities of, or other interests in, any open-end or closed-end management type investment company or investment trust registered under the provisions of 15 U.S.C. Section 80(a)-1 et seq., provided that the portfolio of such investment company or investment trust is limited to United States government obligations and to repurchase agreements fully collateralized by those obligations, and provided further that any such investment company or investment trust shall take delivery of that collateral, either directly or through an authorized custodian.

History: 1953 Comp., § 32A-7-401, enacted by Laws 1975, ch. 257, § 7-401; 1987, ch. 66, § 1.

Probate Code. - See 45-1-101 NMSA 1978 and notes thereto.

Reliance on others' advice not violation of "prudent man" standard. - The fact that the trustee obtains advice from an accountant, an attorney and an appraiser, and relies on their advice without an independent investigation on his part, is not a violation of the "prudent man" standard. *C.B. & T. Co. v. Hefner*, 98 N.M. 594, 651 P.2d 1029 (Ct. App. 1982).

Attorney's undisclosed knowledge not imputed to trustee. - Where an attorney is representing both parties in a sales transaction, where one of the parties, a trustee, does not view the transaction as adversarial, but the attorney has knowledge of facts which make the transaction adversarial and fails to disclose those facts so that the trustee can make a fully informed decision, the attorney's undisclosed knowledge is not to be imputed to the trustee. *C.B. & T. Co. v. Hefner*, 98 N.M. 594, 651 P.2d 1029 (Ct. App. 1982), cert. denied, 98 N.M. 590, 651 P.2d 636 (1982).

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 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. - 76 Am. Jur. 2d Trusts § 291.

Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

90 C.J.S. Trusts § 246.

## **Article 8**

### **Simultaneous Death Act**

## **§ 45-8-1. [Uniform Simultaneous Death Act; disposition of property when] no sufficient evidence of survivorship.**

Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as otherwise in this act [45-8-1 to 45-8-8 NMSA 1978] provided.

History: 1953 Comp., § 29-1-24, enacted by Laws 1959, ch. 172, § 1.

Law reviews. - 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. - 23 Am. Jur. 2d Descent and Distribution § 110; 80 Am. Jur. 2d Wills § 1699, 1700.

Construction, application and effect of Uniform Simultaneous Death Act, 39 A.L.R.3d 1332.

Construction of provision as to which of two or more parties shall be deemed the survivor in case of death simultaneously, in a common disaster, or within a specified period of time, 40 A.L.R.3d 359.

25A C.J.S. Death §§ 11, 12(2); 48 C.J.S. Joint Tenancy § 4.

## **§ 45-8-2. Survival of beneficiaries.**

If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his surviving another person, and both persons die, and there is no sufficient evidence that the two have died otherwise than simultaneously, the beneficiary shall be deemed not to have survived. If there is no sufficient evidence that two or more beneficiaries have died otherwise than simultaneously and property has been disposed of in such a way that at the time of their death each of such beneficiaries would have been entitled to the property if he had survived the others, the property shall be divided into as many equal portions as there were such beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each of such beneficiaries had survived.

History: 1953 Comp., § 29-1-25, enacted by Laws 1959, ch. 172, § 2.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Descent and Distribution § 110; 80 Am. Jur. 2d Wills § 1699.

25A C.J.S. Death § 11.

## **§ 45-8-3. Joint tenants.**

Where there is no sufficient evidence that two joint tenants have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them have so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.

History: 1953 Comp., § 29-1-26, enacted by Laws 1959, ch. 172, § 3.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25A C.J.S. Death § 11.

#### **§ 45-8-4. Community property.**

Where a husband and wife have died, leaving community property, and there is no sufficient evidence that they have died otherwise than simultaneously, one-half of all the community property shall pass as if the husband had survived and as if said one-half were his separate property, and the other one-half thereof shall pass as if the wife had survived and as if said other one-half were her separate property.

History: 1953 Comp., § 29-1-27, enacted by Laws 1959, ch. 172, § 4.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Community Property §§ 48, 109; 80 Am. Jur. 2d Wills § 1659.  
25A C.J.S. Death § 11.

#### **§ 45-8-5. Insurance policies; [death of insured and beneficiary.]**

Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary. If, however, the policy is community property of the insured and his spouse, and there is no alternative beneficiary except the estate or personal representative of the insured, the proceeds shall be distributed as community property under Section 4 [45-8-4 NMSA 1978].

History: 1953 Comp., § 29-1-28, enacted by Laws 1959, ch. 172, § 5.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Community Property § 109; 80 Am. Jur. 2d Wills § 1699.  
25A C.J.S. Death § 11.

#### **§ 45-8-6. Act does not apply if decedent provides otherwise.**

This act [45-8-1 to 45-8-8 NMSA 1978] shall not apply in the case of wills, living trusts, deeds or contracts of insurance, or any other situation where provision is made for distribution of property different from the provisions of this act, or where provision is made for a presumption as to survivorship which results in a distribution of property different from that here provided.

History: 1953 Comp., § 29-1-29, enacted by Laws 1959, ch. 172, § 6.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 80 Am. Jur. 2d Wills § 1700.  
25A C.J.S. Death § 11.

### **§ 45-8-7. Uniformity of interpretation.**

This act [45-8-1 to 45-8-8 NMSA 1978] shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact it.

History: 1953 Comp., § 29-1-30, enacted by Laws 1959, ch. 172, § 7.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 82 C.J.S. Statutes § 371.

### **§ 45-8-8. Short title.**

This act [45-8-1 to 45-8-8 NMSA 1978] may be cited as the Uniform Simultaneous Death Act.

History: 1953 Comp., § 29-1-31, enacted by Laws 1959, ch. 172, § 8.

Severability clauses. - Laws 1959, ch. 172, § 10, provides for the severability of the act if any part or application thereof is held invalid.

Compiler's notes. - Laws 1959, ch. 172, § 9, repeals all laws or parts of law inconsistent with the act.

### **§ 45-8-9. 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.

Cross-references. - As to intestate share of spouse in separate and community properties, see 45-2-102 NMSA 1978. As to the general disposition of community property upon the death of one spouse, see 45-2-804 NMSA 1978. As to definition of community property, see 40-3-8B NMSA 1978. As to presumption of separate property where acquisition by wife in her own name prior to July 1, 1973, see 40-3-12 NMSA 1978. As to transfer and management of community real property, see 40-3-13 NMSA 1978. As to transfer and management of community personal property, see 40-3-14 NMSA 1978.

Severability clauses. - Laws 1973, ch. 276, § 10, provides for the severability of the act if any part or application thereof is held invalid.