

# CHAPTER 46A

## Uniform Trust Code

### ARTICLE 1

#### General Provisions and Definitions

##### 46A-1-101. Short title.

Chapter 46A NMSA 1978 may be cited as the "Uniform Trust Code".

History: Laws 2003, ch. 122, § 1-101; 2007, ch. 128, § 1.

#### ANNOTATIONS

**The 2007 amendment**, effective July 1, 2007, changed the statutory reference.

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

##### 46A-1-102. Scope.

The Uniform Trust Code [46A-1-101 to 46A-11-1104 NMSA 1978] applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment or decree that requires the trust to be administered in the manner of an express trust.

**History:** Laws 2003, ch. 122, § 1-102.

#### ANNOTATIONS

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

##### 46A-1-103. Definitions.

As used in the Uniform Trust Code:

A. "action", with respect to an act of a trustee, includes a failure to act;

B. "ascertainable standard" means a standard relating to an individual's health, education, support or maintenance within the meaning of Subparagraph (A) of Paragraph (1) of Subsection (b) of Section 2041 and Paragraph (1) of Subsection (c) of Section 2514 of the Internal Revenue Code of 1986, as amended;

C. "beneficiary" means a person that:

(1) has a present or future beneficial interest in a trust, vested or contingent;  
or

(2) in a capacity other than that of trustee, holds a power of appointment over trust property;

D. "charitable trust" means a trust or portion of a trust created for a charitable purpose described in Subsection A of Section 46A-4-405 NMSA 1978;

E. "conservator" means a person appointed by the court to administer the estate of a minor or adult individual;

F. "environmental law" means a federal, state or local law, rule, regulation or ordinance relating to protection of the environment;

G. "guardian" means a person appointed by the court or a parent to make decisions regarding the support, care, education, health and welfare of a minor or adult person. "Guardian" does not include a guardian ad litem;

H. "interests of the beneficiaries" means the beneficial interests provided in the terms of the trust;

I. "jurisdiction", with respect to a geographic area, includes a state or country;

J. "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency or instrumentality, public corporation or any other legal or commercial entity;

K. "power of withdrawal" means a presently exercisable general power of appointment other than a power exercisable:

(1) by a trustee and limited by an ascertainable standard; or

(2) by another person only upon consent of the trustee or a person holding an adverse interest;

L. "property" means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein;

M. "qualified beneficiary" means a beneficiary who, on the date the beneficiary's qualification is determined:

(1) is a distributee or permissible distributee of trust income or principal;

(2) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in Paragraph (1) of this subsection terminated on that date without causing the trust to terminate; or

(3) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date;

N. "revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest;

O. "settlor" means a person, including a testator, who creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution, except to the extent another person has the power to revoke or withdraw that portion;

P. "spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest;

Q. "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States. "State" includes an Indian tribe, pueblo, nation or band recognized by federal law or formally acknowledged by a state;

R. "terms of a trust" means:

(1) except as otherwise provided in Paragraph (2) of this subsection, the manifestation of the settlor's intent regarding a trust's provisions as:

(a) expressed in the trust instrument; or

(b) established by other evidence that would be admissible in a judicial proceeding; or

(2) the trust's provisions as established, determined or amended by:

(a) a trustee or trust director in accordance with applicable law;

(b) court order; or

(c) a nonjudicial settlement agreement under Section 46A-1-111 NMSA 1978;

S. "trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto; and

T. "trustee" includes an original trustee, an additional trustee, a successor trustee and a co-trustee.

**History:** Laws 2003, ch. 122, § 1-103; 2007, ch. 128, § 2; 2018, ch. 63, § 20.

## ANNOTATIONS

**Cross references.** — For Section 2514 of the Internal Revenue Code of 1986, see 26 U.S.C. § 2514.

**The 2018 amendment,** effective January 1, 2019, revised the definition of "terms of a trust" as used in the Uniform Trust Code; in Subsection R, added paragraph designation "(1)", in Paragraph R(1), added "except as otherwise provided in Paragraph (2) of this subsection", added subparagraph designations "(a)" and "(b)", in Subparagraph R(1)(a), after "or", deleted "as may be", at the end of Subparagraph R(1)(b) added "or", and added Paragraph R(2).

**The 2007 amendment,** effective July 1, 2007, added the definition of "ascertainable standard" and changed the definition of "power of withdrawal" .

**Interpretation of the terms of a trust.** — Where husband and wife entered into a community property trust which reserved to the grantors the power to amend or revoke the trust by an instrument signed by the grantors and delivered in grantors' lifetimes to the trustee; the trust provided that the terms of the trust were to be liberally construed in favor of the surviving spouse's interests and above the interests of the other beneficiaries, that upon the death of one grantor, the surviving grantor had the unrestricted right to take any and all of the trust assets upon demand, that the surviving grantor had the right to redirect the distribution of the trust remainder in the surviving grantor's last will and testament, and that words used in the plural included the singular; and the attorney who drafted the trust stated that the trust was drafted to confer upon the surviving spouse the power to amend the trust after the death of one spouse, the trust granted to the surviving spouse the power to amend the trust after the death of the other spouse. *Cable v. Wells Fargo Bank N.M., N.A.*, 2010-NMSC-017, 148 N.M. 127, 231 P.3d 108, aff'g on different grounds, 2008-NMCA-005, 143 N.M. 269, 175 P.3d 937.

### **46A-1-104. Knowledge.**

A. Subject to Subsection B of this section, a person has knowledge of a fact if the person:

- (1) has actual knowledge;
- (2) has received a notice or notification of it; or
- (3) from all the facts and circumstances known to the person at the time in question, has reason to know it.

B. An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the employee's regular duties or the employee knows that a matter involving the trust would be materially affected by the information.

History: Laws 2003, ch. 122, § 1-104; 2007, ch. 128, § 3.

### ANNOTATIONS

**The 2007 amendment**, effective July 1, 2007, eliminated the provision that charges a person with knowledge if that person should have knowledge of a fact.

#### **46A-1-105. Default and mandatory rules.**

A. Except as otherwise provided in the terms of the trust, the Uniform Trust Code governs the duties and powers of a trustee, relations among trustees and the rights and interests of a beneficiary.

B. The terms of a trust prevail over any provision of the Uniform Trust Code except:

- (1) the requirements for creating a trust;
- (2) subject to Sections 9, 11 and 12 [46-14-9, 46-14-11 and 46-14-12] of the Uniform Directed Trust Act, the duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;
- (3) the requirement that a trust and its terms be for the benefit of its beneficiaries and that the trust have a purpose that is lawful, not contrary to public policy and possible to achieve;
- (4) the power of the court to modify or terminate a trust under Sections 46A-4-410 through 46A-4-416 NMSA 1978;
- (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Chapter 46A, Article 5 NMSA 1978;
- (6) the power of the court under Section 46A-7-702 NMSA 1978 to require, dispense with or modify or terminate a bond;

(7) the power of the court under Subsection B of Section 46A-7-708 NMSA 1978 to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high;

(8) the duty under Paragraphs (2) and (3) of Subsection B of Section 46A-8-813 NMSA 1978 to notify qualified beneficiaries of an irrevocable trust who have attained twenty-five years of age of the existence of the trust, of the identity of the trustee and of their right to request reports of the trustee;

(9) except as otherwise provided in Subsection F of Section 46A-8-813 NMSA 1978, the duty under Subsection A of Section 46A-8-813 NMSA 1978 to respond to the request of a qualified beneficiary of an irrevocable trust for a trustee's reports and other information reasonably related to the administration of a trust;

(10) the effect of an exculpatory term under Section 46A-10-1008 NMSA 1978;

(11) the rights under Sections 46A-10-1010 through 46A-10-1013 NMSA 1978 of a person other than a trustee or beneficiary;

(12) periods of limitation for commencing a judicial proceeding; provided, however, any such period may be increased;

(13) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and

(14) the subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 46A-2-203 and 46A-2-204 NMSA 1978.

**History:** Laws 2003, ch. 122, § 1-105; 2007, ch. 128, § 4; 2018, ch. 63, § 21.

## ANNOTATIONS

**The 2018 amendment**, effective January 1, 2019, referenced certain provisions of the Uniform Directed Trust Act relating to legal duties of a trustee that prevail over terms of a trust; and in Paragraph B(2), added "subject to Sections 9, 11, and 12 of the Uniform Directed Trust Act".

**The 2007 amendment**, effective July 1, 2007, provided that the Uniform Trust Code prevails over the trust with regard to the interests of the beneficiaries, changed the age of qualified beneficiaries entitled to notice to those who have attained the age of twenty-five, and permitted periods of limitations for commencing judicial proceedings to be increased.

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

## **46A-1-106. Common law of trusts; principles of equity.**

The common law of trusts and principles of equity supplement the Uniform Trust Code [46A-1-101 to 46A-1-1104 NMSA 1978], except to the extent modified by that code or another statute of this state.

**History:** Laws 2003, ch. 122, § 1-106.

### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 1-1106 made the act effective July 1, 2003.

## **46A-1-107. Governing law.**

The meaning and effect of the terms of a trust are determined by:

A. the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or

B. in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

**History:** Laws 2003, ch. 122, § 1-107; 2007, ch. 128, § 5; 2011, ch. 124, § 94.

### **ANNOTATIONS**

**The 2011 amendment**, effective January 1, 2012, provided that the law of the jurisdiction designated in a trust is the governing law for interpreting the trust.

**The 2007 amendment**, effective July 1, 2007, added the provision that the meaning and effect of the terms of the trust are determined by the law of the state designated in the terms of the trust.

## **46A-1-108. Principal place of administration.**

A. Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

(1) a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or

(2) all or part of the administration occurs in the designated jurisdiction.

B. A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration and the interests of the beneficiaries.

C. Without precluding the right of the court to order, approve or disapprove a transfer, the trustee, in furtherance of the duty prescribed by Subsection B of this section, may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.

D. The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than sixty days before initiating the transfer. The notice of proposed transfer must include:

(1) the name of the jurisdiction to which the principal place of administration is to be transferred;

(2) the address and telephone number at the new location at which the trustee can be contacted;

(3) an explanation of the reasons for the proposed transfer;

(4) the date on which the proposed transfer is anticipated to occur; and

(5) the date, not less than sixty days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

E. The authority of a trustee under this section to transfer a trust's principal place of administration terminates if a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice.

F. In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to Section 7-704 [46A-7-704 NMSA 1978] of the Uniform Trust Code.

**History:** Laws 2003, ch. 122, § 1-108.

## ANNOTATIONS

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **46A-1-109. Methods and waiver of notice.**



A. Notice to a person under the Uniform Trust Code [46A-1-101 to 46A-11-1104 NMSA 1978] or the sending of a document to a person under that code must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business or a properly directed electronic message.

B. Notice otherwise required under the Uniform Trust Code [46A-1-101 to 46A-11-1104 NMSA 1978] or a document otherwise required to be sent under that code need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

C. Notice under the Uniform Trust Code [46A-1-101 to 46A-11-1104 NMSA 1978] or the sending of a document under that code may be waived by the person to be notified or sent the document.

D. Notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.

**History:** Laws 2003, ch. 122, § 1-109.

## **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

### **46A-1-110. Others treated as qualified beneficiaries.**

A. A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary under the Uniform Trust Code [46A-1-101 NMSA 1978] if the charitable organization, on the date the charitable organization's qualification is being determined:

- (1) is a distributee or permissible distributee of trust income or principal;
- (2) would be a distributee or permissible distributee of trust income or principal upon the termination of the interests of other distributees or permissible distributees then receiving or eligible to receive distributions; or
- (3) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

B. A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in Section 46A-4-408 or 46A-4-409 NMSA 1978 has the rights of a qualified beneficiary under the Uniform Trust Code.

C. The attorney general has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this state or its charitable beneficiary or beneficiaries that receive or are eligible to receive in the aggregate the trust's largest distribution in this state.

History: Laws 2003, ch. 122, § 1-110; 2007, ch. 128, § 6.

## ANNOTATIONS

**The 2007 amendment**, effective July 1, 2007, eliminated the requirement that notice be given to beneficiaries who have requested notice, gave certain charitable organizations that receive distributions the rights of a qualified beneficiary and gave the attorney general the rights of a qualified beneficiary with respect to a charitable trust having its charitable beneficiaries that receive the trust's largest distribution in New Mexico.

### **46A-1-111. Nonjudicial settlement agreements.**

A. For purposes of this section, "interested persons" means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

B. Except as otherwise provided in Subsection C of this section, interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

C. A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under the Uniform Trust Code [46A-1-101 to 46A-1-104 NMSA 1978] or other applicable law.

D. Matters that may be resolved by a nonjudicial settlement agreement include:

- (1) the interpretation or construction of the terms of the trust;
- (2) the approval of a trustee's report or accounting;
- (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
- (4) the resignation or appointment of a trustee and the determination of a trustee's compensation;
- (5) transfer of a trust's principal place of administration; and
- (6) liability of a trustee for an action relating to the trust.

E. Any interested person may request the court to approve a nonjudicial settlement agreement to determine whether the representation as provided in Article 3 [46A-3-301 to 46A-3-305 NMSA 1978] of the Uniform Trust Code was adequate and to determine whether the agreement contains terms and conditions the court could have properly approved.

**History:** Laws 2003, ch. 122, § 1-111.

### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **46A-1-112. Rules of construction.**

The rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.

**History:** Laws 2003, ch. 122, § 1-112.

### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **46A-1-113. Insurable interest of trustee.**

A. In this section, "settlor" means a person that executes a trust instrument. "Settlor" includes a person for which a fiduciary or agent is acting.

B. A trustee of a trust has an insurable interest in the life of an individual insured under a life insurance policy that is owned by the trustee of the trust acting in a fiduciary capacity or that designates the trust itself as the owner if, on the date the policy is issued:

(1) the insured is:

(a) a settlor of the trust; or

(b) an individual in whom a settlor of the trust has, or would have had if living at the time the policy was issued, an insurable interest; and

(2) the life insurance proceeds are primarily for the benefit of one or more trust beneficiaries that have:

(a) an insurable interest in the life of the insured; or

(b) a substantial interest engendered by love and affection in the continuation of the life of the insured and, if not already included under Subparagraph (a) of this paragraph, who are: 1) related within the third degree or closer, as measured by the civil law system of determining degrees of relation, either by blood or law, to the insured; or 2) stepchildren of the insured.

History: 1978 Comp., § 46A-1-113, enacted by Laws 2011, ch. 124, § 95; 2016, ch. 69, § 723.

### ANNOTATIONS

**The 2016 amendment**, effective July 1, 2016, amended the definition of "settlor"; in Subsection A, after "means a person", deleted "including a person for which a fiduciary or agent is acting", and after "trust instrument", added "'Settlor' includes a person for which a fiduciary or agent is acting."; and in Subsection B, in the introductory sentence, after "life insurance policy", added "that is", after "owned by", deleted "the trust or", and after "fiduciary capacity", added "or that designates the trust itself as the owner", and in Paragraph (2), after "primarily for the benefit of", added "one or more".

## ARTICLE 2

### Judicial Proceedings

#### 46A-2-201. Role of court in administration of trust.

A. The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.

B. A trust is not subject to continuing judicial supervision unless ordered by the court.

C. A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

**History:** Laws 2003, ch. 122, § 2-201.

### ANNOTATIONS

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

#### 46A-2-202. Jurisdiction over trustee and beneficiary.

A. By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

B. With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

C. This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary or other person receiving property from the trust.

**History:** Laws 2003, ch. 122, § 2-202.

### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

#### **46A-2-203. Subject-matter jurisdiction.**

The district court has exclusive jurisdiction of all proceedings involving a trust.

**History:** Laws 2003, ch. 122, § 2-203; 2007, ch. 128, § 7.

### **ANNOTATIONS**

**The 2007 amendment,** effective July 1, 2007, broadened district court jurisdiction to include all proceedings involving a trust.

#### **46A-2-204. Venue.**

A. Except as otherwise provided in Subsection B of this section, venue for a judicial proceeding involving a trust is in the county of New Mexico in which the trust's principal place of administration is or will be located or, if the trust is created by will and the estate is not yet closed, in the county in which the decedent's estate is being administered.

B. If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in a county of New Mexico in which a beneficiary resides, in a county in which any trust property is located or, if the trust is created by will, in the county in which the decedent's estate was or is being administered.

**History:** Laws 2007, ch. 128, § 8.

## ANNOTATIONS

**Effective dates.** — Laws 2007, ch. 128, § 31 made the section effective July 1, 2007.

### ARTICLE 3 Representation

#### **46A-3-301. Representation; basic effect.**

A. Notice to a person who may represent and bind another person pursuant to the provisions of Chapter 46A, Article 3 NMSA 1978 has the same effect as if notice were given directly to the other person.

B. The consent of a person who may represent and bind another person pursuant to the provisions of Chapter 46A, Article 3 NMSA 1978 is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

C. Except as otherwise provided in Sections 46A-4-411 and 46A-6-602 NMSA 1978, a person who pursuant to the provisions of Chapter 46A, Article 3 NMSA 1978 may represent a settlor who lacks capacity, may receive notice and give a binding consent on the settlor's behalf.

D. A settlor may not represent or bind a beneficiary pursuant to the provisions of Chapter 46A, Article 3 NMSA 1978 with respect to the termination or modification of a trust under Subsection A of Section 46A-4-411 NMSA 1978.

History: Laws 2003, ch. 122, § 3-301; 2007, ch. 128, § 9.

## ANNOTATIONS

**The 2007 amendment**, effective July 1, 2007, added Subsection D.

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

#### **46A-3-302. Representation by holder of general testamentary power of appointment.**

To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default or otherwise, are subject to the power.

**History:** Laws 2003, ch. 122, § 3-302.

### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **46A-3-303. Representation by fiduciaries and parents.**

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

- A. a conservator may represent and bind the estate that the conservator controls;
- B. a guardian may represent and bind the protected person if a conservator of the protected person's estate has not been appointed;
- C. an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;
- D. a trustee may represent and bind the beneficiaries of the trust;
- E. a personal representative of a decedent's estate may represent and bind persons interested in the estate; and
- F. a parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed.

**History:** Laws 2003, ch. 122, § 3-303; 2009, ch. 159, § 42.

### **ANNOTATIONS**

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

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

### **46A-3-304. Representation by person having substantially identical interest.**

Unless otherwise represented, a minor, incapacitated or unborn person, or a person whose identity or location is unknown and not reasonably ascertainable, may be

represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

**History:** Laws 2003, ch. 122, § 3-304.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

#### **46A-3-305. Appointment of representative.**

A. If the court determines that an interest is not represented under this article, or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent and otherwise represent, bind and act on behalf of a minor, incapacitated or unborn person, or a person whose identity or location is unknown. A representative may be appointed to represent several persons or interests.

B. A representative may act on behalf of the person represented with respect to any matter arising under the Uniform Trust Code [46A-1-101 to 46A-11-1104 NMSA 1978], whether or not a judicial proceeding concerning the trust is pending.

C. In making decisions, a representative may consider the general benefit accruing to the living members of the person's family.

**History:** Laws 2003, ch. 122, § 3-305.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **ARTICLE 4**

## **Creation, Validity, Modification and Termination of Trust**

#### **46A-4-401. Methods of creating trust.**



A trust may be created by:

A. transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

B. declaration by the owner of property that the owner holds identifiable property as trustee; or

C. exercise of a power of appointment in favor of a trustee.

**History:** Laws 2003, ch. 122, § 4-401.

### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **46A-4-402. Requirements for creation.**

A. A trust is created only if:

- (1) the settlor has capacity to create a trust;
- (2) the settlor indicates an intention to create the trust;
- (3) the trust has a definite beneficiary or is:

(a) a charitable trust;

(b) a trust for the care of an animal, as provided in Section 4-408 [46A-4-408 NMSA 1978] of the Uniform Trust Code; or

(c) a trust for a noncharitable purpose, as provided in Section 4-409 [46A-4-409 NMSA 1978] of the Uniform Trust Code;

(4) the trustee has duties to perform; and

(5) the same person is not the sole trustee and sole beneficiary.

B. A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

C. A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property

subject to the power passes to the persons who would have taken the property had the power not been conferred.

**History:** Laws 2003, ch. 122, § 4-402.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

#### **46A-4-403. Trusts created in other jurisdictions.**

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed or the law of the jurisdiction in which, at the time of creation:

- A. the settlor was domiciled, had a place of abode or was a national;
- B. a trustee was domiciled or had a place of business; or
- C. any trust property was located.

**History:** Laws 2003, ch. 122, § 4-403.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

#### **46A-4-404. Trust purposes.**

A trust may be created only to the extent its purposes are lawful, not contrary to public policy and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.

**History:** Laws 2003, ch. 122, § 4-404.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

#### **46A-4-405. Charitable purposes; enforcement.**

A. A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes or other purposes the achievement of which is beneficial to the community.

B. If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.

C. The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.

D. The corpus and income of a charitable trust may only be expended in furtherance of the charitable mission of the charitable trust, unless that charitable mission is amended or the charitable trust terminated pursuant to a cy pres proceeding as described in Section 4-413 [46A-4-413 NMSA 1978] of the Uniform Trust Code.

E. The attorney general, as *parens patriae*, shall have authority to maintain a proceeding to enforce the charitable trust and its charitable mission.

F. Nothing contained in the Uniform Trust Code [46A-1-101 NMSA 1978] shall limit the authority of the attorney general under the Charitable Solicitations Act [Chapter 57, Article 22 NMSA 1978].

**History:** Laws 2003, ch. 122, § 4-405.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

#### **46A-4-406. Creation of trust induced by fraud, duress or undue influence.**

A trust is void to the extent its creation was induced by fraud, duress or undue influence.

**History:** Laws 2003, ch. 122, § 4-406.

## ANNOTATIONS

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **46A-4-407. Evidence of oral trust.**

Except as required by a statute other than the Uniform Trust Code [46A-1-101 NMSA 1978], a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

**History:** Laws 2003, ch. 122, § 4-407.

## ANNOTATIONS

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **46A-4-408. Trust for care of animal.**

A. A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

B. A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

C. Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

**History:** Laws 2003, ch. 122, § 4-408.

## ANNOTATIONS

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **46A-4-409. Noncharitable trust without ascertainable beneficiary.**

Except as otherwise provided in Section 4-408 [46A-4-408 NMSA 1978] of the Uniform Trust Code or by another statute, the following rules apply:

A. a trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than twenty-one years;

B. a trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court; and

C. property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

**History:** Laws 2003, ch. 122, § 4-409.

### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **46A-4-410. Modification or termination of trust; proceedings for approval or disapproval.**

A. In addition to the methods of termination prescribed by Sections 4-411 through 4-414 [46A-4-411 to 46A-4-414 NMSA 1978] of the Uniform Trust Code, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved or the purposes of the trust have become unlawful, contrary to public policy or impossible to achieve.

B. A proceeding to approve or disapprove a proposed modification or termination under Sections 4-411 through 4-416 [46A-4-411 to 46A-4-416 NMSA 1978] of the Uniform Trust Code or a trust combination or division under Section 4-417 [46A-4-417 NMSA 1978] of that code may be commenced by a trustee or beneficiary, and a proceeding to approve or disapprove a proposed modification or termination under Section 4-411 [46A-4-411 NMSA 1978] of that code may be commenced by the settlor.

The settlor of a charitable trust may maintain a proceeding to modify the trust under Section 4-413 [46A-4-413 NMSA 1978] of that code.

**History:** Laws 2003, ch. 122, § 4-410.

## ANNOTATIONS

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **46A-4-411. Modification or termination of noncharitable irrevocable trust by consent.**

A. A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. If upon petition the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; by the settlor's conservator with the approval of the court supervising the conservatorship if an agent is not so authorized; or by the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized and a conservator has not been appointed.

B. A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

C. For purposes of this section only, a spendthrift provision in the terms of a trust is not presumed to constitute either a material or an immaterial provision of the trust.

D. Upon termination of a trust under Subsection A or B of this section, the trustee shall distribute the trust property as agreed by the beneficiaries.

E. If not all of the beneficiaries consent to a proposed modification or termination of the trust under Subsection A or B of this section, the modification or termination may be approved by the court if the court is satisfied that:

(1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) the interests of a beneficiary who does not consent will be adequately protected.

History: Laws 2003, ch. 122, § 4-411; 2007, ch. 128, § 10.

### ANNOTATIONS

**The 2007 amendment**, effective July 1, 2007, permitted a court to modify or terminate a noncharitable trust even if modification or termination is inconsistent with a material purpose of the trust and provided that a spendthrift provision is not a material or immaterial provision of a trust.

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

### **46A-4-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.**

A. The court may modify the administrative or dispositive terms of a trust or terminate the trust if it is established by clear and convincing evidence that there are circumstances not anticipated by the settlor and modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

B. The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

C. Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

History: Laws 2003, ch. 122, § 4-412; 2007, ch. 128, § 11.

### ANNOTATIONS

**The 2007 amendment**, effective July 1, 2007, required clear and convincing evidence that there are circumstances not anticipated by a settler to change or terminate a trust.

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

### **46A-4-413. Cy pres.**

A. Except as otherwise provided in Subsection B of this section, if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve or wasteful:

- (1) the trust does not fail, in whole or in part;
- (2) the trust property does not revert to the settlor or the settlor's successors in interest; and
- (3) the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

B. A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under Subsection A of this section to apply cy pres to modify or terminate the trust only if, when the provision takes effect:

- (1) the trust property is to revert to the settlor and the settlor is still living; or
- (2) fewer than twenty-one years have elapsed since the date of the trust's creation.

C. The attorney general as *parens patriae* is a necessary party to any cy pres proceeding in the Uniform Trust Code [46A-1-101 NMSA 1978].

**History:** Laws 2003, ch. 122, § 4-413.

## **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **46A-4-414. Termination of uneconomic trust.**

A. After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than fifty thousand dollars (\$50,000) may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

B. The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

C. Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

D. This section does not apply to an easement for conservation or preservation.



**History:** Laws 2003, ch. 122, § 4-414.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

#### **46A-4-415. Reformation to correct mistakes.**

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

**History:** Laws 2003, ch. 122, § 4-415.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

#### **46A-4-416. Modification to achieve settlor's tax objectives.**

To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

**History:** Laws 2003, ch. 122, § 4-416.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

#### **46A-4-417. Combination and division of trusts.**

After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.

**History:** Laws 2003, ch. 122, § 4-417.

## ANNOTATIONS

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

## ARTICLE 5

### Creditor's Claims; Spendthrift and Discretionary Trusts

#### **46A-5-501. Rights of beneficiary's creditor or assignee.**

To the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to such relief as is appropriate under the circumstances.

History: Laws 2003, ch. 122, § 5-501; 2007, ch. 128, § 12.

## ANNOTATIONS

**The 2007 amendment**, effective July 1, 2007, provided that if a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor to reach the beneficiary's interest.

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

#### **46A-5-502. Spendthrift provision.**

A. A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

B. A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust", or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

C. A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this article, a creditor or

assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

**History:** Laws 2003, ch. 122, § 5-502.

### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **46A-5-503. Exceptions to spendthrift provision.**

A. As used in this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another state.

B. A spendthrift provision is unenforceable against:

(1) a beneficiary's child, spouse or former spouse who has a judgment or court order against the beneficiary for support or maintenance;

(2) a judgment creditor who has provided services for the protection of a beneficiary's interest in the trust; and

(3) a claim of this state or the United States to the extent a statute of this state or federal law so provides.

C. A claimant against whom a spendthrift provision cannot be enforced may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to such relief as is appropriate under the circumstances. The order attaching present or future distributions to or for the benefit of the beneficiary shall be the exclusive remedy available to a claimant against whom a spendthrift provision cannot be enforced.

**History:** Laws 2003, ch. 122, § 5-503; 2007, ch. 128, § 13.

### **ANNOTATIONS**

**The 2007 amendment,** effective July 1, 2007, in Subsection B, restated the provisions of Subsections B and C.

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

### **46A-5-504. Discretionary trusts; effect of standard.**

A. As used in this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another state.

B. Except as otherwise provided in Subsection C of this section, whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

- (1) the discretion is expressed in the form of a standard of distribution; or
- (2) the trustee has abused the discretion.

C. To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse or former spouse; and

(2) the court shall direct the trustee to pay to the child, spouse or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

D. This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

E. If the trustee's or co-trustee's discretion to make distributions for the trustee's or co-trustee's own benefit is limited by an ascertainable standard, a creditor shall not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim were the beneficiary not acting as trustee or co-trustee.

History: Laws 2003, ch. 122, § 5-504; 2007, ch. 128, § 14.

## ANNOTATIONS

**The 2007 amendment**, effective July 1, 2007, added Subsection E.

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

### **46A-5-505. Creditor's claim against settlor.**

A. Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) during the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors;

(2) with respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution; and

(3) after the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses and allowances.

B. For purposes of this section:

(1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

(2) upon the lapse, release or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release or waiver exceeds the greater of the amount specified in Section 2041(b)(2), 2514(e) or 2503(b) of the Internal Revenue Code of 1986, as amended.

**History:** Laws 2003, ch. 122, § 5-505.

## ANNOTATIONS

**Cross references.** — For the Internal Revenue Code of 1986, see Title 26 U.S.C.S.

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

**Invasion of trust.** — Section 46A-5-505A(3) NMSA 1978 allows a revocable trust to be invaded in two relevant instances: to satisfy the claims of creditors and to provide the surviving family with the statutory allowances. There is no legislative intent in the plain language of the statute that would allow an omitted spouse to invade a trust corpus to determine or satisfy an intestate share. *Bell v. Estate of Ralph M. Bell*, 2008-NMCA-045, 143 N.M. 716, 181 P.3d 708, cert. quashed, 145 N.M. 532, 202 P.3d 125.

**Omitted spouse.** — The intestate share of an omitted spouse is not a statutory allowance as contemplated by Section 46A-5-505A(3) NMSA 1878. *Bell v. Estate of Ralph M. Bell*, 2008-NMCA-045, 143 N.M. 716, 181 P.3d 708, cert. quashed, 145 N.M. 532, 202 P.3d 125.

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

### **46A-5-506. Overdue distribution.**

A. Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

B. As used in this section, "mandatory distribution" means a distribution of income or principal that the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. "Mandatory distribution" does not include a distribution subject to the exercise of the trustee's discretion even if the discretion is expressed in the form of a standard of distribution or the terms of the trust authorizing distribution combine language of discretion with language of direction.

History: Laws 2003, ch. 122, § 5-506; 2007, ch. 128, § 15.

#### **ANNOTATIONS**

**The 2007 amendment,** effective July 1, 2007, added Subsection B.

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

### **46A-5-507. Personal obligations of trustee.**

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

**History:** Laws 2003, ch. 122, § 5-507.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

## **ARTICLE 6**

### **Revocable Trusts**

#### **46A-6-601. Capacity of settlor of revocable trust.**

The capacity required to create, amend, revoke or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

**History:** Laws 2003, ch. 122, § 6-601.

## ANNOTATIONS

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **46A-6-602. Revocation or amendment of revocable trust.**

A. Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before July 1, 2003.

B. If a revocable trust is created or funded by more than one settlor:

(1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses;

(2) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and

(3) upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.

C. The settlor may revoke or amend a revocable trust:

(1) by substantial compliance with a method provided in the terms of the trust;  
or

(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

(a) a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

(b) any other method manifesting clear and convincing evidence of the settlor's intent.

D. Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

E. A settlor's powers with respect to revocation, amendment or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power.

F. A conservator of the settlor or, if no conservator has been appointed, a guardian of the settlor may exercise a settlor's powers with respect to revocation, amendment or distribution of trust property only with the approval of the court supervising the conservatorship or guardianship.

G. A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

History: Laws 2003, ch. 122, § 6-602; 2007, ch. 128, § 16.

## ANNOTATIONS

**The 2007 amendment**, effective July 1, 2007, added Paragraph (3) of Subsection B.

**Method of revocation.** — Mere filing and service of a divorce petition do not constitute "clear and convincing evidence" of a settlor's intent to revoke a trust. Less formal methods of trust revocation are usually insufficient means to revoke a trust, "because they provide less reliable indicia of intent" than those methods outlined in either the terms of the trust or in the statutory language of the Uniform Trust Code. *Oldham v. Oldham*, 2011-NMSC-007, 149 N.M. 215, 247 P.3d 736.

**Power of surviving spouse to amend community property trust.** — Where husband and wife entered into a community property trust which reserved to the grantors the power to amend or revoke the trust by an instrument signed by the grantors and delivered in grantors' lifetimes to the trustee; the trust provided that the terms of the trust were to be liberally construed in favor of the surviving spouse's interests and above the interests of the other beneficiaries, that upon the death of one grantor, the surviving grantor had the unrestricted right to take any and all of the trust assets upon demand, that the surviving grantor had the right to redirect the distribution of the trust remainder in the surviving grantor's last will and testament, and that words used in the plural included the singular; and the attorney who drafted the trust stated that the trust was drafted to confer upon the surviving spouse the power to amend the trust after the death of one spouse, the trust granted to the surviving spouse the power to amend the trust after the death of the other spouse. *Cable v. Wells Fargo Bank N.M., N.A.*, 2010-NMSC-017, 148 N.M. 127, 231 P.3d 108, *aff'g* on different grounds, 2008-NMCA-005, 143 N.M. 269, 175 P.3d 937.



**Amendment by surviving grantor.** — Where a trust is silent on amendment after the death of one of the grantors and provides that the surviving grantor has the unrestricted right to withdraw all assets from the trust estate, the power to amend the trust is implied. *Cable v. Wells Fargo Bank N.M., N.A.*, 2008-NMCA-005, 143 N.M. 269, 175 P.3d 937, aff'd, 2010-NMSC-017, 148 N.M. 127, 231 P.3d 10.

**Revocation of a trust by a will.** — Where the decedent, during the decedent's lifetime, established a revocable trust which provided that in the event of the death of the decedent's spouse prior to the complete distribution of the spouse's share, the spouses' share would be distributed to the spouse's relative; Section 5.1 of the trust agreement provided that the decedent reserved the right during the decedent's lifetime to revoke the trust by an instrument signed by the decedent and delivered to the trustees; Section 5.1 did not expressly state that the requirements of Section 5.1 were the exclusive means by which the trust could be revoked; the spouse died one day before the decedent died; the decedent's will expressly referred to the trust and provided that the will revoked the trust and that the decedent's spouse's share of the trust passed onto the decedent's estate to be distributed as provided in the decedent's will, the trust was effectively revoked by the decedent's will. *Schlicht v. Olguin*, 2014-NMCA-074.

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

#### **46A-6-603. Settlor's powers; powers of withdrawal.**

A. While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

B. While a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

C. During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

**History:** Laws 2003, ch. 122, § 6-603; 2007, ch. 128, § 17; 2018, ch. 63, § 22.

#### **ANNOTATIONS**

**The 2018 amendment**, effective January 1, 2019, provided additional powers of a settlor of a trust; and added a new Subsection A and redesignated former Subsections A and B as Subsections B and C, respectively.

**The 2007 amendment**, effective July 1, 2007, eliminated the provision that a trustee has a duty to all settlers who have capacity to revoke a trust.

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

### **46A-6-604. Limitation on action contesting validity of revocable trust; distribution of trust property.**

A. A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

- (1) three years after the settlor's death; or
- (2) one hundred twenty days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address and of the time allowed for commencing a proceeding.

B. Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

- (1) the trustee knows of a pending judicial proceeding contesting the validity of the trust; or
- (2) a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within sixty days after the contestant sent the notification.

C. A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

History: Laws 2007, ch. 128, § 18.

### **ANNOTATIONS**

**Effective dates.** — Laws 2007, ch. 128, § 31 made the section effective July 1, 2007.

## **ARTICLE 7**

### **Office of Trustee**

#### **46A-7-701. Accepting or declining trusteeship.**

A. Except as otherwise provided in Subsection C of this section, a person designated as trustee accepts the trusteeship:

- (1) by substantially complying with a method of acceptance provided in the terms of the trust; or

(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee or otherwise indicating acceptance of the trusteeship.

B. A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship.

C. A person designated as trustee, without accepting the trusteeship, may:

(1) act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and

(2) inspect or investigate trust property to determine potential liability under environmental law or other law or for any other purpose.

**History:** Laws 2003, ch. 122, § 7-701.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

#### **46A-7-702. Trustee's bond.**

A. A trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

B. The court may specify the amount of a bond, its liabilities and whether sureties are necessary. The court may modify or terminate a bond at any time.

C. A regulated financial service institution qualified to do trust business in New Mexico need not give bond, even if required by the terms of the trust.

**History:** Laws 2003, ch. 122, § 7-702; 2007, ch. 128, § 19.

#### **ANNOTATIONS**

**The 2007 amendment,** effective July 1, 2007, added Subsection C.

#### **46A-7-703. Co-trustees.**

A. Co-trustees who are unable to reach a unanimous decision may act by majority decision.

B. If a vacancy occurs in a co-trusteeship, the remaining co-trustees may act for the trust.

C. Subject to Section 12 [46-14-12 NMSA 1978] of the Uniform Directed Trust Act, a co-trustee shall participate in the performance of a trustee's function unless the co-trustee is unavailable to perform the function because of absence, illness, disqualification under other law or other temporary incapacity, or the co-trustee has properly delegated the performance of the function to another trustee.

D. If a co-trustee is unavailable to perform duties because of absence, illness, disqualification under other law or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining co-trustee or a majority of the remaining co-trustees may act for the trust.

E. A trustee shall not delegate to a co-trustee the performance of a function the settlor reasonably expected the trustees to perform jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

F. Except as otherwise provided in Subsection G of this section, a trustee who does not join in an action of another trustee is not liable for the action.

G. Subject to Section 12 of the Uniform Directed Trust Act, each trustee shall exercise reasonable care to:

- (1) prevent a co-trustee from committing a serious breach of trust; and
- (2) compel a co-trustee to redress a serious breach of trust.

H. A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any co-trustee of the dissent at or before the time of the action is not liable for the action unless the action is a serious breach of trust.

**History:** Laws 2003, ch. 122, § 7-703; 2018, ch. 63, § 23.

## ANNOTATIONS

**The 2018 amendment**, effective January 1, 2019, made certain provisions related to co-trustees subject to the Uniform Directed Trust Act; in Subsection C, added "Subject to Section 12 of the Uniform Directed Trust Act", and after the first occurrence of "co-trustee", deleted "must" and added "shall"; in Subsection E, after "A trustee", deleted "may" and added "shall"; and in Subsection G, added "Subject to Section 12 of the Uniform Directed Trust Act".

#### **46A-7-704. Vacancy in trusteeship; appointment of successor.**

A. A vacancy in a trusteeship occurs if:

- (1) a person designated as trustee rejects the trusteeship;
- (2) a person designated as trustee cannot be identified or does not exist;
- (3) a trustee resigns;
- (4) a trustee is disqualified or removed;
- (5) a trustee dies; or
- (6) a guardian or conservator is appointed for an individual serving as trustee.

B. If one or more co-trustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

C. A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:

- (1) by a person designated in the terms of the trust to act as successor trustee;
- (2) by a person appointed by unanimous agreement of the qualified beneficiaries; or
- (3) by a person appointed by the court.

D. A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:

- (1) by a person designated in the terms of the trust to act as successor trustee;
- (2) by a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the attorney general concurs in the selection; or
- (3) by a person appointed by the court.

E. Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

**History:** Laws 2003, ch. 122, § 7-704.

### ANNOTATIONS

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

**Death of trustee.** — The death of a sole or surviving trustee does not terminate the trust, unless the settlor has manifested an intention that the trust shall be personal to the particular trustee. *Butt v. Bank of America, N.A.*, 477 F.3d 1171 (10th Cir. 2007)

#### **46A-7-705. Resignation of trustee.**

A. A trustee may resign:

(1) upon at least thirty days' notice to the qualified beneficiaries, the settlor, if living, and all co-trustees; or

(2) with the approval of the court.

B. In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

C. Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

History: Laws 2003, ch. 122, § 7-705; 2007, ch. 128, § 20.

### ANNOTATIONS

**The 2007 amendment**, effective July 1, 2007, required a trustee to give notice of resignation to the settlor.

#### **46A-7-706. Removal of trustee.**

A. The settlor, a co-trustee or a beneficiary may request the court to remove a trustee or a trustee may be removed by the court on its own initiative.

B. The court may remove a trustee if:

(1) the trustee has committed a serious breach of trust;

(2) lack of cooperation among co-trustees substantially impairs the administration of the trust;

(3) because of unfitness, unwillingness or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.

C. Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief as may be necessary to protect the trust property or the interests of the beneficiaries.

**History:** Laws 2003, ch. 122, § 7-706.

### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

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

### **46A-7-707. Delivery of property by former trustee.**

A. Unless a co-trustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

B. A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the co-trustee, successor trustee or other person entitled to it.

**History:** Laws 2003, ch. 122, § 7-707.

### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

### **46A-7-708. Compensation of trustee.**

A. If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

B. If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if:

(1) the duties of the trustee are substantially different from those contemplated when the trust was created; or

(2) the compensation specified by the terms of the trust would be unreasonably low or high.

**History:** Laws 2003, ch. 122, § 7-708.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

### **46A-7-709. Reimbursement of expenses.**

A. A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for:

(1) expenses that were properly incurred in the administration of the trust; and

(2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

B. An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

**History:** Laws 2003, ch. 122, § 7-709.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

## **ARTICLE 8**

### **Duties and Powers of Trustee**

#### **46A-8-801. Duty to administer trust.**

Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries and in accordance with the Uniform Trust Code [46A-1-101 NMSA 1978].

**History:** Laws 2003, ch. 122, § 8-801.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.



**Claim of breach of fiduciary duty against co-owner of trademark.** — Where beneficiary of survivor trust claimed the co-owner of a trademark took actions that negatively impacted beneficiary's half interest in the trademark, court of appeals determined that the contention of negative impact on beneficiary's trademark interest was in the nature of a claim of trademark infringement by one co-owner against the other, not a claim of breach of fiduciary duty in the trust context; notwithstanding, the court of appeals held that when parties are co-owners of a trademark, one party cannot sue the other party for trademark infringement because a co-owner cannot infringe the trademark it owns. *Khalsa v. Puri*, 2015-NMCA-027, cert. denied, 2015-NMCERT-001.

**Fiduciary duty not owed to non-beneficiary of trust.** — Where wife, as beneficiary of a survivor's trust, created from half of the community estate contained in a living trust following beneficiary's husband's death, claimed that the trustees of an administrative trust, created from the other half of the community estate contained in the living trust, breached their fiduciary duties in the management of the administrative trust, wife was precluded from claiming a breach of fiduciary duties when she was not a beneficiary of the administrative trust. *Khalsa v. Puri*, 2015-NMCA-027, cert. denied, 2015-NMCERT-001.

#### **46A-8-802. Duty of loyalty.**

A. A trustee shall administer the trust solely in the interests of the beneficiaries.

B. Subject to the rights of persons dealing with or assisting the trustee as provided in Section 46A-10-1012 NMSA 1978, a sale, encumbrance or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

- (1) the transaction was authorized by the terms of the trust;
- (2) the transaction was approved by the court;
- (3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 46A-10-1005 NMSA 1978;
- (4) the beneficiary consented to the trustee's conduct, ratified the transaction or released the trustee in compliance with Section 46A-10-1009 NMSA 1978; or
- (5) the transaction involved a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

C. A sale, encumbrance or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

- (1) the trustee's spouse;
- (2) the trustee's descendants, siblings, parents or the spouse of any of them;
- (3) an agent or attorney of the trustee; or
- (4) a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

D. A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

E. A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

F. An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the Uniform Prudent Investor Act [45-7-601 NMSA 1978]. In addition to its compensation for acting as trustee, the trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust. If the trustee receives compensation from the investment company or investment trust for providing investment advisory or investment services, the trustee at least annually shall notify the persons entitled under Section 46A-8-813 NMSA 1978 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined.

G. In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

H. This section does not preclude the following transactions, if fair to the beneficiaries:

- (1) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;
- (2) payment of reasonable compensation to the trustee;

(3) a transaction between a trust and another trust, decedent's estate or conservatorship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) a deposit of trust money in a regulated financial-service institution operated by the trustee; or

(5) an advance by the trustee of money for the protection of the trust.

I. The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

History: Laws 2003, ch. 122, § 8-802; 2007, ch. 128, § 21.

### ANNOTATIONS

**The 2007 amendment**, effective July 1, 2007, adds Paragraph (3) of Subsection B and requires the trustee to notify the persons entitled to receive the trustee's annual report if the trustee receives compensation for providing investment or advisory services from an investment company or investment trust in which the trustee has invested trust funds.

**Breach of the duty of loyalty.** — A transaction involving a conflict of interest in breach of the duty of loyalty is voidable at the beneficiary's option, and voiding such a transaction will require the trustee to disgorge personal profit gained through the breach if that profit would not have been earned had the transaction never occurred; the beneficiary is entitled to this profit, even if the transaction did not cause any loss to the trust. *Miller v. Bank of America*, 2015-NMSC-022, *rev'g* 2014-NMCA-053, 326 P.3d 20.

Where trustee bank, in a breach of its duty of care, invested trust assets in an unproductive commercial building in direct violation of express trust provisions, which caused an \$894,000 loss in the value of the trust, arranged loans to the trust from the bank's own affiliates that were secured by mortgages on the building, and collected loan fees and mortgage interest from the trust in breach of its duty of loyalty, and where the district court awarded \$171,000 in damages without discussing the actual method of calculation for the restoration award, the court of appeals reversed the district court and awarded plaintiffs \$894,000 to restore the value of the trust, but did not award disgorgement damages, holding that an award of restoration damages and disgorgement damages would amount to a double recovery. The New Mexico supreme court reversed the court of appeals, holding that both restoration and disgorgement damages were required under the New Mexico Uniform Trust Code, and remanded the case back to the district court for a recalculation of damages because it was unclear whether disgorgement damages, the mortgage interest and loan fees paid to the trustee, were included in the calculation of the restoration award. *Miller v. Bank of America*, 2015-NMSC-022, *rev'g* 2014-NMCA-053, 326 P.3d 20.

### **46A-8-803. Impartiality.**

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests.

**History:** Laws 2003, ch. 122, § 8-803.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

#### **46A-8-804. Prudent administration.**

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.

**History:** Laws 2003, ch. 122, § 8-804.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

**Prudent administration in investigation of assets.** — In a claim that trustees breached their fiduciary duties in the investigation and inventory of trust assets, evidence showed that prior to the decedent husband's death, husband hired a bookkeeper to prepare a general ledger for the living trust and that the bookkeeper spent decades ensuring that all of husband's community property and separate assets were properly transferred to and titled in the living trust and inventoried on the living trust's general ledgers, that the bookkeeper communicated regularly with husband's attorney and executive secretary to ensure that all assets were transferred to and titled in the living trust during the husband's lifetime, that the trustee's expert CPA testified that the records he reviewed reflected a professional and complete accounting of the community's assets, and that all of the assets of the living trust properly made their way into the two trusts that were created after husband's death; there was sufficient evidence to support the district court's decision that the intellectual property at issue had been properly inventoried, that wife's share of the property had been appropriately distributed, and that the trustees conducted the inventory and transfer of living trust assets as a prudent person would and in a reasonable manner, and therefore the trustees did not breach any fiduciary duties in their investigation of assets. *Khalsa v. Puri*, 2015-NMCA-027, cert. denied, 2015-NMCERT-001.

**Prudent administration in management of assets.** — Where beneficiary of survivor's trust claimed that the trustees breached their fiduciary duties in their management of intellectual property based on beneficiary's claim that she was entitled to more than half of the community property due to decedent husband's excess expenditure of community funds prior to his death, district court properly concluded that claim should be

characterized as the claim of one spouse against the estate of the other spouse for alleged misappropriation of community property; there was sufficient evidence to support the district court's decision that the intellectual property at issue had been properly inventoried, that wife's share of the property had been appropriately distributed, that the trustees conducted the inventory and transfer of living trust assets as a prudent person would and in a reasonable manner, and that the trustees took reasonable actions in preserving the value of intellectual property, and therefore the trustees did not breach any fiduciary duties in their management of assets. *Khalsa v. Puri*, 2015-NMCA-027, cert. denied, 2015-NMCERT-001.

#### **46A-8-805. Costs of administration.**

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust and the skills of the trustee.

**History:** Laws 2003, ch. 122, § 8-805.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

#### **46A-8-806. Trustee's skills.**

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

**History:** Laws 2003, ch. 122, § 8-806.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

#### **46A-8-807. Delegation by trustee.**

A. A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill and caution in:

- (1) selecting an agent;
- (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
- (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

B. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

C. A trustee who complies with Subsection A of this section is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

D. By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

**History:** Laws 2003, ch. 122, § 8-807.

### ANNOTATIONS

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

### **46A-8-808. Repealed.**

**History:** Laws 2003, ch. 122, § 8-808; repealed by Laws 2018, ch. 63, § 24.

### ANNOTATIONS

**Repeals.** — Laws 2018, ch. 63, § 24 repealed 46A-8-808 NMSA 1978, as enacted by Laws 2003, ch. 122, § 8-808, relating to powers to direct, effective January 1, 2019. For provisions of former section, see the 2017 NMSA 1978 on *NMOneSource.com*.

### **46A-8-809. Control and protection of trust property.**

A trustee shall take reasonable steps to take control of and protect the trust property.

**History:** Laws 2003, ch. 122, § 8-809.

### ANNOTATIONS

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

### **46A-8-810. Recordkeeping and identification of trust property.**

A. A trustee shall keep adequate records of the administration of the trust.

B. A trustee shall keep trust property separate from the trustee's own property.

C. Except as otherwise provided in Subsection D of this section, a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

D. If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

**History:** Laws 2003, ch. 122, § 8-810.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

#### **46A-8-811. Enforcement and defense of claims.**

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

**History:** Laws 2003, ch. 122, § 8-811.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

#### **46A-8-812. Collecting trust property.**

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and to redress a breach of trust known to the trustee to have been committed by a former trustee.

**History:** Laws 2003, ch. 122, § 8-812.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

#### **46A-8-813. Duty to inform and report.**

A. A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

B. A trustee:

(1) upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument;

(2) within sixty days after accepting a trusteeship, shall notify the qualified beneficiaries of the acceptance and of the trustee's name, address and telephone number;

(3) within sixty days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, shall notify the qualified beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument and of the right to a trustee's report as provided in Subsection C of this section; and

(4) shall notify the qualified beneficiaries in advance of any change in the method or rate of the trustee's compensation.

C. A trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values. Upon a vacancy in a trusteeship, unless a co-trustee remains in office, a report must be sent to the qualified beneficiaries by the former trustee. A personal representative, conservator or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee.

D. A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

E. Paragraphs (2) and (3) of Subsection B of this section do not apply to a trustee who accepts a trusteeship before July 1, 2003, to an irrevocable trust created before July 1, 2003 or to a revocable trust that becomes irrevocable before July 1, 2003.

F. A knowing waiver by a settlor of the duties of the trustee to inform and report to beneficiaries under the Uniform Trust Code [46A-1-101 NMSA 1978] is effective, but only while the trustee is a regulated financial service institution qualified to do trust business in New Mexico. The knowing waiver must be conspicuous, must be contained in the terms of the trust or of a separate affidavit signed by the settlor and must state that the settlor has been informed of the risks and consequences of the waiver and that the settlor nevertheless directs that the reports and information be withheld by the trustee. As used in this subsection, "conspicuous" means conspicuous as defined in Section 55-1-201 NMSA 1978. The knowing waiver may direct that the reports and information be withheld:

(1) in whole or in part;



(2) from one or more beneficiaries or classes of beneficiaries, qualified or otherwise;

(3) in all events;

(4) until the occurrence of a date, event or contingency;

(5) in the sole and absolute discretion of the trustee or another person or both; or

(6) subject to more than one of the restrictions in Paragraphs (1) through (5) of this subsection.

History: Laws 2003, ch. 122, § 8-813; 2007, ch. 128, § 22.

### **ANNOTATIONS**

**The 2007 amendment**, effective July 1, 2007, added Subsections E and F.

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

### **46A-8-814. Discretionary powers; tax savings.**

A. Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole" or "uncontrolled", the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

B. Subject to Subsection D of this section, and unless the terms of the trust expressly indicate that a rule in this subsection does not apply:

(1) a person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard; and

(2) a trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

C. A power whose exercise is limited or prohibited by Subsection B of this section may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

D. Subsection B of this section does not apply to:

(1) a power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in Section 2056(b)(5) or 2523(b)(5) of the Internal Revenue Code of 1986, as amended, was previously allowed;

(2) any trust during any period that the trust may be revoked or amended by its settlor; or

(3) a trust if contributions to the trust qualify for the annual exclusion under Section 2503(c) of the Internal Revenue Code of 1986, as amended.

History: Laws 2003, ch. 122, § 8-814; 2007, ch. 128, § 23.

### ANNOTATIONS

**Cross references.** — For the federal Internal Revenue Code, see 26 U.S.C. § 1 et seq.

**The 2007 amendment,** effective July 1, 2007, amended Paragraph (2) of Subsection B to eliminate the qualification that the ascertainable standard relate to the trustee's individual health, education, support or maintenance within the meaning of the Internal Revenue Code.

### **46A-8-815. General powers of trustee.**

A. A trustee, without authorization by the court, may exercise:

- (1) powers conferred by the terms of the trust; and
- (2) except as limited by the terms of the trust:

(a) all powers over the trust property that an unmarried competent owner has over individually owned property;

(b) any other powers appropriate to achieve the proper investment, management and distribution of the trust property; and

(c) any other powers conferred by the Uniform Trust Code [46A-1-101 NMSA 1978].

B. The exercise of a power is subject to the fiduciary duties prescribed by Chapter 46A, Article 8 NMSA 1978.

History: Laws 2003, ch. 122, § 8-815; 2007, ch. 128, § 24.

### ANNOTATIONS

**The 2007 amendment**, effective July 1, 2007, changed the statutory reference in Subsection B.

### **46A-8-816. Specific powers of trustee.**

Without limiting the authority conferred by Section 8-815 [46A-8-815 NMSA 1978] of the Uniform Trust Code, a trustee may:

- A. collect trust property and accept or reject additions to the trust property from a settlor or any other person;
- B. acquire or sell property, for cash or on credit, at public or private sale;
- C. exchange, partition or otherwise change the character of trust property;
- D. deposit trust money in an account in a regulated financial-service institution;
- E. borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;
- F. with respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members or property owners, including merging, dissolving or otherwise changing the form of business organization or contributing additional capital;
- G. with respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:
  - (1) vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;
  - (2) hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;
  - (3) pay calls, assessments and other sums chargeable or accruing against the securities and sell or exercise stock subscription or conversion rights; and
  - (4) deposit the securities with a depository [depository] or other regulated financial-service institution;
- H. with respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;

I. enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

J. grant an option involving a sale, lease or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

K. insure the property of the trust against damage or loss and insure the trustee, the trustee's agents and beneficiaries against liability arising from the administration of the trust;

L. abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

M. with respect to possible liability for violation of environmental law:

(1) inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

(2) take action to prevent, abate or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

(3) decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

(4) compromise claims against the trust that may be asserted for an alleged violation of environmental law; and

(5) pay the expense of any inspection, review, abatement or remedial action to comply with environmental law;

N. pay or contest any claim, settle a claim by or against the trust and release, in whole or in part, a claim belonging to the trust;

O. pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;

P. exercise elections with respect to federal, state and local taxes;

Q. select a mode of payment under any employee benefit or retirement plan, annuity or life insurance payable to the trustee, exercise rights thereunder, including exercise of

the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;

R. make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;

S. pledge trust property to guarantee loans made by others to the beneficiary;

T. appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security and remove any trustee so appointed;

U. pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or by:

(1) paying it to the beneficiary's conservator or, if the beneficiary does not have a conservator, the beneficiary's guardian;

(2) paying it to the beneficiary's custodian under the Uniform Transfers to Minors Act [46-7-11 to 46-7-34 NMSA 1978] or custodial trustee under the Uniform Custodial Trust Act [45-7-501 to 45-7-522 NMSA 1978], and, for that purpose, creating a custodianship or custodial trust;

(3) if the trustee does not know of a conservator, guardian, custodian or custodial trustee, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or

(4) managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution;

V. on distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes and adjust for resulting differences in valuation;

W. resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration or other procedure for alternative dispute resolution;

X. prosecute or defend an action, claim or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

Y. sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers; and

Z. on termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.

**History:** Laws 2003, ch. 122, § 8-816.

### ANNOTATIONS

**Bracketed material.** — The bracketed material in Paragraph G(4) was inserted by the compiler and is not part of the law.

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

**A trustee cannot represent the trust pro se.** Lee v. Catron, 2009-NMCA-018, 145 N.M. 573, 203 P.3d 104, cert. denied, 2008-NMCERT-012, and cert. denied, 130 S. Ct. 90, 175 L. Ed. 2d 29.

### **46A-8-817. Distribution upon termination.**

A. Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within thirty days after the proposal was sent, but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

B. Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses and taxes.

C. A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

- (1) it was induced by improper conduct of the trustee; or
- (2) the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

**History:** Laws 2003, ch. 122, § 8-817.

### ANNOTATIONS

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

## **ARTICLE 9**

### **Reserved**

# **ARTICLE 10**

## **Liability of Trustees and Rights of Persons Dealing with Trustees**

### **46A-10-1001. Breach of trust.**

A. A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

B. To remedy a breach of trust that has occurred or may occur, the court may:

- (1) compel the trustee to perform the trustee's duties;
- (2) enjoin the trustee from committing a breach of trust;
- (3) compel the trustee to redress a breach of trust by paying money, restoring property or other means;
- (4) order a trustee to account;
- (5) appoint a special fiduciary to take possession of the trust property and administer the trust;
- (6) suspend the trustee;
- (7) remove the trustee as provided in Section 46A-7-706 NMSA 1978;
- (8) reduce or deny compensation to the trustee;
- (9) subject to Section 46A-10-1012 NMSA 1978, void an act of the trustee, impose a lien or a constructive trust on trust property or trace trust property wrongfully disposed of and recover the property or its proceeds; or
- (10) order any other appropriate relief.

History: Laws 2003, ch. 122, § 10-1001; 2007, ch. 128, § 25.

### **ANNOTATIONS**

The 2007 amendment, effective July 1, 2007, added Subsection B.

### **46A-10-1002. Damages for breach of trust.**

A. A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

- (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
- (2) the profit the trustee made by reason of the breach.

B. Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

History: Laws 2003, ch. 122, § 10-1002; 2007, ch. 128, § 26.

### ANNOTATIONS

**The 2007 amendment**, effective July 1, 2007, added Subsection A and amended Subsection B to add the exception.

**Restoration damages and disgorgement damages may be awarded together when there is a breach of trust.** — When there is a breach of trust, the loss to the beneficiaries and the profit by the trustee are distinct harms that traditionally give rise to different types of damages: restoration and disgorgement. Each has its own remedial purpose, and both may be awarded if necessary to satisfy each purpose fully by compensating the trust and removing all profit from the trustee's self-dealing. The measure of disgorgement is the amount of defendant's gain, and a beneficiary need not suffer any loss at all to be entitled to the remedy. Disgorgement is not intended to compensate beneficiaries but to prevent unjust enrichment of the trustee and to deter that trustee and others from similar conduct. Damages for unjust enrichment differ from compensatory damages in that the measure and limit of compensatory damages is the plaintiff's loss or injury, while the measure of restitution is the defendant's gain or benefit. *Miller v. Bank of America*, 2015-NMSC-022, *rev'g* 2014-NMCA-053, 326 P.3d 20.

Where trustee bank, in a breach of its duty of care, invested trust assets in an unproductive commercial building in direct violation of express trust provisions, which caused an \$894,000 loss in the value of the trust, arranged loans to the trust from the bank's own affiliates that were secured by mortgages on the building, and collected loan fees and mortgage interest from the trust in breach of its duty of loyalty, and where the district court awarded \$171,000 in damages without discussing the actual method of calculation for the restoration award, the court of appeals reversed the district court and awarded plaintiffs \$894,000 to restore the value of the trust, but did not award



disgorgement damages, holding that an award of restoration damages and disgorgement damages would amount to a double recovery. The New Mexico supreme court reversed the court of appeals, holding that both restoration and disgorgement damages were required under the New Mexico Uniform Trust Code, and remanded the case back to the district court for a recalculation of damages because it was unclear whether disgorgement damages, the mortgage interest and loan fees paid to the trustee, were included in the calculation of the restoration award. *Miller v. Bank of America*, 2015-NMSC-022, *rev'g* 2014-NMCA-053, 326 P.3d 20.

**Breach of duty.** — Where decedent created testamentary trusts for generation of income for beneficiary distribution and preservation of the value of the principal assets for distribution to plaintiffs upon the death of the decedent's spouse; the will prohibited defendant from investing in unproductive assets; in 1991, defendant purchased a commercial building as an asset of the trusts; by 1995, defendant became aware that the building was unproductive of net income and a drain on the income and other assets of the trusts; defendant continued to invest in the building despite its status as a wasting asset and obtained plaintiffs' consent to obtain a loan to renovate the building and to sell trust assets to reduce the loan balance; at the end of 1991, the net value of the trusts was \$669,996; at the end of 2003, the net value of the trusts was effectively zero; defendant had very little experience with commercial property management and never disclosed the building's unproductive status to plaintiffs; and plaintiffs were unaware of all the material facts regarding the building and did not fully consent to defendant's conduct, defendant breached its fiduciary duty and was liable for damages to plaintiffs resulting from the decline in the value of the trusts. *Miller v. Bank of America, N.A.*, 2014-NMCA-053, cert. granted, 2014-NMCERT-005.

**Inflationary adjustment of restoration damages and prejudgment interest.** — Where defendant mismanaged trust assets and breached its fiduciary duty by improperly depleting trust assets for the purpose of improving an unproductive commercial building; the net value of the trust assets declined from \$669,996 at the end of 1991 to a net value that was effectively zero at the end of 2003; the district court awarded plaintiffs restoration damages of \$894,000, based on a standard adjustment for inflation from 1991 to June 1, 2004 when the trust assets were distributable to plaintiffs, plus prejudgment interest from June 1, 2014, the inflation adjustment did not constitute a double recovery and overlap the recovery of prejudgment interest because the inflation adjustment was required to keep plaintiffs whole and to calculate the amount needed to restore the real value of the trust for the period 1991 to June 1, 2004 and the prejudgment interest compensated plaintiffs for the use of the value of their trust shares from June 1, 2004 until judgment was entered. *Miller v. Bank of America, N.A.*, 2014-NMCA-053, cert. granted, 2014-NMCERT-005.

**Offset of damages for income distributions.** — Where defendant retained a commercial building during defendant's entire term as trustee even though the building was a wasting asset; defendant depleted trust assets and borrowed funds to renovate the building; during defendant's term as trustee, the return on trust assets was negative and the net value of trust assets decline substantially; despite the negative return on

trust assets, defendant further depleted trust assets by paying \$404,421 as income distributions to the beneficiaries; and the proper measure of damages for defendant's breach of its fiduciary duties was the amount required to restore the value of the trust estate and all of its income distributions to what they would have been if the trust had been properly managed, defendant was not entitled to an offset of the income distributions against compensatory damages because defendant offered no evidence that the income distributions exceeded the amount that would have been actually received by plaintiffs if defendant had timely sold the building and properly invested the principal in assets that produced a reasonable rate of return while continuing to preserve principal. *Miller v. Bank of America, N.A.*, 2014-NMCA-053, cert. granted, 2014-NMCERT-005.

**Disgorgement of profits to the trustee for self-dealing.** — Where defendant retained a commercial building during defendant's entire term as trustee even though the building was a wasting asset; defendant borrowed \$800,000 from an affiliate entity in an attempt to restore the building to a competitive condition; district court awarded plaintiffs restoration damages of \$894,000 for defendant's breach of its fiduciary duties; and plaintiffs sought to recover \$540,000 as a disgorgement of profits to defendant for self-dealing arising from the loans to the trust, an award of disgorgement damages to plaintiffs would constitute a double recovery because the award of restoration damages made plaintiffs whole and effectively included the amount claimed as disgorgement damages. *Miller v. Bank of America, N.A.*, 2014-NMCA-053, cert. granted, 2014-NMCERT-005.

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

### **46A-10-1003. Damages in absence of breach.**

A. A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.

B. Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

**History:** Laws 2003, ch. 122, § 10-1003.

### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

**A trustee is prohibited from profiting from the trust.** — A trustee may not retain any personal profit, whether or not there has been a breach of the duty of loyalty. The New Mexico Uniform Trust Code requires that a trustee disgorge all personal profit. *Miller v. Bank of America*, 2015-NMSC-022, *rev'g* 2014-NMCA-053, 326 P.3d 20.

Where trustee bank, in a breach of its duty of care, invested trust assets in an unproductive commercial building in direct violation of express trust provisions, which caused an \$894,000 loss in the value of the trust, arranged loans to the trust from the bank's own affiliates that were secured by mortgages on the building, and collected loan fees and mortgage interest from the trust in breach of its duty of loyalty, and where the district court awarded \$171,000 in damages without discussing the actual method of calculation for the restoration award, the court of appeals reversed the district court and awarded plaintiffs \$894,000 to restore the value of the trust, but did not award disgorgement damages, holding that an award of restoration damages and disgorgement damages would amount to a double recovery. The New Mexico supreme court reversed the court of appeals, holding that both restoration and disgorgement damages were required under the New Mexico Uniform Trust Code, and remanded the case back to the district court for a recalculation of damages because it was unclear whether disgorgement damages, the mortgage interest and loan fees paid to the trustee, were included in the calculation of the restoration award. *Miller v. Bank of America*, 2015-NMSC-022, *rev'g* 2014-NMCA-053, 326 P.3d 20.

#### **46A-10-1004. Attorney fees and costs.**

In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

**History:** Laws 2003, ch. 122, § 10-1004.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

**Award of attorney fees is discretionary with the district court.** — An award of attorney fees is a matter within the district court's discretion. *Khalsa v. Puri*, 2015-NMCA-027, cert. denied, 2015-NMCERT-001.

Where defendant claimed that plaintiff waived an award of attorney fees by failing to request attorney fees in the pleadings, the claim that a request for attorney fees is waived unless it is pleaded is not supported by authority; the district court did not abuse its discretion in awarding attorney fees based on the years of litigation over numerous issues, plaintiff's failure to present any direct evidence to support her claims, and in defendants' success in defending the claims. *Khalsa v. Puri*, 2015-NMCA-027, cert. denied, 2015-NMCERT-001.

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

#### **46A-10-1005. Limitation of action against trustee.**

A. A beneficiary shall not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

B. A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

C. If Subsection A of this section does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after the first to occur of:

- (1) the removal, resignation or death of the trustee;
- (2) the termination of the beneficiary's interest in the trust; or
- (3) the termination of the trust.

History: Laws 2007, ch. 128, § 27.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

#### **46A-10-1006. Reliance on trust instrument.**

A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

History: Laws 2003, ch. 122, § 10-1005; recompiled as § 46A-10-1006 by Laws 2007, ch. 128, § 30.

#### **ANNOTATIONS**

**Recompilation.** — Laws 2007, ch. 128, § 30 recompiled former 46A-10-1005 NMSA 1978, as enacted by Laws 2003, ch. 122, § 10-1005, as 46A-10-1006 NMSA 1978, effective July 1, 2007.

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

#### **46A-10-1007. Event affecting administration or distribution.**

If the happening of an event, including marriage, divorce, performance of educational requirements or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

History: Laws 2003, ch. 122, § 10-1006; recompiled as § 46A-10-1007 by Laws 2007, ch. 128, § 30.

## ANNOTATIONS

**Recompilation.** — Laws 2007, ch. 128, § 30 recompiled former 46A-10-1006 NMSA 1978, as enacted by Laws 2003, ch. 122, § 10-1006, as 46A-10-1007 NMSA 1978, effective July 1, 2007.

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

### **46A-10-1008. Exculpation of trustee.**

A. A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

B. An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

History: Laws 2003, ch. 122, § 10-1007; recompiled as § 46A-10-1008 by Laws 2007, ch. 128, § 30.

## ANNOTATIONS

**Recompilation.** — Laws 2007, ch. 128, § 30 recompiled former 46A-10-1007 NMSA 1978, as enacted by Laws 2003, ch. 122, § 10-1007, as 46A-10-1008 NMSA 1978, effective July 1, 2007.

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

## **46A-10-1009. Beneficiary's consent, release or ratification.**

A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach or ratified the transaction constituting the breach, unless:

A. the consent, release or ratification of the beneficiary was induced by improper conduct of the trustee; or

B. at the time of the consent, release or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

History: Laws 2003, ch. 122, § 10-1008; recompiled as § 46A-10-1009 by Laws 2007, ch. 128, § 30.

### **ANNOTATIONS**

**Recompilation.** — Laws 2007, ch. 128, § 30 recompiled former 46A-10-1008 NMSA 1978, as enacted by Laws 2003, ch. 122, § 10-1008, as 46A-10-1009 NMSA 1978, effective July 1, 2007.

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

## **46A-10-1010. Limitation on personal liability of trustee.**

A. Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.

B. A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

C. A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

History: Laws 2003, ch. 122, § 10-1009; recompiled as § 46A-10-1010 by Laws 2007, ch. 128, § 30.

### **ANNOTATIONS**

**Recompilation.** — Laws 2007, ch. 128, § 30 recompiled former 46A-10-1009 NMSA 1978, as enacted by Laws 2003, ch. 122, § 10-1009, as 46A-10-1010 NMSA 1978, effective July 1, 2007.

**Compiler's note.** — Laws 2007, ch. 128, § 30 recompiled Laws 2003, ch. 122, §§ 10-1005 through 10-1009 as §§ 46A-10-1006 through 46A-10-1010 NMSA 1978. Section 10-1010 NMSA 1978 was previously enacted as "Reserved" by Laws 2003, ch. 122, § 10-1010. The compiler has deleted the compilation of Laws 2003, ch. 122, § 10-1010 as superceded by 2007, ch. 128, § 30.

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

### **46A-10-1011. Interest as general partner.**

A. Except as otherwise provided in Subsection C of this section or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed or recorded pursuant to the provisions of any version of the Uniform Partnership Act [54-1A-1002 NMSA 1978] or the Uniform Limited Partnership Act [repealed].

B. Except as otherwise provided in Subsection C of this section, a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

C. The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the trustee's spouse or one or more of the trustee's descendants, siblings or parents, or the spouse of any of them.

D. If the trustee of a revocable trust holds an interest as a general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.

History: Laws 2007, ch. 128, § 28.

### **ANNOTATIONS**

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

Laws 2007, ch. 129, § 1206 repealed the Uniform Limited Partnership Act, Sections 54-2-1 through 54-2-63 NMSA 1978, effective January 1, 2009.

**Effective dates.** — Laws 2007, ch. 128, § 31 made the section effective July 1, 2007.

### **46A-10-1012. Protection of person dealing with trustee.**

A. A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

B. A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

C. A person who in good faith delivers assets to a trustee need not ensure their proper application.

D. A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated, is protected from liability as if the former trustee were still a trustee.

E. Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

History: Laws 2003, ch. 122, § 10-1011; recompiled as § 46A-10-1012 by Laws 2007, ch. 128, § 30.

### **ANNOTATIONS**

**Recompilation.** — Laws 2007, ch. 128, § 30 recompiled former 46A-10-1011 NMSA 1978, as enacted by Laws 2003, ch. 122, § 10-1011, as 46A-10-1012 NMSA 1978, effective July 1, 2007.

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

### **46A-10-1013. Certification of trust.**

A. Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

- (1) that the trust exists and the date the trust instrument was executed;
- (2) the identity of the settlor;



- (3) the identity and address of the currently acting trustee;
- (4) the powers of the trustee;
- (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (6) the authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
- (7) the trust's taxpayer identification number;
- (8) the manner of taking title to trust property; and
- (9) if an action is to be undertaken through an agent, that delegation of the action to an agent is not prohibited by the trust instrument.

B. A certification of trust may be signed or otherwise authenticated by any trustee. The recipient of a certification of trust that will be used to affect title to real property may require the certification to be acknowledged by a trustee so as to allow it to be recorded.

C. A certification of trust must state that the trust has not been revoked, modified or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

D. A certification of trust need not contain the dispositive terms of a trust.

E. A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction.

F. A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

G. A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

H. A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

I. This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

History: Laws 2003, ch. 122, § 10-1012; recompiled as § 46A-10-1013 by Laws 2007, ch. 128, § 30.

#### **ANNOTATIONS**

**Recompilation.** — Laws 2007, ch. 128, § 30 recompiled former 46A-10-1012 NMSA 1978, as enacted by Laws 2003, ch. 122, § 10-1012, as 46A-10-1013 NMSA 1978, effective July 1, 2007.

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

## **ARTICLE 11**

### **Miscellaneous Provisions**

#### **46A-11-1101. Uniformity of application and construction.**

In applying and construing the Uniform Trust Code [46A-1-101 NMSA 1978], consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**History:** Laws 2003, ch. 122, § 11-1101.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

#### **46A-11-1102. Electronic records and signatures.**

The provisions of the Uniform Trust Code [46A-1-101 to 46A-11-1104 NMSA 1978] governing the legal effect, validity or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of Section 102 of the federal Electronic Signatures in Global and National Commerce Act and supersede, modify and limit the requirements of the federal Electronic Signatures in Global and National Commerce Act.

**History:** Laws 2003, ch. 122, § 11-1102.

#### **ANNOTATIONS**

**Cross references.** — For the federal Electronic Signatures in Global and National Commerce Act generally, see 15 U.S.C.S. § 7001 et seq. For Section 102 of the act, see 15 U.S.C.S. § 7002.

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

### **46A-11-1103. Severability.**

If any provision of the Uniform Trust Code [46A-1-101 NMSA 1978] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of that code which can be given effect without the invalid provision or application, and to this end the provisions of the code are severable.

**History:** Laws 2003, ch. 122, § 11-1103.

## **ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 122, § 11-1106 made the act effective July 1, 2003.

### **46A-11-1104. Application to existing relationships.**

A. Except as otherwise provided in the Uniform Trust Code [46A-1-101 NMSA 1978], on the effective date of the Uniform Trust Code or of any amendment to that code:

(1) the Uniform Trust Code or the amendment applies to all trusts created before, on or after its effective date;

(2) the Uniform Trust Code or the amendment applies to all judicial proceedings concerning trusts commenced on or after its effective date;

(3) the Uniform Trust Code or the amendment applies to judicial proceedings concerning trusts commenced before its effective date, unless the court finds that application of a particular provision of the Uniform Trust Code or the amendment would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of the Uniform Trust Code or the amendment does not apply and the superseded law applies;

(4) any rule of construction or presumption provided in the Uniform Trust Code or the amendment applies to trust instruments executed before the effective date of the Uniform Trust Code or any amendment to that code unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done before the effective date of the Uniform Trust Code or any amendment to that code is not affected by the Uniform Trust Code or the amendment.

B. If a right is acquired, extinguished or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of the Uniform Trust Code or any amendment to that code, that statute continues to apply to the right even if it has been repealed or superseded.

C. The Uniform Trust Code or any amendment to that code does not apply to the trust created by the Enabling Act for New Mexico of June 20, 1910, 36 Stat. 557, Ch. 310.

History: Laws 2003, ch. 122, § 11-1104; 2011, ch. 124, § 96.

## ANNOTATIONS

**Compiler's notes.** — The Enabling Act for New Mexico (June 20, 1910, 36 Stat. 557, ch. 310), referred to in Subsection C, is set forth in Pamphlet 3 in Volume 1 NMSA 1978.

**The 2011 amendment,** effective January 1, 2012, made amendments to the Uniform Trust Code applicable to the provisions of the Uniform Trust Code as of the effective date of the amendments.

### **46A-11-1105. Application to existing relationships.**

A. Except as otherwise provided in this 2007 act:

(1) the provisions of this 2007 act apply to all trusts created before, on or after July 1, 2007;

(2) the provisions of this 2007 act apply to all judicial proceedings concerning trusts commenced on or after July 1, 2007;

(3) the provisions of this 2007 act apply to judicial proceedings concerning trusts commenced before July 1, 2007 unless the court finds that application of a particular provision of this 2007 act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this 2007 act does not apply and the superseded law applies;

(4) any rule of construction or presumption provided in this 2007 act applies to trust instruments executed before July 1, 2007 unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done before the effective date of this 2007 act is not affected by the provisions of this 2007 act.

B. If a right is acquired, extinguished or barred upon the expiration of a prescribed period that has commenced to run under any other statute before July 1, 2007, that statute continues to apply to the right even if it has been repealed or superseded.

C. The provisions of this 2007 act do not apply to the trust created by the Enabling Act for New Mexico of June 20, 1910, 36 Stat. 557, Ch. 310.

History: Laws 2007, ch. 128, § 29.

### **ANNOTATIONS**

**Effective dates.** — Laws 2007, ch. 128, § 31 made the section effective July 1, 2007.