

# CHAPTER 46

## Fiduciaries and Trusts

### ARTICLE 1

#### Fiduciary Obligations and Investments

##### 46-1-1. Repealed.

###### ANNOTATIONS

**Repeals.** — Laws 2011, ch. 124, § 97 repealed 46-1-1 NMSA 1978, as enacted by Laws 1923, ch. 26, § 1, relating to definitions, effective January 1, 2012. For provisions of former section, see the 2010 NMSA 1978 on *NMOneSource.com*.

##### 46-1-2. Repealed.

###### ANNOTATIONS

**Repeals.** — Laws 2011, ch. 124, § 97 repealed 46-1-2 NMSA 1978, as enacted by Laws 1923, ch. 26, § 2, relating to payment or transfer to fiduciary, effective January 1, 2012. For provisions of former section, see the 2010 NMSA 1978 on *NMOneSource.com*.

##### 46-1-3. Repealed.

###### ANNOTATIONS

**Repeals.** — Laws 2011, ch. 124, § 97 repealed 46-1-3 NMSA 1978, as enacted by Laws 1923, ch. 26, § 4, relating to negotiable instruments transferred by fiduciary, effective January 1, 2012. For provisions of former section, see the 2010 NMSA 1978 on *NMOneSource.com*.

##### 46-1-4. Repealed.

###### ANNOTATIONS

**Repeals.** — Laws 2011, ch. 124, § 97 repealed 46-1-4 NMSA 1978, as enacted by Laws 1923, ch. 26, § 5, relating to bill of exchange drawn by fiduciary and payee's liability to principal, effective January 1, 2012. For provisions of former section, see the 2010 NMSA 1978 on *NMOneSource.com*.

##### 46-1-5. Repealed.

## ANNOTATIONS

**Repeals.** — Laws 2011, ch. 124, § 97 repealed 46-1-5 NMSA 1978, as enacted by Laws 1923, ch. 26, § 6, relating to transfer of bill of exchange drawn by fiduciary who holds it as payee or transferee, effective January 1, 2012. For provisions of former section, see the 2010 NMSA 1978 on *NMOneSource.com*.

### **46-1-6. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2011, ch. 124, § 97 repealed 46-1-6 NMSA 1978, as enacted by Laws 1923, ch. 26, § 7, relating to bank accounts in name of fiduciary, checks drawn by fiduciary and bank's liability to principal, effective January 1, 2012. For provisions of former section, see the 2010 NMSA 1978 on *NMOneSource.com*.

### **46-1-7. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2011, ch. 124, § 97 repealed 46-1-7 NMSA 1978, as enacted by Laws 1923, ch. 26, § 8, relating to bank accounts in name of principal, checks drawn by fiduciary and bank's liability to principal, effective January 1, 2012. For provisions of former section, see the 2010 NMSA 1978 on *NMOneSource.com*.

### **46-1-8. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2011, ch. 124, § 97 repealed 46-1-8 NMSA 1978, as enacted by Laws 1923, ch. 26, § 9, relating to checks deposited in fiduciary's personal account and bank's liability to principal, effective January 1, 2012. For provisions of former section, see the 2010 NMSA 1978 on *NMOneSource.com*.

### **46-1-9. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2011, ch. 124, § 97 repealed 46-1-9 NMSA 1978, as enacted by Laws 1923, ch. 26, § 10, relating to joint trustees and checks drawn by one, effective January 1, 2012. For provisions of former section, see the 2010 NMSA 1978 on *NMOneSource.com*.

### **46-1-10. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2011, ch. 124, § 97 repealed 46-1-10 NMSA 1978, as enacted by Laws 1923, ch. 26, § 11, relating to prior transactions, effective January 1, 2012. For provisions of former section, see the 2010 NMSA 1978 on *NMOneSource.com*.

### **46-1-11. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2011, ch. 124, § 97 repealed 46-1-11 NMSA 1978, as enacted by Laws 1923, ch. 26, § 12, relating to law governing transactions not in this act, effective January 1, 2012. For provisions of former section, see the 2010 NMSA 1978 on *NMOneSource.com*.

### **46-1-12. Power of fiduciary or custodian to deposit securities in a central depository.**

A. Notwithstanding any other provision of law, any fiduciary holding securities in its fiduciary capacity, and any bank or trust company holding securities as a custodian or managing agent, is authorized to deposit or arrange for the deposit of the securities in a clearing corporation as defined in Subsection C[(a)(5)] of Section 55-8-102 NMSA 1978. When securities are so deposited, certificates representing securities of the same class of the same issuer may be merged and held in bulk in the name of the nominee of the clearing corporation with any other such securities deposited in the clearing corporation by any person, regardless of the ownership of the securities, and certificates of small denomination may be merged into one or more certificates of larger denomination. The records of the fiduciary and the records of the bank or trust company acting as custodian or as managing agent shall at all times show the name of the party for whose account the securities are deposited. Title to the securities may be transferred by bookkeeping entry on the books of the clearing corporation without physical delivery of certificates representing the securities. A bank or trust company depositing securities pursuant to this section shall be subject to such rules and regulations as, in the case of state chartered institutions, the commissioner of banking [director of the financial institutions division] and, in the case of national banking associations, the comptroller of the currency may from time to time issue. A fiduciary shall, on demand by any party for a judicial proceeding for the settlement of the fiduciary's account, or on demand by the attorney for the party, certify in writing to the party the securities deposited by the fiduciary in the clearing corporation for its account as the fiduciary.

B. This section shall apply to any fiduciary holding securities in its fiduciary capacity, and to any bank or trust company holding securities as a custodian or managing agent, acting on the effective date of this section or which thereafter may act regardless of the date of the agreement, instrument or court order by which it is appointed and regardless of whether or not the fiduciary, custodian or managing agent owns capital stock of the clearing corporation.

C. As used in this section, "fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer or any other person acting in a fiduciary capacity for any person, trust or estate.

**History:** 1953 Comp., § 33-1-36, enacted by Laws 1973, ch. 76, § 1.

### ANNOTATIONS

**Bracketed material.** — The bracketed material in Subsection A was inserted by the compiler. Following the 1996 revision of Article 8 of the U.C.C., "clearing corporation" is now defined in 55-8-102(a)(5) NMSA 1978. Laws 1977, ch. 245, § 120, amending 58-1-32 NMSA 1978, provides that "upon the effective date of the Commerce and Industry Department Act, the title of commissioner of banking shall be changed to the 'director of the financial institutions division.'" Laws 1977, ch. 245, § 239 makes the act effective on March 31, 1978. The bracketed material was not enacted by the legislature, and it is not a part of the law.

### **46-1-13. Establishment of common trust funds; inclusion of affiliates.**

Any bank or trust company qualified to act as fiduciary in this state may establish common trust funds for the purpose of furnishing investments to itself and its affiliated bank or trust company as fiduciary or to itself and its affiliated bank or trust company and others as co-fiduciaries and may, as fiduciary or co-fiduciary, invest funds which it lawfully holds for investment in interests in the common trust funds, if such investment is not prohibited by the instrument, judgment, decree or order creating the fiduciary relationship and if, in the case of co-fiduciaries, the bank or trust company procures the consent of its co-fiduciaries to the investment.

As used in this section, "affiliated" means two or more banks or trust companies in which eighty percent or more of the voting shares of each bank or trust company, excluding shares owned by the United States or by any company wholly owned by the United States, are directly or indirectly owned or controlled by a holding company.

**History:** 1953 Comp., § 33-1-21, enacted by Laws 1955, ch. 66, § 1; 1984, ch. 63, § 1.

### ANNOTATIONS

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Authority of common trustee to transfer securities from one trust to another by purchase and sale, 129 A.L.R. 150.

Construction of Uniform Common Trust Fund Act, 64 A.L.R.2d 268.

90 C.J.S. Trusts § 329.

## **46-1-14. Court accountings.**

When an accounting of a common trust fund is presented to a court for approval, the court shall assign a time and place for hearing and order notice thereof by: (1) publication once a week for three weeks the first publication to be not less than twenty days prior to the date of the hearing, of a notice in a newspaper having a circulation in the county in which the bank or trust company or branch thereof operating the common trust fund is located; and (2) mailing not less than fourteen days prior to the date of the hearing a copy of the notice to all beneficiaries of the trusts participating in the common trust fund whose names are known to the bank or trust company from the records kept by it in the regular course of business in the administration of said trusts, directed to them at the addresses shown by such records; and (3) such further notice if any as the court may order.

**History:** 1953 Comp., § 33-1-22, enacted by Laws 1955, ch. 66, § 2.

## **46-1-15. Uniformity of interpretation.**

This act [46-1-13 through 46-1-16 NMSA 1978] shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

**History:** 1953 Comp., § 33-1-23, enacted by Laws 1955, ch. 66, § 3.

## **46-1-16. Short title.**

This act [46-1-13 through 46-1-16 NMSA 1978] may be cited as the Uniform Common Trust Fund Act.

**History:** 1953 Comp., § 33-1-24, enacted by Laws 1955, ch. 66, § 4.

### **ANNOTATIONS**

**Severability clauses.** — Laws 1955, ch. 66, § 5, provides for the severability of the act if any part or application thereof is held invalid.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 76 Am. Jur. 2d Trusts §§ 512 to 514.

Uniform Common Trust Fund Act, 64 A.L.R.2d 268.

## **ARTICLE 2**

### **Trusts**

#### **46-2-1. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-1 NMSA 1978, as enacted by Laws 1951, ch. 193, § 1, relating to definitions, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### 46-2-2. Repealed.

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-2 NMSA 1978, as enacted by Laws 1951, ch. 193, § 2, relating to bank account to pay special debts, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### 46-2-3. Repealed.

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-3 NMSA 1978, as enacted by Laws 1951, ch. 193, § 3, relating to loan of trust funds, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### 46-2-4. Repealed.

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-4 NMSA 1978, as enacted by Laws 1995, ch. 190, § 2, relating to corporate trustee depositing trust funds with self or affiliated depository institution, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### 46-2-5. Repealed.

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-5 NMSA 1978, as enacted by Laws 1951, ch. 193, § 5, relating to trustee buying from or selling to self, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### 46-2-6. Repealed.

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-6 NMSA 1978, as enacted by Laws 1995, ch. 190, § 3, relating to trustee selling from one trust to another trust, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### **46-2-7. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-7 NMSA 1978, as enacted by Laws 1951, ch. 193, § 7, relating to corporate trustee buying its own stock, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### **46-2-8. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-8 NMSA 1978, as enacted by Laws 1951, ch. 193, § 8, relating to voting stock, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### **46-2-9. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-9 NMSA 1978, as enacted by Laws 1951, ch. 193, § 9, relating to holding stock in name of nominee, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### **46-2-10. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-10 NMSA 1978, as enacted by Laws 1951, ch. 193, § 10, relating to powers attached to office, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### **46-2-11. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-11 NMSA 1978, as enacted by Laws 1951, ch. 193, § 11, relating to powers exercisable by majority, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### **46-2-12. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-12 NMSA 1978, as enacted by Laws 1951, ch. 193, § 15, relating to withdrawals from mingled trust funds, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### **46-2-13. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-13 NMSA 1978, as enacted by Laws 1951, ch. 193, § 16, relating to unenforceable oral trust created by deed, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### **46-2-14. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-14 NMSA 1978, as enacted by Laws 1951, ch. 193, § 17, relating to power of settlor, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### **46-2-15. Repealed.**

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-15 NMSA 1978, as enacted by Laws 1951, ch. 193, § 18, relating to power of beneficiary, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### **46-2-16. Repealed.**



## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-16 NMSA 1978, as enacted by Laws 1951, ch. 193, § 19, relating to power of the court, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### 46-2-17. Repealed.

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-17 NMSA 1978, as enacted by Laws 1951, ch. 193, § 20, relating to liabilities for violations of act, effective July 1, 2003. For provisions of former section, see the 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### 46-2-18. Repealed.

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-18 NMSA 1978, as enacted by Laws 1951, ch. 193, § 21, relating to uniformity of interpretation, effective July 1, 2003. For provisions of former section, see 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

### 46-2-19. Repealed.

## ANNOTATIONS

**Repeals.** — Laws 2003, ch. 122, § 11-1105 repealed 46-2-19 NMSA 1978, as enacted by Laws 1951, ch. 193, § 22, relating to the short title of the act, effective July 1, 2003. For provisions of former section, see 2002 NMSA 1978 on *NMOneSource.com*. For present similar provisions, see Chapter 46A.

## ARTICLE 2A

### Fiduciary Investments

#### 46-2A-1. Fiduciary investments; certain securities.

A bank or trust company that is acting as a fiduciary or agent may, in its discretion or at the direction of another person who is authorized to direct the investment of money held by the bank or trust company, invest in the securities of an open-end or closed-end management investment company or investment trust that is registered under the federal Investment Company Act of 1940, as amended. The bank or trust company, or

any affiliate thereof, may provide services to the investment trust or investment company, including acting as an investment advisor, manager, sponsor, distributor, custodian, transfer agent or registrar, and may receive reasonable compensation for the services; provided that with respect to any funds invested, the bank or trust company or its affiliate shall disclose to the persons to whom statements of the account are rendered the rate, formula or other method by which the compensation paid is determined.

**History:** Laws 1993, ch. 51, § 1.

### ANNOTATIONS

**Cross references.** — For Uniform Prudent Investor Act, see 45-7-601 NMSA 1978 et seq.

For the federal Investment Company Act of 1940, see 15 U.S.C. § 80a-1 et seq.

## ARTICLE 3 Principal and Income

### 46-3-1. Repealed.

#### ANNOTATIONS

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-1 NMSA 1978, as enacted by Laws 1969, ch. 239, § 1, relating to definitions, effective July 1, 2001. For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

### 46-3-2. Repealed.

#### ANNOTATIONS

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-2 NMSA 1978, as enacted by Laws 1969, ch. 239, § 2, relating to duty of trustee as to receipts and expenditures, effective July 1, 2001. For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

### 46-3-3. Repealed.

#### ANNOTATIONS

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-3 NMSA 1978, as enacted by Laws 1969, ch. 239, § 3, relating to income, principal, charges, effective July 1, 2001.

For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

#### **46-3-4. Repealed.**

##### **ANNOTATIONS**

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-4 NMSA 1978, as enacted by Laws 1969, ch. 239, § 4, relating to when right to income arises; apportionment of income, effective July 1, 2001. For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

#### **46-3-5. Repealed.**

##### **ANNOTATIONS**

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-5 NMSA 1978, as enacted by Laws 1969, ch. 239, § 1, relating to income earned during administration of a decedent's estate, effective July 1, 2001. For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

#### **46-3-6. Repealed.**

##### **ANNOTATIONS**

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-6 NMSA 1978, as enacted by Laws 1969, ch. 239, § 6, relating to corporate distributions, effective July 1, 2001. For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

#### **46-3-7. Repealed.**

##### **ANNOTATIONS**

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-7 NMSA 1978, as enacted by Laws 1969, ch. 239, § 7, relating to bond premium and discount, effective July 1, 2001. For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

#### **46-3-8. Repealed.**

##### **ANNOTATIONS**

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-8 NMSA 1978, as enacted by Laws 1969, ch. 239, § 8, relating to business and farming operations, effective July 1, 2001. For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

### **46-3-9. Repealed.**

#### **ANNOTATIONS**

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-9 NMSA 1978, as enacted by Laws 1969, ch. 239, § 1, relating to disposition of natural resources, effective July 1, 2001. For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

### **46-3-10. Repealed.**

#### **ANNOTATIONS**

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-10 NMSA 1978, as enacted by Laws 1969, ch. 239, § 10, relating to other property subject to depletion, effective July 1, 2001. For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

### **46-3-11. Repealed.**

#### **ANNOTATIONS**

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-11 NMSA 1978, as enacted by Laws 1969, ch. 239, § 11, relating to underproductive property, effective July 1, 2001. For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

### **46-3-12. Repealed.**

#### **ANNOTATIONS**

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-12 NMSA 1978, as enacted by Laws 1969, ch. 239, § 12, relating to charges against income and principal, effective July 1, 2001. For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

## **46-3-13. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-13 NMSA 1978, as enacted by Laws 1969, ch. 239, § 13, relating to application of act, effective July 1, 2001. For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

## **46-3-14. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-14 NMSA 1978, as enacted by Laws 1969, ch. 239, § 14, relating to uniformity of interpretation, effective July 1, 2001. For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

## **46-3-15. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2001, ch. 113, § 604 repealed 46-3-15 NMSA 1978, as enacted by Laws 1969, ch. 239, § 15, relating to the short title of the act, effective July 1, 2001. For provisions of former section, see the 2000 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, see Chapter 46, Article 3A NMSA 1978.

## **ARTICLE 3A**

### **Uniform Principal and Income**

## **ARTICLE 1**

### **DEFINITIONS AND FIDUCIARY DUTIES**

#### **46-3A-101. Short title.**

Chapter 46, Article 3A NMSA 1978 may be cited as the "Uniform Principal and Income Act".

History: Laws 2001, ch. 113, § 101; 2011, ch. 124, § 86.

### **ANNOTATIONS**

**The 2011 amendment**, effective January 1, 2012, changed the statutory reference to the act.

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

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

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Constitutionality of retrospective application of Uniform Principal and Income Act or other statutes relating to ascertainment of principal and income and apportionment of receipts and expenses among life tenants and remaindermen, 69 A.L.R.2d 1137.

90 C.J.S. Trusts § 355.

## **46-3A-102. Definitions.**

As used in the Uniform Principal and Income Act:

A. "accounting period" means a calendar year unless another twelve-month period is selected by a fiduciary. The term includes a portion of a calendar year or other twelve-month period that begins when an income interest begins or ends when an income interest ends;

B. "beneficiary" includes, in the case of a decedent's estate, an heir and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary;

C. "fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator and a person performing substantially the same function;

D. "income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange or liquidation of a principal asset, to the extent provided in Article 4 of the Uniform Principal and Income Act;

E. "income beneficiary" means a person to whom net income of a trust is or may be payable;

F. "income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee's discretion;

G. "mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute;

H. "net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under the Uniform Principal and Income Act to or from income during the period;

I. "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;

J. "principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates;

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

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

(2) would be a distributee or permissible distributee of trust income or principal if the interest of the distributees described in Paragraph (1) of this subsection terminated on that date; or

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

L. "remainder beneficiary" means a person entitled to receive principal when an income interest ends;

M. "terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct;

N. "total return trust" means a trust that is converted to a total return trust pursuant to Section 46-3A-105 NMSA 1978 or a trust the terms of which manifest the settlor's intent that the trustee will administer the trust in accordance with Section 46-3A-106 NMSA 1978; and

O. "trustee" includes an original, additional or successor trustee, whether or not appointed or confirmed by a court.

**History:** Laws 2001, ch. 113, § 102; 2005, ch. 329, § 1.

## **ANNOTATIONS**

**The 2005 amendment**, effective July 1, 2005, added Subsections K(1) through (3) to define "qualified beneficiary" and added Subsection N to define "total return trust".

### **46-3A-103. Fiduciary duties; general principles.**

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Articles 2 [46-3A-201, 46-3A-202 NMSA 1978] and 3 [46-3A-301 through 46-3A-303 NMSA 1978], a fiduciary:

(1) shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in the Uniform Principal and Income Act;

(2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by the Uniform Principal and Income Act;

(3) shall administer a trust or estate in accordance with the Uniform Principal and Income Act if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and the Uniform Principal and Income Act do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under Section 104(a) [46-3A-104 NMSA 1978] or a discretionary power of administration regarding a matter within the scope of the Uniform Principal and Income Act, whether granted by the terms of a trust, a will, or the Uniform Principal and Income Act, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with the Uniform Principal and Income Act is presumed to be fair and reasonable to all of the beneficiaries.

**History:** Laws 2001, ch. 113, § 103.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

**Duty to produce income.** — It is the usual duty of trustees to cause a trust to produce income for the benefit of the trust. *Loco Credit Union v. Reed*, 1973-NMSC-122, 85 N.M. 729, 516 P.2d 1112.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Construction of specific provision of will or trust instrument giving executor or trustee power to determine what is income or what is principal, 27 A.L.R.2d 1323.



Propriety of considering beneficiary's other means under trust provision authorizing invasion of principal for beneficiary's support, 41 A.L.R.3d 255.

Validity, construction, and effect of provisions of charitable trust providing for accumulation of income, 6 A.L.R.4th 903.

Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

#### **46-3A-104. Trustee's power to adjust.**

(a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in Subsection (a) of Section 46-3A-103 NMSA 1978, that the trustee is unable to comply with Subsection (b) of Section 46-3A-103 NMSA 1978.

(b) In deciding whether and to what extent to exercise the power conferred by Subsection (a) of this section, a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

- (1) the nature, purpose and expected duration of the trust;
- (2) the intent of the settlor;
- (3) the identity and circumstances of the beneficiaries;
- (4) the needs for liquidity, regularity of income, and preservation and appreciation of capital;
- (5) the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;
- (6) the net amount allocated to income under the other sections of the Uniform Principal and Income Act and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;
- (7) whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) the actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) the anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a surviving spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) that reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) if possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) if the trustee is a beneficiary of the trust;

(8) if the trustee is not a beneficiary, but the adjustment would benefit the trustee directly or indirectly; or

(9) if the trust is a total return trust.

(d) If Paragraph (5), (6), (7) or (8) of Subsection (c) of this section applies to a trustee and there is more than one trustee, a co-trustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by Subsection (a) of this section or may release only the power to adjust from income to principal or the power to

adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in Paragraphs (1) through (6) or Paragraph (8) of Subsection (c) of this section or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in Subsection (c) of this section. The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by Subsection (a) of this section.

**History:** Laws 2001, ch. 113, § 104; 2005, ch. 329, § 2.

### ANNOTATIONS

**The 2005 amendment,** effective July 1, 2005, added Subsection (c)(9) to provide that a trustee may not make an adjustment if the trust is a total return trust.

**Duty to produce income.** — It is the usual duty of trustees to cause a trust to produce income for the benefit of the trust. *Loco Credit Union v. Reed*, 1973-NMSC-122, 85 N.M. 729, 516 P.2d 1112.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Construction of specific provision of will or trust instrument giving executor or trustee power to determine what is income or what is principal, 27 A.L.R.2d 1323.

Allocation between income and principal of capital gains dividends or mutual fund or investment trust or corporation, 98 A.L.R.2d 511.

Propriety of considering beneficiary's other means under trust provision authorizing invasion of principal for beneficiary's support, 41 A.L.R.3d 255.

Dividends: modern status of rules governing allocations of stock dividends or splits between principal and income, 81 A.L.R.3d 876.

Validity, construction, and effect of provisions of charitable trust providing for accumulation of income, 6 A.L.R.4th 903.

Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

**46-3A-105. Conversion to total return trust.**

A. Unless expressly prohibited by the governing instrument, a trustee may release the power to adjust as provided in Section 46-3A-104 NMSA 1978 or convert a trust to a total return trust as provided in this section if all of the following apply:

(1) the trust describes the amount that may or must be distributed to a beneficiary by referring to the trust's income and the trustee determines that conversion to a total return trust will enable the trustee to better carry out the purposes of the trust;

(2) the trustee provides a written notice of the trustee's decision to convert the trust to a total return trust specifying a prospective effective date for the conversion that may not be sooner than sixty days after the notice is provided to the qualified beneficiaries, determined as of the date the notice is provided and assuming nonexercise of all powers of appointment;

(3) there are one or more legally competent beneficiaries as provided in Paragraph (1) of Subsection K of Section 46-3A-102 NMSA 1978 and one or more legally competent remainder beneficiaries described in either Paragraph (1) or (2) of Subsection K of Section 46-3A-102 NMSA 1978, determined as of the date the notice is provided; and

(4) no beneficiary has objected in writing to the conversion to a total return trust and noticed the objection to the trustee within sixty days after the notice was provided.

B. Conversion to a total return trust or reconversion to an income trust may be made by agreement between the trustee and all qualified beneficiaries of the trust. The trustee and all qualified beneficiaries may also agree to modify the distribution percentage, except that the trustee and the qualified beneficiaries may not agree to a distribution percentage less than three percent or greater than five percent.

C. The trustee may elect to petition the court to order conversion to a total return trust, including the reason that conversion under Subsection A of this section is unavailable because:

(1) a beneficiary timely objects to the conversion to a total return trust;

(2) there are no legally competent beneficiaries described in Paragraph (1) of Subsection K of Section 46-3A-102 NMSA 1978; or

(3) there are no legally competent beneficiaries described in Paragraph (1) or (2) of Subsection K of Section 46-3A-102 NMSA 1978.

D. A beneficiary may request the trustee to convert to a total return trust or adjust the distribution percentage pursuant to this section. If the trustee declines or fails to act within six months after receiving a written request from a beneficiary to do so, the beneficiary may petition the court to order the conversion or adjustment.

E. The trustee may petition the court prospectively to reconvert from a total return trust or to adjust the distribution percentage if the trustee determines that the reconversion or adjustment will enable the trustee to better carry out the purposes of the trust. A beneficiary may request the trustee to petition the court prospectively to reconvert from a total return trust or adjust the distribution percentage. If the trustee declines or fails to act within six months after receiving a written request from a beneficiary to do so, the beneficiary may petition the court to order the reconversion or adjustment.

F. In a judicial proceeding instituted under this section, the trustee may present information concerning:

(1) the trustee's support for, or opposition to, a conversion to a total return trust, a reconversion from a total return trust or an adjustment of the distribution percentage of a total return trust, including whether the trustee believes conversion, reconversion or adjustment of the distribution percentage would enable the trustee to better carry out the purposes of the trust; and

(2) any other matter relevant to the proposed conversion, reconversion or adjustment of the distribution percentage.

G. A trustee's actions undertaken in accordance with this section shall not be determined improper or inconsistent with the trustee's duty of impartiality unless the court finds from all the evidence that the trustee acted in bad faith.

H. The court may order conversion to a total return trust, reconversion prospectively from a total return trust or adjustment of the distribution percentage of a total return trust if the court determines that the conversion, reconversion or adjustment of the distribution percentage will enable the trustee to better carry out the purposes of the trust.

I. If a conversion to a total return trust is made pursuant to a court order, the trustee may reconvert the trust to an income trust only:

(1) pursuant to a subsequent court order; or

(2) by filing with the court an agreement made pursuant to Subsection B of this section to reconvert to an income trust.

J. Upon a reconversion, the power to adjust, as described in Section 46-3A-104 NMSA 1978 and as it existed before the conversion, shall be revived.

K. An action may be taken under this section no more frequently than every three years, unless the court for good cause orders otherwise.

History: Laws 2005, ch. 329, § 3.

## ANNOTATIONS

**Effective dates.** — Laws 2005, ch. 329, § 12 made the act effective July 1, 2005.

### **46-3A-106. Administration of total return trust.**

A. During the period that a trust is a total return trust, the trustee shall administer the trust in accordance with the provisions of this section unless otherwise expressly provided by the terms of the trust.

B. The trustee shall invest the trust assets seeking a total return without regard to whether the return is from income or appreciation of principal.

C. The trustee shall make income distributions in accordance with the governing instrument subject to the provisions of this section.

D. The distribution percentage for any trust converted to a total return trust by a trustee in accordance with Subsection A of Section 46-3A-105 NMSA 1978 shall be four percent, unless a different percentage has been determined in an agreement made pursuant to Subsection B of Section 46-3A-105 NMSA 1978 or ordered by the court pursuant to Subsection C of Section 46-3A-105 NMSA 1978.

E. The trustee shall pay to a beneficiary in the case of an underpayment within a reasonable time, and shall recover from a beneficiary in the case of an overpayment, either by repayment by the beneficiary or by withholding from future distributions to the beneficiary:

(1) an amount equal to the difference between the amount properly payable and the amount actually paid; and

(2) interest compounded annually at a rate per annum equal to the distribution percentage in the year or years during which the underpayment or overpayment occurs; provided that accrual of interest may not commence until the beginning of the trust year following the year in which the underpayment or overpayment occurs.

F. As used in Sections 46-3A-105 through 46-3A-113 NMSA 1978:

(1) "income" as the term appears in the governing instrument means the distribution amount;

(2) "distribution amount" means the annual amount equal to the distribution percentage multiplied by the average net fair market value of the trust's assets; and

(3) "average net fair market value of the trust's assets" means the net fair market value of the trust's assets averaged over the lesser of the three preceding years or the period during which the trust has been in existence.

History: Laws 2005, ch. 329, § 4.

## ANNOTATIONS

**Effective dates.** — Laws 2005, ch. 329, § 12 made the act effective July 1, 2005.

### **46-3A-107. Determination of matters in administration.**

A. The trustee may determine any of the following matters in administering a total return trust as the trustee deems necessary or helpful for the proper functioning of the trust:

(1) the effective date of a conversion to a total return trust pursuant to Section 46-3A-105 NMSA 1978;

(2) the manner of prorating the distribution amount for a short year in which a beneficiary's interest commences or ceases, or, if the trust is a total return trust for only part of the year, the trustee may elect to treat the trust year as two separate years, the first of which ends at the close of the day on which the conversion or reconversion occurs, and the second of which ends at the close of the trust year;

(3) whether distributions are made in cash or in-kind;

(4) the manner of adjusting valuations and calculations of the distribution amount to account for other payments from, or contributions to, the trust;

(5) whether to value the trust's assets annually or more frequently;

(6) which valuation dates to use and how many valuation dates to use; and

(7) valuation decisions concerning any asset for which there is no readily available market value, including:

(a) how frequently to value the asset;

(b) whether and how often to engage a professional appraiser to value the asset; and

(c) whether to exclude the value of the asset from the net fair market value of the trust's assets for purposes of determining the distribution amount.

B. For purposes of this section, any asset excluded pursuant to Subparagraph (c) of Paragraph (7) of Subsection A of this section shall be referred to as an "excluded asset" and the trustee shall distribute any net income received from the excluded asset as provided for in the governing instrument, subject to the following principles:

(1) the trustee shall treat each asset for which there is no readily available market value as an excluded asset unless the trustee determines that there are compelling reasons not to do so and the trustee considers all relevant factors, including the best interests of the beneficiaries;

(2) if tangible personal property or real property is possessed or occupied by a beneficiary, the trustee may not limit or restrict any right of the beneficiary to use the property in accordance with the governing instrument regardless of whether the trustee treats the property as an excluded asset;

(3) assets for which there is a readily available market value include cash and cash equivalents; stocks, bonds and other securities and instruments for which there is an established market on a stock exchange, in an over-the-counter market or otherwise; and any other property that can reasonably be expected to be sold within one week of the decision to sell without extraordinary efforts by the seller;

(4) assets for which there is no readily available market value include stocks, bonds and other securities and instruments for which there is no established market on a stock exchange, in an over-the-counter market or otherwise; real property; tangible personal property; and artwork and other collectibles.

History: Laws 2005, ch. 329, § 5.

## ANNOTATIONS

**Effective dates.** — Laws 2005, ch. 329, § 12 made the act effective July 1, 2005.

### **46-3A-108. Distribution of total return trust.**

A. Expenses, taxes and other charges that would otherwise be deducted from income if the trust was not a total return trust may not be deducted from the distribution amount.

B. Unless otherwise provided by the governing instrument, the distribution amount each year shall be deemed to be paid from the following sources for that year in the following order:

- (1) net income determined as if the trust were not a total return trust;
- (2) other ordinary income as determined for federal income tax purposes;
- (3) net realized short-term capital gains as determined for federal income tax purposes;
- (4) net realized long-term capital gains as determined for federal income tax purposes;



(5) trust principal comprising assets for which there is a readily available market value; and

(6) other trust principal.

History: Laws 2005, ch. 329, § 6.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2005, ch. 329, § 12 made the act effective July 1, 2005.

#### **46-3A-109. Restrictions on distributions.**

A. The distribution amount may not be less than the net income of the trust, determined without regard to the provisions of Sections 46-3A-105 through 46-3A-113 NMSA 1978, for a trust that was exempt, in whole or in part, from generation-skipping transfer tax on July 1, 2005 by reason of any effective date or transition rule.

B. Conversion to a total return trust shall not affect any provisions in the governing instrument:

(1) that directs or authorizes the trustee to distribute principal;

(2) that directs or authorizes the trustee to distribute a fixed annuity or a fixed fraction of the value of trust assets;

(3) that authorizes a beneficiary to withdraw a portion or all of the principal; or

(4) that in any manner diminishes an amount permanently set aside for charitable purposes under the governing instrument unless both income and principal are set aside.

History: Laws 2005, ch. 329, § 7.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2005, ch. 329, § 12 made the act effective July 1, 2005.

#### **46-3A-110. Limitations on conversion.**

If a trustee is also a beneficiary of the trust and conversion or failure to convert would enhance or diminish the beneficial interest of that trustee, or if possession or exercise of the conversion power by a particular trustee alone would cause any individual to be treated as owner of a part of the trust for federal income tax purposes or cause a part of the trust to be included in the gross estate of any individual for federal

estate tax purposes, then that trustee may not participate as a trustee in the exercise of the conversion power, except that:

A. the trustee may petition the court under Subsection C of Section 46-3A-105 NMSA 1978 to order conversion in accordance with this section; and

B. a co-trustee or co-trustees to whom this section does not apply may convert the trust to a total return trust in accordance with Sections 46-3A-105 and 46-3A-106 NMSA 1978.

History: Laws 2005, ch. 329, § 8.

### **ANNOTATIONS**

**Effective dates.** — Laws 2005, ch. 329, § 12 made the act effective July 1, 2005.

#### **46-3A-111. Release.**

A trustee may irrevocably release the power granted by the provisions of Sections 46-3A-105 through 46-3A-113 NMSA 1978 if the trustee reasonably believes the release is in the best interests of the trust and its beneficiaries. The release may be personal to the releasing trustee or it may apply generally to some or all subsequent trustees. The release may be for any specified period, including a period measured by the life of an individual.

History: Laws 2005, ch. 329, § 9.

### **ANNOTATIONS**

**Effective dates.** — Laws 2005, ch. 329, § 12 made the act effective July 1, 2005.

#### **46-3A-112. Remedies.**

A. A trustee who reasonably and in good faith takes any action or omits to take any action pursuant to Sections 46-3A-105 through 46-3A-113 NMSA 1978 is not liable to any person interested in the trust.

B. If a trustee reasonably and in good faith takes or omits to take any action pursuant to Sections 46-3A-105 through 46-3A-113 NMSA 1978 and a person interested in the trust opposes the act or omission, in addition to any other remedy otherwise provided or available by law, the person may seek an order of the court directing the trustee to:

- (1) convert the trust to a total return trust;
- (2) reconvert from a total return trust;

(3) change the distribution percentage; or

(4) order any administrative procedures the court determines are necessary or helpful for the proper functioning of the trust.

C. A claim for relief pursuant to Subsection B of this section that is not barred by adjudication, consent or limitation is nevertheless barred as to any beneficiary who has received a written notice fully disclosing the matter unless a proceeding to assert the claim is commenced within six months after receipt of the statement.

History: Laws 2005, ch. 329, § 10.

### ANNOTATIONS

**Effective dates.** — Laws 2005, ch. 329, § 12 made the act effective July 1, 2005.

#### **46-3A-113. Applicability.**

A. Sections 46-3A-105 through 46-3A-113 NMSA 1978 shall apply to trusts in existence on July 1, 2005 and to trusts created on or after that date.

B. Sections 46-3A-105 through 46-3A-113 NMSA 1978 shall be construed to apply to the administration of a trust that is administered in New Mexico under New Mexico law or that is governed by New Mexico law with respect to the meaning and effect of its terms unless:

(1) the trust is a trust described in Section 170(f)(2)(B), 664(d), 2702(a)(3) or 2702(b) of the federal Internal Revenue Code of 1986;

(2) the governing instrument expressly prohibits the use of Sections 46-3A-105 through 46-3A-113 NMSA 1978 by specific reference to one or more provisions of those sections; or

(3) the terms of a trust in existence on July 1, 2005 incorporate provisions that operate as a total return trust. The trustee or a beneficiary of such a trust may adopt provisions in Sections 46-3A-105 through 46-3A-113 NMSA 1978 that do not contradict provisions in the governing instrument.

History: Laws 2005, ch. 329, § 11.

### ANNOTATIONS

**Cross references.** — For the federal Internal Revenue Code of 1986, see 26 U.S.C. § 1.

**Effective dates.** — Laws 2005, ch. 329, § 12 made the act effective July 1, 2005.

## **ARTICLE 2 DECEDENT'S ESTATE OR TERMINATING INCOME INTEREST**

### **46-3A-201. Determination and distribution of net income.**

After a decedent dies, in the case of an estate or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in Articles 3 through 5 [46-3A-301 through 46-3A-501 NMSA 1978] which apply to trustees and the rules in Paragraph (5). The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in Articles 3 through 5 which apply to trustees and by:

(A) including in net income all income from property used to discharge liabilities;

(B) paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

(C) paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust or applicable law.

(3) A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust or applicable law from net income determined under Paragraph (2) or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.

(4) A fiduciary shall distribute the net income remaining after distributions required by Paragraph (3) in the manner described in Section 202 [46-3A-202 NMSA 1978] to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in Paragraph (1) because of a payment described in Section 501 [46-3A-501 NMSA 1978] or 502 [46-3A-502 NMSA 1978] to the extent that the will, the terms of the trust or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

**History:** Laws 2001, ch. 113, § 201.

## ANNOTATIONS

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Allocation to capital or income of testamentary trust of interest, dividends, or other earnings, during settlement of estate or pending conversion directed by testator, 70 A.L.R. 636, 105 A.L.R. 1194, 158 A.L.R. 441.

### **46-3A-202. Distribution to residuary and remainder beneficiaries.**

(a) Each beneficiary described in Section 201(4) [46-3A-201 NMSA 1978] is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

(1) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately

before the distribution date, including assets that later may be sold to meet principal obligations.

(2) The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

(4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

**History:** Laws 2001, ch. 113, § 202.

## **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

## **ARTICLE 3 APPORTIONMENT AT BEGINNING AND END OF INCOME INTEREST**

### **46-3A-301. When right to income begins and ends.**

(a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) on the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(2) on the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(3) on the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(c) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under Subsection (d), even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

**History:** Laws 2001, ch. 113, § 301.

## ANNOTATIONS

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Apportionment of income where right to income commences or ends during accrual period, 126 A.L.R. 12.

Apportionment of income as between successive life beneficiaries, 159 A.L.R. 589.

### **46-3A-302. Apportionment of receipts and disbursements when decedent dies or income interest begins.**

(a) A trustee shall allocate an income receipt or disbursement other than one to which Section 201(1)[46-3A-201 NMSA 1978] applies to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins must be allocated to principal and the balance must be allocated to income.

(c) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of the Uniform Principal and Income Act. Distributions to shareholders or other owners from an entity to which Section 401 [46-3A-401 NMSA 1978] applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

**History:** Laws 2001, ch. 113, § 302.

### ANNOTATIONS

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

### **46-3A-303. Apportionment when income interest ends.**

(a) In this section, "undistributed income" means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

(c) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate or other tax requirements.

**History:** Laws 2001, ch. 113, § 303.

### ANNOTATIONS

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.



# **ARTICLE 4**

## **ALLOCATION OF RECEIPTS**

### **DURING ADMINISTRATION OF TRUST**

#### **PART 1**

##### **RECEIPTS FROM ENTITIES**

###### **46-3A-401. Character of receipts.**

(a) As used in this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund or any other organization in which a trustee has an interest other than a trust or estate to which Section 402 [46-3A-402 NMSA 1978] applies, a business or activity to which Section 403 [46-3A-403 NMSA 1978] applies or an asset-backed security to which Section 415 [46-3A-415 NMSA 1978] applies.

(b) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:

- (1) property other than money;
- (2) money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;
- (3) money received in total or partial liquidation of the entity; and
- (4) money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money is received in partial liquidation:

- (1) to the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or
- (2) if the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money is not received in partial liquidation, nor may it be taken into account under Subsection (d) (2), to the extent that it does not exceed the amount of income tax

that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

**History:** Laws 2001, ch. 113, § 401.

### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

#### **46-3A-402. Distribution from trust or estate.**

A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, Section 401 or 415 [46-3A-401 to 46-3A-415 NMSA 1978] applies to a receipt from the trust.

**History:** Laws 2001, ch. 113, § 402.

### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

#### **46-3A-403. Business and other activities conducted by trustee.**

(a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a

trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records include:

- (1) retail, manufacturing, service and other traditional business activities;
- (2) farming;
- (3) raising and selling livestock and other animals;
- (4) management of rental properties;
- (5) extraction of minerals and other natural resources;
- (6) timber operations; and
- (7) activities to which Section 414 [46-3A-414 NMSA 1978] applies.

**History:** Laws 2001, ch. 113, § 403.

## **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

## **PART 2**

### **RECEIPTS NOT NORMALLY APPORTIONED**

#### **46-3A-404. Principal receipts.**

A trustee shall allocate to principal:

(1) to the extent not allocated to income under the Uniform Principal and Income Act, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest or a payer under a contract naming the trust or its trustee as beneficiary;

(2) money or other property received from the sale, exchange, liquidation or change in form of a principal asset, including realized profit, subject to Article 4 [46-3A-401 through 46-3A-415 NMSA 1978];

(3) amounts recovered from third parties to reimburse the trust because of disbursements described in Section 502(a)(7) [46-3A-502 NMSA 1978] or for other reasons to the extent not based on the loss of income;

(4) proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

(5) net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

(6) other receipts as provided in Part 3 [46-3A-408 NMSA 1978].

**History:** Laws 2001, ch. 113, § 404.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

#### **46-3A-405. Rental property.**

To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

**History:** Laws 2001, ch. 113, § 405.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

#### **46-3A-406. Obligation to pay money.**

(a) An amount received as interest, whether determined at a fixed, variable or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption or other disposition of an obligation to pay money to the trustee more than one year

after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust must be allocated to income.

(c) This section does not apply to an obligation to which Section 409, 410, 411, 412, 414 or 415 [46-3A-409, 46-3A-410, 46-3A-411, 46-3A-412, 46-3A-414, 46-3A-415 NMSA 1978] applies.

**History:** Laws 2001, ch. 113, § 406.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

#### **46-3A-407. Insurance policies and similar contracts.**

(a) Except as otherwise provided in Subsection (b), a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income or, subject to Section 403 [46-3A-403 NMSA 1978], loss of profits from a business.

(c) This section does not apply to a contract to which Section 409 [46-3A-409 NMSA 1978] applies.

**History:** Laws 2001, ch. 113, § 407.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

### **PART 3**

## **RECEIPTS NORMALLY APPORTIONED**

#### **46-3A-408. Insubstantial allocations not required.**

If a trustee determines that an allocation between principal and income required by Section 409, 410, 411, 412 or 415 [46-3A-409, 46-3A-410, 46-3A-411, 46-3A-412 or 46-3A-415 NMSA 1978] is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in Section 104(c) [46-3A-104 NMSA 1978] applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in Section 104(d) and may be released for the reasons and in the manner described in Section 104(e). An allocation is presumed to be insubstantial if:

(1) the amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than ten percent; or

(2) the value of the asset producing the receipt for which the allocation would be made is less than ten percent of the total value of the trust's assets at the beginning of the accounting period.

**History:** Laws 2001, ch. 113, § 408.

## ANNOTATIONS

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

### **46-3A-409. Deferred compensation, annuities and similar payments.**

A. As used in this section:

(1) "payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer. For purposes of Subsections D, E, F and G of this section, "payment" also includes any payment from any separate fund, regardless of the reason for the payment; and

(2) "separate fund" includes a private or commercial annuity, an individual retirement account and a pension, profit-sharing, stock-bonus or stock-ownership plan.

B. To the extent that a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate the payment to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend or an equivalent payment.

C. If no part of a payment is characterized as interest, a dividend or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate

to income ten percent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

D. Except as otherwise provided in Subsection E of this section, Subsections F and G of this section apply and Subsections B and C of this section do not apply in determining the allocation of a payment made from a separate fund to:

(1) a trust to which an election to qualify for a marital deduction pursuant to Section 2056(b)(7) of the Internal Revenue Code of 1986, as amended, has been made; or

(2) a trust that qualifies for the marital deduction pursuant to Section 2056(b)(5) of the Internal Revenue Code of 1986, as amended.

E. Subsections D, F and G of this section do not apply if, and to the extent that, the series of payments would, without the application of Subsection D of this section, qualify for the marital deduction pursuant to Section 2056(b)(7)(C) of the Internal Revenue Code of 1986, as amended.

F. A trustee shall determine the internal income of each separate fund for the accounting period as if the separate fund were a trust subject to the Uniform Principal and Income Act. Upon request of the surviving spouse, the trustee shall demand that the person administering the separate fund distribute the internal income to the trust. The trustee shall allocate a payment from the separate fund to income to the extent of the internal income of the separate fund and distribute that amount to the surviving spouse. The trustee shall allocate the balance of the payment to principal. Upon request of the surviving spouse, the trustee shall allocate principal to income to the extent the internal income of the separate fund exceeds payments made from the separate fund to the trust during the accounting period.

G. If a trustee cannot determine the internal income of a separate fund but can determine the value of the separate fund, the internal income of the separate fund is deemed to equal four percent of the fund's value according to the most recent statement of value preceding the beginning of the accounting period. If the trustee can determine neither the internal income of the separate fund nor the fund's value, the internal income of the fund is deemed to equal the product of the interest rate and the present value of the expected future payments as determined pursuant to Section 7520 of the Internal Revenue Code of 1986, as amended, for the month preceding the accounting period for which the computation is made.

H. This section does not apply to a payment to which Section 46-3A-410 NMSA 1978 applies.

History: Laws 2001, ch. 113, § 409; 2011, ch. 124, § 87.

## ANNOTATIONS

**Cross references.** — For the federal Internal Revenue Code of 1986, see 26 U.S.C. § 1.

**The 2011 amendment**, effective January 1, 2012, in Subsection A, clarified the definition of "payment" for purposes of Subsections E through G and defined "separate fund"; added Subsection D to provide for the determination of the allocation of payments from separate funds to trusts; added Subsection E to limit the application of Subsections D, F and G if payments qualify for the marital deduction; and added Subsections F and G to provide for the treatment and determination of the internal income of separate funds.

**Applicability.** — Laws 2011, ch. 124, § 103 provided that the provisions of Laws 2011, ch. 124, § 87 apply to a trust described in Subsection D of Section 46-3A-409 NMSA 1978 on and after the following dates:

- A. if the trust is not funded as of January 1, 2012, the date of the decedent's death;
- B. if the trust is initially funded in the calendar year beginning January 1, 2012, the date of the decedent's death; or
- C. if the trust is not described in Subsection A or B of this section, January 1, 2012.

### **46-3A-410. Liquidating asset.**

(a) As used in this section, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to Section 409 [46-3A-409 NMSA 1978], resources subject to Section 411 [46-3A-411 NMSA 1978], timber subject to Section 412 [46-3A-412 NMSA 1978], an activity subject to Section 414 [46-3A-414 NMSA 1978], an asset subject to Section 415 [46-3A-415 NMSA 1978] or any asset for which the trustee establishes a reserve for depreciation under Section 503 [46-3A-503 NMSA 1978].

(b) A trustee shall allocate to income ten percent of the receipts from a liquidating asset and the balance to principal.

**History:** Laws 2001, ch. 113, § 410.

## ANNOTATIONS



**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

### **46-3A-411. Minerals, water and other natural resources.**

(a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

(1) If received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income.

(2) If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal.

(3) If an amount is received from a working interest, royalty payment, shut-in well payment, take-or-pay payment, bonus or delay rental or any other interest not provided for in Paragraph (1) or (2) of this subsection, the amount that is allowed as a deduction from gross income for depletion purposes under the federal income tax law in effect at the time of severance shall be allocated to principal and the balance to income. If the amount that is allowed as a deduction is less than fifteen percent of gross income for depletion purposes, or if depletion is not allowed, then the amount to be allocated to principal and the amount to be allocated to income shall be determined in accordance with Section 104 [46-3A-104 NMSA 1978].

(b) An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, ninety percent of the amount must be allocated to principal and the balance to income.

(c) The Uniform Principal and Income Act applies whether or not a decedent or donor was extracting minerals, water or other natural resources before the interest became subject to the trust.

(d) If a trust owns an interest in minerals, water or other natural resources on the effective date of the Uniform Principal and Income Act, the trustee may allocate receipts from the interest as provided in that act or in the manner used by the trustee before the effective date of that act. If the trust acquires an interest in minerals, water or other natural resources after the effective date of the Uniform Principal and Income Act, the trustee shall allocate receipts from the interest as provided in that act.

**History:** Laws 2001, ch. 113, § 411.

### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

#### **46-3A-412. Timber.**

(a) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

(1) to income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) to principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) to or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in Paragraphs (1) and (2); or

(4) to principal to the extent that advance payments, bonuses and other payments are not allocated pursuant to Paragraph (1), (2) or (3).

(b) In determining net receipts to be allocated pursuant to Subsection (a), a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(c) The Uniform Principal and Income Act applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

(d) If a trust owns an interest in timberland on the effective date of the Uniform Principal and Income Act, the trustee may allocate net receipts from the sale of timber and related products as provided in that act or in the manner used by the trustee before the effective date of that act. If the trust acquires an interest in timberland after the effective date of the Uniform Principal and Income Act, the trustee shall allocate net receipts from the sale of timber and related products as provided in that act.

**History:** Laws 2001, ch. 113, § 412.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

#### **46-3A-413. Property not productive of income.**

(a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under Section 104 [46-3A-104 NMSA 1978] and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time or exercise the power conferred by Section 104(a). The trustee may decide which action or combination of actions to take.

(b) In cases not governed by Subsection (a), proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

**History:** Laws 2001, ch. 113, § 413.

### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

### **46-3A-414. Derivatives and options.**

(a) As used in this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(b) To the extent that a trustee does not account under Section 403 [46-3A-403 NMSA 1978] for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, must be allocated to principal.

**History:** Laws 2001, ch. 113, § 414.

### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

### **46-3A-415. Asset-backed securities.**

(a) As used in this section, "asset-backed security" means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which Section 401 or 409 [46-3A-401 or 46-3A-409 NMSA 1978] applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, the trustee shall allocate ten percent of the payment to income and the balance to principal.

**History:** Laws 2001, ch. 113, § 415.

### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

## **ARTICLE 5 ALLOCATION OF DISBURSEMENTS DURING ADMINISTRATION OF TRUST**

### **46-3A-501. Disbursements from income.**

A trustee shall make the following disbursements from income to the extent that they are not disbursements to which Section 201(2)(B) or (C) [46-3A-201 NMSA 1978] applies:

(1) one-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(2) one-half of all expenses for accountings, judicial proceedings or other matters that involve both the income and remainder interests;

(3) all of the other ordinary expenses incurred in connection with the administration, management or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal and expenses of a proceeding or other matter that concerns primarily the income interest; and

(4) recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

**History:** Laws 2001, ch. 113, § 501.

### ANNOTATIONS

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 51 Am. Jur. 2d Life Tenants and Remaindermen §§ 172, 173.

Income or corpus: trustee's compensation as payable from income or corpus, 117 A.L.R. 1154.

Expenses of trust administration, such as court costs, costs of litigation, bond premiums, attorneys' fees, etc., as payable from income or corpus, 124 A.L.R. 1183.

Executors' or attorneys' fees and other expenses of administration of estate prior to establishment of trust as chargeable to corpus or to income, 135 A.L.R. 1322.

Award of attorneys' fees out of trust estate in action by trustee against cotrustee, 24 A.L.R.4th 624.

### **46-3A-502. Disbursements from principal.**

(a) A trustee shall make the following disbursements from principal:

(1) the remaining one-half of the disbursements described in Section 501(1) and (2) [46-3A-501 NMSA 1978];

(2) all of the trustee's compensation calculated on principal as a fee for acceptance, distribution or termination, and disbursements made to prepare property for sale;

(3) payments on the principal of a trust debt;

(4) expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(5) premiums paid on a policy of insurance not described in Section 501(4) [46-3A-501 NMSA 1978] of which the trust is the owner and beneficiary;

(6) estate, inheritance and other transfer taxes, including penalties, apportioned to the trust; and

(7) disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties and defending claims based on environmental matters.

(b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

**History:** Laws 2001, ch. 113, § 502.

### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 51 Am. Jur. 2d Life Tenants and Remaindermen §§ 172, 173.

Income or corpus: trustee's compensation as payable from income or corpus, 117 A.L.R. 1154.

Expenses of trust administration, such as court costs, costs of litigation, bond premiums, attorneys' fees, etc., as payable from income or corpus, 124 A.L.R. 1183.

Executors' or attorneys' fees and other expenses of administration of estate prior to establishment of trust as chargeable to corpus or to income, 135 A.L.R. 1322.

Award of attorneys' fees out of trust estate in action by trustee against cotrustee, 24 A.L.R.4th 624.

**46-3A-503. Transfers from income to principal for depreciation.**

(a) As used in this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion or gradual obsolescence of a fixed asset having a useful life of more than one year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) during the administration of a decedent's estate; or

(3) under this section if the trustee is accounting under Section 403 [46-3A-403 NMSA 1978] for the business or activity in which the asset is used.

(c) An amount transferred to principal need not be held as a separate fund.

**History:** Laws 2001, ch. 113, § 503.

## ANNOTATIONS

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

### **46-3A-504. Transfers from income to reimburse principal.**

(a) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(b) Principal disbursements to which Subsection (a) applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

(1) an amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

(2) a capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

(3) disbursements made to prepare property for rental, including tenant allowances, leasehold improvements and broker's commissions;

(4) periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

(5) disbursements described in Section 502(a)(7) [46-3A-502 NMSA 1978].

(c) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in Subsection (a).

**History:** Laws 2001, ch. 113, § 504.

### ANNOTATIONS

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

#### **46-3A-505. Income taxes.**

A. A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

B. A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

C. A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid:

(1) from income to the extent that receipts from the entity are allocated only to income;

(2) from principal to the extent that receipts from the entity are allocated only to principal;

(3) proportionately from principal and income to the extent that receipts from the entity are allocated to both income and principal; and

(4) from principal to the extent that the tax exceeds the total receipts from the entity.

D. After applying Subsections A through C of this section, the trustee shall adjust income or principal receipts to the extent that the trust's taxes are reduced because the trust receives a deduction for payments made to a beneficiary.

**History:** Laws 2001, ch. 113, § 505; 2011, ch. 124, § 88.



## ANNOTATIONS

**The 2011 amendment**, effective January 1, 2012, in Subsection D, provided for the proportional payment of a tax from principal and income if income is allocated to both principal and interest and from principal if the tax exceeds income; and required the trustee to adjust income and principal if the trust's taxes are reduced because of a deduction for payments to a beneficiary.

### **46-3A-506. Adjustments between principal and income because of taxes.**

(a) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(1) elections and decisions, other than those described in Subsection (b), that the fiduciary makes from time to time regarding tax matters;

(2) an income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(3) the ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust or a beneficiary.

(b) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust or beneficiary are decreased, each estate, trust or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust or beneficiary whose income taxes are reduced must be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income.

**History:** Laws 2001, ch. 113, § 506.

## ANNOTATIONS

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

## **ARTICLE 6**

### **MISCELLANEOUS PROVISIONS**

#### **46-3A-601. Uniformity of application and construction.**

In applying and construing the Uniform Principal and Income Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**History:** Laws 2001, ch. 113, § 601.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

#### **46-3A-602. Severability clause.**

If any provision of the Uniform Principal and Income Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of the act are severable.

**History:** Laws 2001, ch. 113, § 602.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

#### **46-3A-603. Application of the Uniform Principal and Income Act to existing trusts and estates.**

The Uniform Principal and Income Act applies to every trust or decedent's estate existing on the effective date of that act, except as otherwise expressly provided in the will or terms of the trust or in that act.

**History:** Laws 2001, ch. 113, § 603.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 113, § 605 made the Uniform Principal and Income Act effective July 1, 2001.

## **ARTICLE 4**

### **State Beneficiary Trusts**

#### **46-4-1. Trusts for state or political subdivision authorized.**

Express trusts of real or personal property may be created by will or by declaration of trust by any person naming this state or any of its political subdivisions, municipalities or agencies as the beneficiary thereof.

**History:** 1953 Comp., § 33-6-1, enacted by Laws 1957, ch. 171, § 1.

#### **46-4-2. Acceptance by beneficiary.**

The governor in behalf of the state, or any agency thereof or the governing body of any political subdivision named as beneficiary of a trust must approve and accept by appropriate act, resolution, order or ordinance the benefits to be bestowed by such trust. Before any such trust shall affect or be binding upon the governor in behalf of the state, or any agency thereof or the governing body of any political subdivision, the trust agreement shall be approved by a majority of the members of the state board of finance.

**History:** 1953 Comp., § 33-6-2, enacted by Laws 1957, ch. 171, § 2.

#### **46-4-3. Instruments to be recorded.**

The instruments creating such express trusts shall be executed in such a manner as to be admitted to probate, if a will, and to recordation in the office of the county clerk in which the trust property is located if a declaration of trust, but they shall be of no effect or force until approved and accepted and endorsed to that effect by the beneficiary and either admitted to probate or filed of record by the clerk of the county where the trust property is located.

**History:** 1953 Comp., § 33-6-3, enacted by Laws 1957, ch. 171, § 3.

### **ANNOTATIONS**

**Cross references.** — For the requirements for recording instruments, see 14-8-4 NMSA 1978.

For the execution of a will, see 45-2-502 NMSA 1978.

#### **46-4-4. Trustees; appointment, succession, powers, duties, term and compensation; status of trustees; liability for acts.**

The instrument or will creating such trusts may provide for the appointment, succession, powers, duties, term and compensation of the trustee or trustees; and in all such respects the terms of said instrument or will shall be controlling. If the said instrument or will makes no provision in regard to any of the foregoing, then the general laws of the state shall control as to such omission or omissions.

The trustee, or trustees, under such an instrument or will shall be an agency of the state and the regularly constituted authority of the beneficiary for the performance of the functions for which the trust shall have been created. No trustee or beneficiary shall be charged personally with any liability whatsoever by reason of any act or omission committed or suffered in the performance of such trust or in the operation of the trust property; but any act, liability for any omission or obligation of a trustee or trustees, in the execution of such trust, or in the operation of the trust property, shall extend to the whole of the trust estate, or so much thereof as may be necessary to discharge such liability or obligation, and not otherwise.

**History:** 1953 Comp., § 33-6-4, enacted by Laws 1957, ch. 171, § 4.

## **ANNOTATIONS**

**Cross references.** — For general laws of the state with respect to trusts and trustees, see Chapter 46, Articles 1, 2, and 3A NMSA 1978.

### **46-4-5. Trust purposes.**

The trusts created for the benefit of the state, its municipalities or political subdivisions or other entities, to be acceptable as set forth in Section 2 [46-4-2 NMSA 1978] of this enactment, must have as the purpose of the trust the furtherance or the providing of funds for the furtherance of some proper and lawful function or duty of the beneficiary.

**History:** 1953 Comp., § 33-6-5, enacted by Laws 1957, ch. 171, § 5.

### **46-4-6. Funds to carry out trust.**

No funds of the beneficiary except those derived from the trust may be applied to carrying out or furtherance of the trust by the trustees, except by express action of the legislative authority of the beneficiary first had.

**History:** 1953 Comp., § 33-6-6, enacted by Laws 1957, ch. 171, § 6.

### **46-4-7. Lease of property.**

The officers or any other governmental agencies or authorities having the custody, management or control of any property, real or personal or both, of the beneficiary of such trust, or of such a proposed trust, which property shall be needful for the execution

of the trust purposes, hereby are authorized and empowered to lease such property for said purposes, after the acceptance of the beneficial interest therein by the beneficiary as herein provided, or conditioned upon such acceptance.

**History:** 1953 Comp., § 33-6-7, enacted by Laws 1957, ch. 171, § 7.

#### **46-4-8. Contractual character; duration of trust.**

Upon the acceptance of the beneficial interest by the beneficiary as hereinabove authorized and provided, the same shall be and constitute a binding contract between the state of New Mexico, the beneficiary and the grantor or grantors, or the executor of the estate of the testator, for the acceptance of the beneficial interest in the trust property by the designated beneficiary and the application of the proceeds of the trust property and its operation for the purposes, and in accordance with the stipulations specified by the trustor or trustors. Such trusts shall have duration for the term of duration of the beneficiary, or such shorter length of time as shall be specified in the instrument or will creating said trust.

**History:** 1953 Comp., § 33-6-8, enacted by Laws 1957, ch. 171, § 8.

#### **46-4-9. Termination of trust.**

Any such trust may be terminated by agreement of the trustees and the authority of the beneficiary having power to accept the trust under the provisions of Section 2 [46-4-2 NMSA 1978] of this enactment; provided that there may be no termination while there exists any outstanding obligation chargeable against the trust property, which by reason of such termination, might become an obligation of the trustees or of the beneficiary.

**History:** 1953 Comp., § 33-6-9, enacted by Laws 1957, ch. 171, § 9.

## **ARTICLE 5**

### **Testamentary Additions to Trusts**

#### **46-5-1. Repealed.**

#### **ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 174, § 84 repealed 46-5-1 NMSA 1978, as enacted by Laws 1965, ch. 26, § 1, relating to the short title of the act, effective July 1, 1993. For provisions of former sections, see the 1992 NMSA 1978 on *NMOneSource.com*.

#### **46-5-2. Repealed.**

#### **ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 174, § 84 repealed 46-5-2 NMSA 1978, as enacted by Laws 1965, ch. 26, § 2, relating to testamentary additions to trusts, effective July 1, 1993. For provisions of former sections, see the 1992 NMSA 1978 on *NMOneSource.com*.

### **46-5-3. Repealed.**

#### **ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 174, § 84 repealed 46-5-3 NMSA 1978, as enacted by Laws 1965, ch. 26, § 4, relating to the uniformity of interpretation, effective July 1, 1993. For provisions of former sections, see the 1992 NMSA 1978 on *NMOneSource.com*.

## **ARTICLE 6**

### **Surety Bonds**

#### **46-6-1. [Corporations which may execute surety bonds; no other surety required; approval of bonds.]**

That whenever any recognizance, stipulation, bond or undertaking is required to be given by the laws of this state, conditioned for the faithful performance of any duty or from doing or refraining from doing anything in such recognizance, stipulation, bond or undertaking specified, which bond is now required or permitted to be given with one or with two or more sureties, the execution of the same, or the guaranteeing of the performance of the condition thereof shall be sufficient if executed or guaranteed solely by a corporation incorporated under the laws of the United States or of any state or territory having power to guarantee the fidelity of persons holding positions of public or private trust; and to execute guarantee bonds and undertakings in special proceedings, and in all judicial proceedings: provided, that such company is qualified under the act of congress entitled "An act relative to recognizances, bonds and undertakings, and to allow certain corporations to be accepted as surety thereon," approved August 13, 1894: and, provided further, that said corporation, if not incorporated under the laws of the state of New Mexico, shall comply with the laws of the state authorizing foreign corporations to do business therein: and, provided further, that all recognizances, stipulations, bonds or undertakings executed under the provisions of said sections shall be subject to the approval and acceptance as to the form and sufficiency of the execution thereof by the person or authority by law authorized to approve and accept the same.

**History:** Laws 1899, ch. 41, § 1; Code 1915, § 505; C.S. 1929, § 17-101; 1941 Comp., § 28-101; 1953 Comp., § 28-1-1.

#### **ANNOTATIONS**

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

**Cross references.** — For surety bonds with respect to public officers and employees generally, see Chapter 10, Article 2 NMSA 1978.

For provisions that practicing attorney cannot be a surety, see 36-2-13 NMSA 1978.

For the bond of an assignee for the benefit of creditors, see 56-9-8 and 56-9-18 NMSA 1978.

**Compiler's notes.** — The act of congress entitled "An act relative to recognizances, bonds and undertakings, and to allow certain corporations to be accepted as surety thereon" was repealed by Section 2 of Act of July 30, 1947, c. 390, 61 Stat. 651. For present similar provisions, see 31 U.S.C. §§ 9301 to 9309.

**Deposit for benefit of holder of bonds.** — The deposit required of surety companies is for the benefit of the holder of any bonds given by the officer concerned. 1912-13 Op. Att'y Gen. No. 13-999 (rendered under former law).

**Amount of county treasurer's bond based upon receipts.** — A county treasurer should furnish but one bond for his entire term, covering all funds, unless the receipts exceed the amount of the bond, when an additional bond would be required. 1914 Op. Att'y Gen. No. 14-117 (rendered under former law).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 63A Am. Jur. 2d Public Officers and Employees § 130 et seq; 76 Am. Jur. 2d Trusts §§ 427 to 440.

Liability of surety company as distinguished from that of gratuitous surety, 12 A.L.R. 382, 94 A.L.R. 876.

Right of obligee in guaranty or surety bond to fill blank as to amount, 37 A.L.R. 1395, 48 A.L.R. 741.

Duress of third person as affecting validity of bond, 62 A.L.R. 1481.

Approval of bond, right of sureties to take advantage of noncompliance with statutory requirement as to, 77 A.L.R. 1479.

Recording officer's bond, liability on, for mistakes or defects in respect to records affecting title to, or interest in, property, 94 A.L.R. 1303.

Statutory conditions prescribed for public officer's bond as part of bond which does not in terms include them or which expressly excludes them, 109 A.L.R. 501.

Liability of sureties on bond of public officer as affected by fact that it was not signed by him, 110 A.L.R. 959.

Receivership, fidelity bond or policy as covering default of corporate officer or employee occurring during or after termination of, 153 A.L.R. 1148.

Extent of liability on fidelity bond renewed from year to year, 7 A.L.R.2d 946.

72 C.J.S. Principal and Surety §§ 292 to 296.

## **46-6-2. Costs of bond; allowance to fiduciaries; costs in court action.**

Any fiduciary not subject to the provisions of the Probate Code [Chapter 45 NMSA 1978], required by law or the order of any court or judge of this state, to give a bond or other obligation as such, may include as a part of the lawful expense of executing his trust such reasonable sum paid a company authorized under the laws of this state so to do, for becoming his surety on such bond as may be allowed by the court in which, or a judge before whom, he is required to account, not exceeding one percent per annum on [of] the amount of such bond; and in all actions and proceedings a party entitled to recover costs therein shall be allowed and may tax and recover such sum paid such a company for executing any bond, recognizance, undertaking, stipulation or other obligation therein not exceeding, however, one percent on the amount of such bond, recognizance, undertaking, stipulation or other obligation, during each year the same has been in force.

**History:** Laws 1899, ch. 41, § 2; Code 1915, § 507; C.S. 1929, § 17-103; 1941 Comp., § 28-103; 1953 Comp., § 28-1-3; Laws 1975, ch. 257, § 8-117.

### **ANNOTATIONS**

**This section makes a special provision for actions and proceedings** and states specifically that it was not limited to the recovery of premiums paid by receivers and others acting in a fiduciary relation. *Chrysler Credit Corp. v. Beagles Chrysler-Plymouth*, 83 N.M. 272, 491 P.2d 160 (1971).

**This section is general enough to include replevin bonds.** *Chrysler Credit Corp. v. Beagles Chrysler-Plymouth*, 83 N.M. 272, 491 P.2d 160 (1971).

**Premium on appeal bond is proper item to be taxed as costs.** *Chrysler Credit Corp. v. Beagles Chrysler-Plymouth*, 83 N.M. 272, 491 P.2d 160 (1971).

## **46-6-3. Release of surety; notice.**

When any surety upon the official bond of any fiduciary in this state not subject to the provisions of the Probate Code [Chapter 45 NMSA 1978], shall desire to be



released from such obligation, such surety may file his application for such release in the court having jurisdiction of such fiduciary and thereupon the clerk of such court shall issue, under the seal thereof, a notice to such fiduciary, requiring him or her to furnish a new bond, with sureties to be approved by the court, within twenty days from the date of the service of said notice. Such notice may be served in the manner provided by law for the service of a summons in civil actions. If such fiduciary shall fail to furnish such bond within the time hereinbefore prescribed he or she may be summarily removed from office, and a new trustee, committee, guardian, assignee, receiver, executor, administrator or other fiduciary forthwith appointed. From and after the time when such new bond is furnished, or such new fiduciary appointed, the surety making such application shall be released from all liability upon the said bond, except for such default or other misconduct on the part of such fiduciary as occurred prior thereto.

It is further provided, that in case of the release or the withdrawal of any surety as provided in this section, and in case the principal shall account in due form of law for all his acts and doings, and all trust funds or estate, then the unearned portion of any premium paid to such surety shall be refunded and repaid by the said surety or such sureties as aforesaid.

**History:** Laws 1899, ch. 41, § 3; Code 1915, § 508; C.S. 1929, § 17-104; 1941 Comp., § 28-104; 1953 Comp., § 28-1-4; Laws 1975, ch. 257, § 8-118.

## ANNOTATIONS

**Cross references.** — For release or reduction of bond in wills and administration, see 45-3-604 NMSA 1978.

For the termination of appointment of personal representatives in wills and administration, see 45-3-608 to 45-3-612, 45-3-618 NMSA 1978.

For termination of guardianship generally, see 45-5-212 NMSA 1978.

For the dismissal of assignees for the benefit of creditors, see 56-9-36 to 56-9-41 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 74 Am. Jur. 2d Suretyship §§ 82 to 85.

### **46-6-4. [Surety companies; failure to pay judgment; forfeiture of right to do business.]**

That if any company authorized to do business in this state shall neglect or refuse to pay any final judgment or decree rendered against it upon any such recognizance, stipulation, bond or undertaking made or guaranteed by it under the provisions of Sections 46-6-1, 46-6-2 or 46-6-3 NMSA 1978, from which no appeal, writ of error or supersedeas has been taken, for thirty days after the rendition of such judgment or decree, it shall forfeit all right to do business.

**History:** Laws 1899, ch. 41, § 4; Code 1915, § 509; C.S. 1929, § 17-105; 1941 Comp., § 28-105; 1953 Comp., § 28-1-5.

#### ANNOTATIONS

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

#### **46-6-5. [Suits against surety companies; estoppel to deny authority.]**

That any company who shall execute or guarantee any recognizance, stipulation, bond or undertaking shall be estopped in any proceeding to enforce the liability which it shall have assumed to incur, to deny its corporate power to execute or guarantee such instrument or assume such liability.

**History:** Laws 1899, ch. 41, § 5; Code 1915, § 510; C.S. 1929, § 17-106; 1941 Comp., § 28-106; 1953 Comp., § 28-1-6.

#### ANNOTATIONS

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

**Judgment against the principal is conclusive, absent fraud or collusion.** State ex rel. Dar Tile Co. v. Glens Falls Ins. Co., 1967-NMSC-206, 78 N.M. 435, 432 P.2d 400.

**Judgments against principal may not be collaterally attacked by surety** because it is claimed that attorneys' fees are not a proper element of damages in a suit based upon a statutory contractor's bond. State ex rel. Dar Tile Co. v. Glens Falls Ins. Co., 1967-NMSC-206, 78 N.M. 435, 432 P.2d 400.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 74 Am. Jur. 2d Suretyship § 85.

What constitutes action on bond, executed under law of United States, so as to be within Federal District Court's jurisdiction under 28 USCS § 1352, 105 A.L.R. Fed. 716.

#### **46-6-6. [Release from obligation on bond required by statute in civil action; petition; notice; hearing; order.]**

Whenever any surety upon any attachment, replevin or other bond required in civil actions by the statutes of this state shall have reason to believe himself in danger from remaining thereon, and desires to be relieved therefrom, he may present a petition for that purpose to the judge of the district court in which the action wherein the said bond is given, is pending, either in vacation or term time, setting forth such reasons and verify

the same by his oath. Whereupon said judge is authorized to hear the same in a summary manner and grant an order relieving the petitioner from such bond if in his judgment the petitioner is entitled to such relief and upon such terms as shall be prescribed in order to secure the right [rights] of all parties interested in the cause; provided, that a copy of such petition shall be served upon the principal and upon the cosurety or sureties on the bond and also upon the defendant in the cause, together with the notice of the time and place where the same will be presented, at least ten days before the hearing; provided, that no surety on any replevin or attachment bond shall be relieved from his liability on such bond until a new bond shall have been given and approved, or until the property, the return or forthcoming of which such original bond was intended to secure, shall have been placed in the custody of the court.

**History:** C.L. 1897, § 2685(190), added by Laws 1907, ch. 107, § 1(190); Code 1915, § 4307; C.S. 1929, § 105-1609; 1941 Comp., § 28-107; 1953 Comp., § 28-1-7.

### ANNOTATIONS

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

**Law reviews.** — For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 74 Am. Jur. 2d Suretyship §§ 82 to 93.

### **46-6-7. [Suit on attachment or replevin bond; no assignment necessary.]**

Any person interested in any bond by virtue of the attachment and replevin laws, may maintain suit thereon without any assignment by the officer to whom the same is given.

**History:** C.L. 1897, § 2685(222)(236), added by Laws 1907, ch. 107, § 1(222)(236); Code 1915, § 4334; C.S. 1929, § 105-1637; 1941 Comp., § 28-108; 1953 Comp., § 28-1-8.

### ANNOTATIONS

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

**Cross references.** — For execution against sureties, see 39-4-10 NMSA 1978.

For replevin generally, see Chapter 42, Article 8 NMSA 1978.

For attachment generally, see Chapter 42, Article 9 NMSA 1978.

**This section does not apply to any bond given the sheriff.** De Witt v. United States Fid. & Guar. Co., 1915-NMSC-020, 20 N.M. 163, 148 P. 489.

**Law reviews.** — For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

#### **46-6-8. [Agreement with surety over deposits of principal.]**

It shall be lawful for any party of whom a bond, undertaking or other obligation is required, to agree with his surety or sureties for the deposit of any or all moneys and assets for which he and his surety or sureties are or may be held responsible, with a bank or trust company, authorized by law to do business as such, or with [any] other depository approved by the court or a judge thereof, if such deposit is otherwise proper, for the safekeeping thereof, and in such manner as to prevent the withdrawal of such money or assets or any part thereof, without the written consent of such surety or sureties, or an order of court, or a judge thereof made on such notice to such surety or sureties as such court or judge may direct; provided, however, that such agreement shall not in any manner release from [liability] or change the liability of the principal or sureties as established by the terms of the said bond.

**History:** 1941 Comp., § 28-109, enacted by Laws 1943, ch. 71, § 1; 1953 Comp., § 28-1-9.

### **ANNOTATIONS**

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

#### **46-6-9. [Arrest bond certificates; surety company undertakings authorized.]**

A. Any domestic or foreign surety company which has qualified to transact surety business in this state may, in any year, become surety in an amount not to exceed two hundred dollars (\$200.00) with respect to any guaranteed arrest bond certificates issued in such year by an automobile club or association by filing with the superintendent of insurance an undertaking thus to become surety.

B. Such undertaking shall be in form to be prescribed by the superintendent and shall state the following:

(1) the name and address of the automobile club or clubs or automobile association or associations with respect to the guaranteed arrest bond certificates of which the surety company undertakes to be surety;

(2) the unqualified obligation of the surety company to pay the fine or forfeiture in an amount not to exceed two hundred dollars (\$200.00) of any person who,

after posting a guaranteed arrest bond certificate with respect to which the surety company has undertaken to be surety, fails to make the appearance to guarantee which the guaranteed arrest bond certificate was posted.

C. The term, guaranteed arrest bond certificate, means any printed card or other certificate issued by an automobile club or association to any of its members, which card or certificate is signed by such member and contains a printed statement that such automobile club or association and a surety company guarantee the appearance of the person whose signature appears on the card or certificate and that they will, in the event of failure of such person to appear in court at the time of trial, pay any fine or forfeiture imposed on such person in an amount not to exceed two hundred dollars (\$200.00).

**History:** 1953 Comp., § 28-1-10, enacted by Laws 1955, ch. 120, § 1.

### ANNOTATIONS

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

## ARTICLE 7 Transfers to Minors

### 46-7-1 to 46-7-10. Repealed.

### ANNOTATIONS

**Repeals.** — Laws 1989, ch. 357, § 26 repealed 46-7-1 to 46-7-10 NMSA 1978, as amended by Laws 1967, ch. 258, §§ 2, 3, 5, 6, 8 to 10 and Laws 1973, ch. 138, §§ 19 to 21, relating to the Uniform Gifts to Minors Act, effective July 1, 1989. For present comparable provisions, see 46-7-11 NMSA 1978 et seq.

### 46-7-11. Short title.

Sections 1 through 24 [46-7-11 through 46-7-34 NMSA 1978] of this act may be cited as the "Uniform Transfers to Minors Act".

**History:** Laws 1989, ch. 357, § 1.

### ANNOTATIONS

**Cross references.** — For Uniform Act for Simplification of Fiduciary Security Transfers, see Chapter 46, Article 8 NMSA 1978.

For the lowering of age of majority to 18 not affecting the time for delivery of gift to donee, see 28-6-1 NMSA 1978.

**Compiler's notes.** — As enacted by Laws 1989, ch. 357, § 1, the phrase "As used in the Uniform Transfers to Minors Act:" inadvertently appeared at the end of this section. For purposes of clarity, the compiler has transferred that phrase, in brackets, to the beginning of 46-7-12 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 59 Am. Jur. 2d, Parent and Child §§ 127, 128.

Unexplained gratuitous transfer of property from one relative to another as raising presumption of gift, 94 A.L.R.3d 608.

Effect of testamentary gift to child conditioned upon specified arrangements for parental control, 11 A.L.R.4th 940.

43 C.J.S., Infants §§ 135 to 138.

## **46-7-12. Definitions.**

[As used in the Uniform Transfers to Minors Act [46-7-11 through 46-7-34 NMSA 1978]:]

- A. "adult" means an individual who has attained the age of twenty-one years;
- B. "benefit plan" means an employer's plan for the benefit of an employee or partner;
- C. "broker" means a person lawfully engaged in the business of effecting transactions in securities or commodities for the person's own account or for the account of others;
- D. "conservator" means a person appointed or qualified by a court to act as general, limited, or temporary guardian of a minor's property or a person legally authorized to perform substantially the same functions;
- E. "court" means the district court;
- F. "custodial property" means:
  - (1) any interest in property transferred to a custodian under the Uniform Transfers to Minors Act; and
  - (2) the income from and proceeds of that interest in property;
- G. "custodian" means a person so designated under Section 10 [46-7-20 NMSA 1978] of the Uniform Transfers to Minors Act or a successor or substitute custodian designated under Section 19 [46-7-29 NMSA 1978] of that act;

H. "financial institution" means a bank, trust company, savings institution or credit union chartered and supervised under state or federal law;

I. "legal representative" means an individual's personal representative or conservator;

J. "member of the minor's family" means the minor's parent, stepparent, spouse, grandparent, brother, sister, uncle or aunt, whether of the whole or half blood or by adoption;

K. "minor" means an individual who has not attained the age of twenty-one years;

L. "person" means an individual, corporation, organization or other legal entity;

M. "personal representative" means an executor, administrator, successor, personal representative or special administrator of a decedent's [decedent's] estate or a person legally authorized to perform substantially the same functions;

N. "state" includes any state of the United States, the District of Columbia, the commonwealth of Puerto Rico and any territory or possession subject to the legislative authority of the United States;

O. "transfer" means a transaction that creates custodial property under Section 10 of the Uniform Transfers to Minors Act;

P. "transferor" means a person who makes a transfer under that act; and

Q. "trust company" means a financial institution, corporation, or other legal entity authorized to exercise general trust powers.

**History:** Laws 1989, ch. 357, § 2.

## **ANNOTATIONS**

**Bracketed material.** — As this act appears in the Session Laws, the phrase "As used in the Uniform Transfers to Minors Act:" inadvertently appeared at the end of 46-7-11 NMSA 1978. For purposes of clarity, the compiler has transferred that phrase, in brackets, to the beginning of this section.

The bracketed material in Subsection M was inserted by the compiler. It was not enacted by the legislature and is not part of the law.

### **46-7-13. Scope and jurisdiction.**

A. The Uniform Transfers to Minors Act applies to a transfer that refers to that act in the designation under Subsection A of Section 10 [46-7-20 NMSA 1978] of that act by

which the transfer is made if at the time of the transfer, the transferor, the minor or the custodian is a resident of this state or the custodial property is located in this state. The custodianship so created remains subject to that act despite a subsequent change in residence of a transferor, the minor or the custodian or the removal of custodial property from this state.

B. A person designated as custodian under the Uniform Transfers to Minors Act is subject to personal jurisdiction in this state with respect to any matter relating to the custodianship.

C. A transfer that purports to be made and which is valid under the Uniform Transfers to Minors Act, the Uniform Gifts to Minors Act or a substantially similar act of another state is governed by the law of the designated state and may be executed and is enforceable in this state if at the time of the transfer, the transferor, the minor or the custodian is a resident of the designated state or the custodial property is located in the designated state.

**History:** Laws 1989, ch. 357, § 3.

## ANNOTATIONS

**Compiler's notes.** — The Uniform Gifts to Minors Act was repealed in 1989 by the act that enacted this section.

### **46-7-14. Nomination of custodian.**

A. A person having the right to designate the recipient of property transferable upon the occurrence of a future event may revocably nominate a custodian to receive the property for a minor beneficiary upon the occurrence of the event by naming the custodian followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the Uniform Transfers to Minors Act." The nomination may name one or more persons as substitute custodians to whom the property shall be transferred, in the order named, if the first nominated custodian dies before the transfer or is unable, declines or is ineligible to serve. The nomination may be made in a will, a trust, a deed, an instrument exercising a power of appointment or in a writing designating a beneficiary of contractual rights which is registered with or delivered to the payer, issuer or other obligor of the contractual rights.

B. A custodian nominated under this section shall be a person to whom a transfer of property of that kind may be made under Subsection A of Section 10 [46-7-20 NMSA 1978] of the Uniform Transfers to Minors Act.

C. The nomination of a custodian under this section does not create custodian property until the nominating instrument becomes irrevocable or a transfer to the nominated custodian is completed under Section 10 of the Uniform Transfers to Minors Act. Unless the nomination of a custodian has been revoked, upon the occurrence of



the future event the custodianship becomes effective and the custodian shall enforce a transfer of the custodial property pursuant to Section 10 of that act.

**History:** Laws 1989, ch. 357, § 4.

#### **46-7-15. Transfer by gift or exercise of power of appointment.**

A person may make a transfer by irrevocable gift to, or the irrevocable exercise of a power of appointment in favor of, a custodian for the benefit of a minor pursuant to Section 10 [46-7-20 NMSA 1978] of the Uniform Transfers to Minors Act.

**History:** Laws 1989, ch. 357, § 5.

#### **46-7-16. Transfer authorized by will or trust.**

A. A personal representative or trustee may make an irrevocable transfer pursuant to Section 10 [46-7-20 NMSA 1978] of the Uniform Transfers to Minors Act to a custodian for the benefit of a minor as authorized in the governing will or trust.

B. If the testator or settler has nominated a custodian under Section 4 [46-7-14 NMSA 1978] of the Uniform Transfers to Minors Act to receive the custodial property, the transfer shall be made to that person.

C. If the testator or settler has not nominated a custodian under Section 4 of that act, or all persons so nominated as custodian die before the transfer or are unable, decline or are ineligible to serve, the personal representative or the trustee, as the case may be, shall designate the custodian from among those eligible to serve as custodian for property of that kind under Section 9 [46-7-19 NMSA 1978] of that act.

**History:** Laws 1989, ch. 357, § 6.

#### **46-7-17. Other transfer by fiduciary.**

A. Subject to Subsection C of this section, a personal representative or trustee may make an irrevocable transfer to another adult or trust company as custodian for the benefit of a minor pursuant to Section 10 [46-7-20 NMSA 1978] of the Uniform Transfers to Minors Act in the absence of a will or under a will or trust that does not contain an authorization to do so.

B. Subject to Subsection C of this section, a conservator may make an irrevocable transfer to another adult or trust company as custodian for the benefit of the minor pursuant to Section 10 of that act.

C. A transfer under Subsection A or B of this section may be made only if:

(1) the personal representative, trustee, or conservator considers the transfer to be in the best interest of the minor;

(2) the transfer is not prohibited by or inconsistent with provisions of the applicable will, trust agreement or other governing instrument; and

(3) the transfer is authorized by the court if it exceeds ten thousand dollars (\$10,000) in value.

**History:** Laws 1989, ch. 357, § 7.

### **46-7-18. Transfer by obligor.**

A. Subject to Subsections B and C of this section, a person not subject to Section 6 or 7 [46-7-16 or 46-7-17 NMSA 1978] of the Uniform Transfers to Minors Act who holds property of or owes a liquidated debt to a minor not having a conservator may make an irrevocable transfer to a custodian for the benefit of the minor pursuant to Section 10 [46-7-20 NMSA 1978] of that act.

B. If a person having the right to do so under Section 4 [46-7-14 NMSA 1978] of that act, has nominated a custodian under that section to receive the custodial property, the transfer shall be made to that person;

C. If no custodian has been nominated under Section 4 of that act, or all persons so nominated as custodian die before the transfer or are unable, decline or are ineligible to serve, a transfer under this section may be made to an adult member of the minor's family or to a trust company unless the property exceeds ten thousand dollars (\$10,000) in value.

**History:** Laws 1989, ch. 357, § 8.

### **46-7-19. Receipt for custodial property.**

A written acknowledgment of delivery by a custodian constitutes a sufficient receipt and discharge for custodial property transferred to the custodian pursuant to the Uniform Transfers to Minors Act.

**History:** Laws 1989, ch. 357, § 9.

### **46-7-20. Manner of creating custodial property and effecting transfer; designation of initial custodian; control.**

A. Custodial property is created and a transfer is made whenever:

(1) an uncertificated security or a certificated security in registered form is either:

(a) registered in the name of the transferor, an adult other than the transferor or a trust company, followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the Uniform Transfers to Minors Act";  
or

(b) delivered if in certificated form, or any document necessary for the transfer of an uncertificated security is delivered, together with any necessary endorsement to an adult other than the transferor or a trust company as custodian, accompanied by an instrument in substantially the form set forth in Subsection B of this section;

(2) money is paid or delivered to a broker or financial institution for credit to an account in the name of the transferor, an adult other than the transferor or a trust company, followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the Uniform Transfers to Minors Act";

(3) the ownership of a life or endowment insurance policy or annuity contract is either:

(a) registered with the issuer in the name of the transferor, an adult other than the transferor or a trust company, followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the Uniform Transfers to Minors Act"; or

(b) assigned in a writing delivered to an adult other than the transferor or a trust company whose name in the assignment is followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the Uniform Transfers to Minors Act";

(4) an irrevocable exercise of a power of appointment or an irrevocable present right to future payment under a contract is the subject of a written notification delivered to the payer, issuer or other obligor that the right is transferred to the transferor, an adult other than the transferor or a trust company, whose name in the notification is followed by the words: "as custodian for \_\_\_\_\_ (name of minor) under the Uniform Transfers to Minors Act";

(5) an interest in real property is recorded in the name of the transferor, an adult other than the transferor or a trust company, followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the Uniform Transfers to Minors Act";

(6) a certificate of title issued by a department or agency of a state or of the United States which evidences title to tangible personal property is either:

(a) issued in the name of the transferor, an adult other than the transferor or a trust company, followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the Uniform Transfers to Minors Act"; or

(b) delivered to an adult other than the transferor or a trust company, endorsed to that person followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the Uniform Transfers to Minors Act"; or

(7) an interest in any property not described in Paragraphs (1) through (6) of this subsection is transferred to an adult other than the transferor or to a trust company by a written instrument in substantially the form set forth in Subsection B of this section.

B. An instrument in the following form satisfies the requirements of Paragraphs (1) and (7) of Subsection A of this section:

"TRANSFER UNDER THE UNIFORM TRANSFERS TO MINORS ACT

I, \_\_\_\_\_ (name of the transferor or name and representative capacity if a fiduciary) hereby transfer to \_\_\_\_\_ (name of custodian), as custodian for \_\_\_\_\_ (name of minor) under the Uniform Transfers to Minors Act, the following: (insert a description of the custodial property sufficient to identify it).

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Signature)

\_\_\_\_\_ (name of custodian) acknowledges receipt of the property described above as custodian for the minor named above under the Uniform Transfers to Minors Act.

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Signature of Custodian)

C. A transferor shall place the custodian in control of the custodial property as soon as practicable.

**History:** Laws 1989, ch. 357, § 10.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — Unexplained gratuitous transfer of property from one relative to another as raising presumption of gift, 94 A.L.R.3d 608.

### **46-7-21. Single custodianship.**

A transfer may be made only for one minor and only one person may be the custodian. All custodial property held under the Uniform Transfers to Minors Act by the same custodian for the benefit of the same minor constitutes a single custodianship.

**History:** Laws 1989, ch. 357, § 11.

### **46-7-22. Validity and effect of transfer.**

A. The validity of a transfer made in a manner prescribed in the Uniform Transfers to Minors Act is not affected by:

(1) failure of the transferor to comply with Subsection C of Section 10 [46-7-20 NMSA 1978] of that act concerning possession and control;

(2) designation of an ineligible custodian, except designation of the transferor in the case of property for which the transferor is ineligible to serve as custodian under Subsection A of Section 10 of that act; or

(3) death or incapacity of a person nominated under Section 4 [46-7-14 NMSA 1978] or designated under Section 10 of that act as custodian or the disclaimer of the office by that person.

B. A transfer made pursuant to Section 10 of the Uniform Transfers to Minors Act is irrevocable, and the custodial property is indefeasibly vested in the minor, but the custodian has all the rights, powers, duties and authority provided in the Uniform Transfers to Minors Act and neither the minor nor the minor's legal representative has any right, power, duty or authority with respect to the custodial property except as provided in that act.

C. By making a transfer, the transferor incorporates in the disposition all the provisions of that act and grants to the custodian, and to any third person dealing with a person designated as custodian, the respective powers, rights and immunities provided in that act.

**History:** Laws 1989, ch. 357, § 12.

## **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** — 38 Am. Jur. 2d Gifts § 15, 16.

Construction and effect of Uniform Gifts to Minors Act, 50 A.L.R.3d 528.

## 46-7-23. Care of custodial property.

A. A custodian shall:

- (1) take control of custodial property;
- (2) register or record title to custodial property if appropriate; and
- (3) collect, hold, manage, invest, and reinvest custodial property.

B. In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries. If a custodian has a special skill or expertise or is named custodian on the basis of representations of a special skill or expertise, the custodian shall use that skill or expertise. However, a custodian, in the custodian's discretion and without liability to the minor or the minor's estate, may retain any custodial property received from a transferor.

C. A custodian may invest in or pay premiums on life insurance or endowment policies on:

- (1) the life of the minor only if the minor or the minor's estate is the sole beneficiary; or
- (2) the life of another person in whom the minor has an insurable interest only to the extent that the minor, the minor's estate or the custodian in the capacity of custodian is the irrevocable beneficiary.

D. A custodian at all times shall keep custodial property separate and distinct from all other property in a manner sufficient to identify it clearly as custodial property of the minor. Custodial property consisting of an undivided interest is so identified if the minor's interest is held as a tenant in common and is fixed. Custodial property subject to recordation is so identified if it is recorded, and custodial property subject to registration is so identified if it is either registered, or held in an account designated, in the name of the custodian, followed in substance by the words: "as a custodian for

\_\_\_\_\_ (name of minor) under the Uniform Transfers to Minors Act".

E. A custodian shall keep records of all transactions with respect to custodial property, including information necessary for the preparation of the minor's tax returns, and shall make them available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor if the minor has attained the age of fourteen years.

**History:** Laws 1989, ch. 357, § 13.

## ANNOTATIONS

**Treasurer and board of finance subject to "prudent person" test.** — The state treasurer and the state board of finance in selecting proper investments for investment of the permanent funds belonging to the museum of New Mexico are subject to the "prudent person" test in this section. 1964 Op. Att'y Gen. No. 64-29.

### **46-7-24. Powers of custodian.**

A. A custodian, acting in a custodial capacity, has all the rights, powers and authority over custodial property that unmarried adult owners have over their own property, but a custodian may exercise those rights, powers and authority in that capacity only.

B. This section does not relieve a custodian from liability for breach of Section 13 [46-7-23 NMSA 1978] of the Uniform Transfers to Minors Act.

**History:** Laws 1989, ch. 357, § 14.

### **46-7-25. Use of custodial property.**

A. A custodian may deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to:

(1) the duty or ability of the custodian personally or of any other person to support the minor; or

(2) any other income or property of the minor which may be applicable or available for that purpose.

B. On petition of an interested person or the minor if the minor has attained the age of fourteen years, the court may order the custodian to deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the court considers advisable for the use and benefit of the minor.

C. A delivery, payment or expenditure under this section is in addition to, not in substitution for, and does not affect any obligation of a person to support the minor.

**History:** Laws 1989, ch. 357, § 15.

### **46-7-26. Custodian's expenses, compensation and bond.**

A. A custodian is entitled to reimbursement from custodial property for reasonable expenses incurred in the performance of the custodian's duties.

B. Except for one who is a transferor under Section 5 [46-7-15 NMSA 1978] of the Uniform Transfers to Minors Act a custodian has a noncumulative election during each calendar year to charge reasonable compensation for services performed during that year.

C. Except as provided in Subsection F of Section 19 [46-7-29 NMSA 1978] of the Uniform Transfers to Minors Act, a custodian need not give a bond.

**History:** Laws 1989, ch. 357, § 16.

### **46-7-27. Exemption of third person from liability.**

A third person in good faith and without court order may act on the instructions of or otherwise deal with any person purporting to make a transfer or purporting to act in the capacity of a custodian and, in the absence of knowledge, is not responsible for determining:

A. the validity of the purported custodian's designation;

B. the propriety of, or the authority under the Uniform Transfers to Minors Act, for any act of the purported custodian;

C. the validity or propriety under that act of any instrument or instructions executed or given either by the person purporting to make a transfer or by the purported custodian; or

D. the propriety of the application of any property of the minor delivered to the purported custodian.

**History:** Laws 1989, ch. 357, § 17.

### **46-7-28. Liability to third persons.**

A. A claim based on:

(1) a contract entered into by a custodian acting in a custodial capacity;

(2) an obligation arising from the ownership or control of custodial property; or

(3) a tort committed during the custodianship, may be asserted against the custodial property by proceeding against the custodian in the custodial capacity, whether or not the custodian or the minor is personally liable therefore.

B. A custodian is not personally liable:



(1) on a contract properly entered into in the custodial capacity unless the custodian fails to reveal that capacity and to identify the custodianship in the contract; or

(2) for an obligation arising from control of custodial property or for a tort committed during the custodianship unless the custodian is personally at fault.

C. A minor is not personally liable for an obligation arising from ownership of custodial property or for a tort committed during the custodianship unless the minor is personally at fault.

**History:** Laws 1989, ch. 357, § 18.

### **46-7-29. Renunciation, resignation, death or removal of custodian; designation of successor custodian.**

A. A person nominated under Section 4 [46-7-14 NMSA 1978] of the Uniform Transfers to Minors Act or designated under Section 9 [46-7-19 NMSA 1978] of that act as custodian may decline to serve by delivering a valid disclaimer to the person who made the nomination or to the transferor or to the transferor's legal representative. If the event giving rise to a transfer has not occurred and no substitute custodian able, willing and eligible to serve was nominated under Section 4 of that act, the person who made the nomination may nominate a substitute custodian under Section 4 of that act; otherwise, the transferor or the transferor's legal representative shall designate a substitute custodian at the time of the transfer, in either case from among the persons eligible to serve as custodian for that kind of property under Subsection A of Section 10 [46-7-20 NMSA 1978] of that act. The custodian so designated has the rights of a successor custodian.

B. A custodian at any time may designate a trust company or an adult other than a transferor under Section 5 [46-7-15 NMSA 1978] of the Uniform Transfers to Minors Act as successor custodian by executing and dating an instrument of designation before a subscribing witness other than the successor. If the instrument of designation does not contain or is not accompanied by the resignation of the custodian, the designation of the successor does not take effect until the custodian resigns, dies, becomes incapacitated or is removed.

C. A custodian may resign at any time by delivering written notice to the minor if the minor has attained the age of fourteen years and to the successor custodian and by delivering the custodial property to the successor custodian.

D. If a custodian is ineligible, dies or becomes incapacitated without having effectively designated a successor and the minor has attained the age of fourteen years, the minor may designate as successor custodian, in the manner prescribed in Subsection B of this section, an adult member of the minor's family, a conservator of the minor or a trust company. If the minor has not attained the age of fourteen years or fails to act within sixty days after the ineligibility, death or incapacity, the conservator of the

minor becomes successor custodian. If the minor has no conservator or the conservator declines to act, the transferor, the legal representative of the transferor or of the custodian, an adult member of the minor's family or any other interested person may petition the court to designate a successor custodian.

E. A custodian who declines to serve under Subsection A of this section or resigns under Subsection C of this section or the legal representative of a deceased or incapacitated custodian as soon as practicable, shall put the custodial property and records in the possession and control of the successor custodian. The successor custodian by action may enforce the obligation to deliver custodial property and records and becomes responsible for each item as received.

F. A transferor, the legal representative of a transferor, an adult member of the minor's family, a guardian of the person of the minor, the conservator of the minor or the minor if the minor has attained the age of fourteen years may petition the court to remove the custodian for cause and to designate a successor custodian other than a transferor under Section 5 [96-7-15 NMSA 1978] of the Uniform Transfers to Minors Act or to require the custodian to give appropriate bond.

**History:** Laws 1989, ch. 357, § 19.

#### **46-7-30. Accounting by and determination of liability of custodian.**

A. A minor who has attained the age of fourteen years, the minor's guardian of the person or legal representative, an adult member of the minor's family, a transferor or a transferor's legal representative may petition the court:

(1) for an accounting by the custodian or the custodian's legal representative;  
or

(2) for a determination of responsibility, as between the custodial property and the custodian personally, for claims against the custodial property unless the responsibility has been adjudicated in an action under Section 8 [46-7-18 NMSA 1978] of the Uniform Transfers to Minors Act to which the minor or the minor's legal representative was a party.

B. A successor custodian may petition the court for an accounting by the predecessor custodian.

C. The court, in a proceeding under the Uniform Transfers to Minors Act or in any other proceeding may require or permit the custodian or the custodian's legal representative to account.

D. If a custodian is removed under Subsection F of Section 19 [46-7-29 NMSA 1978] of the Uniform Transfers to Minors Act, the court shall require an accounting and

order delivery of the custodial property and records to the successor custodian and the execution of all instruments required for transfer of the custodial property.

**History:** Laws 1989, ch. 357, § 20.

### **46-7-31. Termination of custodianship.**

The custodian shall transfer in an appropriate manner the custodial property to the minor or to the minor's estate upon the earlier of:

A. the minor's attainment of twenty-one years of age with respect to custodial property transferred under Section 5 or 6 [46-7-15 or 46-7-16 NMSA 1978] of the Uniform Transfers to Minors Act;

B. the minor's attainment of the age of majority under the laws of this state other than the Uniform Transfers to Minors Act with respect to custodial property transferred under Section 7 or 8 [46-7-17 or 46-7-18 NMSA 1978] of that act;

C. the minor's death.

**History:** Laws 1989, ch. 357, § 21.

### **ANNOTATIONS**

**Cross references.** — For age of majority, see 28-6-1 NMSA 1978.

### **46-7-32. Applicability.**

The Uniform Transfers to Minors Act applies to a transfer within the scope of Section 3 [46-7-13 NMSA 1978] of that act made after its effective date if:

A. the transfer purports to have been made under the Uniform Gifts to Minors Act of New Mexico; or

B. the instrument by which the transfer purports to have been made uses in substance the designation "as custodian under the Uniform Gifts to Minors Act" or "as custodian under the Uniform Transfers to Minors Act" of any other state and the application of the Uniform Transfers to Minors Act is necessary to validate the transfer.

**History:** Laws 1989, ch. 357, § 22.

### **ANNOTATIONS**

**Compiler's notes.** — The Uniform Gifts to Minors Act was repealed in 1989 by the same act that enacted this section.

### **46-7-33. Effect on existing custodianships.**

A. Any transfer of custodial property as now defined in the Uniform Transfers to Minors Act made before the effective date of that act is validated notwithstanding that there was no specific authority in the Uniform Gifts to Minors Act for the coverage of custodial property of that kind or for a transfer from that source at the time the transfer was made.

B. The Uniform Transfers to Minors Act applies to all transfers made before the effective date of that act in a manner and form prescribed in the Uniform Gifts to Minors Act, except insofar as the application impairs constitutionally vested rights or extends the duration of custodianships in existence on the effective date of that act.

C. Sections 2 and 21 [46-7-12 and 46-7-31 NMSA 1978] of the Uniform Transfers to Minors Act with respect to the age of a minor for whom custodial property is held under that act do not apply to custodial property held in a custodianship that terminated because of the minor's attainment of the age of eighteen after June 17, 1973 and before the effective date of this section.

**History:** Laws 1989, ch. 357, § 23.

#### **ANNOTATIONS**

**Compiler's notes.** — Laws 1989, ch. 357, § 27 made the Uniform Transfers to Minors Act effective on July 1, 1989.

The Uniform Gifts to Minors Act was repealed in 1989 by the same act that enacted this section.

### **46-7-34. Uniformity of application and construction.**

The Uniform Transfers to Minors Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of that act among states enacting it.

**History:** Laws 1989, ch. 357, § 24.

#### **ANNOTATIONS**

**Severability.** — Laws 1989, ch. 357, § 25 provides for the severability of the Uniform Transfers to Minors Act if any part or application thereof is held invalid.

## **ARTICLE 8**

### **Simplification of Fiduciary Security Transfers**

## **46-8-1. Short (long) title.**

Sections 1 through 10 [46-8-1 through 46-8-10 NMSA 1978] of this act may be cited as the "Uniform Act for Simplification of Fiduciary Security Transfers".

**History:** Laws 1991, ch. 177, § 1.

### **ANNOTATIONS**

**Cross references.** — For fiduciary obligations and investments, see Chapter 46, Article 1 NMSA 1978.

For trusts, see Chapter 46A NMSA 1978.

For Uniform Transfers to Minors Act, see Chapter 46, Article 7 NMSA 1978.

For notice to purchaser of adverse claims, see 55-8-105 NMSA 1978.

## **46-8-2. Definitions.**

In the Uniform Act for Simplification of Fiduciary Security Transfers, unless the context otherwise requires:

A. "assignment" includes any written stock power, bond power, bill of sale, deed, declaration of trust or other instrument of transfer;

B. "claim of beneficial interest" includes a claim of any interest by a decedent's legatee, distributee, heir or creditor, a beneficiary under a trust, a ward, a beneficial owner of a security registered in the name of a nominee or a minor owner of a security registered in the name of a custodian, or a claim of any similar interest, whether the claim is asserted by the claimant or by a fiduciary or by any other authorized person on his behalf, and includes a claim that the transfer would be in breach of fiduciary duties;

C. "corporation" means a private or public corporation, association or trust issuing a security;

D. "fiduciary" means an executor, administrator, trustee, guardian, committee, conservator, curator, tutor, custodian or nominee;

E. "person" includes an individual, a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest or any other legal or commercial entity;

F. "security" includes any share of stock, bond, debenture, note or other security issued by a corporation that is registered as to ownership on the books of the corporation;

G. "transfer" means a change on the books of a corporation in the registered ownership of a security; and

H. "transfer agent" means a person employed or authorized by a corporation to transfer securities issued by the corporation.

**History:** Laws 1991, ch. 177, § 2.

### **46-8-3. Registration in the name of a fiduciary.**

A corporation or transfer agent registering a security in the name of a person who is a fiduciary or who is described as a fiduciary is not bound to inquire into the existence, extent or correct description of the fiduciary relationship; and thereafter the corporation and its transfer agent may assume without inquiry that the newly registered owner continues to be the fiduciary until the corporation or transfer agent receives written notice that the fiduciary is no longer acting as such with respect to the particular security.

**History:** Laws 1991, ch. 177, § 3.

### **46-8-4. Assignment by a fiduciary.**

Except as otherwise provided in the Uniform Act for Simplification of Fiduciary Security Transfers, a corporation or transfer agent making a transfer of a security pursuant to an assignment by a fiduciary:

A. may assume without inquiry that the assignment, even though to the fiduciary himself or to his nominee, is within his authority and capacity and is not in breach of his fiduciary duties;

B. may assume without inquiry that the fiduciary has complied with any controlling instrument and with the law of the jurisdiction governing the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer; and

C. is not charged with notice of and is not bound to obtain or examine any court record or any recorded or unrecorded document relating to the fiduciary relationship or the assignment, even though the record or document is in its possession.

**History:** Laws 1991, ch. 177, § 4.

### **46-8-5. Evidence of appointment or incumbency.**

A corporation or transfer agent making a transfer pursuant to an assignment by a fiduciary who is not the registered owner shall obtain the following evidence of appointment or incumbency:

A. in the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of that court or an officer thereof and dated within sixty days before the transfer; or

B. in any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by the corporation or transfer agent to be responsible or, in the absence of such a document or certificate, other evidence reasonably deemed by the corporation or transfer agent to be appropriate; corporations and transfer agents may adopt standards with respect to evidence of appointment or incumbency under this subsection provided such standards are not manifestly unreasonable; neither the corporation nor transfer agent is charged with notice of the contents of any document obtained pursuant to Subsection B of this section except to the extent that the contents relate directly to the appointment or incumbency.

**History:** Laws 1991, ch. 177, § 5.

#### **46-8-6. Adverse claims.**

A. A person asserting a claim of beneficial interest adverse to the transfer of a security pursuant to an assignment by a fiduciary may give the corporation or transfer agent written notice of the claim. The corporation or transfer agent is not put on notice unless the written notice identifies the claimant, the registered owner, and the issue of which the security is a part, provides an address for communications directed to the claimant and is received before the transfer. Nothing in the Uniform Act for the Simplification of Fiduciary Security Transfers relieves the corporation or transfer agent of any liability for making or refusing to make the transfer after it is so put on notice unless it proceeds in the manner authorized in Subsection B of this section.

B. As soon as practicable after the presentation of a security for transfer pursuant to an assignment by a fiduciary, a corporation or transfer agent which has received notice of a claim of beneficial interest adverse to the transfer may send notice of the presentation by registered or certified mail to the claimant at the address given by him. If the corporation or transfer agent so mails such a notice it shall withhold the transfer for thirty days after the mailing and shall then make the transfer unless restrained by a court order.

**History:** Laws 1991, ch. 177, § 6.

#### **46-8-7. Non-liability of corporation and transfer agent.**

A corporation or transfer agent incurs no liability to any person by making a transfer or otherwise acting in a manner authorized by the Uniform Act for Simplification of Fiduciary Security Transfers.

**History:** Laws 1991, ch. 177, § 7.

#### **46-8-8. Non-liability of third persons.**

A. No person who participates in the acquisition, disposition, assignment or transfer of a security by or to a fiduciary, including a person who guarantees the signature of the fiduciary, is liable for participation in any breach of fiduciary duty by reason of failure to inquire whether the transaction involves a breach unless it is shown that he acted with actual knowledge that the proceeds of the transaction were being or were to be used wrongfully for the individual benefit of the fiduciary or that the transaction was otherwise in breach of duty.

B. If a corporation or transfer agent makes a transfer pursuant to an assignment by a fiduciary, a person who guaranteed the signature of the fiduciary is not liable on the guarantee to any person to whom the corporation or transfer agent by reason of The Uniform Act for Simplification of Fiduciary Security Transfers incurs no liability.

C. This section does not impose any liability upon the corporation or its transfer agent.

**History:** Laws 1991, ch. 177, § 8.

#### **46-8-9. Territorial application.**

A. The rights and duties of a corporation and its transfer agents in registering a security in the name of a fiduciary or in making a transfer of a security pursuant to an assignment by a fiduciary are governed by the law of the jurisdiction under whose laws the corporation is organized.

B. The Uniform Act for Simplification of Fiduciary Security Transfers applies to the rights and duties of a person other than the corporation and its transfer agents with regard to acts and omissions in this state in connection with the acquisition, disposition, assignment or transfer of a security by or to a fiduciary and of a person who guarantees in this state the signature of a fiduciary in connection with such a transaction.

**History:** Laws 1991, ch. 177, § 9.

#### **46-8-10. Tax obligations.**

The Uniform Act for the Simplification of Fiduciary Transfers does not affect any obligation of a corporation or transfer agent with respect to estate, inheritance, succession or other taxes imposed by the laws of this state.

**History:** Laws 1991, ch. 177, § 10.

## **ARTICLE 9**

### **Uniform Management of Institutional Funds Act**



## **46-9-1. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2009, ch. 130, § 11 repealed 46-9-1 NMSA 1978, enacted by Laws 1997, ch. 199, § 1, relating to the Uniform Management of Institutional Funds Act, effective July 1, 2009. For provisions of former section, see the 2008 NMSA 1978 on *NMOneSource.com*.

## **46-9-2. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2009, ch. 130, § 11 repealed 46-9-2 NMSA 1978, enacted by Laws 1997, ch. 199, § 2, relating to the Uniform Management of Institutional Funds Act, effective July 1, 2009. For provisions of former section, see the 2008 NMSA 1978 on *NMOneSource.com*.

## **46-9-3. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2009, ch. 130, § 11 repealed 46-9-3 NMSA 1978, enacted by Laws 1997, ch. 199, § 3, relating to the Uniform Management of Institutional Funds Act, effective July 1, 2009. For provisions of former section, see the 2008 NMSA 1978 on *NMOneSource.com*.

## **46-9-4. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2009, ch. 130, § 11 repealed 46-9-4 NMSA 1978, enacted by Laws 1997, ch. 199, § 4, relating to the Uniform Management of Institutional Funds Act, effective July 1, 2009. For provisions of former section, see the 2008 NMSA 1978 on *NMOneSource.com*.

## **46-9-5. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2009, ch. 130, § 11 repealed 46-9-5 NMSA 1978, enacted by Laws 1997, ch. 199, § 5, relating to the Uniform Management of Institutional Funds Act, effective July 1, 2009. For provisions of former section, see the 2008 NMSA 1978 on *NMOneSource.com*.

## **46-9-6. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2009, ch. 130, § 11 repealed 46-9-6 NMSA 1978, enacted by Laws 1997, ch. 199, § 6, relating to the Uniform Management of Institutional Funds Act, effective July 1, 2009. For provisions of former section, see the 2008 NMSA 1978 on *NMOneSource.com*.

## **46-9-7. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2009, ch. 130, § 11 repealed 46-9-7 NMSA 1978, enacted by Laws 1997, ch. 199, § 7, relating to the Uniform Management of Institutional Funds Act, effective July 1, 2009. For provisions of former section, see the 2008 NMSA 1978 on *NMOneSource.com*.

## **46-9-8. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2009, ch. 130, § 11 repealed 46-9-8 NMSA 1978, enacted by Laws 1997, ch. 199, § 8, relating to the Uniform Management of Institutional Funds Act, effective July 1, 2009. For provisions of former section, see the 2008 NMSA 1978 on *NMOneSource.com*.

## **46-9-9. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2009, ch. 130, § 11 repealed 46-9-9 NMSA 1978, enacted by Laws 1997, ch. 199, § 9, relating to the Uniform Management of Institutional Funds Act, effective July 1, 2009. For provisions of former section, see the 2008 NMSA 1978 on *NMOneSource.com*.

## **46-9-10. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2009, ch. 130, § 11 repealed 46-9-10 NMSA 1978, enacted by Laws 1997, ch. 199, § 10, relating to the Uniform Management of Institutional Funds Act, effective July 1, 2009. For provisions of former section, see the 2008 NMSA 1978 on *NMOneSource.com*.

## **46-9-11. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2009, ch. 130, § 11 repealed 46-9-11 NMSA 1978, enacted by Laws 1997, ch. 199, § 11, relating to the Uniform Management of Institutional Funds Act, effective July 1, 2009. For provisions of former section, see the 2008 NMSA 1978 on *NMOneSource.com*.

## **46-9-12. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2009, ch. 130, § 11 repealed 46-9-12 NMSA 1978, enacted by Laws 1997, ch. 199, § 12, relating to the Uniform Management of Institutional Funds Act, effective July 1, 2009. For provisions of former section, see the 2008 NMSA 1978 on *NMOneSource.com*.

## **ARTICLE 9A**

### **Uniform Prudent Management of Institutional Funds**

#### **46-9A-1. Short title.**

This act [46-9A-1 through 46-9A-10 NMSA 1978] may be cited as the "Uniform Prudent Management of Institutional Funds Act".

History: Laws 2009, ch. 130, § 1.

### **ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 130, § 12 provided that the act was effective July 1, 2009.

#### **46-9A-2. Definitions.**

As used in the Uniform Prudent Management of Institutional Funds Act:

A. "charitable purpose" means the relief of poverty, advancement of education or religion, promotion of health, promotion of a governmental purpose or any other purpose the achievement of which is beneficial to the community;

B. "endowment fund" means an institutional fund or part thereof that, pursuant to the terms of a gift instrument, is not wholly expendable by the institution on a current

basis. "Endowment fund" does not include assets that an institution designates as an endowment fund for its own use;

C. "gift instrument" means a record or records, including an institutional solicitation, pursuant to which property is granted to, transferred to or held by an institution as an institutional fund;

D. "institution" means:

(1) a person, other than an individual, organized and operated exclusively for charitable purposes;

(2) a government or governmental subdivision, agency or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; or

(3) a trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated;

E. "institutional fund" means a fund held by an institution exclusively for charitable purposes. "Institutional fund" does not include:

(1) program-related assets;

(2) a fund held for an institution by a trustee that is not an institution;

(3) a fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund;

(4) a fund established pursuant to the provisions of Article 8, Section 10 of the constitution of New Mexico; or

(5) a fund established pursuant to the provisions of Article 12, Section 2 of the constitution of New Mexico;

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

G. "program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment; and

H. "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

History: Laws 2009, ch. 130, § 2.

## ANNOTATIONS

**Effective dates.** — Laws 2009, ch. 130, § 12 provided that the act was effective July 1, 2009.

### **46-9A-3. Standard of conduct in managing and investing an institutional fund.**

A. Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

B. In addition to complying with the duty of loyalty imposed by law other than the Uniform Prudent Management of Institutional Funds Act, each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

C. In managing and investing an institutional fund, an institution:

(1) may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution and the skills available to the institution; and

(2) shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

D. An institution may pool two or more institutional funds for purposes of management and investment.

E. Except as otherwise provided by a gift instrument, the following rules apply:

(1) in managing and investing an institutional fund, the following factors, if relevant, shall be considered:

(a) general economic conditions;

(b) the possible effect of inflation or deflation;

(c) the expected tax consequences, if any, of investment decisions or strategies;

(d) the role that each investment or course of action plays within the overall investment portfolio of the fund;

(e) the expected total return from income and the appreciation of investments;

(f) other resources of the institution;

(g) the needs of the institution and the fund to make distributions and to preserve capital; and

(h) an asset's special relationship or special value, if any, to the charitable purposes of the institution;

(2) management and investment decisions about an individual asset shall be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution;

(3) except as otherwise provided by law other than the Uniform Prudent Management of Institutional Funds Act, an institution may invest in any kind of property or type of investment consistent with this section;

(4) an institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification;

(5) within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of the Uniform Prudent Management of Institutional Funds Act; and

(6) a person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

History: Laws 2009, ch. 130, § 3.

## ANNOTATIONS

**Effective dates.** — Laws 2009, ch. 130, § 12 provided that the act was effective July 1, 2009.

### **46-9A-4. Appropriation for expenditure or accumulation of an endowment fund; rules of construction.**

A. Subject to the intent of a donor expressed in the gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the

assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

- (1) the duration and preservation of the endowment fund;
- (2) the purposes of the institution and the endowment fund;
- (3) general economic conditions;
- (4) the possible effect of inflation or deflation;
- (5) the expected total return from income and the appreciation of investments;
- (6) other resources of the institution; and
- (7) the investment policy of the institution.

B. To limit the authority to appropriate for expenditure or accumulate pursuant to Subsection A of this section, a gift instrument shall specifically state the limitation.

C. Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only "income", "interest", "dividends" or "rents, issues or profits", or "to preserve the principal intact", or words of similar import:

- (1) create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund; and
- (2) do not otherwise limit the authority to appropriate for expenditure or accumulate pursuant to Subsection A of this section.

History: Laws 2009, ch. 130, § 4.

## **ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 130, § 12 provided that the act was effective July 1, 2009.

### **46-9A-5. Delegation of management and investment functions.**

A. Subject to any specific limitation set forth in a gift instrument or in any law other than the Uniform Prudent Management of Institutional Funds Act, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An

institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

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

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

C. An institution that complies with Subsection A of this section is not liable for the decisions or actions of an agent to which the function was delegated.

D. By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

E. An institution may delegate management and investment functions to its committees, officers or employees as authorized by law of this state other than the Uniform Prudent Management of Institutional Funds Act.

History: Laws 2009, ch. 130, § 5.

## ANNOTATIONS

**Effective dates.** — Laws 2009, ch. 130, § 12 provided that the act was effective July 1, 2009.

### **46-9A-6. Release or modification of restrictions on management, investment or purpose.**

A. If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

B. The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if the restriction impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The



institution shall notify the attorney general of the application, and the attorney general shall be given an opportunity to be heard. To the extent practicable, any modification shall be made in accordance with the donor's probable intention.

C. If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the attorney general of the application, and the attorney general shall be given an opportunity to be heard.

D. If an institution determines that a restriction contained in a gift instrument on the management, investment or purpose of an institutional fund is unlawful, impracticable, impossible to achieve or wasteful, the institution, sixty days after notification to the attorney general, may release or modify the restriction, in whole or part, if:

(1) the institutional fund subject to the restriction has a total value of less than twenty-five thousand dollars (\$25,000);

(2) more than twenty years have elapsed since the fund was established; and

(3) the institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

History: Laws 2009, ch. 130, § 6.

## ANNOTATIONS

**Effective dates.** — Laws 2009, ch. 130, § 12 provided that the act was effective July 1, 2009.

### **46-9A-7. Reviewing compliance.**

Compliance with the Uniform Prudent Management of Institutional Funds Act is determined in light of the facts and circumstances existing at the time a decision is made or action is taken and not by hindsight.

History: Laws 2009, ch. 130, § 7.

## ANNOTATIONS

**Effective dates.** — Laws 2009, ch. 130, § 12 provided that the act was effective July 1, 2009.

### **46-9A-8. Application to existing institutional funds.**

The Uniform Prudent Management of Institutional Funds Act applies to institutional funds existing on or established after July 1, 2009. As applied to institutional funds existing on July 1, 2009, the Uniform Prudent Management of Institutional Funds Act governs only decisions made or actions taken on or after July 1, 2009. Decisions made and actions taken before July 1, 2009 are governed by the Uniform Management of Institutional Funds Act [repealed] as if that act had not been repealed.

History: Laws 2009, ch. 130, § 8.

#### **ANNOTATIONS**

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

Laws 2009, ch. 130, § 11, repealed the Uniform Management of Institutional Funds Act, effective July 1, 2009.

**Effective dates.** — Laws 2009, ch. 130, § 12 provided that the act was effective July 1, 2009.

#### **46-9A-9. Relation to Electronic Signatures in Global and National Commerce Act.**

The Uniform Prudent Management of Institutional Funds Act modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101 of that act, 15 U.S.C. Section 7001(a), or authorize electronic delivery of any of the notices described in Section 103 of that act, 15 U.S.C. Section 7003(b).

History: Laws 2009, ch. 130, § 9.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 130, § 12 provided that the act was effective July 1, 2009.

#### **46-9A-10. Uniformity of application and construction.**

In applying and construing the Uniform Prudent Management of Institutional Funds Act, 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 2009, ch. 130, § 10.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 130, § 12 provided that the act was effective July 1, 2009.

## **ARTICLE 10**

### **Uniform Disclaimer of Property Interests Act**

#### **46-10-1. Recompiled.**

##### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 89 recompiled and amended former 46-10-1 NMSA 1978 as 45-2-1101 NMSA 1978, effective January 1, 2012.

#### **46-10-2. Recompiled.**

##### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 90 recompiled and amended former 46-10-2 NMSA 1978 as 45-2-1102 NMSA 1978, effective January 1, 2012.

#### **46-10-3. Recompiled.**

##### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 101 recompiled former 46-10-3 NMSA 1978 as 45-2-1103 NMSA 1978, effective January 1, 2012.

#### **46-10-4. Recompiled.**

##### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 101 recompiled former 46-10-4 NMSA 1978 as 45-2-1104 NMSA 1978, effective January 1, 2012.

#### **46-10-5. Recompiled.**

##### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 101 recompiled former 46-10-5 NMSA 1978 as 45-2-1105 NMSA 1978, effective January 1, 2012.

#### **46-10-6. Recompiled.**

##### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 91 recompiled and amended former 46-10-6 NMSA 1978 as 45-2-1106 NMSA 1978, effective January 1, 2012.

#### **46-10-7. Recompiled.**

##### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 101 recompiled former 46-10-7 NMSA 1978 as 45-2-1107 NMSA 1978, effective January 1, 2012.

#### **46-10-8. Recompiled.**

##### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 101 recompiled former 46-10-8 NMSA 1978 as 45-2-1108 NMSA 1978, effective January 1, 2012.

#### **46-10-9. Recompiled.**

##### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 101 recompiled former 46-10-9 NMSA 1978 as 45-2-1109 NMSA 1978, effective January 1, 2012.

#### **46-10-10. Recompiled.**

##### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 101 recompiled former 46-10-10 NMSA 1978 as 45-2-1110 NMSA 1978, effective January 1, 2012.

#### **46-10-11. Recompiled.**

##### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 101 recompiled former 46-10-11 NMSA 1978 as 45-2-1111 NMSA 1978, effective January 1, 2012.

#### **46-10-12. Recompiled.**

##### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 92 recompiled and amended former 46-10-12 NMSA 1978 as 45-2-1112 NMSA 1978, effective January 1, 2012.

## **46-10-13. Recompiled.**

### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 101 recompiled former 46-10-13 NMSA 1978 as 45-2-1113 NMSA 1978, effective January 1, 2012.

## **46-10-14. Recompiled.**

### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 101 recompiled former 46-10-14 NMSA 1978 as 45-2-1114 NMSA 1978, effective January 1, 2012.

## **46-10-15. Recompiled.**

### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 93 recompiled and amended former 46-10-15 NMSA 1978 as 45-2-1115 NMSA 1978, effective January 1, 2012.

## **46-10-16. Recompiled.**

### **ANNOTATIONS**

**Recompilations.** — Laws 2011, ch. 124, § 101 recompiled former 46-10-16 NMSA 1978 as 45-2-1116 NMSA 1978, effective January 1, 2012.

## **46-10-17. Repealed.**

### **ANNOTATIONS**

**Repeals.** — Laws 2011, ch. 124, § 97 repealed 46-10-17 NMSA 1978, as enacted by Laws 2001, ch. 290, § 17, relating to uniformity of application and construction, effective January 1, 2012. For provisions of former section, see the 2010 NMSA 1978 on *NMOneSource.com*.

# **ARTICLE 11**

## **Uniform Powers of Appointment**

### **ARTICLE 1**

#### **GENERAL PROVISIONS**

## **46-11-101. Short title.**

Sections 101 through 603 [46-11-101 through 46-11-603] of this act may be cited as the "Uniform Powers of Appointment Act".

History: Laws 2016, ch. 69, § 101.

### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

## **46-11-102. Definitions.**

As used in the Uniform Powers of Appointment Act:

A. "appointee" means a person to which a powerholder makes an appointment of appointive property;

B. "appointive property" means the property or property interest subject to a power of appointment;

C. "blanket-exercise clause" means a clause in an instrument that exercises a power of appointment and is not a specific-exercise clause. "Blanket-exercise clause" includes a clause that:

(1) expressly uses the words "any power" in exercising any power of appointment the powerholder has;

(2) expressly uses the words "any property" in appointing any property over which the powerholder has a power of appointment; or

(3) disposes of all property subject to disposition by the powerholder;

D. "donor" means a person that creates a power of appointment;

E. "exclusionary power of appointment" means a power of appointment exercisable in favor of any one or more of the permissible appointees to the exclusion of the other permissible appointees;

F. "general power of appointment" means a power of appointment exercisable in favor of the powerholder, the powerholder's estate, a creditor of the powerholder or a creditor of the powerholder's estate;

G. "gift-in-default clause" means a clause identifying a taker in default of appointment;

H. "impermissible appointee" means a person that is not a permissible appointee;

I. "instrument" means a record;

J. "nongeneral power of appointment" means a power of appointment that is not a general power of appointment;

K. "permissible appointee" means a person in whose favor a powerholder may exercise a power of appointment;

L. "person" means an individual; an estate; a trust; a business or nonprofit entity; a public corporation; a government or governmental subdivision, agency or instrumentality; or another legal entity;

M. "power of appointment" means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. "Power of appointment" does not include a power of attorney;

N. "powerholder" means a person in which a donor creates a power of appointment;

O. "presently exercisable power of appointment" means a power of appointment exercisable by the powerholder at the relevant time. "Presently exercisable power of appointment":

(1) includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard or the passage of a specified time only after:

(a) the occurrence of the specified event;

(b) the satisfaction of the ascertainable standard; or

(c) the passage of the specified time; and

(2) does not include a power exercisable only at the powerholder's death;

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

Q. "specific-exercise clause" means a clause in an instrument that specifically refers to and exercises a particular power of appointment;

R. "taker in default of appointment" means a person that takes all or part of the appointive property to the extent the powerholder does not effectively exercise the power of appointment; and

S. "terms of the instrument" means the manifestation of the intent of the maker of the instrument regarding the instrument's provisions as expressed in the instrument or as may be established by other evidence that would be admissible in a legal proceeding.

History: Laws 2016, ch. 69, § 102.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-103. Governing law.**

Unless the terms of the instrument creating a power of appointment manifest a contrary intent:

A. the creation, revocation or amendment of the power is governed by the law of the donor's domicile at the relevant time; and

B. the exercise, release or disclaimer of the power, or the revocation or amendment of the exercise, release or disclaimer of the power, is governed by the law of the powerholder's domicile at the relevant time.

History: Laws 2016, ch. 69, § 103.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-104. Common law and principles of equity.**

The common law and principles of equity supplement the Uniform Powers of Appointment Act, except to the extent modified by that act or New Mexico law other than that act.

History: Laws 2016, ch. 69, § 104.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.



## **ARTICLE 2 CREATION, REVOCATION AND AMENDMENT OF POWER OF APPOINTMENT**

### **46-11-201. Creation of power of appointment.**

A. A power of appointment is created only if:

(1) the instrument creating the power:

(a) is valid under applicable law; and

(b) except as otherwise provided in Subsection B of this section, transfers the appointive property; and

(2) the terms of the instrument creating the power manifest the donor's intent to create in a powerholder a power of appointment over the appointive property exercisable in favor of a permissible appointee.

B. Subparagraph (b) of Paragraph (1) of Subsection A of this section does not apply to the creation of a power of appointment by the exercise of a power of appointment.

C. A power of appointment shall not be created in a deceased individual.

D. Subject to the provisions of Section 45-2-901 NMSA 1978, a power of appointment may be created in an unborn or unascertained powerholder.

History: Laws 2016, ch. 69, § 201.

### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

### **46-11-202. Nontransferability.**

A powerholder shall not transfer a power of appointment. If a powerholder dies without exercising or releasing a power, the power lapses.

History: Laws 2016, ch. 69, § 202.

### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

### **46-11-203. Presumption of unlimited authority.**

Subject to Section 205 [46-11-205 NMSA 1978] of the Uniform Powers of Appointment Act, and unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is:

A. presently exercisable;

B. exclusionary; and

C. except as otherwise provided in Section 204 [46-11-204 NMSA 1978] of the Uniform Powers of Appointment Act, general.

History: Laws 2016, ch. 69, § 203.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

### **46-11-204. Exception to presumption of unlimited authority.**

Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is nongeneral if:

A. the power is exercisable only at the powerholder's death; and

B. the permissible appointees of the power are a defined and limited class that does not include the powerholder's estate, the powerholder's creditors or the creditors of the powerholder's estate.

History: Laws 2016, ch. 69, § 204.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

### **46-11-205. Rules of classification.**

A. As used in this section, "adverse party" means a person with a substantial beneficial interest in property that would be affected adversely by a powerholder's exercise or nonexercise of a power of appointment in favor of the powerholder, the

powerholder's estate, a creditor of the powerholder or a creditor of the powerholder's estate.

B. If a powerholder may exercise a power of appointment only with the consent or joinder of an adverse party, the power is nongeneral.

C. If the permissible appointees of a power of appointment are not defined and limited, the power is exclusionary.

History: Laws 2016, ch. 69, § 205.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-206. Power to revoke or amend.**

A donor may revoke or amend a power of appointment only to the extent that:

A. the instrument creating the power is revocable by the donor; or

B. the donor reserves a power of revocation or amendment in the instrument creating the power of appointment.

History: Laws 2016, ch. 69, § 206.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

### **ARTICLE 3**

## **EXERCISE OF POWER OF APPOINTMENT**

#### **46-11-301. Requisites for exercise of power of appointment.**

A power of appointment is exercised only:

A. if the instrument exercising the power is valid under applicable law; and

B. if the terms of the instrument exercising the power:

(1) manifest the powerholder's intent to exercise the power; and

(2) subject to Section 304 [46-11-304 NMSA 1978] of the Uniform Powers of Appointment Act, satisfy the requirements of exercise, if any, imposed by the donor; and

C. to the extent the appointment is a permissible exercise of the power.

History: Laws 2016, ch. 69, § 301.

#### ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-302. Intent to exercise; determining intent from residuary clause.**

A. As used in this section:

(1) "residuary clause" does not include a residuary clause containing a blanket-exercise clause or a specific-exercise clause; and

(2) "will" includes a codicil and a testamentary instrument that revises another will.

B. A residuary clause in a powerholder's will, or a comparable clause in the powerholder's revocable trust, manifests the powerholder's intent to exercise a power of appointment only if:

(1) the terms of the instrument containing the residuary clause do not manifest a contrary intent;

(2) the power is a general power exercisable in favor of the powerholder's estate;

(3) there is no gift-in-default clause or the gift-in-default clause is ineffective; and

(4) the powerholder did not release the power.

History: Laws 2016, ch. 69, § 302.

#### ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-303. Intent to exercise; after-acquired power.**

Unless the terms of the instrument exercising a power of appointment manifest a contrary intent:

A. except as otherwise provided in Subsection B of this section, a blanket-exercise clause extends to a power acquired by the powerholder after executing the instrument containing the clause; and

B. if the powerholder is also the donor of the power, the clause does not extend to the power unless there is no gift-in-default clause or the gift-in-default clause is ineffective.

History: Laws 2016, ch. 69, § 303.

### ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-304. Substantial compliance with donor-imposed formal requirement.**

A powerholder's substantial compliance with a formal requirement of appointment imposed by the donor, including a requirement that the instrument exercising the power of appointment make reference or specific reference to the power, is sufficient if:

A. the powerholder knows of and intends to exercise the power; and

B. the powerholder's manner of attempted exercise of the power does not impair a material purpose of the donor in imposing the requirement.

History: Laws 2016, ch. 69, § 304.

### ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-305. Permissible appointment.**

A. A powerholder of a general power of appointment that permits appointment to the powerholder or the powerholder's estate may make any appointment, including an appointment in trust or creating a new power of appointment, that the powerholder could make in disposing of the powerholder's own property.

B. A powerholder of a general power of appointment that permits appointment only to the creditors of the powerholder or of the powerholder's estate may appoint only to those creditors.

C. Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the powerholder of a nongeneral power may:

- (1) make an appointment in any form, including an appointment in trust, in favor of a permissible appointee;
- (2) create a general power in a permissible appointee; or
- (3) create a nongeneral power in any person to appoint to one or more of the permissible appointees of the original nongeneral power.

History: Laws 2016, ch. 69, § 305.

#### ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-306. Appointment to deceased appointee or permissible appointee's descendant.**

A. Subject to Sections 45-2-603 and 45-2-707 NMSA 1978, an appointment to a deceased appointee is ineffective.

B. Unless the terms of the instrument creating a power of appointment manifest a contrary intent, a powerholder of a nongeneral power may exercise the power in favor of, or create a new power of appointment in, a descendant of a deceased permissible appointee whether or not the descendant is described by the donor as a permissible appointee.

History: Laws 2016, ch. 69, § 306.

#### ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-307. Impermissible appointment.**

A. Except as otherwise provided in Section 306 [46-11-306 NMSA 1978] of the Uniform Powers of Appointment Act, an exercise of a power of appointment in favor of an impermissible appointee is ineffective.

B. An exercise of a power of appointment in favor of a permissible appointee is ineffective to the extent the appointment is a fraud on the power.

History: Laws 2016, ch. 69, § 307.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-308. Selective allocation doctrine.**

If a powerholder exercises a power of appointment in a disposition that also disposes of property the powerholder owns, the owned property and the appointive property must be allocated in the permissible manner that best carries out the powerholder's intent.

History: Laws 2016, ch. 69, § 308.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-309. Capture doctrine; disposition of ineffectively appointed property under general power.**

To the extent a powerholder of a general power of appointment, other than a power to withdraw property from, revoke or amend a trust, makes an ineffective appointment:

A. the gift-in-default clause controls the disposition of the ineffectively appointed property; or

B. if there is no gift-in-default clause or to the extent the clause is ineffective, the ineffectively appointed property:

(1) passes to:

(a) the powerholder if the powerholder is a permissible appointee and is living; or

(b) if the powerholder is an impermissible appointee or deceased, the powerholder's estate if the estate is a permissible appointee; or

(2) if there is no taker under Paragraph (1) of this subsection, passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

History: Laws 2016, ch. 69, § 309.

### ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-310. Disposition of unappointed property under released or unexercised general power.**

To the extent a powerholder releases or fails to exercise a general power of appointment other than a power to withdraw property from, revoke or amend a trust:

A. the gift-in-default clause controls the disposition of the unappointed property; or

B. if there is no gift-in-default clause or to the extent the clause is ineffective:

(1) except as otherwise provided in Paragraph (2) of this subsection, the unappointed property passes to:

(a) the powerholder if the powerholder is a permissible appointee and is living; or

(b) if the powerholder is an impermissible appointee or deceased, the powerholder's estate if the estate is a permissible appointee; or

(2) to the extent the powerholder released the power, or if there is no taker under Paragraph (1) of this subsection, the unappointed property passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

History: Laws 2016, ch. 69, § 310.

### ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-311. Disposition of unappointed property under released or unexercised nongeneral power.**

To the extent a powerholder releases, ineffectively exercises or fails to exercise a nongeneral power of appointment:

A. the gift-in-default clause controls the disposition of the unappointed property; or



B. if there is no gift-in-default clause or to the extent that the clause is ineffective, the unappointed property:

(1) passes to the permissible appointees if:

(a) the permissible appointees are defined and limited; and

(b) the terms of the instrument creating the power do not manifest a contrary intent; or

(2) if there is no taker under Paragraph (1) of this subsection, passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

History: Laws 2016, ch. 69, § 311.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-312. Disposition of unappointed property if partial appointment to taker in default.**

Unless the terms of the instrument creating or exercising a power of appointment manifest a contrary intent, if the powerholder makes a valid partial appointment to a taker in default of appointment, the taker in default of appointment may share fully in unappointed property.

History: Laws 2016, ch. 69, § 312.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-313. Appointment to taker in default.**

If a powerholder makes an appointment to a taker in default of appointment and the appointee would have taken the property under a gift-in-default clause had the property not been appointed, the power of appointment is deemed not to have been exercised and the appointee takes under the clause.

History: Laws 2016, ch. 69, § 313.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-314. Powerholder's authority to revoke or amend exercise.**

A powerholder may revoke or amend an exercise of a power of appointment only to the extent that:

A. the powerholder reserves a power of revocation or amendment in the instrument exercising the power of appointment and, if the power is nongeneral, the terms of the instrument creating the power of appointment do not prohibit the reservation; or

B. the terms of the instrument creating the power of appointment provide that the exercise is revocable or amendable.

History: Laws 2016, ch. 69, § 314.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

## **ARTICLE 4 DISCLAIMER OR RELEASE; CONTRACT TO APPOINT OR NOT TO APPOINT**

#### **46-11-401. Disclaimer.**

As provided by the Uniform Disclaimer of Property Interests Act [45-2-1101 through 45-2-1116 NMSA 1978]:

A. a powerholder may disclaim all or part of a power of appointment; and

B. a permissible appointee, appointee or taker in default of appointment may disclaim all or part of an interest in appointive property.

History: Laws 2016, ch. 69, § 401.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-402. Authority to release.**

A powerholder may release a power of appointment, in whole or in part, except to the extent that the terms of the instrument creating the power prevent the release.

History: Laws 2016, ch. 69, § 402.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-403. Method of release.**

A powerholder of a releasable power of appointment may release the power in whole or in part:

A. by substantial compliance with a method provided in the terms of the instrument creating the power; or

B. if the terms of the instrument creating the power do not provide a method or the method provided in the terms of the instrument is not expressly made exclusive, by a record manifesting the powerholder's intent by clear and convincing evidence.

History: Laws 2016, ch. 69, § 403.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-404. Revocation or amendment of release.**

A powerholder may revoke or amend a release of a power of appointment only to the extent that:

A. the instrument of release is revocable by the powerholder; or

B. the powerholder reserves a power of revocation or amendment in the instrument of release.

History: Laws 2016, ch. 69, § 404.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

**46-11-405. Power to contract; presently exercisable power of appointment.**

A powerholder of a presently exercisable power of appointment may contract:

A. not to exercise the power; or

B. to exercise the power if the contract when made does not confer a benefit on an impermissible appointee.

History: Laws 2016, ch. 69, § 405.

**ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

**46-11-406. Power to contract; power of appointment not presently exercisable.**

A powerholder of a power of appointment that is not presently exercisable may contract to exercise or not to exercise the power only if the powerholder:

A. is also the donor of the power; and

B. has reserved the power in a revocable trust.

History: Laws 2016, ch. 69, § 406.

**ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

**46-11-407. Remedy for breach of contract to appoint or not to appoint.**

The remedy for a powerholder's breach of a contract to appoint or not to appoint appointive property is limited to damages payable out of the appointive property or, if appropriate, specific performance of the contract.

History: Laws 2016, ch. 69, § 407.

**ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

## **ARTICLE 5**

### **RIGHTS OF POWERHOLDER'S CREDITORS IN APPOINTIVE PROPERTY**

#### **46-11-501. Creditor claim; general power created by powerholder.**

A. As used in this section, "power of appointment created by the powerholder" includes a power of appointment created in a transfer by another person to the extent that the powerholder contributed value to the transfer.

B. Appointive property subject to a general power of appointment created by the powerholder is subject to a claim of a creditor of the powerholder or of the powerholder's estate to the extent provided in the Uniform Voidable Transactions Act [56-10-14 through 56-10-29 NMSA 1978].

C. Subject to Subsection B of this section, appointive property subject to a general power of appointment created by the powerholder is not subject to a claim of a creditor of the powerholder or the powerholder's estate to the extent the powerholder irrevocably appointed the property in favor of a person other than the powerholder or the powerholder's estate.

D. Subject to Subsections B and C of this section, and notwithstanding the presence of a spendthrift provision or whether the claim arose before or after the creation of the power of appointment, appointive property subject to a general power of appointment created by the powerholder is subject to a claim of a creditor of:

(1) the powerholder, to the same extent as if the powerholder owned the appointive property, if the power is presently exercisable; and

(2) the powerholder's estate, to the extent the estate is insufficient to satisfy the claim and subject to the right of a decedent to direct the source from which liabilities are paid, if the power is exercisable at the powerholder's death.

History: Laws 2016, ch. 69, § 501.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

## **46-11-502. Creditor claim; general power not created by powerholder.**

A. Except as otherwise provided in Subsection B of this section, appointive property subject to a general power of appointment created by a person other than the powerholder is subject to a claim of a creditor of:

(1) the powerholder, to the extent that the powerholder's property is insufficient, if the power is presently exercisable; and

(2) the powerholder's estate, to the extent that the estate is insufficient, subject to the right of a decedent to direct the source from which liabilities are paid.

B. Subject to Subsection C of Section 504 [46-11-504 NMSA 1978] of the Uniform Powers of Appointment Act, a power of appointment created by a person other than the powerholder that is subject to an ascertainable standard relating to an individual's health, education, support or maintenance within the meaning of 26 U.S.C. Section 2041(b)(1)(A), as amended, or 26 U.S.C. Section 2514(c)(1), as amended, is treated for purposes of this article as a nongeneral power.

History: Laws 2016, ch. 69, § 502.

### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

## **46-11-503. Power to withdraw.**

A. For purposes of this article and except as otherwise provided in Subsection B of this section, a power to withdraw property from a trust is treated, during the time the power may be exercised, as a presently exercisable general power of appointment to the extent of the property subject to the power to withdraw.

B. On the lapse, release or waiver of a power to withdraw property from a trust, the power is treated as a presently exercisable general power of appointment only to the extent that the value of the property affected by the lapse, release or waiver exceeds the greater of the amount specified in 26 U.S.C. Section 2041(b)(2), as amended, and 26 U.S.C. Section 2514(e), as amended, or the amount specified in 26 U.S.C. Section 2503(b), as amended.

History: Laws 2016, ch. 69, § 503.

### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-504. Creditor claim; nongeneral power.**

A. Except as otherwise provided in Subsections B and C of this section, appointive property subject to a nongeneral power of appointment is exempt from a claim of a creditor of the powerholder or the powerholder's estate.

B. Appointive property subject to a nongeneral power of appointment is subject to a claim of a creditor of the powerholder or the powerholder's estate to the extent that the powerholder owned the property and, reserving the nongeneral power, transferred the property in violation of the Uniform Voidable Transactions Act [56-10-14 through 56-10-29 NMSA 1978].

C. If the initial gift in default of appointment is to the powerholder or the powerholder's estate, a nongeneral power of appointment is treated for purposes of this article as a general power.

History: Laws 2016, ch. 69, § 504.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

## **ARTICLE 6 MISCELLANEOUS PROVISIONS**

#### **46-11-601. Uniformity of application and construction.**

In applying and construing the Uniform Powers of Appointment Act, consideration shall be given to the need to promote uniformity of the act with respect to its subject matter among states that enact it.

History: Laws 2016, ch. 69, § 601.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

#### **46-11-602. Relation to Electronic Signatures in Global and National Commerce Act.**

The Uniform Powers of Appointment Act modifies, limits or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

History: Laws 2016, ch. 69, § 602.

## ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

### **46-11-603. Application to existing relationships.**

A. Except as otherwise provided in the Uniform Powers of Appointment Act, on and after January 1, 2017:

(1) the Uniform Powers of Appointment Act applies to a power of appointment created before, on or after January 1, 2017;

(2) the Uniform Powers of Appointment Act applies to a judicial proceeding concerning a power of appointment commenced on or after January 1, 2017;

(3) the Uniform Powers of Appointment Act applies to a judicial proceeding concerning a power of appointment commenced before January 1, 2017 unless the court finds that application of a particular provision of the Uniform Powers of Appointment Act would interfere substantially with the effective conduct of the judicial proceeding or prejudice a right of a party, in which case the particular provision of the Uniform Powers of Appointment Act does not apply and the superseded law applies;

(4) a rule of construction or presumption provided in the Uniform Powers of Appointment Act applies to an instrument executed before January 1, 2017 unless there is a clear indication of a contrary intent in the terms of the instrument; and

(5) except as otherwise provided in Paragraphs (1) through (4) of this subsection, an action done before January 1, 2017 is not affected by the Uniform Powers of Appointment Act.

B. If a right is acquired, extinguished or barred on the expiration of a prescribed period that commenced under New Mexico law other than the Uniform Powers of Appointment Act before January 1, 2017, the law continues to apply to the right.

History: Laws 2016, ch. 69, § 603.

## ANNOTATIONS



**Effective dates.** — Laws 2016, ch. 69, § 727B made Laws 2016, ch. 69, §§ 101 through 603 and 724 effective January 1, 2017.

## **ARTICLE 12**

### **Uniform Trust Decanting**

#### **46-12-101. Short title.**

Sections 1-101 through 1-129 [46-12-101 through 46-12-129 NMSA 1978] of this act may be cited as the "Uniform Trust Decanting Act".

History: Laws 2016, ch. 72, § 1-101.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-102. Definitions.**

As used in the Uniform Trust Decanting Act:

A. "appointive property" means the property or property interest subject to a power of appointment;

B. "ascertainable standard" means a standard relating to an individual's health, education, support or maintenance within the meaning of 26 U.S.C. Section 2041(b)(1)(A), as amended, or 26 U.S.C. Section 2514(c)(1), as amended, and any applicable regulations;

C. "authorized fiduciary" means:

(1) a trustee or other fiduciary, other than a settlor, that has discretion to distribute, or direct a trustee to distribute, part or all of the principal of the first trust to one or more current beneficiaries;

(2) a special fiduciary appointed under Section 1-109 [46-12-109 NMSA 1978] of the Uniform Trust Decanting Act; or

(3) a special-needs fiduciary under Section 1-113 [46-12-113 NMSA 1978] of the Uniform Trust Decanting Act;

D. "beneficiary" means a person that:

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

(2) holds a power of appointment over trust property; or

(3) is an identified charitable organization that will or may receive distributions under the terms of the trust;

E. "charitable interest" means an interest in a trust that:

(1) is held by an identified charitable organization and makes the organization a qualified beneficiary;

(2) benefits only charitable organizations and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary; or

(3) is held solely for charitable purposes and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary;

F. "charitable organization" means:

(1) a person, other than an individual, organized and operated exclusively for charitable purposes; or

(2) a government or governmental subdivision, agency or instrumentality, to the extent it holds funds exclusively for a charitable purpose;

G. "charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, a municipal or other governmental purpose or another purpose the achievement of which is beneficial to the community;

H. "court" means the district court;

I. "current beneficiary" means a beneficiary that, on the date the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal. "Current beneficiary":

(1) includes the holder of a presently exercisable general power of appointment; and

(2) does not include a person that is a beneficiary only because the person holds any other power of appointment;

J. "decanting power" or "the decanting power" means the power of an authorized fiduciary under the Uniform Trust Decanting Act to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust;

K. "expanded distributive discretion" means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard;

L. "first trust" means a trust over which an authorized fiduciary may exercise the decanting power;

M. "first-trust instrument" means the trust instrument for a first trust;

N. "general power of appointment" means a power of appointment exercisable in favor of a powerholder, the powerholder's estate, a creditor of the powerholder or a creditor of the powerholder's estate;

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

P. "person" means an individual; an estate; a business or nonprofit entity; a public corporation; a government or governmental subdivision, agency or instrumentality; or another legal entity;

Q. "power of appointment" means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. "Power of appointment" does not include a power of attorney;

R. "powerholder" means a person in which a donor creates a power of appointment;

S. "presently exercisable power of appointment" means a power of appointment exercisable by the powerholder at the relevant time. "Presently exercisable power of appointment":

(1) includes a power of appointment exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard or the passage of a specified time only after:

(a) the occurrence of the specified event;

(b) the satisfaction of the ascertainable standard; or

(c) the passage of the specified time; and

(2) does not include a power exercisable only at the powerholder's death;

T. "qualified beneficiary" means a beneficiary that 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;

U. "reasonably definite standard" means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of 26 U.S.C. Section 674(b)(5)(A), as amended, and any applicable regulations;

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

W. "second trust" means:

(1) a first trust after modification under the Uniform Trust Decanting Act; or

(2) a trust to which a distribution of property from a first trust is or may be made under the Uniform Trust Decanting Act;

X. "second-trust instrument" means the trust instrument for a second trust;

Y. "settlor", except as otherwise provided in Section 1-125 [46-12-125 NMSA 1978] of the Uniform Trust Decanting Act, means a person, including a testator, that 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 the person's contribution except to the extent that another person has power to revoke or withdraw that portion;

Z. "sign" means, with present intent to authenticate or adopt a record:

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

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

AA. "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 located within the United States and recognized by federal law or formally acknowledged by a state of the United States;

BB. "terms of the trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument, as may be

established by other evidence that would be admissible in a judicial proceeding or as may be established by court order or nonjudicial settlement agreement; and

CC. "trust instrument" means a record executed by the settlor to create a trust or by any person to create a second trust that contains some or all of the terms of the trust, including any amendments.

History: Laws 2016, ch. 72, § 1-102.

## ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

### **46-12-103. Scope.**

A. Except as otherwise provided in Subsections B and C of this section, the Uniform Trust Decanting Act applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.

B. The Uniform Trust Decanting Act does not apply to a trust held solely for charitable purposes.

C. Subject to Section 1-115 [46-12-115 NMSA 1978] of the Uniform Trust Decanting Act, a trust instrument may restrict or prohibit exercise of the decanting power.

D. The Uniform Trust Decanting Act does not limit the power of a trustee, powerholder or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, New Mexico law other than the Uniform Trust Decanting Act, common law, a court order or a nonjudicial-settlement agreement.

E. The Uniform Trust Decanting Act does not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

History: Laws 2016, ch. 72, § 1-103.

## ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

### **46-12-104. Fiduciary duty.**

A. In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

B. The Uniform Trust Decanting Act does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of the Uniform Trust Decanting Act.

C. Except as otherwise provided in a first-trust instrument, the terms of the first trust are, for purposes of the Uniform Trust Decanting Act, Section 46A-8-801 NMSA 1978 and Subsection A of Section 46A-8-802 NMSA 1978, deemed to include the decanting power.

History: Laws 2016, ch. 72, § 1-104.

### ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-105. Application; governing law.**

A. The Uniform Trust Decanting Act applies to a trust that:

(1) has its principal place of administration in New Mexico, including a trust whose principal place of administration has been changed to New Mexico; or

(2) provides by its trust instrument that it is governed by New Mexico law or is governed by New Mexico law for the purpose of:

(a) administration, including administration of a trust whose governing law for purposes of administration has been changed to New Mexico law;

(b) construction of terms of the trust; or

(c) determining the meaning or effect of terms of the trust.

B. Except as otherwise provided in the Uniform Trust Decanting Act, on and after January 1, 2017:

(1) the Uniform Trust Decanting Act applies to a trust created before, on or after January 1, 2017;

(2) the Uniform Trust Decanting Act applies to a judicial proceeding concerning a trust commenced on or after January 1, 2017;

(3) the Uniform Trust Decanting Act applies to a judicial proceeding concerning a trust commenced before January 1, 2017 unless the court finds that application of a particular provision of the Uniform Trust Decanting Act would interfere substantially with the effective conduct of the judicial proceeding or prejudice a right of a party, in which case the particular provision of the Uniform Trust Decanting Act does not apply and the superseded law applies;

(4) a rule of construction or presumption provided in the Uniform Trust Decanting Act applies to a trust instrument executed before January 1, 2017 unless there is a clear indication of a contrary intent in the terms of the instrument; and

(5) except as otherwise provided in Paragraphs (1) through (4) of this subsection, an action done before January 1, 2017 is not affected by the Uniform Trust Decanting Act.

C. If a right is acquired, extinguished or barred on the expiration of a prescribed period that commenced under New Mexico law other than the Uniform Trust Decanting Act before January 1, 2017, the law continues to apply to the right.

History: Laws 2016, ch. 72, § 1-105.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-106. Reasonable reliance.**

A trustee or other person that reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust under the Uniform Trust Decanting Act, New Mexico law other than the Uniform Trust Decanting Act or the law of another jurisdiction, is not liable to any person for any action or failure to act as a result of the reliance.

History: Laws 2016, ch. 72, § 1-106.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-107. Notice; exercise of decanting power.**

A. In this section, a notice period begins on the day notice is given under Subsection C of this section and ends fifty-nine days after the day notice is given.

B. Except as otherwise provided in the Uniform Trust Decanting Act, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

C. Except as otherwise provided in Subsection F of this section, an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than sixty days before the exercise to:

- (1) each settlor of the first trust, if living or then in existence;
- (2) each qualified beneficiary of the first trust;
- (3) each holder of a presently exercisable power of appointment over any part or all of the first trust;
- (4) each person that currently has the right to remove or replace the authorized fiduciary;
- (5) each other fiduciary of the first trust;
- (6) each fiduciary of the second trust; and
- (7) the attorney general, if Subsection B of Section 1-114 [46-12-114 NMSA 1978] of the Uniform Trust Decanting Act applies.

D. An authorized fiduciary is not required to give notice under Subsection C of this section to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

E. A notice given under Subsection C of this section shall:

- (1) specify the manner in which the authorized fiduciary intends to exercise the decanting power;
- (2) specify the proposed effective date for exercise of the power;
- (3) include a copy of the first-trust instrument; and
- (4) include a copy of all second-trust instruments.

F. The decanting power may be exercised before expiration of the notice period specified in Subsection A of this section if all persons entitled to receive notice waive the period in a signed record.



G. The receipt of notice, waiver of the notice period or expiration of the notice period does not affect the right of a person to file an application under Section 1-109 [46-12-109 NMSA 1978] of the Uniform Trust Decanting Act asserting that:

(1) an attempted exercise of the decanting power is ineffective because it did not comply with the Uniform Trust Decanting Act or was an abuse of discretion or breach of fiduciary duty; or

(2) Section 1-122 [46-12-122 NMSA 1978] of the Uniform Trust Decanting Act applies to the exercise of the decanting power.

H. An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under Subsection C of this section if the authorized fiduciary acted with reasonable care to comply with that subsection.

History: Laws 2016, ch. 72, § 1-107.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-108. Representation.**

A. Notice to a person with authority to represent and bind another person under a first-trust instrument or the Uniform Trust Code [Chapter 46A NMSA 1978] has the same effect as notice given directly to the person represented.

B. Consent of or waiver by a person with authority to represent and bind another person under a first-trust instrument or the Uniform Trust Code is binding on the person represented unless the person represented objects to the representation before the consent or waiver otherwise would become effective.

C. A person with authority to represent and bind another person under a first-trust instrument or the Uniform Trust Code may file an application under Section 1-109 [46-12-109 NMSA 1978] of the Uniform Trust Decanting Act on behalf of the person represented.

D. A settlor shall not represent or bind a beneficiary under the Uniform Trust Decanting Act.

History: Laws 2016, ch. 72, § 1-108.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

### **46-12-109. Court involvement.**

A. On application of an authorized fiduciary, a person entitled to notice under Subsection C of Section 1-107 [46-12-107 NMSA 1978] of the Uniform Trust Decanting Act, a beneficiary or, with respect to a charitable interest, the attorney general or other person that has standing to enforce the charitable interest, the court, may:

(1) provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under the Uniform Trust Decanting Act and consistent with the fiduciary duties of the authorized fiduciary;

(2) appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under the Uniform Trust Decanting Act and to exercise the decanting power;

(3) approve an exercise of the decanting power;

(4) determine that a proposed or attempted exercise of the decanting power is ineffective because:

(a) after applying Section 1-122 [46-12-122 NMSA 1978] of the Uniform Trust Decanting Act, the proposed or attempted exercise does not or did not comply with the Uniform Trust Decanting Act; or

(b) the proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty;

(5) determine the extent to which Section 1-122 of the Uniform Trust Decanting Act applies to a prior exercise of the decanting power;

(6) provide instructions to the trustee regarding the application of Section 1-122 of the Uniform Trust Decanting Act to a prior exercise of the decanting power; or

(7) order other relief to carry out the purposes of the Uniform Trust Decanting Act.

B. On application of an authorized fiduciary, the court may approve:

(1) an increase in the fiduciary's compensation under Section 1-116 [46-12-116 NMSA 1978] of the Uniform Trust Decanting Act; or

(2) a modification under Section 1-118 [46-12-118 NMSA 1978] of the Uniform Trust Decanting Act of a provision granting a person the right to remove or replace the fiduciary.

History: Laws 2016, ch. 72, § 1-109.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-110. Formalities.**

An exercise of the decanting power shall be made in a record signed by an authorized fiduciary. The signed record shall, directly or by reference to the notice required by Section 1-107 [46-12-107 NMA 1978] of the Uniform Trust Decanting Act, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

History: Laws 2016, ch. 72, § 1-110.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-111. Decanting power under expanded distributive discretion.**

A. As used in this section:

(1) "noncontingent right" means a right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. "Noncontingent right" does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary's estate;

(2) "presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary;

(3) "successor beneficiary" means a beneficiary that is not a qualified beneficiary on the date the beneficiary's qualification is determined. "Successor beneficiary" does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment; and

(4) "vested interest" means:

(a) a right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power;

(b) a current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount or a percentage of value of some or all of the trust property;

(c) a current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount or a percentage of value of some or all of the trust property;

(d) a presently exercisable general power of appointment; or

(e) a right to receive an ascertainable part of the trust property on the trust's termination that is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

B. Subject to Subsection C of this section and Section 1-114 [46-12-114 NMSA 1978] of the Uniform Trust Decanting Act, an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

C. Subject to Section 1-113 [46-12-113 NMSA 1978] of the Uniform Trust Decanting Act, in an exercise of the decanting power under this section, a second trust shall not:

(1) include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in Subsection D of this section;

(2) include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary or successor beneficiary of the first trust, except as otherwise provided in Subsection D of this section; or

(3) reduce or eliminate a vested interest.

D. Subject to Paragraph (3) of Subsection C of this section and Section 1-114 of the Uniform Trust Decanting Act, in an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction and may:

(1) retain a power of appointment granted in the first trust;

(2) omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

(3) create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and

(4) create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

E. A power of appointment described in Paragraphs (1) through (4) of Subsection D of this section may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust.

F. If an authorized fiduciary has expanded distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has expanded distributive discretion.

History: Laws 2016, ch. 72, § 1-111.

## ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

### **46-12-112. Decanting power under limited distributive discretion.**

A. As used in this section, "limited distributive discretion" means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

B. An authorized fiduciary that has limited distributive discretion over the principal of the first trust for benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

C. Under this section and subject to Section 1-114 [46-12-114 NMSA 1978] of the Uniform Trust Decanting Act, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, shall grant each beneficiary of the first trust beneficial interests that are substantially similar to the beneficial interests of the beneficiary in the first trust.

D. A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:

- (1) the distribution is applied for the benefit of the beneficiary;
- (2) the beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated and the distribution is made as permitted under the Uniform Trust Code [Chapter 46A NMSA 1978]; or
- (3) the distribution is made as permitted under the terms of the first-trust instrument and the second-trust instrument for the benefit of the beneficiary.

E. If an authorized fiduciary has limited distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power provided by this section over that part of the principal over which the authorized fiduciary has limited distributive discretion.

History: Laws 2016, ch. 72, § 1-112.

## ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

### **46-12-113. Trust for beneficiary with disability.**

A. As used in this section:

(1) "beneficiary with a disability" means a beneficiary of a first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated incapacitated;

(2) "governmental benefits" means financial aid or services from a state, federal or other type of public agency;

(3) "special-needs fiduciary" means, with respect to a trust that has a beneficiary with a disability:

(a) a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries;

(b) if no trustee or fiduciary has discretion under Subparagraph (a) of this paragraph, a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries;  
or

(c) if no trustee or fiduciary has discretion under Subparagraphs (a) and (b) of this paragraph, a trustee or other fiduciary, other than a settlor, that is required to

distribute part or all of the income or principal of the first trust to one or more current beneficiaries; and

(4) "special-needs trust" means a trust that the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

B. A special-needs fiduciary may exercise the decanting power provided by Section 1-111 [46-12-111 NMSA 1978] of the Uniform Trust Decanting Act over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:

(1) a second trust is a special-needs trust that benefits the beneficiary with a disability; and

(2) the special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

C. In an exercise of the decanting power provided by this section, the following rules apply:

(1) notwithstanding Paragraph (2) of Subsection C of Section 1-111 of the Uniform Trust Decanting Act, the interest in the second trust of a beneficiary with a disability may:

(a) be a pooled trust as defined by medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. Section 1396p(d)(4)(C), as amended; or

(b) contain payback provisions complying with reimbursement requirements of medicaid law under 42 U.S.C. Section 1396p(d)(4)(A), as amended;

(2) Paragraph (3) of Subsection C of Section 1-111 of the Uniform Trust Decanting Act does not apply to the interests of the beneficiary with a disability; and

(3) except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, shall grant each other beneficiary of the first trust beneficial interests in the second trusts that are substantially similar to the beneficiary's beneficial interests in the first trust.

History: Laws 2016, ch. 72, § 1-113.

## ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

## **46-12-114. Protection of charitable interest.**

A. As used in this section:

(1) "determinable charitable interest" means a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event or after the passage of a specified time and that is unconditional or will be held solely for charitable purposes; and

(2) "unconditional" means not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the United States Internal Revenue Code of 1986, as amended, on the date of the distribution if the charitable organization meets the requirement on the date of determination.

B. If a first trust contains a determinable charitable interest, the attorney general has the rights of a qualified beneficiary and may represent and bind the charitable interest.

C. If a first trust contains a charitable interest, the second trust or trusts shall not:

(1) diminish the charitable interest;

(2) diminish the interest of an identified charitable organization that holds the charitable interest;

(3) alter any charitable purpose stated in the first-trust instrument; or

(4) alter any condition or restriction related to the charitable interest.

D. If there are two or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of Subsection C of this section.

E. If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to Subsection C of this section shall be administered under New Mexico law unless:

(1) the attorney general, after receiving notice under Section 1-107 [46-12-107 NMSA 1978] of the Uniform Trust Decanting Act, fails to object in a signed record delivered to the authorized fiduciary within the notice period;

(2) the attorney general consents in a signed record to the second trust or trusts being administered under the law of another jurisdiction; or



(3) the court approves the exercise of the decanting power.

F. The Uniform Trust Decanting Act does not limit the powers and duties of the attorney general under New Mexico law other than that act.

History: Laws 2016, ch. 72, § 1-114.

## ANNOTATIONS

**Cross references.** — For the federal Internal Revenue Code of 1986, see 26 U.S.C. § 1.

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

### **46-12-115. Trust limitation on decanting.**

A. An authorized fiduciary shall not exercise the decanting power to the extent that the first-trust instrument expressly prohibits exercise of:

(1) the decanting power; or

(2) a power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust.

B. Exercise of the decanting power is subject to any restriction in the first-trust instrument that expressly applies to exercise of:

(1) the decanting power; or

(2) a power granted by state law to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

C. A general prohibition of the amendment or revocation of a first trust, a spendthrift clause or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.

D. Subject to Subsections A and B of this section, an authorized fiduciary may exercise the decanting power provided by the Uniform Trust Decanting Act even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.

E. If a first-trust instrument contains an express prohibition described in Subsection A of this section or an express restriction described in Subsection B of this section, the provision shall be included in the second-trust instrument.

History: Laws 2016, ch. 72, § 1-115.

## ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

### **46-12-116. Change in compensation.**

A. If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary shall not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless:

- (1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or
- (2) the increase is approved by the court.

B. If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary shall not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by the Uniform Trust Code [Chapter 46A NMSA 1978] unless:

- (1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or
- (2) the increase is approved by the court.

C. A change in an authorized fiduciary's compensation that is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of Subsections A and B of this section.

History: Laws 2016, ch. 72, § 1-116.

## ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

### **46-12-117. Relief from liability and indemnification.**

A. Except as otherwise provided in this section, a second-trust instrument shall not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument.

B. A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

C. A second-trust instrument shall not reduce fiduciary liability in the aggregate.

D. Subject to Subsection C of this section, a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by New Mexico law other than the Uniform Trust Decanting Act.

History: Laws 2016, ch. 72, § 1-117.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-118. Removal or replacement of authorized fiduciary.**

An authorized fiduciary shall not exercise the decanting power to modify a provision in a first-trust instrument granting another person power to remove or replace the fiduciary unless:

A. the person holding the power consents to the modification in a signed record and the modification applies only to the person;

B. the person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or

C. the court approves the modification and the modification grants a substantially similar power to another person.

History: Laws 2016, ch. 72, § 1-118.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-119. Tax-related limitations.**

A. As used in this section:

(1) "grantor trust" means a trust as to which a settlor of a first trust is considered the owner under 26 U.S.C. Sections 671 through 677, as amended, or 26 U.S.C. Section 679, as amended;

(2) "Internal Revenue Code" means the United States Internal Revenue Code of 1986, as amended;

(3) "nongrantor trust" means a trust that is not a grantor trust; and

(4) "qualified benefits property" means property subject to the minimum distribution requirements of 26 U.S.C. Section 401(a)(9), as amended, and any applicable regulations or subject to any similar requirements that refer to 26 U.S.C. Section 401(a)(9), as amended or the regulations.

B. An exercise of the decanting power is subject to the following limitations:

(1) if a first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for a marital deduction for purposes of the gift or estate tax under the Internal Revenue Code or a state gift, estate or inheritance tax, the second-trust instrument shall not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified;

(2) if the first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for a charitable deduction for purposes of the income, gift or estate tax under the Internal Revenue Code or a state income, gift, estate or inheritance tax, the second-trust instrument shall not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified;

(3) if the first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for the exclusion from the gift tax described in 26 U.S.C. Section 2503(b), as amended, the second-trust instrument shall not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. Section 2503(b), as amended. If the first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for the exclusion from the gift tax described in 26 U.S.C. Section 2503(b), as amended, by application of 26 U.S.C. Section 2503(c), as amended, the second-trust instrument shall not include or omit a term that, if included or omitted from the trust instrument for the trust to which the

property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. Section 2503(c), as amended;

(4) if the property of the first trust includes shares of stock in an S corporation, as defined in 26 U.S.C. Section 1361, as amended, and the first trust is, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would be, a permitted shareholder under any provision of 26 U.S.C. Section 1361, as amended, an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under 26 U.S.C. Section 1361(c)(2), as amended. If the property of the first trust includes shares of stock in an S corporation and the first trust is, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would be, a qualified subchapter-S trust within the meaning of 26 U.S.C. Section 1361(d), as amended, the second-trust instrument shall not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust;

(5) if the first trust contains property that qualified, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would have qualified, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under 26 U.S.C. Section 2642(c), as amended, the second-trust instrument shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under 26 U.S.C. Section 2642(c), as amended;

(6) if the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument shall not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under 26 U.S.C. Section 401(a)(9), as amended, and any applicable regulations or any similar requirements that refer to 26 U.S.C. Section 401(a)(9), as amended, or the regulations. If an attempted exercise of the decanting power violates this paragraph, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power, and Section 46-12-122 NMSA 1978 applies to the separate share;

(7) if the first trust qualifies as a grantor trust because of the application of 26 U.S.C. Section 672(f)(2)(A), as amended, the second trust shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under 26 U.S.C. Section 672(f)(2)(A), as amended;

(8) as used in this paragraph, "tax benefit" means a federal or state tax deduction, exemption, exclusion or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject to Paragraph (9) of this subsection, a second-trust instrument shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if:

(a) the first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the benefit; and

(b) the transfer of property held by the first trust or the first trust qualified, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would have qualified, for the tax benefit;

(9) subject to Paragraph (4) of this subsection:

(a) except as otherwise provided in Paragraph (7) of this subsection, the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and

(b) except as otherwise provided in Paragraph (10) of this subsection, the second trust may be a grantor trust, even if the first trust is a nongrantor trust; and

(10) an authorized fiduciary shall not exercise the decanting power if a settlor objects in a signed record delivered to the fiduciary within the notice period and:

(a) the first trust and a second trust are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the first trust to cease to be a grantor trust and the second trust does not grant an equivalent power to the settlor or other person; or

(b) the first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with respect to the settlor, unless: 1) the settlor has the power at all times to cause the second trust to cease to be a grantor trust; or 2) the first-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second-trust instrument contains the same provision.

History: Laws 2016, ch. 72, § 1-119; 2017, ch. 41, § 20.

## ANNOTATIONS

**Cross references.** — For the federal Internal Revenue Code of 1986, see 26 U.S.C. § 1 et seq.

**The 2017 amendment**, effective July 1, 2017, made technical amendments; in Subsection B, Paragraph B(6), after "the exercise of the power, and Section", deleted "1-122 of the Uniform Trust Decanting Act" and added "46-12-122 NMSA 1978"; and in Subparagraph B(10)(a), after "power to cause the", deleted "second" and added "first".

### **46-12-120. Duration of second trust.**

A. Subject to Subsection B of this section, a second trust may have a duration that is the same as or different from the duration of the first trust.

B. To the extent that property of a second trust is attributable to property of the first trust, the property of the second trust is subject to any maximum perpetuity, accumulation or suspension-of-the-power-of-alienation rules that apply to property of the first trust.

History: Laws 2016, ch. 72, § 1-120.

### ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-121. Need to distribute not required.**

An authorized fiduciary may exercise the decanting power regardless of whether under the first trust's discretionary distribution standard the fiduciary would have made, or could have been compelled to make, a discretionary distribution of principal at the time of the exercise.

History: Laws 2016, ch. 72, § 1-121.

### ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-122. Saving provision.**

A. If exercise of the decanting power would be effective under the Uniform Trust Decanting Act except that the second-trust instrument in part does not comply with the Uniform Trust Decanting Act, the exercise of the power is effective and the following rules apply with respect to the principal of the second trust attributable to the exercise of the power:

(1) a provision in the second-trust instrument that is not permitted under the Uniform Trust Decanting Act is void to the extent necessary to comply with the Uniform Trust Decanting Act; and

(2) a provision required by the Uniform Trust Decanting Act to be in the second-trust instrument that is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with the Uniform Trust Decanting Act.

B. If a trustee or other fiduciary of a second trust determines that Subsection A of this section applies to a prior exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary's duties.

History: Laws 2016, ch. 72, § 1-122.

### ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-123. Trust for care of animal.**

A. As used in this section:

(1) "animal trust" means a trust or an interest in a trust created to provide for the care of one or more animals; and

(2) "protector" means a person appointed in an animal trust to enforce the trust on behalf of the animal or, if no such person is appointed in the trust, a person appointed by the court for that purpose.

B. The decanting power may be exercised over an animal trust that has a protector to the extent that the trust could be decanted under the Uniform Trust Decanting Act as if each animal that benefits from the trust were an individual if the protector consents in a signed record to the exercise of the power.

C. A protector for an animal has the rights under the Uniform Trust Decanting Act of a qualified beneficiary.

D. Notwithstanding any other provision of the Uniform Trust Decanting Act, if a first trust is an animal trust, in an exercise of the decanting power, the second trust shall provide that trust property may be applied only to its intended purpose for the period the first trust benefited the animal.

History: Laws 2016, ch. 72, § 1-123.

### ANNOTATIONS

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-124. Terms of second trust.**



A reference in the Uniform Trust Code [Chapter 46A NMSA 1978] to a trust instrument or terms of the trust includes a second-trust instrument and the terms of the second trust.

History: Laws 2016, ch. 72, § 1-124.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-125. Settlor.**

A. For purposes of New Mexico law other than the Uniform Trust Decanting Act and subject to Subsection B of this section, a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.

B. In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, a settlor of the second trust and the authorized fiduciary may be considered.

History: Laws 2016, ch. 72, § 1-125.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-126. Later-discovered property.**

A. Except as otherwise provided in Subsection C of this section, if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust or trusts.

B. Except as otherwise provided in Subsection C of this section, if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power remains part of the trust estate of the first trust.

C. An authorized fiduciary may provide in an exercise of the decanting power, or by the terms of a second trust, for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power.

History: Laws 2016, ch. 72, § 1-126.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-127. Obligations.**

A debt, liability or other obligation enforceable against property of a first trust is enforceable to the same extent against the property when held by the second trust after exercise of the decanting power.

History: Laws 2016, ch. 72, § 1-127.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-128. Uniformity of application and construction.**

In applying and construing the Uniform Trust Decanting Act, 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 2016, ch. 72, § 1-128.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

#### **46-12-129. Relation to Electronic Signatures in Global and National Commerce Act.**

The Uniform Trust Decanting Act modifies, limits or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

History: Laws 2016, ch. 72, § 1-129.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2016, ch. 72, § 3-101 made the Uniform Trust Decanting Act, §§ 46-12-101 through 46-12-129 NMSA 1978, effective January 1, 2017.

## **ARTICLE 13**

### **Revised Uniform Fiduciary Access to Digital Assets**

#### **46-13-1. Short title. (Effective January 1, 2018.)**

*Sections 1 through 18 of this act [46-13-1 through 46-13-18 NMSA 1978] may be cited as the "Revised Uniform Fiduciary Access to Digital Assets Act".*

*History:* Laws 2017, ch. 72, § 1.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 1 effective January 1, 2018.

#### **46-13-2. Definitions. (Effective January 1, 2018.)**

*As used in the Revised Uniform Fiduciary Access to Digital Assets Act:*

A. *"account" means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives or stores a digital asset of the user or provides goods or services to the user;*

B. *"agent" means an attorney-in-fact granted authority under a durable or nondurable power of attorney;*

C. *"carries" means engages in the transmission of an electronic communication;*

D. *"catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication the time and date of the communication and the electronic address of the person;*

E. *"conservator" means a person appointed by a court to manage the estate of a living individual. The term includes a limited conservator;*

F. *"content of an electronic communication" means information concerning the substance or meaning of the communication that:*

(1) *has been sent or received by a user;*

(2) *is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public; and*

(3) *is not readily accessible to the public;*

G. *"court" means the district court;*

H. *"custodian" means a person that carries, maintains, processes, receives or stores a digital asset of a user;*

I. *"designated recipient" means a person chosen by a user using an online tool to administer digital assets of the user;*

J. *"digital asset" means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record;*

K. *"electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities;*

L. *"electronic communication" has the meaning set forth in 18 U.S.C. Section 2510(12), as amended;*

M. *"electronic-communication service" means a custodian that provides to a user the ability to send or receive an electronic communication;*

N. *"fiduciary" means an original, additional or successor personal representative, conservator, agent or trustee;*

O. *"information" means data, text, images, videos, sounds, codes, computer programs, software, databases or the like;*

P. *"online tool" means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person;*

Q. *"person" means an individual, estate, partnership, association, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency or instrumentality or other legal or commercial entity;*

R. *"personal representative" means an executor, administrator, special administrator or person that performs substantially the same function under law of this state other than the Revised Uniform Fiduciary Access to Digital Assets Act;*

S. "power of attorney" means a record that grants an agent authority to act in the place of a principal;

T. "principal" means an individual who grants authority to an agent in a power of attorney;

U. "protected person" means an individual for whom a conservator has been appointed. The term includes an individual for whom an application for the appointment of a conservator is pending;

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

W. "remote-computing service" means a custodian that provides to a user computer-processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. Section 2510(14), as amended;

X. "terms-of-service agreement" means an agreement that controls the relationship between a user and a custodian;

Y. "trustee" means a fiduciary with legal title to property under an agreement or declaration that creates a beneficial interest in another. The term includes a successor trustee;

Z. "user" means a person that has an account with a custodian; and

AA. "will" includes a codicil, testamentary instrument that only appoints an executor and instrument that revokes or revises a testamentary instrument.

**History:** Laws 2017, ch. 72, § 2.

## **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 2 effective January 1, 2018.

### **46-13-3. Applicability. (Effective January 1, 2018.)**

A. *The Revised Uniform Fiduciary Access to Digital Assets Act applies to:*

(1) a fiduciary acting under a will or power of attorney executed before, on or after July 1, 2017;

(2) a personal representative acting for a decedent who died before, on or after July 1, 2017;

(3) a conservatorship proceeding commenced before, on or after July 1, 2017; and

(4) a trustee acting under a trust created before, on or after July 1, 2017.

B. The Revised Uniform Fiduciary Access to Digital Assets Act applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

C. The Revised Uniform Fiduciary Access to Digital Assets Act does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

**History:** Laws 2017, ch. 72, § 3.

### **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 3 effective January 1, 2018.

### **46-13-4. User direction for disclosure of digital assets. (Effective January 1, 2018.)**

A. A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney or other record.

B. If a user has not used an online tool to give direction under Subsection A of this section or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney or other record disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

C. A user's direction under Subsection A or B of this section overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

**History:** Laws 2017, ch. 72, § 4.

### **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 4 effective January 1, 2018.

#### **46-13-5. Terms-of-service agreement. (Effective January 1, 2018.)**

*A. The Revised Uniform Fiduciary Access to Digital Assets Act does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.*

*B. The Revised Uniform Fiduciary Access to Digital Assets Act does not give a fiduciary or designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.*

*C. A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, by federal law or by a terms-of-service agreement if the user has not provided direction under Section 4 of the Revised Uniform Fiduciary Access to Digital Assets Act [46-13-4 NMSA 1978].*

**History:** Laws 2017, ch. 72, § 5.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 5 effective January 1, 2018.

#### **46-13-6. Procedure for disclosing digital assets. (Effective January 1, 2018.)**

*A. When disclosing digital assets of a user under the Revised Uniform Fiduciary Access to Digital Assets Act, the custodian may at its sole discretion:*

- (1) grant a fiduciary or designated recipient full access to the user's account;*
- (2) grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or*
- (3) provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.*

*B. A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under the Revised Uniform Fiduciary Access to Digital Assets Act.*

*C. A custodian need not disclose under the Revised Uniform Fiduciary Access to Digital Assets Act a digital asset deleted by a user.*

*D. If a user directs or a fiduciary requests a custodian to disclose under the Revised Uniform Fiduciary Access to Digital Assets Act some, but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:*

- (1) a subset limited by date of the user's digital assets;*
- (2) all of the user's digital assets to the fiduciary or designated recipient;*
- (3) none of the user's digital assets; or*
- (4) all of the user's digital assets to the court for review in camera.*

**History:** Laws 2017, ch. 72, § 6.

### **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 6 effective January 1, 2018.

#### **46-13-7. Disclosure of content of electronic communications of deceased user. (Effective January 1, 2018.)**

*If a deceased user consented to, or a court directs, disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the custodian:*

- A. a written request for disclosure in physical or electronic form;*
- B. a certified copy of the death certificate of the user;*
- C. a certified copy of the letters of administration or letters testamentary of the personal representative or a small estate affidavit pursuant to the provisions of Section 45-3-1201 NMSA 1978;*
- D. unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney or other record evidencing the user's consent to disclosure of the content of electronic communications; and*
- E. if requested by the custodian:*
  - (1) a number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account;*



- (2) *evidence linking the account to the user; or*
- (3) *a finding by the court that:*

*(a) the user had a specific account with the custodian, identifiable by the information specified in Paragraph (1) of this subsection;*

*(b) disclosure of the content of electronic communications of the user would not violate 18 U.S.C. Section 2701 et seq., as amended, 47 U.S.C. Section 222, as amended, or other applicable law;*

*(c) unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or*

*(d) disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.*

**History:** *Laws 2017, ch. 72, § 7.*

#### **ANNOTATIONS**

**Effective dates.** — *Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 7 effective January 1, 2018.*

#### **46-13-8. Disclosure of other digital assets of a deceased user. (Effective January 1, 2018.)**

*Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the representative gives the custodian:*

*A. a written request for disclosure in physical or electronic form;*

*B. a certified copy of the death certificate of the user;*

*C. a certified copy of the letters of administration or letters testamentary of the personal representative or a small estate affidavit pursuant to the provisions of Section 45-3-1201 NMSA 1978; and*

*D. if requested by the custodian:*

*(1) a number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account;*

(2) *evidence linking the account to the user;*

(3) *an affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or*

(4) *a finding by the court that:*

*(a) the user had a specific account with the custodian, identifiable by the information specified in Paragraph (1) of this subsection; or*

*(b) disclosure of the user's digital assets is reasonably necessary for administration of the estate.*

**History:** *Laws 2017, ch. 72, § 8.*

### **ANNOTATIONS**

**Effective dates.** — *Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 8 effective January 1, 2018.*

### **46-13-9. Disclosure of content of electronic communications of principal. (Effective January 1, 2018.)**

*To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian:*

*A. a written request for disclosure in physical or electronic form;*

*B. an original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;*

*C. a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and*

*D. if requested by the custodian:*

*(1) a number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or*

*(2) evidence linking the account to the principal.*

**History:** *Laws 2017, ch. 72, § 9.*

### **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 9 effective January 1, 2018.

#### **46-13-10. Disclosure of other digital assets of principal. (Effective January 1, 2018.)**

*Unless otherwise ordered by the court, directed by the principal or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:*

*A. a written request for disclosure in physical or electronic form;*

*B. an original or a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;*

*C. a certification by the agent, under penalty of perjury, that the power of attorney is in effect; and*

*D. if requested by the custodian:*

*(1) a number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or*

*(2) evidence linking the account to the principal.*

**History:** Laws 2017, ch. 72, § 10.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 10 effective January 1, 2018.

#### **46-13-11. Disclosure of digital assets held in trust when trustee is an original user. (Effective January 1, 2018.)**

*Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.*

**History:** Laws 2017, ch. 72, § 11.

#### **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 11 effective January 1, 2018.

### **46-13-12. Disclosure of contents of electronic communications held in trust when trustee is not an original user. (Effective January 1, 2018.)**

*Unless otherwise ordered by the court, directed by the user or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received or stored by the custodian in the account of the trust if the trustee gives the custodian:*

*A. a written request for disclosure in physical or electronic form;*

*B. a certified copy of the trust instrument or a certified copy of the trust instrument or a certification of trust under Section 46A-10-1013 NMSA 1978 that includes consent to disclosure of the content of electronic communications to the trustee;*

*C. a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and*

*D. if requested by the custodian:*

*(1) a number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or*

*(2) evidence linking the account to the trust.*

**History:** Laws 2017, ch. 72, § 12.

### **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 12 effective January 1, 2018.

### **46-13-13. Disclosure of other digital assets held in trust when trustee is not an original user. (Effective January 1, 2018.)**

*Unless otherwise ordered by the court, directed by the user or provided in a trust, a custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of electronic communications sent or received by an original or successor user and stored, carried or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:*

A. *a written request for disclosure in physical or electronic form;*

B. *a certified copy of the trust instrument or a certified copy of the trust instrument or a certification of trust under Section 46A-10-1013 NMSA 1978;*

C. *a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and*

D. *if requested by the custodian:*

(1) *a number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or*

(2) *evidence linking the account to the trust.*

**History:** *Laws 2017, ch. 72, § 13.*

### **ANNOTATIONS**

**Effective dates.** — *Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 13 effective January 1, 2018.*

### **46-13-14. Disclosure of digital assets to conservator of a protected person. (Effective January 1, 2018.)**

A. *After an opportunity for a hearing under Chapter 45, Article 5 NMSA 1978, the court may grant a conservator access to the digital assets of a protected person.*

B. *Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a conservator the catalogue of electronic communications sent or received by a protected person and any digital assets, other than the content of electronic communications, in which the protected person has a right or interest if the conservator gives the custodian:*

(1) *a written request for disclosure in physical or electronic form;*

(2) *a certified copy of the court order that gives the conservator authority over the digital assets of the protected person; and*

(3) *if requested by the custodian:*

(a) *a number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the account of the protected person; or*

(b) *evidence linking the account to the protected person.*

*C. A conservator with general authority to manage the assets of a protected person may request a custodian of the digital assets of the protected person to suspend or terminate an account of the protected person for good cause. A request made under this section shall be accompanied by a certified copy of the court order giving the conservator authority over the protected person's property.*

**History:** Laws 2017, ch. 72, § 14.

## **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 14 effective January 1, 2018.

### **46-13-15. Fiduciary duty and authority. (Effective January 1, 2018.)**

*A. The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:*

- (1) the duty of care;*
- (2) the duty of loyalty; and*
- (3) the duty of confidentiality.*

*B. A fiduciary's or designated recipient's authority with respect to a digital asset of a user:*

*(1) except as otherwise provided in Section 4 of the Revised Uniform Fiduciary Access to Digital Assets Act [46-13-4 NMSA 1978], is subject to the applicable terms of service;*

*(2) is subject to other applicable law, including copyright law;*

*(3) in the case of a fiduciary, is limited by the scope of the fiduciary's duties;*  
*and*

*(4) may not be used to impersonate the user.*

*C. A fiduciary with authority over the property of a decedent, protected person, principal or settlor has the right to access any digital asset in which the decedent, protected person, principal or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.*

*D. A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, protected person, principal or settlor for the purpose of*

*applicable computer-fraud and unauthorized-computer-access laws, including the Computer Crimes Act [30-45-1 through 30-45-7 NMSA 1978].*

*E. A fiduciary with authority over the tangible, personal property of a decedent, protected person, principal or settlor:*

*(1) has the right to access the property and any digital asset stored in it; and*

*(2) is an authorized user for the purpose of computer-fraud and unauthorized-computer-access laws, including those offenses enumerated in the Computer Crimes Act.*

*F. A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.*

*G. A fiduciary of a user may request a custodian to terminate the user's account. A request for termination shall be in writing, in either physical or electronic form, and accompanied by:*

*(1) if the user is deceased, a certified copy of the death certificate of the user;*

*(2) a certified copy of the letters of administration or letters testamentary of the personal representative or a small estate affidavit pursuant to the provisions of Section 45-3-1201 NMSA 1978, court order, power of attorney or trust giving the fiduciary authority over the account; and*

*(3) if requested by the custodian:*

*(a) a number, username, address or other unique subscriber or account identifier assigned by the custodian to identify the user's account;*

*(b) evidence linking the account to the user; or*

*(c) a finding by the court that the user had a specific account with the custodian, identifiable by the information specified in Subparagraph (a) of this paragraph.*

**History:** Laws 2017, ch. 72, § 15.

## **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 15 effective January 1, 2018.

## **46-13-16. Custodian compliance and immunity. (Effective January 1, 2018.)**

*A. Not later than sixty days after receipt of the information required under Sections 7 through 15 [46-13-7 through 46-13-15 NMSA 1978] of the Revised Uniform Fiduciary Access to Digital Assets Act, a custodian shall comply with a request under the Revised Uniform Fiduciary Access to Digital Assets Act from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.*

*B. An order under Subsection A of this section directing compliance shall contain a finding that compliance is not in violation of 18 U.S.C. Section 2702, as amended.*

*C. A custodian may notify the user that a request for disclosure or to terminate an account was made under the Revised Uniform Fiduciary Access to Digital Assets Act.*

*D. A custodian may deny a request under the Revised Uniform Fiduciary Access to Digital Assets Act from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.*

*E. The Revised Uniform Fiduciary Access to Digital Assets Act does not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under the Revised Uniform Fiduciary Access to Digital Assets Act to obtain a court order that:*

- (1) specifies that an account belongs to the protected person or principal;*
- (2) specifies that there is sufficient consent from the protected person or principal to support the requested disclosure; and*
- (3) contains a finding required by law other than the Revised Uniform Fiduciary Access to Digital Assets Act.*

*F. A custodian and its officers, employees and agents are immune from liability for an act or omission done with reasonable care in compliance with the Revised Uniform Fiduciary Access to Digital Assets Act.*

**History:** Laws 2017, ch. 72, § 16.

### **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 16 effective January 1, 2018.



## **46-13-17. Uniformity of application and construction. (Effective January 1, 2018.)**

*In applying and construing the Revised Uniform Fiduciary Access to Digital Assets Act, 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 2017, ch. 72, § 17.

### **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 17 effective January 1, 2018.

## **46-13-18. Relation to Electronic Signatures in Global and National Commerce Act. (Effective January 1, 2018.)**

*The Revised Uniform Fiduciary Access to Digital Assets Act modifies, limits or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).*

**History:** Laws 2017, ch. 72, § 18.

### **ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 72, § 20 makes Laws 2017, ch. 72, § 18 effective January 1, 2018.