CHAPTER 46
Fiduciaries and Trusts

ARTICLE 1
Fiduciary Obligations and Investments

46-1-1. [Definitions.]

A. In this act [46-1-1 to 46-1-11 NMSA 1978] unless the context or subject matter otherwise requires:

"bank" includes any person or association of persons, whether incorporated or not, carrying on the business of banking;

"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;

"person" includes a corporation, partnership or other association, or two or more persons having a joint or common interest;

"principal" includes any person to whom a fiduciary as such owes an obligation.

B. A thing is done "in good faith" within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not.

History: Laws 1923, ch. 26, § 1; C.S. 1929, § 51-101; 1941 Comp., § 36-101; 1953 Comp., § 33-1-1.

ANNOTATIONS

Cross references. — For cost of bond being an allowed fiduciary expense, see 46-6-2 NMSA 1978.

For the release of a surety on a bond, see 46-6-3 NMSA 1978.

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

For disposition of unclaimed property, see Chapter 7, Article 8A NMSA 1978.

For the penalties for embezzlement, see 30-16-8 NMSA 1978.

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

For the Real Estate Trust Act, see 47-2-1 to 47-2-6 NMSA 1978.

For a state bank acting as a fiduciary, see 58-1-17 to 58-1-19 NMSA 1978.

Uniform Fiduciaries Act. — Laws 1923, ch. 26, §§ 1 to 12, the effective provisions of which are compiled as 46-1-1 to 46-1-11 NMSA 1978, constitute the Uniform Fiduciaries Act.

Purpose of Uniform Fiduciary Act was to facilitate banking transactions by relieving a depository, acting honestly, of the duty of inquiry as to the right of its depositors, even though fiduciaries, to check out their accounts. Transport Trucking Co. v. First Nat'l Bank, 61 N.M. 320, 300 P.2d 476 (1956).

Bank may sue faithless fiduciary's principal for payment of instrument. — While this section, 46-1-5 and 46-1-8 NMSA 1978, contain phraseology indicating exculpation of a bank when it is sought to be charged by a fiduciary's principals, these sections, nevertheless, create a statutory right in a bank acting in good faith to bring action against a faithless fiduciary's principal to enforce payment of an instrument dishonored by the principal. Roswell State Bank v. Lawrence Walker Cotton Co., 56 N.M. 107, 240 P.2d 1143 (1952).

Absence of any bad faith on part of bank. — Where principal conducted business with presumed knowledge of existence of fiduciaries act and placed blanks in agent's hands which, when executed, are negotiable, and agent deposited in bank a bill of exchange against the principal payable to himself as seller and, before bill had cleared, agent was permitted to withdraw the deposit pursuant to instruction from drawee bank to pay bill, principal was liable for principal amount of the bill of exchange, in absence of any bad faith on part of the bank in paying the bill. Roswell State Bank v. Lawrence Walker Cotton Co., 56 N.M. 107, 240 P.2d 1143 (1952).

Law reviews. — For comment, "Banks and Banking - Liability of Bank to Payee for Cashing Check With Unauthorized Endorsement - Effect of Signature Cards," see 7 Nat. Resources J. 106 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and application of Uniform Fiduciaries Act, affecting rights and obligations arising from payment of personal obligations from trust funds, 114 A.L.R. 1088.

Rights, powers and duties in respect of sale or transfer of corporate stock in which one holds a legal life estate, 126 A.L.R. 1302.

Liability of trustee for payments or conveyances under a trust subsequently held to be invalid, 77 A.L.R.4th 1177.

36A C.J.S. Fiduciary § 381.

46-1-2. [Payment or transfer to fiduciary.]

A person who in good faith pays or transfers to a fiduciary any money or other property which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary; and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary.

History: Laws 1923, ch. 26, § 2; C.S. 1929, § 51-102; 1941 Comp., § 36-102; 1953 Comp., § 33-1-2.

ANNOTATIONS

Cross references. — For trusts being subject to income taxes, see 7-2-7 NMSA 1978.

Attorney owes duty to statutory beneficiaries. — An attorney handling a wrongful death case owes to the statutory beneficiaries of that action a duty of reasonable care to protect their interests in receiving any proceeds obtained. Leyba v. Whitley, 120 N.M. 768, 907 P.2d 172 (1995).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of fiduciary for loss on investment as affected by fact that it was taken in his own name without indication of fiduciary capacity, 106 A.L.R. 271, 150 A.L.R. 805.

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

70 C.J.S. Payment § 6.

46-1-3. [Negotiable instrument transferred by fiduciary.]

If any negotiable instrument payable or indorsed to a fiduciary as such is indorsed by the fiduciary, or if any negotiable instrument payable or indorsed to his principal is indorsed by a fiduciary empowered to indorse such instrument on behalf of his principal, the indorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in indorsing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is transferred by the fiduciary in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is transferred in

any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in transferring the instrument.

History: Laws 1923, ch. 26, § 4; C.S. 1929, § 51-104; 1941 Comp., § 36-104; 1953 Comp., § 33-1-4.

ANNOTATIONS

Cross references. — For negotiable instruments generally, see Chapter 55, Article 3 NMSA 1978.

Endorsee has no obligation to inquire respecting breach of duty. — The obvious intent of the legislature in enacting this section was to relieve the endorsee of the obligation to inquire respecting a breach of duty by a fiduciary endorser, where such fiduciary had authority to transfer the instrument by his endorsement or signature. Cooper v. Bank of N.M., 77 N.M. 398, 423 P.2d 431 (1966).

Bank has obligation to inquire. — This section did not operate to relieve bank of its obligation to inquire whether fiduciary endorser breached his duty to his principal, where fiduciary was not authorized or empowered to transfer checks by his endorsement alone. Cooper v. Bank of N.M., 77 N.M. 398, 423 P.2d 431 (1966).

Meaning of words construed with reference to legislative intention. — The words "empowered" and "endorse" in the statute must be construed with reference to the intention or purpose of the legislation to be derived from the whole statute. Cooper v. Bank of N.M., 77 N.M. 398, 423 P.2d 431 (1966).

Meaning of "endorse" and "empowered". — "Endorse," as used in the statute, means to transfer a negotiable instrument by signing one's name on the back thereof. The word "empowered" means authorized. Cooper v. Bank of N.M., 77 N.M. 398, 423 P.2d 431 (1966).

Law reviews. — For comment, "Banks and Banking - Liability of Bank to Payee for Cashing Check With Unauthorized Endorsement - Effect of Signature Cards," see 7 Nat. Resources J. 106 (1967).

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

46-1-4. [Bill of exchange drawn by fiduciary; payee's liability to principal.]

If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in drawing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith.

If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument.

History: Laws 1923, ch. 26, § 5; C.S. 1929, § 51-105; 1941 Comp., § 36-105; 1953 Comp., § 33-1-5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

46-1-5. [Transfer of bill of exchange drawn by fiduciary who holds it as payee or transferee.]

If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally, or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith.

History: Laws 1923, ch. 26, § 6; C.S. 1929, § 51-106; 1941 Comp., § 36-106; 1953 Comp., § 33-1-6.

ANNOTATIONS

Bank may sue faithless fiduciary's principal for payment of instrument. — While this section, 46-1-1 and 46-1-8 NMSA 1978 contain phraseology indicating exculpation of a bank when it is sought to be charged by a fiduciary's principals, these sections, nevertheless, create a statutory right in bank acting in good faith to bring action against

a faithless fiduciary's principal to enforce payment of an instrument dishonored by the principal. Roswell State Bank v. Lawrence Walker Cotton Co., 56 N.M. 107, 240 P.2d 1143 (1952).

Absence of any bad faith on part of bank. — Where principal conducted business with presumed knowledge of existence of fiduciary's act and placed blanks in agent's hands which, when executed, are negotiable, and agent deposited in bank a bill of exchange against a principal payable to himself as seller and before bill had cleared agent was permitted to withdraw the deposit pursuant to instruction from drawee bank to pay bill, principal was liable for principal amount of the bill of exchange in absence of any bad faith on part of the bank in paying the bill. Roswell State Bank v. Lawrence Walker Cotton Co., 56 N.M. 107, 240 P.2d 1143 (1952).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

46-1-6. [Bank account in name of fiduciary; check drawn by fiduciary; bank's liability to principal.]

If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.

History: Laws 1923, ch. 26, § 7; C.S. 1929, § 51-107; 1941 Comp., § 36-107; 1953 Comp., § 33-1-7.

ANNOTATIONS

Cross references. — For deposit of moneys by fiduciary and surety with bank deposit to be controlled by surety, see 46-6-8 NMSA 1978.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

46-1-7. [Bank account in name of principal; check drawn by fiduciary; bank's liability to principal.]

If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith.

If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check.

History: Laws 1923, ch. 26, § 8; C.S. 1929, § 51-108; 1941 Comp., § 36-108; 1953 Comp., § 33-1-8.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

46-1-8. [Check deposited in fiduciary's personal account; bank's liability to principal.]

If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary, or of checks payable to him as fiduciary, or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or of checks payable to his principal and indorsed by him, if he is empowered to indorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts, that its action in reeciving [receiving] the deposit or paying the check amounts to bad faith.

History: Laws 1923, ch. 26, § 9; C.S. 1929, § 51-109; 1941 Comp., § 36-109; 1953 Comp., § 33-1-9.

ANNOTATIONS

Bracketed material. — The bracketed material in this section was inserted by the compiler; it was not enacted by the legislature and is not a part of the law.

Purpose of Uniform Fiduciary Act was to facilitate banking transactions by relieving a depository, acting honestly, of the duty of inquiry as to the right of its depositors, even though fiduciaries, to check out their accounts. Transport Trucking Co. v. First Nat'l Bank, 61 N.M. 320, 300 P.2d 476 (1956).

Bank may sue faithless fiduciary's principal for payment of instrument. — While this section, 46-1-1 and 46-1-5 NMSA 1978 contain phraseology indicating exculpation of a bank when it is sought to be charged by a fiduciary's principals, these sections, nevertheless, create a statutory right in a bank acting in good faith to bring action against a faithless fiduciary's principal to enforce payment of an instrument dishonored by the principal. Roswell State Bank v. Lawrence Walker Cotton Co., 56 N.M. 107, 240 P.2d 1143 (1952).

Absence of any bad faith on part of bank. — Where principal conducted business with presumed knowledge of existence of fiduciaries act and placed blanks in agent's hands which, when executed, are negotiable, and agent deposited in bank a bill of exchange against the principal payable to himself as seller and before bill had cleared, agent was permitted to withdraw the deposit pursuant to instruction from drawee bank to pay bill, principal was liable for principal amount of the bill of exchange, in absence of any bad faith on part of the bank in paying the bill. Roswell State Bank v. Lawrence Walker Cotton Co., 56 N.M. 107, 240 P.2d 1143 (1952).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Bank deposit: responsibility of fiduciary for loss of funds deposited in bank in his own name or other form not indicating fiduciary character, 43 A.L.R. 600.

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

46-1-9. [Joint trustees; check drawn by one.]

When a deposit is made in a bank in the name of two or more persons as trustees and a check is drawn upon the trust account by any trustee or trustees authorized by the other trustee or trustees to draw checks upon the trust account, neither the payee nor other holder nor the bank is bound to inquire whether it is a breach of trust to authorize such trustee or trustees to draw checks upon the trust account, and is not liable unless the circumstances be such that the action of the payee or other holder or the bank amounts to bad faith.

History: Laws 1923, ch. 26, § 10; C.S. 1929, § 51-110; 1941 Comp., § 36-110; 1953 Comp., § 33-1-10.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

46-1-10. [Prior transactions not affected.]

The provisions of this act [46-1-1 to 46-1-11 NMSA 1978] shall not apply to transactions taking place prior to the time when it takes effect.

History: Laws 1923, ch. 26, § 11; C.S. 1929, § 51-111; 1941 Comp., § 36-111; 1953 Comp., § 33-1-11.

46-1-11. [Law governing transactions not in this act.]

In any case not provided for in this act [46-1-1 to 46-1-11 NMSA 1978] the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments and banking, shall continue to apply.

History: Laws 1923, ch. 26, § 12; C.S. 1929, § 51-112; 1941 Comp., § 36-112; 1953 Comp., § 33-1-12.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Payment or distribution under invalid instruction as breach of trustee's duty, 6 A.L.R.4th 1196.

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 to 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 to 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

(Repealed by Laws 2003, ch. 122, § 11-1105.)

46-2-1 to 46-2-19. Repealed.

ANNOTATIONS

Repeals. — Laws 2003, ch. 122, § 11-1105 repeals 46-2-1 to 46-2-19 NMSA 1978, as enacted by Laws 1951, ch. 193, §§ 1 to 3, 5, 7 to 11, 15 to 22 and Laws 1995, ch. 190, §§ 2 and 3, and as amended by Laws 1965, ch. 27, § 1, Laws 1995, ch. 190, §§ 1, 4 and 5, the Uniform Trusts Act, effective July 1, 2003. For provisions of former sections, see 2001 Replacement Pamphlet. 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.

Investment Company Act of 1940. — The federal Investment Company Act of 1940 is codified at 15 U.S.C. § 80a-1 et seq.

ARTICLE 3
Principal and Income

(Repealed by Laws 2001, ch. 113, § 104.)

46-3-1 to 46-3-15. Repealed.

ANNOTATIONS

Repeals. — Laws 2001, ch. 113, § 604 repeals 46-3-1 to 46-3-15 NMSA 1978, as enacted by Laws 1969, ch. 239, §§ 1 to 15, relating to principal and income of fiduciaries and trusts, effective July 1, 2001. For provisions of former sections, see 1997 Replacement Pamphlet. 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.

This act [46-3A-101 to 46-3A-603 NMSA 1978] may be cited as the "Uniform Principal and Income Act".

History: Laws 2001, ch. 113, § 101.

ANNOTATIONS

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

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

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

The 2005 amendment, effective July 1, 2005, adds Subsections K(1) through (3) to define "qualified beneficiary" and adds 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 and 3, 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 [46-3A-101 to 46-3A-603 NMSA 1978];

(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 makes 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, 85 N.M. 729, 516 P.2d 1112 (1973).

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

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

The 2005 amendment, effective July 1, 2005, adds 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, 85 N.M. 729, 516 P.2d 1112 (1973).

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 makes 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 makes 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 makes 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 makes 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 makes 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 makes 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 makes 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 makes 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

Effective dates. — Laws 2005, ch. 329, § 12 makes 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 to 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 makes 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 makes 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 makes 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 [46-3A-101 to 46-3A-603 NMSA 1978] . 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 makes 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 makes 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 makes 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 makes 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 makes 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 [46-3A-101 to 46-3A-603 NMSA 1978], 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 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 makes 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 makes 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 makes 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 makes 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 makes 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, "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, including 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 it 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) If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction.

(e) This section does not apply to payments to which Section 410 [46-3A-410 NMSA 1978] applies.

History: Laws 2001, ch. 113, § 409.

ANNOTATIONS

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

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 makes 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 [46-3A-101 to 46-3A-603 NMSA 1978] 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 makes 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 [46-3A-1091 to 46-3A-603 NMSA 1978] 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 makes 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 makes 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 makes 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 makes 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 makes 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 makes 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 makes 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 makes 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 proportionately:

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

(2) from principal to the extent that:

(A) receipts from the entity are allocated to principal; and

(B) the trust's share of the entity's taxable income exceeds the total receipts described in Paragraphs (1) and (2)(A).

(d) For purposes of this section, receipts allocated to principal or income must be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.

History: Laws 2001, ch. 113, § 505.

ANNOTATIONS

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

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 makes 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 [46-3A-101 to 46-3A-603 NMSA 1978], 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 makes 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 [46-3A-101 to 46-3A-603 NMSA 1978] 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 makes 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 [46-3A-101 to 46-3A-603 NMSA 1978] 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 makes 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

(Repealed by Laws 1993, ch. 174, § 84.)

46-5-1 to 46-5-3. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 174, § 84 repeals 46-5-1 to 46-5-3 NMSA 1978, as enacted by Laws 1965, ch. 26, §§ 1, 2 and 4, relating to testamentary additions to trusts, effective July 1, 1993. For provisions of former sections, see 1989 Replacement Pamphlet.

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

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. 164 (opinion 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. 31, 37 (opinion 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.

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

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

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., 78 N.M. 435, 432 P.2d 400 (1967).

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 in this section was inserted by the compiler; it was not enacted by the legislature and is not a 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

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., 20 N.M. 163, 148 P. 489 (1915).

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 in this section was inserted by the compiler. It was not enacted by the legislature and is not a 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.

ARTICLE 7
Transfers to Minors

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

ANNOTATIONS

Repeals. — Laws 1989, ch. 357, § 26 repeals 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 provisions of former sections, see 1978 Original Pamphlet. For present comparable provisions, see 46-7-11 NMSA 1978 et seq.

46-7-11. Short title.

Sections 1 through 24 [46-7-11 to 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 to 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 decendent'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 [46-7-11 to 46-7-34 NMSA 1978] 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

Uniform Gifts to Minors Act. — 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 [46-7-11 to 46-7-34 NMSA 1978].

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 [46-7-11 to 46-7-34 NMSA 1978] 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 [46-7-11 to 46-7-34 NMSA 1978] 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 [46-7-11 to 46-7-34 NMSA 1978], 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 [46-7-11 to 46-7-34 NMSA 1978] 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 [46-7-11 to 46-7-34 NMSA 1978] 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 [46-7-11 to 46-7-34 NMSA 1978] 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

Uniform Gifts to Minors Act. — 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 [46-7-11 to 46-7-34 NMSA 1978] 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 makes the Uniform Transfers to Minors Act effective on July 1, 1989.

Uniform Gifts to Minors Act. — 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 [46-7-11 to 46-7-34 NMSA 1978] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of that act among states enacting it.

History: Laws 1989, ch. 357, § 24.

ANNOTATIONS

Severability clauses. — 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 to 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 [46-8-1 to 46-8-10 NMSA 1978], 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 [46-8-1 to 46-8-10 NMSA 1978], 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 [46-8-1 to 46-8-10 NMSA 1978] 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 [46-8-1 to 46-8-10 NMSA 1978].

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 [46-8-1 to 46-8-10 NMSA 1978] 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 [46-8-1 to 46-8-10 NMSA 1978] 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 [46-8-1 to 46-8-10 NMSA 1978] 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. Definitions.

As used in the Uniform Management of Institutional Funds Act [46-9-1 to 46-9-12 NMSA 1978]:

A. "institution" means:

(1) an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable or other eleemosynary purposes;

(2) a government, a governmental subdivision or agency or other governmental organization to the extent that it holds funds exclusively for educational, religious, charitable or other eleemosynary purposes; or

(3) an organization described in Section 501(c)(3) of the Internal Revenue Code organized and operated exclusively to support one or more organizations described in Paragraphs (1) and (2) of Subsection A of this section. "Institution" does not include an institution with assets of more than ten million dollars ($10,000,000) and that is organized and operated for private educational purposes;

B. "institutional fund" means a fund held by an institution for its exclusive use, benefit or purposes, or for the exclusive use, benefit or purposes of one or more other institutions, but does not include:

(1) a fund held for an institution by a trustee that is not an institution;

(2) a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund;

(3) a fund established pursuant to the provisions of Article 8, Section 10 of the constitution of New Mexico; or

(4) a fund established pursuant to the provisions of Article 12, Section 2 of the constitution of New Mexico;

C. "endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument;

D. "governing board" means the body responsible for the management of an institution or of an institutional fund;

E. "historic dollar value" means the aggregate fair value in dollars of:

(1) an endowment fund at the time it became an endowment fund;

(2) each subsequent donation to the fund at the time it is made; and

(3) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the institution is conclusive; and

F. "gift instrument" means a will, deed, grant, conveyance, agreement, memorandum, writing, articles, bylaws, charter, declaration, agreement, constitutional provision, law, rule, regulation or other governing document under which property is transferred to or held by an institution as an institutional fund.

History: Laws 1997, ch. 199, § 1.

ANNOTATIONS

Internal Revenue Code. — Section 501(c)(3) of the federal Internal Revenue Code appears as 26 U.S.C. § 501(c)(3).

46-9-2. Accumulation of annual net income; reserve; appropriation of appreciation.

A. The governing board may accumulate so much of the annual net income of an institutional fund as is prudent under the standard established by Section 6 [46-9-6 NMSA 1978] of the Uniform Management of Institutional Funds Act. The governing board may hold any or all of the accumulated annual net income in an income reserve for subsequent expenditure for the uses and purposes for which the institutional fund is established or may add any or all of the accumulated annual net income to the principal of the institutional fund as is prudent under the standard established by Section 6 of the Uniform Management of Institutional Funds Act.

B. Subject to the limitation set forth in Subsection C of this section, the governing board may appropriate for expenditure for the uses and purposes for which an endowment fund is established so much of the net appreciation, realized and unrealized, in the fair value of the assets of an endowment fund over the historic dollar value of the fund as is prudent under the standard established by Section 6 of the Uniform Management of Institutional Funds Act.

C. The appropriation for expenditure by the governing board of the net appreciation of an endowment fund in any one year in an amount greater than seven percent of the fair market value of the endowment fund, calculated on the basis of market values determined at least quarterly and averaged over a period of three or more years, shall create a rebuttable presumption of imprudence on the part of the governing board.

D. This section does not limit the authority of the governing board to expend funds as permitted under other law, the terms of the applicable gift instrument or charter, or the articles of incorporation or other governing instrument of the institution.

History: Laws 1997, ch. 199, § 2.

46-9-3. Rules of construction.

A. Section 2 [46-9-2 NMSA 1978] of the Uniform Management of Institutional Funds Act does not apply if, and to the extent that, the applicable gift instrument indicates the donor's intention that annual net income shall not be accumulated or added to the principal or that net appreciation shall not be expended. A restriction upon accumulation of annual net income or addition of such income to the principal or the expenditure of net appreciation may not be implied from a designation of a gift as an endowment or from a direction or authorization in the applicable gift instrument to use only "income", "interest", "dividends" or "rents, issues or profits", or "to preserve the principal intact", or a direction that contains other words of similar import.

B. Except as otherwise provided in Subsection A of this section, the following terms or comparable language in the provisions of a gift instrument, unless otherwise limited or modified, authorizes any investment strategy permitted under the Uniform Management of Institutional Funds Act [46-9-1 to 46-9-12 NMSA 1978]: "investments permitted by law for investment of trust funds", "legal investments", "authorized investments", "using the judgment and care under the circumstances then prevailing

that persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital", "prudent man rule", "prudent trustee rule", "prudent person rule" and "prudent investor rule".

History: Laws 1997, ch. 199, § 3.

46-9-4. Investment authority.

In addition to an investment otherwise authorized by law or by the applicable gift instrument, and without restriction to investments a fiduciary may make, but subject to any specific limitations set forth in the applicable gift instrument or in the applicable law other than law relating to investments by a fiduciary, the governing board may:

A. invest and reinvest an institutional fund in kind of property or type of investment consistent with the standards of the Uniform Management of Institutional Funds Act [46-9-1 to 46-9-12 NMSA 1978], including any real or personal property deemed advisable by the governing board, whether or not it produces a current return, including mortgages, stocks, bonds, debentures and other securities of profit or nonprofit corporations, shares in or obligations of associations, limited liability companies, partnerships or individuals and obligations of any government or subdivision or instrumentality thereof;

B. retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable;

C. include all or any part of an institutional fund in any pooled or common fund maintained by the institution; or

D. invest all or any part of an institutional fund in any other pooled or common fund available for investment, including shares or interests in regulated investment companies, mutual funds, common trust funds, investment partnerships, real estate investment trusts or similar organizations in which funds are commingled and investment determinations are made by persons other than the governing board.

History: Laws 1997, ch. 199, § 4.

46-9-5. Delegation of investment and management functions.

A. Except as otherwise provided by applicable law relating to governmental institutions or funds, a governing board may delegate investment and management functions that a prudent governing body could delegate under the circumstances. A governing board shall exercise reasonable care, skill and caution in:

(1) selecting an agent;

(2) establishing the scope and terms of the delegation, consistent with the purposes of the institutional fund; and

(3) periodically reviewing the agent's actions in order to monitor the agent's performance and the agent's compliance with the terms of the delegation.

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

C. The members of a governing board who comply with the requirements of Subsection B of this section are not liable for the decisions or actions of the agent to whom the function was delegated.

D. By accepting the delegation of an investment or management function from a governing board of an institution that is subject to the laws of New Mexico, an agent submits to the jurisdiction of the courts of New Mexico in all actions arising from the delegation.

E. The governing board may authorize the payment of compensation for investment advisory or management services.

History: Laws 1997, ch. 199, § 5.

46-9-6. Standard of conduct; portfolio strategy.

A. Members of a governing board shall invest and manage an institutional fund as a prudent investor would, by considering the purposes, distribution requirements and other circumstances of the fund. In satisfying this standard, the governing board shall exercise reasonable care, skill and caution.

B. Among the circumstances that a governing board shall consider are:

(1) long- and short-term needs of the institution in carrying out its educational, religious, charitable or other eleemosynary purposes;

(2) its present and anticipated financial requirements;

(3) the expected total return from income and the appreciation of its investments;

(4) general economic conditions;

(5) the possible effect of inflation or deflation;

(6) the expected tax consequence, if any, of investment decisions or strategies;

(7) the role that each investment or course of action plays within the overall investment portfolio of the institutional fund;

(8) other resources of the institution;

(9) the needs of the institution and the institutional fund for liquidity, regularity of income and preservation or appreciation of capital; and

(10) an asset's special relationship or special value, if any, to the purposes of the applicable gift instrument or to the institution.

C. A governing board's investment and management decisions about individual assets shall be made not in isolation but 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 institution.

D. A governing board shall make a reasonable effort to verify the facts relevant to the investment and management of institutional fund assets.

E. A governing board shall diversify the investments of an institutional fund unless the board reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversifying.

F. Subject to the provisions of Subsection B of Section 4 [46-9-4 NMSA 1978] of the Uniform Management of Institutional Funds Act, within a reasonable time after receiving donated assets, a governing board shall review the donated assets and make and implement decisions concerning the retention and disposition of assets in order to bring the portfolio of the institutional fund into compliance with the purposes, terms, distribution requirements and other circumstances of the institutional fund and with the requirements of the Uniform Management of Institutional Funds Act [46-9-1 to 46-9-12 NMSA 1978].

G. A governing board shall invest and manage the assets of an institutional fund solely in the interest of the institution.

H. In investing and managing assets of an institutional fund, a governing board may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the fund and the terms of the gift instrument.

History: Laws 1997, ch. 199, § 6.

46-9-7. Release of restrictions on use or investment.

A. With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

B. If written consent of the donor cannot be obtained by reason of his death, disability, unavailability or impossibility of identification, the governing board may apply in the name of the institution to the district court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The attorney general shall be notified of the application and shall be given an opportunity to be heard. If the district court finds that the restriction is obsolete, inappropriate or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund.

C. A release under this section may not allow a fund to be used for purposes other than the educational, religious, charitable or other eleemosynary purposes of the institution affected.

D. This section does not limit the application of the doctrine of cy-pres.

History: Laws 1997, ch. 199, § 7.

46-9-8. Reviewing compliance.

Compliance with the Uniform Management of Institutional Funds Act [46-9-1 to 46-9-12 NMSA 1978] is determined in light of the facts and circumstances existing at the time of a governing board's decision and not by hindsight.

History: Laws 1997, ch. 199, § 8.

46-9-9. Severability.

If any provision of the Uniform Management of Institutional Funds Act [46-9-1 to 46-9-12 NMSA 1978] or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of that act that can be given effect without the invalid provision or application, and to this end the provisions of the Uniform Management of Institutional Funds Act are declared severable.

History: Laws 1997, ch. 199, § 9.

46-9-10. Application.

The Uniform Management of Institutional Funds Act [46-9-1 to 46-9-12 NMSA 1978] applies to gift instruments executed or in effect on or after its effective date and to institutional funds existing on and created after its effective date. The Uniform Management of Institutional Funds Act governs any decisions and actions taken after its effective date.

History: Laws 1997, ch. 199, § 10.

46-9-11. Uniformity of application and construction.

The Uniform Management of Institutional Funds Act [46-9-1 to 46-9-12 NMSA 1978] shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of that act among those states that enact it.

History: Laws 1997, ch. 199, § 11.

46-9-12. Short title.

Sections 1 through 12 [46-9-1 to 46-9-12 NMSA 1978] of this act may be cited as the "Uniform Management of Institutional Funds Act".

History: Laws 1997, ch. 199, § 12.

ARTICLE 10
Uniform Disclaimer of Property Interests Act

46-10-1. Short title.

This act [46-10-1 to 46-10-17 NMSA 1978] may be cited as the "Uniform Disclaimer of Property Interests Act".

History: Laws 2001, ch. 290, § 1.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

GENERAL COMMENT

Part 11 [46-10-1 NMSA 1978 to 46-10-17 NMSA 1978] incorporates into the Code the Uniform Disclaimer of Property Interests Act (UDIPA or Act). The UDPIA replaces the Code's former disclaimer provision (Section 2-801). It also replaces three Uniform Acts promulgated in 1978 (Uniform Disclaimer of Property Interests Act, Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, and Uniform Disclaimer of Transfers under Nontestatmentary Instruments Act). The new Act is the most comprehensive disclaimer statute ever written. It is designed to allow every sort of disclaimer, including those that are useful for tax planning purposes. It does not, however, include a specific time limit on the making of any disclaimer. Because a disclaimer is a refusal to accept, the only bar to a disclaimer should be acceptance of the offer. In addition, in almost all jurisdictions disclaimers can be used for more than tax planning. A proper disclaimer will often keep the disclaimed property from the disclaimant's creditors. In short, the new Act is an enabling statute which prescribes all the rules for refusing a proffered interest in or power over property and the effect of that refusal on the power or interest while leaving

the effect of the refusal itself to other law. Section 2-1113(e) [46-10-13 NMSA 1978] explicitly states that a disclaimer may be barred or limited by law other than the Act.

The decision not to include a specific time limit -- to "decouple" the disclaimer statute from the time requirement applicable to a "qualified disclaimer" under IRC §2518 -- is also designed to reduce confusion. The older Uniform Acts and almost all the current state statutes (many of which are based on those Acts) were drafted in the wake of the passage of IRC §2518 in 1976. That provision replaced the "reasonable time" requirement of prior law with a requirement that a disclaimer must be made within nine months of the creation of the interest disclaimed if the disclaimer is to be a "qualified disclaimer" which is not regarded as transfer by the disclaimant. The statutes that were written in response to this new provision of tax law reflected the nine month time limit. Under most of these statutes (including the older Uniform Acts and former Section 2-801) a disclaimer must be made within nine months of the creation of a present interest (for example, as disclaimer of an outright gift under a will must be made within nine months of the decedent's death), which corresponds to the requirement of IRC §2518. A future interest, however, may be disclaimed within nine months of the time the interest vests in possession or enjoyment (for example, a remainder whether or not contingent on surviving the holder of the life income interest must be disclaimed within nine months of the death of the life income beneficiary). The time limit for future interests does not correspond to IRC §2518 which generally requires that a qualified disclaimer of a future interest be made within nine months of the interest's creation, no matter how contingent it may then be. The nine-month time limit of the existing statutes really is a trap. While it superficially conforms to IRC §2518, its application to the disclaimer of future interests does not. The removal of all mention of time limits will clearly signal the practitioner that the requirements for a tax qualified disclaimer are set by different law.

The elimination of the time limit is not the only change from current statutes. The Act abandons the concept of "relates back" as a proxy for when a disclaimer becomes effective. Instead, by stating specifically when a disclaimer becomes effective and explicitly stating in Section 2-1105(f) that a disclaimer "is not a transfer, assignment, or release," the Act makes clear the results of refusing property or powers through a disclaimer. Second, UDPIA creates rules for several types of disclaimers that have not been explicitly addressed in previous statutes. The Act provides detailed rules for the disclaimer of interests in jointly held property (Section 2-1107). Such disclaimers have important uses especially in tax planning, but their status under current law is not clear. Furthermore, although current statutes mention the disclaimer of jointly held property, they provide no details. Recent developments in the law of qualified disclaimers of jointly held property make fuller treatment of such disclaimers necessary. Section 2-1108 [46-10-8 NMSA 1978] addresses the disclaimer by trustees of property that would otherwise become part of the trust. The disclaimer of powers of appointment and other powers not held in a fiduciary capacity is treated in Section 2-1109 [46-10-9 NMSA 1978] and disclaimers by appointees, objects, and takers in default of exercise of a power of appointment is the subject of Section 2-1110 [46-10-10 NMSA 1978]. Finally, Section 2-1111 provides rules for the disclaimer of powers held in a fiduciary capacity.

46-10-2. Definitions.

As used in the Uniform Disclaimer of Property Interests Act [46-10-1 NMSA 1978]:

A. "disclaimant" means the person to whom a disclaimed interest or power would have passed had the disclaimer not been made;

B. "disclaimed interest" means the interest that would have passed to the disclaimant had the disclaimer not been made;

C. "disclaimer" means the refusal to accept an interest in or power over property;

D. "fiduciary" means a personal representative, trustee, agent acting under a power of attorney or other person authorized to act as a fiduciary with respect to the property of another person;

E. "jointly held property" means property held in the name of two or more persons under an arrangement in which all holders have concurrent interests and under which the last surviving holder is entitled to the whole of the property;

F. "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;

G. "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. The term includes an Indian tribe, an Indian band or an Alaskan native village recognized by federal law or formally acknowledged by a state; and

H. "trust" means:

(1) an express trust, charitable or noncharitable, with additions thereto, whenever and however created; and

(2) a trust created pursuant to a statute, judgment or decree which requires the trust to be administered in the manner of an express trust.

History: Laws 2001, ch. 290, § 2.

ANNOTATIONS

Cross references. — For trusts generally, *see* 46-2-1 NMSA 1978 et seq.

For Uniform Probate Code, *see* Chapter 45 NMSA 1978.

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-3. Scope.

The Uniform Disclaimer of Property Interests Act [46-10-1 NMSA 1978] applies to disclaimers of any interest in or power over property, whenever created.

History: Laws 2001, ch. 290, § 3.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-4. Uniform Disclaimer of Property Interests Act supplemented by other law.

A. Unless displaced by a provision of the Uniform Disclaimer of Property Interests Act [46-10-1 NMSA 1978], the principles of law and equity supplement that act.

B. The Uniform Disclaimer of Property Interests Act does not limit any right of a person to waive, release, disclaim or renounce an interest in or power over property under a law other than that act.

History: Laws 2001, ch. 290, § 4.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-5. Power to disclaim; general requirements; when irrevocable.

A. A person may disclaim, in whole or part, any interest in or power over property, including a power of appointment. A person may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim.

B. Except to the extent a fiduciary's right to disclaim is expressly restricted or limited by another statute of this state or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment, whether acting in a personal or representative capacity. A fiduciary may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to

disclaim, or an instrument other than the instrument that created the fiduciary relationship imposed a restriction or limitation on the right to disclaim.

C. To be effective, a disclaimer must be in a writing or other record, declare the disclaimer, describe the interest or power disclaimed, be signed by the person making the disclaimer, and be delivered or filed in the manner provided in Section 12 [46-10-12 NMSA 1978] of the Uniform Disclaimer of Property Interests Act. As used in this subsection, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

D. A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power or any other interest or estate in the property.

E. A disclaimer becomes irrevocable when it is delivered or filed pursuant to Section 12 of the Uniform Disclaimer of Property Interests Act or when it becomes effective as provided in Sections 6 through 11 of that act [46-10-6 through 46-10-11 NMSA 1978], whichever occurs later.

F. A disclaimer made under the Uniform Disclaimer of Property Interests Act is not a transfer, assignment or release.

History: Laws 2001, ch. 290, § 5.

ANNOTATIONS

COMMENT

Subsections (a) and (b) give both persons (as defined in Section 2-1102(6)) [46-10-2 NMSA 1978] and fiduciaries (as defined in Section 2-1102(4)) [46-10-2 NMSA 1978] and other persons a broad power to disclaim both interests in and powers over property. In both instances, the ability to disclaim interests is comprehensive; it does not matter whether the disclaimed interest is vested, either in interest or in possession. For example, Father's will creates a testamentary trust which is to pay income to his descendants and after the running of the traditional perpetuities period is to terminate and be distributed to his descendants then living by representation. If at any time there are no descendants, the trust is to terminate and be distributed to collateral relatives. At the time of Father's death he has many descendants and the possibility of his line dying out and the collateral relatives taking under the trust is remote in the extreme. Nevertheless, under the Act the collateral relatives may disclaim their contingent remainders. In order to make a qualified disclaimer for tax purposes, however, they must disclaim them within 9 months of Father's death.) Every sort of power may also be disclaimed.

Subsection (a) continues the provisions of current law by making ineffective any attempt to limit the right to disclaim which the creator of an interest or non-fiduciary power seeks

to impose on a person. This provision follows from the principle behind all disclaimers -- no one can be forced to accept property – and extends that principle to powers over property.

This Act also gives fiduciaries broad powers to disclaim both interests and powers. A fiduciary who may also be a beneficiary of the fiduciary arrangement may disclaim in either capacity. For example, a trustee who is also one of several beneficiaries of a trust may have the power to invade trust principal for the beneficiaries. The trustee may disclaim the power as trustee under Section 2-1111 [46-10-11 NMSA 1978] or may disclaim as a holder of a power of appointment under Section 2-1109 [46-10-9 NMSA 1978]. Subsection (b) also gives fiduciaries the right to disclaim in spite of spendthrift or similar restrictions given, but subjects that right to a restriction applicable only to fiduciaries. As a policy matter, the creator of a trust or other arrangement creating a fiduciary relationship should be able to prevent a fiduciary accepting office under the arrangement from altering the parameters of the relationship. This reasoning also applies to fiduciary relationships created by statute such as those governing conservatorships and guardianships. Subsection (b) therefore does not override express restrictions on disclaimers contained in the instrument creating the fiduciary relationship or in other statutes of the State.

Subsection (c) sets forth the formal requirements for a disclaimer. The definitions of "record" and "signed" in this subsection are derived from the Uniform Electronic Transactions Act §102. The definitions recognize that a disclaimer may be prepared in forms other than typewritten pages with a signature in pen. Because of the novelty of a disclaimer executed in electronic form and the ease with which the term "record" can be confused with recording of documents, the Act does not use the term "record" in isolation but refers to "writing or other record." The delivery requirement is set forth in Section 2-1112.

Subsection (d) specifically allows a partial disclaimer of an interest in property or of a power over property, and gives the disclaimant wide latitude in describing the portion disclaimed. For example, a residuary beneficiary of an estate may disclaim a fraction or percentage of the residue or may disclaim specific property included in the residue (all the shares of X corporation or a specific number of shares). A devisee or donee may disclaim specific acreage or an undivided fraction or carve out a life estate or remainder from a larger interest in real or personal property. (It must be noted, however, that a disclaimer by a devisee or donee which seeks to "carve out" a remainder or life estate is not a "qualified disclaimer" for tax purposes, Treas. Reg. §25.2518-3(b).)

Subsection (e) makes the disclaimer irrevocable on the later to occur of (i) delivery or filing or (ii) its becoming effective under the section governing the disclaimer of the particular power or interest. A disclaimer must be "irrevocable" in order to be a qualified disclaimer for tax purposes. Since a disclaimer under this Act becomes effective at the time significant for tax purposes, a disclaimer under this Act will always meet the irrevocability requirement for tax qualification. The interaction of the Act and the

requirements for a tax qualified disclaimer can be illustrated by analyzing a disclaimer of an interest in a revocable lifetime trust.

Example 1. G creates a revocable lifetime trust which will terminate on G's death and distribute the trust property to G's surviving descendants by representation. G's son, S, determines that he would prefer his share of G's estate to pass to his descendants and executes a disclaimer of his interest in the revocable trust. The disclaimer is then delivered to G (see Section 2-1112(e)(3)) [46-10-12 NMSA 1978]. The disclaimer is not irrevocable at that time, however, because it will not become effective until G's death when the trust becomes irrevocable (see Section 2-1106(b)(1)). Because the disclaimer will not become irrevocable until it becomes effective at G's death, S may recall the disclaimer before G's death and, if he does so, the disclaimer will have no effect.

Subsection (f) restates the long standing rule that a disclaimer is a true refusal to accept and not an act by which the disclaimant transfers, assigns, or releases the disclaimed interest. This subsection states the effect and meaning of the traditional "relation back" doctrine of prior Acts. It also makes it clear that the disclaimed interest passes without direction by the disclaimant, a requirement of tax qualification.

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-6. Disclaimer of interest in property.

A. As used in this section:

(1) "time of distribution" means the time when a disclaimed interest would have taken effect in possession or enjoyment; and

(2) "future interest" means an interest that takes effect in possession or enjoyment, if at all, later than the time of its creation.

B. Except for a disclaimer governed by Section 7 or 8 of the Uniform Disclaimer of Property Interests Act [46-10-7 or 46-10-8 NMSA 1978], the following rules apply to a disclaimer of an interest in property:

(1) The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as of the time of the intestate's death.

(2) The disclaimed interest passes according to any provision in the instrument creating the interest providing for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general.

(3) If the instrument does not contain a provision described in Paragraph (2), the following rules apply:

(a) If the disclaimant is an individual, the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution. However, if, by law or under the instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution.

(b) If the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist.

(4) Upon the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment.

History: Laws 2001, ch. 290, § 6.

ANNOTATIONS

Cross references. — For intestate succession, *see* 45-2-101 NMSA 1978 et seq.

COMMENT

Subsection (a) defines two terms that are used only in Section 2-1106 [46-10-6 NMSA 1978]. The first, "future interest," is used in Section 2-1106(b)(4) [46-10-6 NMSA 1978] in connection with the acceleration rule.

The second defined term, "time of distribution," is used in determining to whom the disclaimed interest passes (see below). Possession or enjoyment is a term of art and means that time at which it is certain to whom the property belongs. It does not mean that the person actually has the property in hand. For example, the time of distribution of present interests created by will and all interests arising under the law of intestate succession is the death of the decedent. At that moment the heir or devisee is entitled to his or her devise or share, and it is irrelevant that time will pass before the will is admitted to probate and that actual receipt of the gift may not occur until the administration of the estate is complete. The time of distribution of present interests created by non-testamentary instruments generally depends on when the instrument becomes irrevocable. Because the recipient of a present interest is entitled to the property as soon as the gift is made, the time of distribution occurs when the creator of the interest can no longer take it back. The time of distribution of a future interest is the time when it comes into possession and the owner of the future interest becomes the owner of a present interest. For example, if B is the owner of the remainder interest in a trust which is to pay income to A for life, the time of distribution of B's remainder is A's death. At that time the trust terminated and B's ownership of the remainder becomes outright ownership of the trust property.

Section 2-1106(b)(1) makes a disclaimer of an interest in property effective as of the time the instrument creating the interest becomes irrevocable or at the decedent's death if the interest is created by intestate succession. A will and a revocable trust are irrevocable at the testator's or settlor's death. Inter vivos trusts may also be irrevocable at their creation or may become irrevocable before the settlor's death. A beneficiary designation is also irrevocable at death, unless it is made irrevocable at an earlier time. This provision continues the provision of Uniform Acts on this subject, but with different wording. Previous Acts have stated that the disclaimer "relates back" to some time before the disclaimed interest was created. The relation back doctrine gives effect to the special nature of the disclaimer as a refusal to accept. Because the disclaimer "relates back," the disclaimant is regarded as never having had an interest in the disclaimed property. A disclaimer by a devisee against whom there is an outstanding judgment will prevent the creditor from reaching the property the debtor would otherwise inherit. This Act continues the effect of the relation back doctrine, not by using the specific words, but by directly stating what the relation back doctrine has been interpreted to mean. Sections 2-1102(3) [46-10-2 NMSA 1978] and 2-1105(f) [46-10-5 NMSA 1978] taken together define a disclaimer as a refusal to accept which is not a transfer or release, and subsection (b)(1) of this section makes the disclaimer effective as of the time the creator cannot revoke the interest. Nothing in the statute, however, prevents the legislatures or the courts from limiting the effect of the disclaimer as refusal doctrine in specific situations or generally. See the Comments to Section 2-1113 [46-10-13 NMSA 1978] below.

Section 2-1106(b)(2) [46-10-6 NMSA 1978] allows the creator of the instrument to control the disposition of the disclaimed interest by express provision in the instrument. The provision may apply to a particular interest. "I give to my cousin A the sum of ten thousand dollars ($10,000) and should he disclaim any part of this gift, I give the part disclaimed to my cousin B." The provision may also apply to all disclaimed interests. A residuary clause beginning "I give my residuary estate, including all disclaimed interests to.... " is such a provision.

Sections 2-1106(b)(3)(B), (C), and (D) apply if Section 2-1106(b)(2) does not and if the disclaimant is an individual. Because "disclaimant" is defined as the person to whom the disclaimed interest would have passed had the disclaimer not been made (Section 2-1102(1)), these paragraphs would apply to disclaimers by fiduciaries on behalf of individuals. The general rule is that the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution defined in Section 2-1106(a)(2). The application of this general rule to present interests given to named individuals is illustrated by the following examples:

Example 1(a). T's will devised "ten thousand dollars ($10,000) to my brother, B." B disclaims the entire devise. B is deemed to have predeceased T, and, therefore B's gift has lapsed. If the State's antilapse statute applies, it will direct the passing of the disclaimed interest. Under Section 2-603(b)(1) [45-2-603 NMSA 1978], for example, B's descendants who survive T by 120 hours will take the devise by representation.

Example 1(b). T's will devised "ten thousand dollars ($10,000) to my friend, F." F disclaims the entire devise. F is deemed to predecease T and the gift has lapsed. Few antilapse statutes apply to devises to non-family members. Under Section 2-603(b), which saves from lapse only gifts made to certain relatives, the devise would lapse and pass through the residuary clause of the will.

Example 1(c). T's will devised "ten thousand dollars ($10,000) to my brother, B, but if B does not survive me, to my children." If B disclaims the devise, he will be deemed to have predeceased T and the alternative gift to T's children will dispose of the devise.

Present interests are also given to the surviving members of a class or group of persons.Perhaps the most common example of this gift is a devise of the testator's residuary estate "to my descendants who survive me by representation."Under the system of distribution among multi-generational classes used in Section 2-709 [45-2-709 NMSA 1978], division of the property to be distributed begins in the eldest generation in which there are living people. The following example illustrates a problem that can arise.

Example 2(a). T's will devised "the residue of my estate to my descendants who survive me by representation." T is survived by son S and daughter D. Son has two living children and D has one. S disclaims his interest. The disclaimed interest is one-half of the residuary estate, the interest S would have received had he not disclaimed. Section 2-1106(b)(3)(B) [46-10-6 NMSA 1978] provides that the disclaimed interest passes as if S had predeceased T. If Section 2-1106(b)(3) stopped there, S's children would take one-half of the disclaimed interest and D would take the other half under Section 2-709 [45-2-709 NMSA 1978]. S's disclaimer should not have that effect, however, but should pass what he would have taken to his children. Section 2-1106(b)(3)(C) solves the problem. It provides that the entire disclaimed interest passes only to S's descendants because they would share in the interest had S truly predeceased T.

The provision also solves a problem that exists when the disclaimant is the only representative of an older generation.

Example 2(b). Assume the same facts as Example 2(a), but D has predeceased T. T is survived, therefore, by S, S's two children, and D's child. S disclaims. Again, the disclaimed interest is one-half of the residuary estate and it passes as if S had predeceased T. Had S actually predeceased T, the three grandchildren of S would have shared equally in T's residuary estate because they are all in the same generation. Were the three grandchildren to share equally in the disclaimed interest, S's two children would each receive one-third of the one-half while D's child would receive one-third of the one-half in addition to the one-half of the residuary estate received as the representative of his or her late parent. Section 2-1106(b)(3)(C) again applies to insure that S's children receive one-half of the residue, exactly the interest S would have received but for the disclaimer.

The disclaimer of future interests created by will leads to a different problem. The effective date of the disclaimer of the future interest, the testator's death,is earlier in time than the distribution date. This in turn leads to a possible anomaly illustrated by the following example.

Example 3. Father's will creates a testamentary trust for Mother who is to receive all the income for life. At her death, the trust is to be distributed to Father and Mother's surviving descendants by representation. Mother is survived by son S and daughter D. Son has two living children and D has one. Son decides that he would prefer his share of the trust to pass to his children and disclaims. The disclaimer must be made within nine months of Father's death if it is to be a qualified disclaimer for tax purposes. Under prior Acts and former Section 2-801, the interest would have passed as if Son had predeceased Father. A problem could arise if, at Mother's death, one or more of S's children living at that time were born after Father's death. It would be possible to argue that had S predeceased Father the afterborn children would not exist and that D and S's two children living at the time of Father's death are entitled to all of the trust property.

The problem illustrated in Example 3 is solved by Section 2-1106(b)(3)(B) [46-10-6 NMSA 1978]. The disclaimed interest would have taken effect in possession or enjoyment, that is, Son would be entitled to receive one-half of the trust property, at Mother's death. Under paragraph (3)(B) Son is deemed to have died immediately before Mother's death even though under Section 2-1106(b)(1) the disclaimer is effective as of Father's death. There is no doubt, therefore, that S's children living at the distribution date, whenever born, are entitled to the share of the trust property S would have received and, as Examples 2(a) and 2(b) show, they will take exactly what S would have received but for the disclaimer. Had S actually died before Mother, he would have received nothing at Mother's death whether or not the disclaimer had been made. There is nothing to pass to S's children and they take as representatives of S under the representational scheme in effect.

Future interests may or may not be conditioned on survivorship. The following examples illustrate disclaimers of future interests not expressly conditioned on survival.

Example 4 (a). G's revocable trust directs the trustee to pay "ten thousand dollars ($10,000) to the grantor's brother, B" at the termination of the trust on G's death. B disclaims the entire gift immediately after G's death. B is deemed to have predeceased G because it is at G's death that the interest given B will come into possession and enjoyment. Had B not disclaimed he would have received $10,000 at that time. The recipient of the disclaimed interest will be determined by the law that applies to gifts of future interests to persons who die before the interest comes into possession and enjoyment. Traditional analysis would regard the gift to B as a vested interest subject to divestment by G's power to revoke the trust. So long as G has not revoked the gift, the interest would pass through B's estate to B's successors in interest. Yet If B's successors in interest are selected by B's will, the disclaimer cannot be a qualified disclaimer for tax purposes. This problem does not arise in a jurisdiction with Section 2-707 (b), because the interest passes not through B's estate but rather to B's

descendants who survive G by 120 hours by representation. Because the antilapse mechanism of Section 2-707 [45-2-707 NMSA 1978] is not limited to gifts to relatives, a disclaimer by a friend rather than a brother would have the same result. For jurisdictions without Section 2-707, however, Section 2-1106(b)(3)(D) [46-10-6 NMSA 1978] provides an equivalent solution: a disclaimed interest that would otherwise pass through B's estate instead passes to B's descendants who survive G by representation.

Example 4 (b). G's revocable trust directed that on his death the trust property is to be distributed to his three children, A, B, and C. A disclaims immediately after G's death and is deemed to predecease the distribution date, which is G's death. The traditional analysis applies exactly as it does in Example 4 (a). The only condition on A's gift would be G's not revoking the trust. A is not explicitly required to survive G. (See First National Bank of Bar Harbor v. Anthony, 557 A.2d 957 (Me. 1989).) The interest would pass to A's successors in interest. If those successors are selected by A's will, the disclaimer cannot be a qualified disclaimer for tax purposes. Section 2-707(b) provides that A's interest passes by representation to A's descendants who survive G by 120 hours. For jurisdictions without Section 2-707, Section 2-1106(b)(3)(D) [46-10-6 NMSA 1978] reaches the same result.

Example 4(c). G conveys land "to A for life, remainder to B." B disclaims immediately after the conveyance. Traditional analysis regards B's remainder as vested; it is not contingent on surviving A. This classification is unaffected by whether or not the jurisdiction has adopted Section 2-707 [45-2-707 NMSA 1978], because that section only applies to future interests in trust; it does not apply to future interests not in trust, such as the one in this example created directly in land. To the extent that B's remainder is transmissible through B's estate, B's disclaimer cannot be a qualified disclaimer for tax purposes. Section 2-1106(b)(3)(D) [46-10-6 NMSA 1978] resolves the problem: a disclaimed interest that would otherwise pass through B's estate instead passes as if it were controlled by Sections 2-707 [45-2-707 NMSA 1978] and 2-711 [45-2-711 NMSA 1978]. Because Section 2-707 only applies to future interests in trust, jurisdictions enacting Section 2-1106 should enact Section 2-1106(b)(3)(D) whether or not they have enacted Section 2-707.

Section 2-1106(b)(3)(A) [46-10-6 NMSA 1978] provides a rule for the passing of property interests disclaimed by persons other than individuals. Because Section 2-1108 [46-10-8 NMSA 1978] applies to disclaimers by trustees of property that would otherwise pass to the trust, Section 2-1106(b)(3)(A) principally applies to disclaimers by corporations, partnerships, and the other entities listed in the definition of "person" in Section 2-1102(6). A charity, for example, might wish to disclaim property the acceptance of which would be incompatible with its purposes.

Section 2-1106(b)(4) continues the provision of prior Uniform Acts and former Section 2-801 on this subject providing for the acceleration of future interests on the making of the disclaimer, except that future interests in the disclaimant do not accelerate. The workings of Section 2-1106(b)(4) are illustrated by the following examples.

Example 5(a). Father's will creates a testamentary trust to pay income to his son S for his life, and on his death to pay the remainder to S's descendants then living, by representation. If S disclaims his life income interest in the trust, he will be deemed to have died immediately before Father's death. The disclaimed interest, S's income interest, came into possession and enjoyment at Father's death as would any present interest created by will (see Examples 1(a), (b), and (c)), and, therefore, the time of distribution is Father's death. If at the income beneficiary of a testamentary trust does not survive the testator, the income interest is not created and the next interest in the trust takes effect. Since the next interest in Father's trust is the remainder in S's descendants, the trust property will pass to S's descendants who survive Father by representation. It is immaterial under the statute that the actual situation at the S's death might be different with different descendants entitled to the remainder.

Example 5(b). Mother's will creates a testamentary trust to pay the income to her daughter D until she reaches age 35 at which time the trust is to terminate and the trust property distributed in equal shares to D and her three siblings. D disclaims her income interest. The remainder interests in her three siblings accelerate and they each receive one-fourth of the trust property. D's remainder interest does not accelerate, however, and she must wait until she is 35 to receive her fourth of the trust property.

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-7. Disclaimer of rights of survivorship in jointly held property.

A. Upon the death of a holder of jointly held property, a surviving holder may disclaim, in whole or part, the greater of:

(1) a fractional share of the property determined by dividing the number one by the number of joint holders alive immediately before the death of the holder to whose death the disclaimer relates; or

(2) all of the property except that part of the value of the entire interest attributable to the contribution furnished by the disclaimant.

B. A disclaimer under Subsection (a) takes effect as of the death of the holder of jointly held property to whose death the disclaimer relates.

C. An interest in jointly held property disclaimed by a surviving holder of the property passes as if the disclaimant predeceased the holder to whose death the disclaimer relates.

History: Laws 2001, ch. 290, § 7.

ANNOTATIONS

COMMENT

The various forms of ownership in which "joint property," as defined in Section 2-1102(5), can be held include common law joint tenancies and any statutory variation that preserves the right of survivorship. The common law was unsettled whether a surviving joint tenant had any right to renounce his interest in jointly-owned property and if so to what extent. See Casner, Estate Planning, 5th ed. §10.7. Specifically, if A and B owned real estate or securities as joint tenants with right of survivorship and A died, the problem was whether B might disclaim what was given to him originally upon creation of the estate, or, if not, whether he could nevertheless reject the incremental portion derived through the right of survivorship. There was also a question of whether a joint bank account should be treated differently from jointly-owned securities or real estate for the purpose of disclaimer.

This common law of disclaimers of jointly held property must be set against the rapid developments in the law of tax qualified disclaimers of jointly held property. Since the previous Uniform Acts were drafted, the law regarding tax qualified disclaimers of joint property interests has been clarified. Courts have repeatedly held that a surviving joint tenant may disclaim that portion of the jointly held property to which the survivor succeeds by operation of law on the death of the other joint tenant so long as the joint tenancy was severable during the life of the joint tenants (Kennedy v. Commissioner, 804 F.2d 1332 (7th Cir. 1986), McDonald v. Commissioner, 853 F.2d 1494 (9th Cir. 1988), Dancy v. Commissioner, 872 F.2d 84 (4th Cir. 1989).) On December 30, 1997 the Service published T.D. 8744 making final proposed amendments of the Regulations under IRC §2518 to reflect the decisions regarding disclaimers of joint property interests.

The amended final Regulations, §25.2518-2(c)(4)(i) allow a surviving joint tenant or tenant by the entireties to disclaim that portion of the tenancy to which he or she succeeds upon the death of the first joint tenant (1/2 where there are two joint tenants) whether or not the tenancy could have been unilaterally severed under local law and regardless of the proportion of consideration furnished by the disclaimant. The Regulations also create a special rule for joint tenancies between spouses created after July 14, 1988 where the spouse of the donor is not a United States citizen. In that case, the donee spouse may disclaim any portion of the joint tenancy includible in the donor spouse's gross estate under IRC §2040, which creates a contribution rule. Thus the surviving non-citizen spouse may disclaim all of the joint tenancy property if the deceased spouse provided all the consideration for the tenancy's creation.

The amended final Regulations, §25.2518-2(c) (4) (iii) also recognize the unique features of joint bank accounts, and allow the disclaimer by a survivor of that part of the account contributed by the decedent, so long as the decedent could have regained that portion during life by unilateral action, bar the disclaimer of that part of the account attributable to the survivor's contributions, and explicitly extend the rule governing joint bank accounts to brokerage and other investment accounts, such as mutual fund accounts, held in joint name.

These developments in the tax law of disclaimers are reflected in subsection (a). The subsection allows a surviving holder of jointly held property to disclaim the greater of the accretive share, the part of the jointly held property which augments the survivor's interest in the property, and all of the property that it not attributable to the disclaimant's contribution to the jointly held property. In the usual joint tenancy or tenancy by the entireties between husband and wife, the survivor will always be able to disclaim one-half the property. If the disclaimer conforms to the requirements of IRC §2518, it will be a qualified disclaimer. In addition the surviving spouse can disclaim all of the property attributable to the decedent's contribution, a provision which will allow the non-citizen spouse to take advantage of the contribution rule of the final Regulations. The contribution rule of subsection (a)(2) will also allow surviving holders of joint property arrangements other than joint tenancies to make a tax qualified disclaimer under the rules applicable to those joint arrangements. For example, if A contributes 60% and B contributes 40% to a joint bank account and they allow the interest on the funds to accumulate, on B's death A can disclaim 40% of the account; on A's death B can disclaim 60% of the account. (Note that under subsection (a)(1) A can disclaim up to 50% of the account on B's death because there are two joint account holders, but the disclaimer would not be fully tax qualified. As previously noted, a tax qualified disclaimer is limited to 40% of the account.) If the account belonged to the parties during their joint lives in proportion to their contributions, the disclaimers in this example can be tax qualified disclaimers if all the requirements of IRC §2518 are met.

Subsection (b) provides that the disclaimer is effective as of the death of the joint holder which triggers the survivorship feature of the joint property arrangement. The disclaimant, therefore, has no interest in and has not transferred the disclaimed interest.

Subsection (c) provides that the disclaimed interest passes as if the disclaimant had predeceased the holder to whose death the disclaimer relates. Where there are two joint holders, a disclaimer by the survivor results in the disclaimed property passing as part of the deceased joint holder's estate because under this subsection, the deceased joint holder is the survivor as to the portion disclaimed. If a married couple owns the family home in joint tenancy, therefore, a disclaimer by the survivor under subsection (a)(1) results in one-half the home passing through the decedent's estate. The surviving spouse and whoever receives the interest through the decedent's estate are tenants in common in the house. In the proper circumstances, the disclaimed one-half could help to use up the decedent's unified credit. Without the disclaimer, the interest would automatically qualify for the marital deduction, perhaps wasting part of the decedent's applicable exclusion amount.

In a multiple holder joint property arrangement, the disclaimed interest will belong to the other joint holder or holders.

Example 1. A, B, and C make equal contributions to the purchase of Blackacre, to which they take title as joint tenants with right of survivorship. On partition each would receive 1/3 of Blackacre and any of them could convert his or her interest to a 1/3 tenancy in common by unilateral severance (which, of course, would have to be

accomplished in accordance with state law). On A's death, B and C may each, if they wish, disclaim up to 1/3 of the property under section (a) (1). Should one of them disclaim the full 1/3, the disclaimant will be deemed to predecease A.

Assume that B so disclaims. With respect to the 1/3 undivided interest that now no longer belongs to A the only surviving joint holder is C. C therefore owns that 1/3 as tenant in common with the joint tenancy. Should C predecease B, the 1/3 tenancy in common interest will pass through C's estate and B will be the sole owner of an undivided 2/3 interest in Blackacre as the survivor of the joint tenancy. Should B predecease C, C will be the sole owner of Blackacre in fee simple absolute.

Alternatively, assume that both B and C make valid disclaimers after A's death. They are both deemed to predeceased A, A is the sole survivor of the joint tenancy and Blackacre passes through A's estate.

Finally, assume that A provided all the consideration for the purchase of Blackacre. On A's death, B and C can each disclaim the entire property under subsection (a)(2). If they both do so, Blackacre will pass through A's estate. If only one of B or C disclaims the entire property, the one who does not will be the sole owner of Blackacre as the only surviving joint tenant. Such a disclaimer would not be completely tax qualified, however. The Regulations limit a tax qualified disclaimer to no more than 1/3 of the property. If, however, B or C were the first to die, A could still disclaim the 1/3 interest that no longer belongs to the decedent under subsection (a) (1), the disclaimer would be a qualified disclaimer for tax purposes under the Regulations, and the result is that the other surviving joint tenant owns 1/3 of Blackacre as tenant in common with the joint tenancy.

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-8. Disclaimer of interest by trustee.

If a trustee disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property.

History: Laws 2001, ch. 290, § 8.

ANNOTATIONS

Cross references. — For trusts generally, *see* 46-2-1 NMSA 1978 et seq.

COMMENT

This section deals with disclaimer of a right to receive property into a trust, and thus applies only to trustees. (A disclaimer of a right to receive property by a fiduciary acting on behalf of an individual, such as a personal representative, conservator, guardian, or agent is governed by the section of the statute applicable to the type of interest being disclaimed.) The instrument under which the right to receive the property was created

may govern the disposition of the property in the event of a disclaimer by providing for a disposition when the trust does not exist. When the instrument does not make such a provision, the doctrine of resulting trust will carry the property back to the donor. The effect of the actions of co-trustees will depend on the state law governing the action of multiple trustees. Every disclaimer by a trustee must be compatible with the trustee's fiduciary obligations.

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-9. Disclaimer of power of appointment or other power not held in fiduciary capacity.

If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, the following rules apply:

A. If the holder has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

B. If the holder has exercised the power and the disclaimer is of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power.

C. The instrument creating the power is construed as if the power expired when the disclaimer became effective.

History: Laws 2001, ch. 290, § 9.

ANNOTATIONS

COMMENT

Section 2-1105(a) [46-10-5 NMSA 1978] authorizes a person to disclaim an interest in or power over property. Section 2-1109 [46-10-9 NMSA 1978] provides rules for disclaimers of powers which are not held in a fiduciary capacity. The most common non-fiduciary power is a power of appointment. Section 2-1105(a) also authorizes the partial disclaimer of a power as well as of an interest. For example, the disclaimer could be of a portion of the power to appoint one's self, while retaining the right to appoint to others. The effect of a disclaimer of a power under Section 2-1109 [46-10-9 NMSA 1978] depends on whether or not the holder has exercised the power and on what sort of power is held. If a holder disclaims a power before exercising it, the power expires and can never be exercised. If the power has been exercised, the power is construed as having expired immediately after its last exercise by the holder. The disclaimer affects only the holder of the power and will not affect other aspects of the power.

Example 1. T creates a testamentary trust to pay the income to A for life, remainder as A shall appoint by will among her descendants living at A's death and four named

charities. If A does not exercise her power, the remainder passes to her descendants living at her death by representation. A disclaims the power. The power can no longer be exercised and on A's death the remainder will pass to the takers in default.

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-10. Disclaimer by appointee, object or taker in default of exercise of power of appointment.

A. A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable.

B. A disclaimer of an interest in property by an object or taker in default of an exercise of a power of appointment takes effect as of the time the instrument creating the power becomes irrevocable.

History: Laws 2001, ch. 290, § 10.

ANNOTATIONS

COMMENT

This section governs disclaimers by those who may or do receive an interest in property through the exercise of a power of appointment. At the time of the creation of a power of appointment, the creator of the power, besides giving the power to the holder of the power, can also limit the objects of the power (the permissible appointees of the property subject to the power) and also name those who are to take if the power is not exercised, persons referred to as takers in default.

This section provides rules for disclaimers by all of these persons: subsection (a) is concerned with a disclaimer by a person who actually receives an interest in property through the exercise of a power of appointment, and subsection (b) recognizes a disclaimer by a taker in default or permissible appointee before the power is exercised. These two situations are quite different. An appointee is in the same position as any devisee or beneficiary of a trust. He or she may receive a present or future interest depending on how the holder of the power exercises it. Subsection (a) therefore, makes the disclaimer effective as of the time the instrument exercising the power–giving the interest to the disclaimant–becomes irrevocable. If the holder of the power created an interest in the appointee, the effect of the disclaimer is governed by Section 2-1106. If the holder created another power in the appointee, the effect of the disclaimer is governed by Section 2-1109 [46-10-9 NMSA 1978].

Example 1. Mother's will creates a testamentary trust for daughter D. The trustees are to pay all income to D for her life and have discretion to invade principal for D's maintenance. On D's death she may appoint the trust property by will among her then

living descendants. In default of appointment the property is to be distributed by representation to D's descendants who survive her. D is the donee, her descendants are the permissible appointees and the takers in default. D exercises her power by appointing the trust property in three equal shares to her children A, B, and C. The three children are the appointees. A disclaims. Under subsection (a) A's disclaimer is effective as of D's death (the time at which the will exercising the power became irrevocable). Because A disclaimed an interest in property, the effect of the disclaimer is governed by Section 2-1106(b) [46-10-6 NMSA 1978]. If D's will makes no provisions for the disposition of the interest should it be disclaimed or of disclaimed interests in general (Section 2-1106(b)(2)), the interest passes as if A predeceased the time of distribution which is D's death. An appointment to a person who is dead at the time of the appointment is ineffective except as provided by an antilapse statute. See Restatement, Second, Property (Donative Transfers) §18.5. The Restatement, Second, Property (Donative Transfers), §18.6 suggests that any requirement of the antilapse statute that the deceased devisee be related in some way to the testator be applied as if the appointive property were owned either by the donor or the holder of the power. (See also Restatement, Third, Property (Wills and Other Donative Transfers) §5.5, Comment l.) That is the position taken by Section 2-603. Since antilapse statutes usually apply to devises to children and grandchildren, the disclaimed interest would pass to A's descendants by representation.

A taker in default or a permissible object of appointment is traditionally regarded as having a type of future interest. See Restatement, Second, Property (Donative Transfers) §11.2, Comments c and d. The future interest will come into possession and enjoyment when the question of whether or not the power is to be exercised is resolved. For testamentary powers that time is the death of the holder.

Subsection (b) provides that a disclaimer by an object or taker in default takes effect as of the time the instrument creating the power becomes effective. Because the disclaimant is disclaiming an interest in property, albeit a future interest, the effect of the disclaimer is governed by Section 2-1106 [46-10-6 NMSA 1978]. The effect of these rules is illustrated by the following examples.

Example 2(a). The facts are the same as Example 1, except A disclaims before D's death and D's will does not exercise the power. Under subsection (b) A's disclaimer is effective as of Mother's death which is the time when the instrument creating the power, Mother's will, became irrevocable. Because A disclaimed an interest in property, the effect of the disclaimer is governed by Section 2-1106(b) [46-10-6 NMSA 1978]. If Mother's will makes no provision for the disposition of the interest should it be disclaimed or of disclaimed interests in general (Section 2-1106(b) (2)), the interest passes and under Section 2-1106(b) (3) as if the disclaimant had died immediately before the time of distribution. Thus, A is deemed to have died immediately before D's death which is the time of distribution. If A actually survives D, the disclaimed interest is one-third of the trust property; it will pass as if A predeceased D, and the result is the same as in Example 1. If A does predecease D he would have received nothing and

there is no disclaimed interest. The disclaimer has no effect on the passing of the trust property.

Example 2 (b). The facts are the same as in Example 2 (a) except D does exercise her power of appointment to give one-third of the trust property to each of her three children, A, B, and C. A's disclaimer means the disclaimed interest will pass as if he predeceased D and the result is the same as in Example 1.

In addition, if all the objects and takers in default disclaim before the power is exercised the power of appointment is destroyed. See Restatement, Second, Property (Donative Transfers) §12.1, Comment g.

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-11. Disclaimer of power held in fiduciary capacity.

A. If a fiduciary disclaims a power held in a fiduciary capacity that has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

B. If a fiduciary disclaims a power held in a fiduciary capacity that has been exercised, the disclaimer takes effect immediately after the last exercise of the power.

C. A disclaimer under this section is effective as to another fiduciary if the disclaimer so provides and the fiduciary disclaiming has the authority to bind the estate, trust or other person for whom the fiduciary is acting.

History: Laws 2001, ch. 290, § 11.

ANNOTATIONS

COMMENT

This section governs disclaimers by fiduciaries of powers held in their fiduciary capacity. Examples include a right to remove and replace a trustee or a trustee's power to make distributions of income or principal. Such disclaimers have not been specifically dealt with in prior Uniform Acts although they could prove useful in several situations. A trustee who is also a beneficiary may want to disclaim a power to invade principal for himself for tax purposes. A trustee of a trust for the benefit for a surviving spouse who also has the power to invade principal for the decedent's descendants may wish to disclaim the power in order to qualify the trust for the marital deduction. (The use of a disclaimer in just that situation was approved in Cleaveland v. U.S., 62 A.F.T.R.2d 88-5992, 88-1 USTC ¶13,766 (C. D. Ill. 1988).)

The section refers to fiduciary in the singular. It is possible, of course, for a trust to have two or more co-trustees and an estate to have two or more co-personal representatives.

This Act leaves the effect of actions of multiple fiduciaries to the general rules in effect in each State relating to multiple fiduciaries. For example, if the general rule is that a majority of trustees can make binding decisions, a disclaimer by two of three co-trustees of a power is effective. A dissenting co-trustee could follow whatever procedure state law prescribes for disassociating him or herself from the action of the majority. A sole trustee burdened with a power to invade principal for a group of beneficiaries including him or herself who wishes to disclaim the power but yet preserve the possibility of another trustee exercising the power would seek the appointment of a disinterested co-trustee to exercise the power and then disclaim the power for him or herself. The subsection thus makes the disclaimer effective only as to the disclaiming fiduciary unless the disclaimer states otherwise. If the disclaimer does attempt to bind other fiduciaries, be they co- fiduciaries or successor fiduciaries, the effect of the disclaimer will depend on local law.

As with any action by a fiduciary, a disclaimer of fiduciary powers must be compatible with the fiduciary's duties.

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-12. Delivery or filing.

A. As used in this section, "beneficiary designation" means an instrument, other than an instrument creating a trust, naming the beneficiary of:

(1) an annuity or insurance policy;

(2) an account with a designation for payment on death;

(3) a security registered in beneficiary form;

(4) a pension, profit-sharing, retirement or other employment-related benefit plan; or

(5) any other nonprobate transfer at death.

B. Subject to Subsections (c) through (l), delivery of a disclaimer may be effected by personal delivery, first-class mail or any other method likely to result in its receipt.

C. In the case of an interest created under the law of intestate succession or an interest created by will, other than an interest in a testamentary trust:

(1) a disclaimer must be delivered to the personal representative of the decedent's estate; or

(2) if no personal representative is then serving, it must be filed with a court having jurisdiction to appoint the personal representative.

D. In the case of an interest in a testamentary trust:

(1) a disclaimer must be delivered to the trustee then serving or, if no trustee is then serving, to the personal representative of the decedent's estate; or

(2) if no personal representative is then serving, it must be filed with a court having jurisdiction to enforce the trust.

E. In the case of an interest in an inter vivos trust:

(1) a disclaimer must be delivered to the trustee then serving;

(2) if no trustee is then serving, it must be filed with a court having jurisdiction to enforce the trust; or

(3) if the disclaimer is made before the time the instrument creating the trust becomes irrevocable, it must be delivered to the settlor of a revocable trust or the transferor of the interest.

F. In the case of an interest created by a beneficiary designation made before the time the designation becomes irrevocable, a disclaimer must be delivered to the person making the beneficiary designation.

G. In the case of an interest created by a beneficiary designation made after the time the designation becomes irrevocable, a disclaimer must be delivered to the person obligated to distribute the interest.

H. In the case of a disclaimer by a surviving holder of jointly held property, the disclaimer must be delivered to the person to whom the disclaimed interest passes.

I. In the case of a disclaimer by an object or taker in default of exercise of a power of appointment at any time after the power was created:

(1) the disclaimer must be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or

(2) if no fiduciary is then serving, it must be filed with a court having authority to appoint the fiduciary.

J. In the case of a disclaimer by an appointee of a nonfiduciary power of appointment:

(1) the disclaimer must be delivered to the holder, the personal representative of the holder's estate or to the fiduciary under the instrument that created the power; or

(2) if no fiduciary is then serving, it must be filed with a court having authority to appoint the fiduciary.

K. In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer must be delivered as provided in Subsection (c), (d) or (e), as if the power disclaimed were an interest in property.

L. In the case of a disclaimer of a power by an agent, the disclaimer must be delivered to the principal or the principal's representative.

History: Laws 2001, ch. 290, § 12.

ANNOTATIONS

Cross references. — For Uniform Probate Code, *see* Chapter 45 NMSA 1978.

For trusts generally, *see* 46-2-1 NMSA 1978 et seq.

COMMENT

The rules set forth in this section are designed so that anyone who has the duty to distribute the disclaimed interest will be notified of the disclaimer. For example, a disclaimer of an interest in an decedent's estate must be delivered to the personal representative of the estate. A disclaimer is required to be filed in Court only when there is no one person or entity to whom delivery can be made.

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-13. When disclaimer barred or limited.

A. A disclaimer is barred by a written waiver of the right to disclaim.

B. A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective:

(1) the disclaimant accepts the interest sought to be disclaimed;

(2) the disclaimant voluntarily assigns, conveys, encumbers, pledges or transfers the interest sought to be disclaimed or contracts to do so; or

(3) a judicial sale of the interest sought to be disclaimed occurs.

C. A disclaimer, in whole or part, of the future exercise of a power held in a fiduciary capacity is not barred by its previous exercise.

D. A disclaimer, in whole or part, of the future exercise of a power not held in a fiduciary capacity is not barred by its previous exercise unless the power is exercisable in favor of the disclaimant.

E. A disclaimer is barred or limited if so provided by law other than the Uniform Disclaimer of Property Interests Act [46-10-1 NMSA 1978].

F. A disclaimer of a power over property that is barred by this section is ineffective. A disclaimer of an interest in property that is barred by this section takes effect as a transfer of the interest disclaimed to the persons who would have taken the interest under the Uniform Disclaimer of Property Interests Act had the disclaimer not been barred.

History: Laws 2001, ch. 290, § 13.

ANNOTATIONS

COMMENT

The 1978 Act required that an effective disclaimer be made within nine months of the event giving rise to the right to disclaim (e.g., nine months from the death of the decedent or donee of a power or the vesting of a future interest). The nine month period corresponded in some situations with the Internal Revenue Code provisions governing qualified tax disclaimers. Under the common law an effective disclaimer had to be made only within a "reasonable" time.

This Act specifically rejects a time requirement for making a disclaimer. Recognizing that disclaimers are used for purposes other than tax planning, a disclaimer can be made effectively under the Act so long as the disclaimant is not barred from disclaiming the property or interest or has not waived the right to disclaim. Persons seeking to make tax qualified disclaimers will continue to have to conform to the requirements of the Internal Revenue Code.

The events resulting in a bar to the right to disclaim set forth in this section are similar to those found in the 1978 Acts and former Section 2-801. Subsection (a) provides that a written waiver of the right to disclaim is effective to bar a disclaimer. Such a waiver might be sought, for example, by a creditor who wishes to make sure that property acquired in the future will be available to satisfy the debt.

Whether particular actions by the disclaimant amount to accepting the interest sought to be disclaimed within the meaning of subsection (b)(1) will necessarily be determined by the courts based upon the particular facts. (See Leipham v. Adams, 77 Wash. App. 827, 894 P.2d 576 (1995); Matter of Will of Hall, 318 S.C. 188, 456 S.E.2d 439 (Ct. App. 1995); Jordan v. Trower, 208 Ga. App. 552, 431 S.E.2d 160 (1993); Matter of Gates, 189 A.D.2d 427, 595 N.Y.S.2d 194 (3d Dept. 1993); "What Constitutes or Establishes Beneficiary's Acceptance or Renunciation of Devise or Bequest," 93 ALR2d 8).

The addition in this Act of the word "voluntary" to the list of actions barring a disclaimer which also appears in the earlier Acts reflects the numerous cases holding that only actions by the disclaimant taken after the right to disclaim has arisen will act as a bar. (See Troy v. Hart, 116 Md. App. 468, 697 A.2d 113 (1997), Estate of Opatz, 554 N.W.2d 813 (N.D. 1996), Frances Slocum Bank v. Martin, 666 N.E.2d 411 (Ind. App. 1996), Brown v. Momar, Inc., 201 Ga. App. 542, 411 S.E.2d 718 (1991), Tompkins State Bank v. Niles, 127 Ill.2d 209, 130 Ill. Dec. 207, 537 N.E.2d 274 (1989).) An existing lien, therefore, will not prevent a disclaimer, although the disclaimant's actions before the right to disclaim arises may work an estoppel. See Hale v. Bardouh, 975 S.W.2d 419 (Tex. Ct. App. 1998). With regard to joint property, the event giving rise to the right to disclaim is the death of a joint holder, not the creation of the joint interest and any benefit received during the deceased joint tenant's life is ignored.

The reference to judicial sale in subsection (b) (3) continues a provision from the earlier Acts and ensures that title gained from a judicial sale by a personal representative will not be clouded by a possible disclaimer.

Subsection (c) rephrases the rules of Section 2-1111 [46-10-11 NMSA 1978] governing the effect of disclaimers of powers

Subsection (d) is applicable to powers which can be disclaimed under Section 2-1109 [46-10-9 NMSA 1978]. It bars the disclaimer of a general power of appointment once it has been exercised. A general power of appointment allows the holder to take the property subject to the power for him or herself, whether outright or by using it to pay his or her creditors (for estate and gift tax purposes, a general power is one that allows the holder to appoint to himself, his estate, his creditors, or the creditors of his estate). The power is presently exercisable if the holder need not wait to some time or for some event to occur before exercising the power. If the holder has exercised such a power, it can no longer be disclaimed.

Subsection (e), unlike the 1978 Act, specifies that "other law" may bar the right to disclaim. Some States, including Minnesota (M.S.A. § 525.532 (c) (6)), Massachusetts (Mass. Gen. Law c. 191A, §8), and Florida (Fla. Stat. §732.801(6)), bar a disclaimer by an insolvent disclaimant. In others a disclaimer by an insolvent debtor is treated as a fraudulent "transfer". See Stein v. Brown, 18 Ohio St. 3d 305 (1985); Pennington v. Bigham, 512 So.2d 1344 (Ala. 1987). A number of States refuse to recognize a disclaimer used to qualify the disclaimant for Medicaid or other public assistance. These decisions often rely on the definition of "transfer" in the federal Medical Assistance Handbook which includes a "waiver" of the right to receive an inheritance (see 42 U.S.C.A. §1396p(e) (1)). See Hinschberger v. Griggs County Social Services, 499 N.W.2d 876 (N.D. 1993); Department of Income Maintenance v. Watts, 211 Conn. 323 (1989), Matter of Keuning, 190 A.D.2d 1033, 593 N.Y.S.2d 653 (4th Dept. 1993), and Matter of Molloy, 214 A.D.2d 171, 631 N.Y.S.2d 910 (2nd Dept. 1995), Troy v. Hart, 116 Md. App. 468, 697 A.2d 113 (1997), Tannler v. Wisconsin Dept. of Health & Social Services, 211 Wis. 2d 179, 564 N.W.2d 735 (1997); but see, Estate of Kirk, 591 N.W.2d 630 (Iowa, 1999) (valid disclaimer by executor of surviving spouse who was Medicaid

beneficiary prevents recovery by Medicaid authorities). It is also likely that state policies will begin to address the question of disclaimers of real property on which an environmental hazard is located in order to avoid saddling the State, as title holder of last resort, with the resulting liability, although the need for fiduciaries to disclaim property subject to environmental liability has probably been diminished by the 1996 amendments to CERCLA by the Asset Conservation Act of 1996 (PL 104-208). These larger policy issues are not addressed in this Act and must, therefore, continue to be addressed by the various States. On the federal level, the United States Supreme Court has held that valid disclaimer does not defeat a federal tax lien levied under IRC §6321, Dyre, Jr. v. United States, 528 U.S. 49, 120 S. Ct. 474 (1999).

Subsection (f) provides a rule stating what happens if an attempt is made to disclaim a power or property interest whose disclaimer is barred by this section. A disclaimer of a power is ineffective, but the attempted disclaimer of the property interest, although invalid as a disclaimer, will operate as a transfer of the disclaimed property interest to the person or persons who would have taken the interest had the disclaimer not been barred. This provision removes the ambiguity that would otherwise be caused by an ineffective refusal to accept property. Whoever has control of the property will know to whom to deliver it and the person attempting the disclaimer will bear any transfer tax consequences.

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-14. Tax qualified disclaimer.

Notwithstanding any other provision of the Uniform Disclaimer of Property Interests Act [46-10-1 NMSA 1978], if as a result of a disclaimer or transfer, the disclaimed or transferred interest is treated pursuant to the provisions of Title 26 of the United States Code, as now or hereafter amended, or any successor statute thereto, and the regulations promulgated thereunder, as never having been transferred to the disclaimant, then the disclaimer or transfer is effective as a disclaimer under the Uniform Disclaimer of Property Interests Act.

History: Laws 2001, ch. 290, § 14.

ANNOTATIONS

COMMENT

This section coordinates the Act with the requirements of a qualified disclaimer for transfer tax purposes under IRC §2518. Any disclaimer which is qualified for estate and gift tax purposes is a valid disclaimer under this Act even if its does not otherwise meet the Act's more specific requirements.

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-15. Recording of disclaimer.

If an instrument transferring an interest in or power over property subject to a disclaimer is required or permitted by law to be filed, recorded or registered, the disclaimer may be so filed, recorded or registered. Failure to file, record or register the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.

History: Laws 2001, ch. 290, § 15.

ANNOTATIONS

COMMENT

This section permits the recordation of a disclaimer of an interest in property ownership of or title to which is the subject of a recording system. This section expands on the corresponding provision of previous Uniform Acts which only referred to permissive recording of a disclaimer of an interest in real property. While local practice may vary, disclaimants should realize that in order to establish the chain of title to real property, and to ward off creditors and bona fide purchasers, the disclaimer may have to be recorded. This section does not change the law of the state governing notice.

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-16. Application to existing relationships.

Except as otherwise provided in Section 13 of the Uniform Disclaimer of Property Interests Act [46-10-13 NMSA 1978], an interest in or power over property existing on the effective date of that act as to which the time for delivering or filing a disclaimer under law superseded by that act has not expired may be disclaimed after the effective date of that act.

History: Laws 2001, ch. 290, § 16.

ANNOTATIONS

COMMENT

This section deals with the application of the Act to existing interests and powers. It insures that disclaimers barred by the running of a time period under prior law will not be revived by the Act. For example, assume prior law, like the prior Acts and former Section 2-801, allows the disclaimer of present interests within nine months of their creation and the disclaimer of future interests nine months after they are indefeasibly vested. Under T's will, X receives an outright devise of a sum of money and also has a contingent remainder in a trust created under the will. The Act is effective in the jurisdiction governing the administration of T's estate ten months after T's death. X

cannot disclaim the general devise, irrespective of the application of Section 2-1113, because the nine months allowed under prior law have run. The contingent remainder, however, may be disclaimed so long as it is not barred under Section 2-1113 [46-10-13 NMSA 1978] without regard to the nine month period of prior law.

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

46-10-17. Uniformity of application and construction.

In applying and construing the Uniform Disclaimer of Property Interests Act [46-10-1 NMSA 1978], 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. 290, § 17.

ANNOTATIONS

COMMENT

This section adopts standard language approved by the Uniform Law Conference that is intended to preempt application of the federal Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign). Section 102(a)(2)(B) of that Act provides that the federal law can be preempted by a later statute of the State that specifically refers to the federal law. Not subject to preemption by the state's are E-Sign's consumer consent provisions (Section 101 (c)) and its notice provisions (Section 103(b)), neither of which have substantive impact on the Disclaimers Act. The effect of this Section is to reaffirm state authority over the formal requirements for the making of a disclaimer. For these requirements, see Section 2-1105 [46-10-5 NMSA 1978], and, specifically, Section 2-1105(c), which allow a disclaimer to be made by means of a signed record.

Effective dates. — Laws 2001, ch. 290, § 20 makes the act effective July 1, 2001.

Severability clauses. — Laws 2001, ch. 290, § 19 provides for the severability of the act if any provision or application of the Uniform Disclaimer of Property Interests Act is held invalid.