

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 receiving [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.

ANNOTATIONS

Effective dates. - Laws 1923, ch. 26, contains no effective date provision, but was enacted at a session which adjourned on March 9, 1923. See N.M. Const., art. IV, § 23.

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. The bracketed material was not enacted by the legislature and is not a part of the law.

Title of commissioner of banking changed. - 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.

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

46-2-1. Definitions.

As used in the Uniform Trusts Act [46-2-1 to 46-2-19 NMSA 1978]:

A. "person" means an individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization or two or more persons having a joint or common interest;

B. "trustee" includes trustees, a corporate as well as a natural person and a successor or substitute trustee, personal representative, guardian, conservator, agent and a trustee of an inter vivos or testamentary trust;

C. "relative" means a spouse, ancestor, descendant, brother or sister;

D. "affiliate" means any person directly or indirectly controlling or controlled by another person, or any person under direct or indirect common control with another person. "Affiliate" includes any person with whom a trustee has an express or implied agreement regarding the purchase of trust investments by each from the other, directly or indirectly, except a broker or stock exchange;

E. "trust" means an express trust only;

F. "in-state depository institution" means a main office or branch of a bank, savings and loan association or credit union authorized to engage in business in New Mexico; and

G. "division" means the financial institutions division of the regulation and licensing department.

History: 1941 Comp., § 36-301, enacted by Laws 1951, ch. 193, § 1; 1953 Comp., § 33-3-1; Laws 1965, ch. 27, § 1; 1995, ch. 190, § 1.

ANNOTATIONS

Cross references. - For the power of fiduciary or custodian to deposit securities in a central depository, see 46-1-12 NMSA 1978.

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

For exemptions from income tax, see 7-2-4 NMSA 1978.

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

The 1995 amendment, effective June 16, 1995, substituted "the Uniform Trusts Act" for "this act unless the context or subject matter otherwise requires" following the section heading, changed subsection designations from numbers to capital letters throughout, made minor stylistic changes in Subsection A, substituted "personal representation" for "an executor administer" in Subsection B, substituted "Affiliate" for "It" in the second sentence of Subsection D, and added Subsections F and G.

Law reviews. - For article, "The Use of Revocable Inter Vivos Trusts in Estate Planning," see 1 N.M. L. Rev. 143 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 76 Am. Jur. 2d Trusts §§ 553 to 603.

Trusts: merger of legal and equitable estates where sole trustees are sole beneficiaries, 7 A.L.R.4th 621.

Relinquishment of interest by life beneficiary in possession as accelerating remainder of which there is substitutional gift in case primary remainderman does not survive life beneficiary, 7 A.L.R.4th 1084.

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

89 C.J.S. Trusts §§ 2, 3.

46-2-2. Bank account to pay special debts.

A. Whenever a bank account shall, by entries made on the books of the depositor and the bank at the time of the deposit, be created exclusively for the purpose of paying dividends, interest or interest coupons, salaries, wages or pensions or other benefits to employees, and the depositor at the time of opening such account does not expressly otherwise declare, the depositor shall be deemed a trustee of such account for the

creditors to be paid therefrom, subject to such power of revocation as the depositor may have reserved by agreement with the bank.

B. If any beneficiary for whom such a trust is created does not present his claim to the bank for payment within one year after it is due, the depositor who created such trust may revoke it as to such creditor.

History: 1941 Comp., § 36-302, enacted by Laws 1951, ch. 193, § 2; 1953 Comp., § 33-3-2.

46-2-3. Loan of trust funds.

Except as provided in Section 4 [46-2-4 NMSA 1978], no corporate trustee shall lend trust funds to itself or an affiliate, or to any director, officer or employee of itself or of an affiliate; nor shall any noncorporate trustee lend trust funds to himself, or to his relative, employer, employee, partner or other business associate.

History: 1941 Comp., § 36-303, enacted by Laws 1951, ch. 193, § 3; 1953 Comp., § 33-3-3.

46-2-4. Corporate trustee depositing trust funds with self or affiliated depository institution.

A. A corporate trustee that is subject to regulation by the state or federal authorities may deposit with itself or an affiliated in-state depository institution, for a period of up to one year, trust funds being held necessarily pending investment, distribution or the payment of debts. The corporate trustee shall pay the trust the interest as it is required by statute to pay on uninvested trust funds, or, if there is no statute, the same rate of interest it or the affiliated in-state depository institution pays upon similar nontrust deposits. The corporate trustee shall maintain a separate fund as security for the deposit with itself or an affiliated in-state depository institution consisting of securities authorized for trust investments, or safekeeping receipts representing the pledge of such securities by the affiliated in-state depository institution, at all times equal in total market value to the amount of the deposits. No security shall be required to the extent that the deposits are insured or given preference by any state or federal law. The separate fund of securities shall be marked as such. Withdrawals from or additions to it may be made, as long as the required value is maintained. The income of securities in the fund shall belong to the corporate trustee. In all statements of its financial condition delivered to the division, the corporate trustee shall show as separate items the amount of trust funds that it has deposited with itself or an affiliated in-state depository institution and the amount of securities that it holds or have been pledged as security for the payment of those deposits.

B. A corporate trustee that is subject to regulation by state or federal authorities may invest trust funds in deposit accounts with itself or an affiliated in-state depository institution, if this investment authority is specifically provided pursuant to Sections 46-2-

14 and 46-2-15 NMSA 1978. Trust fund investments in deposits with itself or an affiliated in-state depository institution shall not be secured by assets of the depository institution.

History: 1978 Comp., § 46-2-4, enacted by Laws 1995, ch. 190, § 2.

ANNOTATIONS

Repeals and reenactments. - Laws 1995, ch. 190, § 2 repeals 46-2-4 NMSA 1978, as enacted by Laws 1951, ch. 193, § 4, and enacts the above section, effective June 16, 1995. For provisions of former section, see 1989 Replacement Pamphlet.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 76 Am. Jur. 2d Trusts § 245.

46-2-5. Trustee buying from or selling to self.

No trustee shall directly or indirectly buy or sell any property for the trust from or to itself or an affiliate; or from or to a director, officer or employee of such trustee or of an affiliate; or from or to a relative, employer, partner or other business associate.

History: 1941 Comp., § 36-305, enacted by Laws 1951, ch. 193, § 5; 1953 Comp., § 33-3-5.

ANNOTATIONS

Trustee's fiduciary duty ceases after repudiation. - Where there was a repudiation of a trust by the trustee, the fundamental rule that as long as the relation of trustee and cestui que trust exists the fiduciary may not assert an interest or title antagonistic to the beneficiaries does not apply, and the trustee may purchase the trust estate. *Garcia v. Sanchez*, 64 N.M. 114, 325 P.2d 289 (1958).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Power of testamentary trustee to purchase at his own sale, 1 A.L.R. 747.

Trustee's, executor's, administrator's or guardian's purchase from or sale to corporation of which he is an officer or stockholder, as voidable or as ground for surcharging his account, 105 A.L.R. 449.

Enforceability of contractual right, in which fiduciary has interest, to purchase property of estate or trust, 6 A.L.R.4th 786.

46-2-6. Trustee selling from one trust to another trust.

A trustee may sell assets held by it as fiduciary in one account to itself as fiduciary in another account, if documentation is retained showing the transaction is beneficial to both accounts, the assets are purchased and sold at fair market value and the transaction is not prohibited by the terms of any governing instrument.

History: 1978 Comp., § 46-2-6, enacted by Laws 1995, ch. 190, § 3.

ANNOTATIONS

Repeals and reenactments. - Laws 1995, ch. 190, § 3, repeals 46-2-6 NMSA 1978, as enacted by Laws 1951, ch. 193, § 17, and enacts the above section, effective June 16, 1995. For provisions of the former section, see 1989 Replacement Pamphlet.

46-2-7. Corporate trustee buying its own stock.

No corporate trustee shall purchase for a trust shares of its own stock, or its bonds or other securities, or the stock, bonds or other securities of an affiliate.

History: 1941 Comp., § 36-307, enacted by Laws 1951, ch. 193, § 7; 1953 Comp., § 33-3-7.

ANNOTATIONS

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. - Right of corporate trustee to invest in or retain its own stock, 134 A.L.R. 1324, 157 A.L.R. 1429.

46-2-8. Voting stock.

A trustee owning corporate stock may vote it by proxy, but shall be liable for any loss resulting to the beneficiaries from a failure to use reasonable care in deciding how to vote the stock and in voting it.

History: 1941 Comp., § 36-308, enacted by Laws 1951, ch. 193, § 8; 1953 Comp., § 33-3-8.

ANNOTATIONS

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).

46-2-9. Holding stock in name of nominee.

A trustee owning stock may hold it in the name of a nominee, without mention of the trust in the stock certificate or stock registration books; provided that (1) the trust records and all reports or accounts rendered by the trustee clearly show the ownership of the stock by the trustee and the facts regarding its holding; and (2) the nominee shall deposit with the trustee a signed statement showing the trust ownership, and shall not have possession of the stock certificate or access thereto except under the immediate supervision of the trustee. The trustee shall be personally liable for any loss to the trust resulting from any act of such nominee in connection with stock so held.

History: 1941 Comp., § 36-309, enacted by Laws 1951, ch. 193, § 9; 1953 Comp., § 33-3-9.

ANNOTATIONS

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).

46-2-10. Powers attached to office.

Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, all powers of a trustee shall be attached to the office and shall not be personal.

History: 1941 Comp., § 36-310, enacted by Laws 1951, ch. 193, § 10; 1953 Comp., § 33-3-10.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 90 C.J.S. Trusts §§ 246, 259.

§ 46-2-11 Powers exercisable by majority (1997 Repl.)

46-2-11. Powers exercisable [exercisable] by majority.

A. Unless it is otherwise provided by the trust instrument, or an amendment thereof, or by court order, any power vested in three or more trustees may be exercised by a majority of such trustees; but no trustee who has not joined in exercising a power shall be liable to the beneficiaries or to others for the consequences of such exercise, nor shall a dissenting trustee be liable for the consequences of an act in which he joins at the direction of the majority trustees, if he expressed his dissent in writing to any of his cotrustees at or before the time of such joinder.

B. Nothing in this section shall excuse a cotrustee from liability for inactivity in the administration of the trust nor for failure to attempt to prevent a breach of trust.

History: 1941 Comp., § 36-311, enacted by Laws 1951, ch. 193, § 11; 1953 Comp., § 33-3-11.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 76 Am. Jur. 2d Trusts § 348.

46-2-12. Withdrawals from mingled trust funds.

Where a person who is a trustee of two or more trusts has mingled the funds of two or more trusts in the same aggregate of cash, or in the same bank or brokerage account or other investment, and a withdrawal is made therefrom by the trustee for his own benefit, or for the benefit of a third person not a beneficiary or creditor of one or more of the trusts, or for an unknown purpose, such withdrawal shall be charged first to the amount of cash, credit or other property of the trustee in the mingled fund, if any, and after the exhaustion of the trustee's cash, credit or other property, then to the several trusts in proportion to their several interests in the cash, credit or other property at the time of the withdrawal.

History: 1941 Comp., § 36-315, enacted by Laws 1951, ch. 193, § 15; 1953 Comp., § 33-3-15.

46-2-13. Unenforceable oral trust created by deed.

A. When an interest in real property is conveyed by deed to a person on a trust which is unenforceable on account of the statute of frauds and the intended trustee or his successor in interest still holds title but refuses to carry out the trust on account of the statute of frauds, the intended trustee or his successor in interest, except to the extent that the successor in interest is a bona fide purchaser of a legal interest in the real property in question, shall be under a duty to convey the interest in real property to the settlor or his successor in interest. A court having jurisdiction may prescribe the conditions upon which the interest shall be conveyed to the settlor or his successor in interest.

B. Where the intended trustee has transferred part or all of his interest and it has come into the hands of a bona fide purchaser, the intended trustee shall be liable to the settlor or his successor in interest for the value of the interest thus transferred at the time of its transfer, less such offsets as the court may deem equitable.

History: 1941 Comp., § 36-316, enacted by Laws 1951, ch. 193, § 16; 1953 Comp., § 33-3-16.

ANNOTATIONS

Requirements as to oral trust in land. - New Mexico law treats an oral trust in land as requiring a reconveyance to the settlor, notwithstanding the unenforceability of such a

trust under the statute of frauds. *Homes ex rel. Marilyn v. Robinson*, 111 N.M. 517, 807 P.2d 215 (1991).

Effect of failure of oral trust. - The failure of an oral trust in land by virtue of the effect of the statute of frauds may result in the imposition of a constructive trust under certain circumstances, or may result in the duty to reconvey title to the settlor. *Aragon v. Rio Costilla Coop. Livestock Ass'n*, 112 N.M. 89, 812 P.2d 1300 (1991).

Resulting trust found. - A resulting trust arose in favor of one brother where two brothers formed a farming partnership, were equally engaged in maintaining the business and retiring indebtedness on real property purchased for the partnership, but title to the real property had been placed in only one brother's name. *Bassett v. Bassett*, 110 N.M. 559, 798 P.2d 160 (1990).

46-2-14. Power of settlor.

The settlor of any trust affected by the Uniform Trusts Act [46-2-1 to 46-2-19 NMSA 1978] may, by provision in the instrument creating the trust if the trust was created by a writing or by oral statement to the trustee at the time of the creation of the trust if the trust was created orally or by an amendment of the trust if the settlor reserved the power to amend the trust, relieve his trustee from any or all of the duties, restrictions and liabilities that would otherwise be imposed upon him by that act, or alter or deny to his trustee any or all of the privileges and powers conferred upon the trustee by that act, or add duties, restrictions, liabilities, privileges or powers to those imposed or granted by that act; but no act of the settlor shall relieve a trustee from the duties, restrictions and liabilities imposed upon him by Section 46-2-3, Subsection A of Section 46-2-4 and Section 46-2-5 NMSA 1978.

History: 1941 Comp., § 36-317, enacted by Laws 1951, ch. 193, § 17; 1953 Comp., § 33-3-17; 1995, ch. 190, § 4.

ANNOTATIONS

The 1995 amendment, effective June 16, 1995, made minor stylistic changes throughout the section.

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.

46-2-15. Power of beneficiary.

Any beneficiary of a trust affected by the Uniform Trusts Act [46-2-1 to 46-2-19 NMSA 1978] may, if of full legal capacity and acting upon full information, by written instrument delivered to the trustee relieve the trustee as to that beneficiary from any or all of the duties, restrictions and liabilities that would otherwise be imposed on the trustee by that act, except as to the duties, restrictions and liabilities imposed by Section 46-2-3,

Subsection A of Section 46-2-4 and Section 46-2-5 NMSA 1978. Any such beneficiary may release the trustee from liability to that beneficiary for past violations of any of the provisions of that act.

History: 1941 Comp., § 36-318, enacted by Laws 1951, ch. 193, § 18; 1953 Comp., § 33-3-18; 1995, ch. 190, § 5.

ANNOTATIONS

The 1995 amendment, effective June 16, 1995, made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity and construction of trust instrument which fails to designate respective interests of beneficiaries, 87 A.L.R.3d 925.

Standard of care required of trustee representing itself to have expert knowledge or skill, 91 A.L.R.3d 904.

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

46-2-16. Power of the court.

A court of competent jurisdiction may, for cause shown and upon notice to the beneficiaries, relieve a trustee from any or all of the duties and restrictions which would otherwise be placed upon him by this act [46-2-1 to 46-2-19 NMSA 1978], or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for violations of the provisions of this act.

History: 1941 Comp., § 36-319, enacted by Laws 1951, ch. 193, § 19; 1953 Comp., § 33-3-19.

ANNOTATIONS

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).

46-2-17. Liabilities for violations of act.

If a trustee violates any of the provisions of this act [46-2-1 to 46-2-19 NMSA 1978], he may be removed and denied compensation in whole or in part; and any beneficiary, cotrustee or successor trustee may treat the violation as a breach of trust.

History: 1941 Comp., § 36-320, enacted by Laws 1951, ch. 193, § 20; 1953 Comp., § 33-3-20.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Loss under authorized investment: liability of trustee, guardian, executor, or administrator for loss of funds invested, as affected by order of court authorizing the investment, 88 A.L.R. 325.

Fiduciary: liability on stock held by one as trustee or in other fiduciary capacity, 91 A.L.R. 257, 97 A.L.R. 1250, 117 A.L.R. 655.

Standard of care required of trustee representing itself to have expert knowledge or skill, 91 A.L.R.3d 904.

Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation, 96 A.L.R.3d 1102.

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

46-2-18. Uniformity of interpretation.

This act [46-2-1 to 46-2-19 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: 1941 Comp., § 36-321, enacted by Laws 1951, ch. 193, § 21; 1953 Comp., § 33-3-21.

46-2-19. Short title.

This act [46-2-1 to 46-2-19 NMSA 1978] may be cited as the Uniform Trusts Act.

History: 1941 Comp., § 36-322, enacted by Laws 1951, ch. 193, § 22; 1953 Comp., § 33-3-22.

ANNOTATIONS

Applicability. - Laws 1951, ch. 193, § 25, provides that the act shall apply to agreements containing trust provisions entered into subsequent to the act's effective date, wills made by testators who die subsequent to the effective date and all other wills, trust agreements and relations insofar as the obligation of contract or due process is not impaired.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Standard of care required of trustee representing itself to have expert knowledge or skill, 91 A.L.R.3d 904.

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

46-3-1. Definitions.

As used in the Revised Uniform Principal and Income Act [46-3-1 to 46-3-15 NMSA 1978]:

A. "income beneficiary" means the person to whom income is presently payable or for whom it is accumulated for distribution as income;

B. "inventory value" means the cost of property purchased by the trustee and the market value of other property at the time it became subject to the trust, but in the case of a testamentary trust the trustee may use any value finally determined for the purposes of an estate or inheritance tax;

C. "remainderman" means the person entitled to principal, including income which has been accumulated and added to principal; and

D. "trustee" means an original trustee and any successor or added trustee.

History: 1953 Comp., § 33-5-18, enacted by Laws 1969, ch. 239, § 1.

ANNOTATIONS

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. - 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.

46-3-2. Duty of trustee as to receipts and expenditures.

A. A trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each:

(1) in accordance with the terms of the trust instrument, notwithstanding contrary provisions of the Revised Uniform Principal and Income Act [46-3-1 to 46-3-15 NMSA 1978];

(2) in the absence of any contrary terms of the trust instrument, in accordance with the provisions of the Revised Uniform Principal and Income Act; or

(3) if neither of the preceding rules of administration is applicable, in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal, and in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their own affairs.

B. If the trust instrument gives the trustee discretion in crediting a receipt or changing an expenditure to income or principal or partly to each, no inference of imprudence or partiality arises from the fact that the trustee has made an allocation contrary to a provision of the Revised Uniform Principal and Income Act.

History: 1953 Comp., § 33-5-19, enacted by Laws 1969, ch. 239, § 2.

ANNOTATIONS

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.

46-3-3. Income; principal; charges.

A. Income is the return in money or property derived from the use of principal, including return received as:

(1) rent of real or personal property, including sums received for cancellation or renewal of a lease;

(2) interest on money lent, including sums received as consideration for the privilege of prepayment of principal except as provided in Section 7 [46-3-7 NMSA 1978] on bond premium and bond discount;

(3) income earned during administration of a decedent's estate as provided in Section 5 [46-3-5 NMSA 1978];

(4) corporate distributions as provided in Section 6 [46-3-6 NMSA 1978];

(5) accrued increment on bonds or other obligations issued at discount as provided in Section 7;

(6) receipts from business and farming operations as provided in Section 8 [46-3-8 NMSA 1978];

(7) receipts from disposition of natural resources as provided in Section 9 [46-3-9 NMSA 1978];

(8) receipts from other principal subject to depletion as provided in Section 10 [46-3-10 NMSA 1978]; and

(9) receipts from disposition of underproductive property as provided in Section 11 [46-3-11 NMSA 1978].

B. Principal is the property which has been set aside by the owner or the person legally empowered so that it is held in trust eventually to be delivered to a remainderman while the return or use of the principal is in the meantime taken or received by or held for accumulation for an income beneficiary. Principal includes:

(1) consideration received by the trustee on the sale or other transfer of principal or on repayment of a loan or as a refund or replacement or change in the form of principal;

(2) proceeds of property taken on eminent domain proceedings;

(3) proceeds of insurance upon property forming part of the principal except proceeds of insurance upon a separate interest of an income beneficiary;

(4) stock dividends, receipts on liquidation of a corporation and other corporate distributions as provided in Section 6;

(5) receipts from the disposition of corporate securities as provided in Section 7;

(6) royalties and other receipts from disposition of natural resources as provided in Section 9;

(7) receipts from other principal subject to depletion as provided in Section 10;

(8) any profit resulting from any change in the form of principal except as otherwise provided herein;

(9) receipts from disposition of underproductive property as provided in Section 11; and

(10) any allowances for depreciation established under Sections 8 and 12A(2) [46-3-8, 46-3-12A(2) NMSA 1978].

C. After determining income and principal in accordance with the terms of the trust instrument or of the Revised Uniform Principal and Income Act [46-3-1 to 46-3-15 NMSA 1978] the trustee shall charge to income or principal expenses and other charges as provided in Section 12.

History: 1953 Comp., § 33-5-20, enacted by Laws 1969, ch. 239, § 3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Life Tenants and Remaindermen §§ 176, 179.

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

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.

46-3-4. When right to income arises; apportionment of income.

A. An income beneficiary is entitled to income from the date specified in the trust instrument, or, if none is specified, from the date an asset becomes subject to the trust. In the case of an asset becoming subject to a trust by reason of a will, it becomes subject to the trust as of the date of the death of the testator even though there is an intervening period of administration of the testator's estate.

B. In the administration of a decedent's estate or an asset becoming subject to a trust by reason of a will:

(1) receipts due but not paid at the date of death of the testator are principal; and

(2) receipts in the form of periodic payments (other than corporate distributions to stockholders), including rent, interest or annuities, not due at the date of the death of the testator shall be treated as accruing from day to day. That portion of the receipt accruing before the date of death is principal, and the balance is income.

C. In all other cases, any receipt from an income producing asset is income even though the receipt was earned or accrued in whole or in part before the date when the asset became subject to the trust.

D. On termination of an income interest, the income beneficiary whose interest is terminated, or his estate, is entitled to:

(1) income undistributed on the date of termination;

(2) income due but not paid to the trustee on the date of termination; and

(3) income in the form of periodic payments (other than corporate distributions to stockholders), including rent, interest or annuities, not due on the date of termination, accrued from day to day.

E. Corporate distributions to stockholders shall be treated as due on the day fixed by the corporation for determination of stockholders of record entitled to distribution or, if no date is fixed, on the date of declaration of the distribution by the corporation.

History: 1953 Comp., § 33-5-21, enacted by Laws 1969, ch. 239, § 4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Life Tenants and Remaindermen §§ 116, 176, 179.

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.

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

46-3-5. Income earned during administration of a decedent's estate.

A. Unless the will otherwise provides and subject to Subsection B all expenses incurred in connection with the settlement of a decedent's estate, including debts, funeral expenses, estate taxes, interest and penalties concerning taxes, family allowances, fees of attorneys and personal representatives and court costs shall be charged against the principal of the estate.

B. Unless the will otherwise provides, income from the assets of a decedent's estate after the death of the testator and before distribution, including income from property used to discharge liabilities, shall be determined in accordance with the rules applicable to a trustee under the Revised Uniform Principal and Income Act [46-3-1 to 46-3-15 NMSA 1978] and distributed as follows:

(1) to specific legatees and devisees, the income from the property bequeathed or devised to them respectively, less taxes, ordinary repairs and other expenses of management and operation of the property, and an appropriate portion of interest accrued since the death of the testator and of taxes imposed on income (excluding taxes on capital gains) which accrue during the period of administration; and

(2) to all other legatees and devisees, except legatees of pecuniary bequests not in trust, the balance of the income, less the balance of taxes, ordinary repairs and other expenses of management and operation of all property from which the estate is entitled to income, interest accrued since the death of the testator and taxes imposed on income (excluding taxes on capital gains) which accrue during the period of administration, in proportion to their respective interests in the undistributed assets of the estate computed at times of distribution on the basis of inventory value.

C. Income received by a trustee under Subsection B shall be treated as income of the trust.

History: 1953 Comp., § 33-5-22, enacted by Laws 1969, ch. 239, § 5.

ANNOTATIONS

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.

46-3-6. Corporate distributions.

A. Corporate distributions of shares of the distributing corporation, including distributions in the form of a stock split or stock dividend, are principal. A right to subscribe to shares or other securities issued by the distributing corporation accruing to stockholders on account of their stock ownership and the proceeds of any sale of the right are principal.

B. Except to the extent that the corporation indicates that some part of a corporate distribution is a settlement of preferred or guaranteed dividends accrued since the trustee became a stockholder or is in lieu of an ordinary cash dividend, a corporate distribution is principal if the distribution is pursuant to:

(1) a call of shares;

(2) a merger, consolidation, reorganization or other plan by which assets of the corporation are acquired by another corporation; or

(3) a total or partial liquidation of the corporation, including any distribution which the corporation indicates is a distribution in total or partial liquidation or any distribution of assets, other than cash, pursuant to a court decree or final administrative order by a government agency ordering distribution of the particular assets.

C. Distributions made from ordinary income by a regulated investment company or by a trust qualifying and electing to be taxed under federal law as a real estate investment trust are income. All other distributions made by the company or trust, including distributions from capital gains, depreciation or depletion, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, are principal.

D. Except as provided in Subsections A, B and C, all corporate distributions are income, including cash dividends, distributions of or rights to subscribe to shares or securities or obligations of corporations other than the distributing corporation and the proceeds of the rights or property distributions. Except as provided in Subsections B and C, if the distributing corporation gives a stockholder an option to receive a distribution either in cash or in its own shares, the distribution chosen is income.

E. The trustee may rely upon any statement of the distributing corporation as to any fact relevant under any provision of this act [46-3-1 to 46-3-15 NMSA 1978] concerning the source or character of dividends or distributions of corporate assets.

History: 1953 Comp., § 33-5-23, enacted by Laws 1969, ch. 239, § 6.

ANNOTATIONS

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Life Tenants and Remaindermen §§ 208, 209, 213-215.

46-3-7. Bond premium and discount.

A. Bonds or other obligations for the payment of money are principal at their inventory value, except as provided in Subsection B for discount bonds. No provision shall be made for amortization of bond premiums or for accumulation for discount. The proceeds of sale, redemption or other disposition of the bonds or obligations are principal.

B. The increment in value of a bond or other obligation for the payment of money payable at a future time in accordance with a fixed schedule of appreciation in excess of the price at which it was issued is distributable as income. The increment in value is distributable to the beneficiary who was the income beneficiary at the time of increment from the first principal cash available or, if none is available, when realized by sale, redemption or other disposition. Whenever unrealized increment is distributed as income but out of principal, the principal shall be reimbursed for the increment when realized.

History: 1953 Comp., § 33-5-24, enacted by Laws 1969, ch. 239, § 7.

ANNOTATIONS

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

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.

46-3-8. Business and farming operations.

A. If a trustee uses any part of the principal in the continuance of a business of which the settlor was a sole proprietor or a partner, the net profits of the business, computed in accordance with generally accepted accounting principles for a comparable business, are income. If a loss results in any fiscal or calendar year, the loss falls on principal and

shall not be carried into any other fiscal or calendar year for purposes of calculating net income.

B. Generally accepted accounting principles shall be used to determine income from an agricultural or farming operation, including the raising of animals or the operation of a nursery.

History: 1953 Comp., § 33-5-25, enacted by Laws 1969, ch. 239, § 8.

46-3-9. Disposition of natural resources.

A. Where any part of the principal consists of property in lands from which may be taken timber, minerals, oils, gas or other natural resources and no provision is made for the disposition of the net proceeds thereof after the payment of expenses and carrying charges on such property, such net proceeds, if received as rent on or bonus for a lease, shall be deemed income, but if received as any other consideration, whether as royalties or otherwise, for the permanent severance of such natural resources from the lands, shall be deemed, to the extent hereinafter provided, principal to be invested to produce income and the remainder of such net proceeds shall be deemed income. Of the net proceeds received during any period as consideration for permanent severance of a natural resource, the amount to be considered as principal for that period shall be the greater of the following:

(1) the amount which bears the same ratio to the fair inventory value of such natural resource, which in the case of a testamentary trust, unless a contrary intention appears in the will, shall be the value as finally determined for federal estate tax purposes, or if none, the value determined for state inheritance tax or succession tax purposes being prima facie evidence of such value, or in default thereof its market value at the time the principal was established, or its cost if purchased later, as the number of units of the natural resource severed during the period bears to the total number of severable units of the natural resource estimated as having existed at the time the principal was established;

(2) the amount which bears the same ratio to the estimated value of the natural resource at the time of commencement of severance as the number of units of the natural resources severed during the period bears to the total number of severable units of the natural resource estimated as having existed at the time of commencement of such severance; or

(3) an amount equal to that percentage of the net proceeds received as consideration for such permanent severance which is allowable as a deduction from gross income for depletion purpose under the federal income tax law then in effect at the time of severance, or if the federal income tax law then in effect makes no provision for the deduction of any stated percentage for depletion, or for any reason is not applicable to such natural resource, then in accordance with the provisions of Section 2A(3) [46-3-2A(3) NMSA 1978]. Such disposition of net proceeds shall apply whether permanent

severance commenced before or after the time the principal was established and without regard to the time when the instrument under which severance is being made was executed. Nothing in this section shall be construed to abrogate or extend any right which may otherwise have accrued by law to a tenant to develop or work such natural resources for his own benefit.

B. If a trustee, on the effective date of the Revised Uniform Principal and Income Act held an item of depletable property of a type specified in this section, he may allocate receipts from the property in the manner used before the effective date of the act, but as to all depletable property acquired after the effective date of the act, by an existing or new trust, the method of allocation provided herein shall be used.

History: 1953 Comp., § 33-5-26, enacted by Laws 1969, ch. 239, § 9.

ANNOTATIONS

"Effective date of the act". - The "effective date of the act", referred to in this section, means the effective date of Laws 1969, ch. 239 (i.e., the Revised Uniform Principal and Income Act), which contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 20, 1969.

46-3-10. Other property subject to depletion.

Except as provided in Section 9 [46-3-9 NMSA 1978], if the principal consists of property subject to depletion, including leaseholds, patents, copyrights, royalty rights and rights to receive payments on contract for deferred compensation, receipts from the property, not in excess of five percent per year of its inventory value, are income, and the balance is principal.

History: 1953 Comp., § 33-5-27, enacted by Laws 1969, ch. 239, § 10.

46-3-11. Underproductive property.

A. Except as otherwise provided in this section, a portion of the net proceeds of sale of any part of principal which has not produced an average net income of at least one percent per year of its inventory value for more than a year (including as income the value of any beneficial use of the property by the income beneficiary) shall be treated as delayed income to which the income beneficiary is entitled as provided in this section. The net proceeds of sale are the gross proceeds received, including the value of any property received in substitution for the property disposed of, less the expenses, including capital gains tax, if any, incurred in disposition and less any carrying charge paid while the property was underproductive.

B. The sum allocated as delayed income is the difference between the net proceeds and the amount which, had it been invested at simple interest at four percent per year while the property was underproductive, would have produced the net proceeds. This

sum, plus any carrying charges and expenses previously charged against income while the property was underproductive, less any income received by the income beneficiary from the property and less the value of any beneficial use of the property by the income beneficiary, is income, and the balance is principal.

C. An income beneficiary or his estate is entitled to delayed income under this section as if it accrued from day to day during the time he was a beneficiary.

D. If principal subject to this section is disposed of by conversion into property which cannot be apportioned easily, including land or mortgages (for example, realty acquired by or in lieu of foreclosure), the income beneficiary is entitled to the net income from any property or obligation into which the original principal is converted while the substituted property or obligation is held. If within five years after the conversion the substituted property has not been further converted into easily apportionable property, no allocation as provided in this section shall be made.

History: 1953 Comp., § 33-5-28, enacted by Laws 1969, ch. 239, § 11.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Life Tenants and Remaindermen §§ 175 to 191.

Expenses: expense in connection with unproductive or underproductive property of trust as chargeable to income, 167 A.L.R. 1431.

46-3-12. Charges against income and principal.

A. The following charges shall be made against income:

(1) ordinary expenses incurred in connection with the administration, management or preservation of the trust property, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the interests of the income beneficiary, remainderman or trustee, interest paid by the trustee and ordinary repairs;

(2) a reasonable allowance for depreciation on property subject to depreciation under generally accepted accounting principles, but no allowance shall be made for depreciation of that portion of any real property used by a beneficiary as a residence or for depreciation of any property held by the trustee on the effective date of the Revised Uniform Principal and Income Act for which the trustee is not then making an allowance for depreciation;

(3) one-half of court costs, attorney's fees and other fees on periodic judicial accounting, unless the court directs otherwise;

(4) court costs, attorney's fees and other fees on other accountings or judicial proceedings if the matter primarily concerns the income interest, unless the court directs otherwise;

(5) one-half of the trustee's regular compensation, whether based on a percentage of principal or income, and all expenses reasonably incurred for current management of principal and application of income; and

(6) any tax levied upon receipts defined as income under the Revised Uniform Principal and Income Act [46-3-1 to 46-3-15 NMSA 1978] or the trust instrument and payable by the trustee.

B. If charges against income are of unusual amount, the trustee may by means of reserves or other reasonable means charge them over a reasonable period of time and withhold from distribution sufficient sums to regularize distributions.

C. The following charges shall be made against principal:

(1) trustee's compensation not chargeable to income under Subsections A(4) and A(5), special compensation of trustees, expenses reasonably incurred in connection with principal, court costs and attorney's fees primarily concerning matters of principal and trustee's compensation computed on principal as an acceptance, distribution or termination fee;

(2) charges not provided for in Subsection A, including the cost of investing and reinvesting principal, the payments on principal of an indebtedness (including a mortgage amortized by periodic payments of principal), expenses for preparation of property for rental or sale and, unless the court directs otherwise, expenses incurred in maintaining or defending any action to construe the trust or protect it or the property or assure the title of any trust property;

(3) extraordinary [extraordinary] repairs or expenses incurred in making a capital improvement to principal, including special assessments, but, a trustee may establish an allowance for depreciation out of income to the extent permitted by Subsection A(2) and by Section 8 [46-3-8 NMSA 1978];

(4) any tax levied upon profit, gain or other receipts allocated to principal notwithstanding denomination of the tax as an income tax by the taxing authority; and

(5) if an estate or inheritance tax is levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, any amount apportioned to the trust, including interest and penalties, even though the income beneficiary also has rights in the principal.

D. Regularly recurring charges payable from income shall be apportioned to the same extent and in the same manner that income is apportioned under Section 4 [46-3-4 NMSA 1978].

History: 1953 Comp., § 33-5-29, enacted by Laws 1969, ch. 239, § 12.

ANNOTATIONS

"Effective date of the Revised Uniform Principal and Income Act". - The "effective date of the Revised Uniform Principal and Income Act", referred to in Subsection A(2), means the effective date of Laws 1969, ch. 239, which contains no effective date provision, but is effective June 20, 1969.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Income or corpus: trustee's compensation as payable from income or corpus, 117 A.L.R. 1154.

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.

Power to determine: specific provision of will or trust instrument giving executor or trustee power to determine what is income and what is principal, 27 A.L.R.2d 1323.

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

46-3-13. Application of act.

Except as specifically provided in the trust instrument or the will or in the Revised Uniform Principal and Income Act [46-3-1 to 46-3-15 NMSA 1978], the act shall apply to any receipt or expense received or incurred after the effective date of the act by any trust or decedent's estate whether established before or after the effective date of the act and whether the asset involved was acquired by the trustee before or after the effective date of the act.

History: 1953 Comp., § 33-5-30, enacted by Laws 1969, ch. 239, § 13.

ANNOTATIONS

"Effective date of the act". - The "effective date of the act", referred to in this section, means the effective date of Laws 1969, ch. 239 (i.e., the Revised Uniform Principal and Income Act), which contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 20, 1969.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction, and effect of provisions of charitable trust providing for accumulation of income, 6 A.L.R.4th 903.

46-3-14. Uniformity of interpretation.

The Revised Uniform Principal and Income Act [46-3-1 to 46-3-15 NMSA 1978] shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: 1953 Comp., § 33-5-31, enacted by Laws 1969, ch. 239, § 14.

46-3-15. Short title.

This act [46-3-1 to 46-3-15 NMSA 1978] may be cited as the Revised Uniform Principal and Income Act.

History: 1953 Comp., § 33-5-32, enacted by Laws 1969, ch. 239, § 15.

ANNOTATIONS

Severability clauses. - Laws 1969, ch. 239, § 16, provides for the severability of the act if any part or application thereof is held invalid.

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 3 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 §§ 487 to 566; 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.

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 decedent's [decedent's] estate or a person legally authorized to perform substantially the same functions;

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

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

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

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

History: Laws 1989, ch. 357, § 2.

ANNOTATIONS

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

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

46-7-13. Scope and jurisdiction.

A. The Uniform Transfers to Minors Act [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.

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 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.

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. - See 46-7-1 to 46-7-10 NMSA 1978 and notes thereto.

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 46, Article 2 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

Effective dates. - Laws 1997, ch. 199, § 14 makes the Uniform Management of Institutional Funds Act effective on July 1, 1997.

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.

ANNOTATIONS

Effective dates. - Laws 1997, ch. 199, § 14 makes the Uniform Management of Institutional Funds Act effective on July 1, 1997.

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.

ANNOTATIONS

Effective dates. - Laws 1997, ch. 199, § 14 makes the Uniform Management of Institutional Funds Act effective on July 1, 1997.

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.

ANNOTATIONS

Effective dates. - Laws 1997, ch. 199, § 14 makes the Uniform Management of Institutional Funds Act effective on July 1, 1997.

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.

ANNOTATIONS

Effective dates. - Laws 1997, ch. 199, § 14 makes the Uniform Management of Institutional Funds Act effective on July 1, 1997.

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 [46-9-4B 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.

ANNOTATIONS

Effective dates. - Laws 1997, ch. 199, § 14 makes the Uniform Management of Institutional Funds Act effective on July 1, 1997.

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.

ANNOTATIONS

Effective dates. - Laws 1997, ch. 199, § 14 makes the Uniform Management of Institutional Funds Act effective on July 1, 1997.

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.

ANNOTATIONS

Effective dates. - Laws 1997, ch. 199, § 14 makes the Uniform Management of Institutional Funds Act effective on July 1, 1997.

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.

ANNOTATIONS

Effective dates. - Laws 1997, ch. 199, § 14 makes the Uniform Management of Institutional Funds Act effective on July 1, 1997.

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.

ANNOTATIONS

Effective dates. - Laws 1997, ch. 199, § 14 makes the Uniform Management of Institutional Funds Act effective on July 1, 1997.

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.

ANNOTATIONS

Effective dates. - Laws 1997, ch. 199, § 14 makes the Uniform Management of Institutional Funds Act effective on July 1, 1997.

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.

ANNOTATIONS

Effective dates. - Laws 1997, ch. 199, § 14 makes the Uniform Management of Institutional Funds Act effective on July 1, 1997.