New Mexico Probate Judges Manual

2013 Edition
Reprinted 2015
(without rules and statutes)

by former Judge Merri Rudd

with Lori Frank

New Mexico Probate Judges Manual

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NEW MEXICO
PROBATE JUDGES MANUAL

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Acknowledgements

I originally wrote this manual with the help of my capable and versatile Court Administrator **Lori Frank**. We hope the manual will help both new and experienced probate judges to understand basic probate process. In interpreting New Mexico's Probate Code and the role of probate judges, there are occasional differences of opinion that we have tried to note.

The following people provided invaluable input, review and assistance in updating the 2013 edition of the manual:

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- Honorable Alice Salcido, Doña Ana County Probate Judge
- Richard B. Spinello, Esq., General Counsel, State Bar of New Mexico
- Honorable Jim Summers, Torrance County Probate Judge
- Honorable James J. Wechsler, New Mexico Court of Appeals

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The **2015 Reprint** of the Probate Judges Manual removes the Code of Judicial Conduct and Statutes previously appearing in Chapters 13 and 14 and all cross-references to those items, per NM Compilation Commission requirements. The **2015 Reprint** involves no substantive legal changes, but does include minor other changes such as updates to web addresses.

2013 Notable Updates

The 2013 edition of the Probate Judges Manual includes numerous minor and major changes. The following list highlights most major changes. Judges are responsible for informing themselves about all changes in the probate code and the manual that affect their courts.

Chapter 1

Section 1.1, end	note new link for free public access to all New Mexico statutes
Section 1.2.3	new section re: probate judge salary and term limits
Section 1.3.2	updated list of district court jurisdiction; probate court lack jurisdiction over guardianships and conservatorship cases
Section 1.4.2	revised estate tax figures
Section 1.4.3	revised definition of "tenants in common" and "joint tenants"
Section 1.5	updated Section 45-2-103, heirs to intestate estate
Section 1.6	new website for state's unclaimed property information

Chapter 2

Section 2.1.1	new law re: who can make will
Section 2.1.4	updated requirements for valid will
Section 2.2	updated list of contents of will and Practical Tip re: attestation clause
Section 2.3.1	updated holographic will section
Section 2.3.4	added specific language re: Section 45-2-514
Section 2.4.1	added paragraph at end re: tangible property in bank safe deposit box
Section 2.5	added paragraph re: multiple codicils
Section 2.7	new law re: revocation of wills
Section 2.8	updated section re: tangible personal property list

Chapter 3

Section 3.1	expanded Practical Tip
Section 3.1.1	new Practical Tip and info re: those without highest priority, updated Important Notes re: *Oldham* case, and revised and/or added Examples 1, 4, 10 and 11, 12
Section 3.1.4	added paragraph re: court's order appointing co-personal representatives
Section 3.1.5	added to opening paragraph re: successor personal representatives
Section 3.1.10	added new intro paragraph re: duties of personal representative and new Practical Tip re: notice of inventory
Section 3.2	added new 3rd paragraph re: not using special administration to avoid obtaining required consents

Chapter 4

Section 4.1.1	added new 2nd paragraph re: substantive errors and other updates re: docketing cases

Section 4.1.2	new paragraph re: form orders if case not ready for judge to sign order of appointment
Section 4.1.3	new section re: correspondence as part of court file and information about redaction of sensitive information on documents submitted to court
Section 4.1.4	updated Docketing Checklist
Section 4.2.1	new material throughout section and updated links for do-it-yourself forms
Section 4.3.2	new material re: funeral home duties and death certificate confidentiality; updated Certificate Acknowledging Receipt and Review of Death Certificate to reflect current law
Section 4.5.1	updated 7. re: who are the heirs, definition of "half blood," and new Code of Judicial Conduct Rule 21-209C.; updated 8. to include new section "What if the Will is Invalid?"; updated 11. re: demands for notice; new section under 12. re: "More than Three Years Since Decedent's Death—Section 45-3-108"
Section 4.6.2	expanded Practical Tip and added material re: declining to appoint the personal representative
Section 4.6.3	new section re: other orders signed by judge
Section 4.7	revised entire section into two different sections re: issuing Letters
Section 4.8	new section—Probate Checklist for judge

Chapter 5

Section 5.3	added that probate judges lack jurisdiction over formal closings
Section 5.4	updated section re: never closing estate
Section 5.5	added new examples for newly discovered property

Chapter 6

Section 6.3.1	multiple updates re: storage of old or closed files
Section 6.3.2	new information, including new web addresses, re: record retention and archives
Section 6.3.4	revised entire section re: confidentiality v. public record
Section 6.3.5	new section re: laws about Inspection of Public Records Act (IPRA)
Section 6.3.6	new section re: court rule 1-079 re: court log for cases inspected by public and sample log of requests
Section 6.3.7	updated section re: fees allowed to charge for copies under IPRA

Chapter 7

Section 7.2.2	updated portions of section re: transfer initiated by district court
Section 7.3.7	added new sample Order of Recusal for "ex parte" Communication

Chapter 8

Entire chapter rewritten due to updated Code of Judicial Conduct, new unauthorized practice of law laws, and *pro hac vice* rules for attorneys from other states. Judges should read entire chapter!

Chapter 9

Section 9.1	updated information about joint tenancy and personal representative's deed

Section 9.3	updated information and Practical Tip about real property located outside of New Mexico
Section 9.3.1	updated information about two probates in two different states
Section 9.4	updated information about Proofs of Authority
Section 9.5	new link to MVD form for vehicle and mobile home transfers
Section 9.7	updated flowchart to reflect New Mexico's new definition of "authentication"

Chapter 10

Section 10.2	updated information about agreements among successors
Section 10.3	updated information about new disclaimer statutes
Section 10.4	added new Practical tip re: recipients of allowances not having to file a claim for the allowances and paragraph re: *Bell* case
Section 10.5	added paragraph re: *Bell* case and Practical Tip re: disputes
Section 10.7	updated/expanded entire section
Section 10.7.1	new section re: Estate Recovery Law in New Mexico
Section 10.8	new intro paragraph re: trusts
Section 10.9	new information re: updated cremation laws
Section 10.11	updated information re: notary laws and requirement of $10,000 bond
Section 10.12	revised entire section re: unclaimed property process
Section 10.12.1	new websites and contact information re: letter forwarding services
Section 10.13	new final paragraph with current cites to power of attorney laws
Section 10.14	updated to reflect New Mexico's revised definition of "authentication"
Section 10.15	updated information and affidavit form based on revised New Mexico law for affidavits of successors in interest
Section 10.16	updated information and affidavit form based on revised New Mexico law for transfer of homestead affidavits
Section 10.17	added new section re: out-of-state personal representative shortcut

Chapter 11

Section 11.3	added new restrictions on fees for performing weddings

Chapter 12

Updated and/or added new definitions of "affidavit of successor in interest," "authenticated," "codicil," "descendant," "disclaimer," "HIPAA," "holographic will," "interested person," "issue," "power of attorney," "probate code," "property," "sign," "successors," "successor personal representative," "testator," and "will."

Chapter 13

Included current copy of annotated Code of Judicial Conduct (removed in 2015).

Chapter 14

Included current copies of selected Uniform Probate Code provisions and other laws (removed in 2015).

Chapter 15

Updated websites and added new resources.

CHAPTER 1

Introduction to Probate

This chapter covers:

- Workplace requirements, including an office, supplies, location, hours and staff.
- Jurisdiction and venue, including probate court jurisdiction, exclusive district court jurisdiction, domicile and venue.
- When a probate is required, including definitions of probate and gross estates, different ways to title property, medical and other information.
- Intestate succession, including identifying the heirs and what happens when someone dies without a valid will.

1.1 Overview

Probate is a court proceeding to pass a deceased person's (**decedent's**) property (also called "assets" or "estate") to the heirs or devisees. The court appoints a **personal representative** who has the legal authority to act on behalf of the estate in passing the decedent's property.

Heirs are the people who would inherit the estate if there were no will. Devisees are the individuals or organizations listed in a will to receive the property of a decedent's estate. A person can be both an heir and a devisee.

A decedent may own real property (houses, land, ranches, timber and mineral interests still attached to the ground, etc.) or personal property. Personal property includes items such as bank accounts, stock accounts, retirement accounts, insurance policies, annuities, and royalties. These are items of intangible personal property. Furniture, guns, jewelry, artwork, vehicles, and other household items are tangible personal property.

Estates with both real property and personal property may be filed in the probate courts.

A decedent's assets do not necessarily require a probate as discussed later in this chapter.

Intestate means dying without a valid will. **Testate** means dying with a valid will. Both intestate and testate estates may be filed in the probate court if three years or less have elapsed since a decedent's death. If more than three years have elapsed, only intestate estates may be filed in the probate courts.

A large part of the probate judge's job is to make sure the **pleadings** (paperwork submitted to the court) are complete and accurate under New Mexico law. To do so, probate judges must be familiar with topics such as jurisdiction, venue, domicile, the how-to's of handling pleadings, and other legal issues. Since many probate judges are not attorneys, this basic training manual will give judges an overview of common issues that may come before them. Judges are always free, however, to call a district court judge, another probate judge, attorney, or other expert if they encounter a case, question, or situation that they do not know the answer to or feel uncomfortable with.

Judges will find references to "Section 45-__-__" throughout this manual. These refer to Sections of New Mexico Statutes Annotated (NMSA) 1978. Chapter 45, Pamphlet 67 is the Uniform Probate Code that governs probates. This manual omits the "NMSA 1978" part of the statute cite for ease of reading. All probate judges should have the entire Probate Code, 2008 Replacement Pamphlet (223 pages) and current supplement. Periodic supplements to the Uniform Probate Code are available as they are published. For copies of the Uniform Probate Code, supplements, or other statutes, contact the New Mexico Compilation Commission, PO Box 15549, Santa Fe NM 87592-5549, (505) 827-4821. The Compilation Commission's physical address is 4355 Center Place, Santa Fe, NM 87507. The website contains more information: www.nmcompcomm.us.

Free public access to all of New Mexico's statutes and rules is available online at: http://www.nmonesource.com/nmpublic/gateway.dll/?f=templates&fn=default.htm. Click in upper left corner "+ Statutes, Rules, Const." to drop down a menu.

1.2 Workplace Requirements

Probate judges should be aware of the following statutory requirements concerning their workplace.

1.2.1 County's Obligation to Provide Office and Supplies

Section 34-7-6 states that the county commissioners of each county in this state shall provide a suitable office for the accommodation of the probate judge of the county, and shall furnish all stationery and such other things as may be necessary for the prompt discharge of the duties of said judges.

1.2.2 Location and Hours of Business

Probate judges of this state are strictly required to hold their courts in the county seat of their counties, and the probate clerks shall also have their office in the county seat of the county at all times. Section 34-7-4. The probate courts of the state shall be in session and open at such times as are needed for the transaction of any business matters that may properly come before the courts under the laws of the state and upon notice given as required under the laws of the state. Section 34-7-8. Probate judges who do not have a full-time staff should set and post regular office hours when they will be available. Judges should be at the court during the hours posted.

How many hours a judge is in the office each week depends on the workload and other factors. Assuming a case includes all required paperwork, consents and other items, most judges review and act on cases docketed at their courts within one week of submission.

Whenever a probate judge is absent from the county where he or she was elected, is incapacitated, or unable to attend to his or her duties for any reason, any district judge of said county may do any and all things that could otherwise be done by the probate judge, without the necessity of having the matters or proceedings transferred from the docket of the probate court to the district court. The fact of said absence or incapacity shall be recited in every order of the district judge entered in accordance with this act. Section 34-7-11.

1.2.3 Probate Judge Salary and Term Limits

The salaries of probate judges are set by the legislature and vary depending on county size. As of December 31, 2012, salaries range from $28,820 for Class A counties to $8,795 for first class counties under twenty-seven million dollars ($27,000,000) valuation to $3,505 for Class H counties. *See* Sections 4-44-4 through 4-44-8 and 4-44-14 for details.

Probate judges and other county officers, such as treasurer, assessor, clerk, county commissioner, and sheriff are term-limited. Article X, Section 2D of the New Mexico Constitution states, "All county officers, after having served two consecutive four-year terms, shall be ineligible to hold any county office for two years thereafter."

1.2.4 Probate Court Staff

The county clerk is the *ex-officio* clerk of the probate court (*see* New Mexico Constitution Article VI, Section 22). The county clerk, however, may, with the consent of the probate judge, appoint a deputy clerk of the probate court, who, when duly appointed and qualified, has full power and is authorized to perform all the duties of the clerk of the probate court. Section 34-7-22.

A deputy clerk may be a staff member of the county clerk's office, or, in larger counties, may be a staff person hired specifically to assist the probate judge. All deputy clerks must take an oath of office which shall be recorded with the records of the probate court. Section 34-7-23. A deputy clerk of the probate court shall not receive any additional salary or pay of any kind for the performance of his duties, and his compensation shall be taken out from the pay and the fees of the clerk as allowed by law and as agreed upon between the deputy and the clerk who appoints him. Section 34-7-25.

1.3 Jurisdiction and Venue

The Uniform Probate Code covers four types of probate cases:

- Informal probate (a will is submitted).
- Informal appointment (no will is submitted).

- Formal testacy (a will is submitted).
- Formal appointment (no will is submitted).

"Jurisdiction" is the authority for a court to act on a certain matter. Probate courts are courts of "limited jurisdiction," and only have authority to act over informal probate/appointment proceedings.

1.3.1 Probate Court Jurisdiction

The probate court may:

- Accept informal probate and appointment cases (Sections 45-3-301 through 311) and may:
    - Admit wills to informal probate; and
    - Informally appoint a personal representative.
- Appoint a special administrator in an informal proceeding (Section 45-3-614).
- Review the reasonableness of fees charged by the personal representative or anyone employed by the personal representative, including attorneys (Section 45-3-721 does not appear to limit this power only to district courts, but since probate judges lack the power to hold evidentiary hearings, it should happen rarely in probate court).
- Appoint a successor personal representative in an informal proceeding, when the original personal representative dies or resigns (Sections 45-3-609, -610).

Note: The district court may also do the above things. The probate court has what is known as **"concurrent jurisdiction"** with the district court to preside over informal probate and appointment matters. This means that a person can file an informal probate and/or appointment in either probate court or district court (Section 45-1-302.1).

> **Practical Tip:**
> If the probate judge is out of town, incapacitated, or otherwise away from the court, any district court judge from that county can sign orders on the judge's behalf. "The fact of such absence or incapacity shall be recited in every order of the district judge..." Section 34-7-11.

1.3.2 Exclusive District Court Jurisdiction

Only the district court has jurisdiction over:

- Formal probate and appointment proceedings, including formal closings.
- Supervised administrations.
- Estates of missing and protected persons.
- Protection of incapacitated persons and minors (including guardianships and conservatorships).
- Survivorship and related accounts and similar property interests.
- Disclaimer of interests in property.

- Apportionment of taxes on estates.
- Governing instruments except wills. "Governing instrument" includes a deed, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), transfer on death (TOD) deed, pension, profit-sharing, retirement or similar benefit plan. Section 45-1-201(A)(20).
- Trusts (*but see* discussion of "pourover wills" in Chapter 2).

<u>Only</u> the district court can:

- Appoint someone without the highest priority to serve as personal representative (Section 45-3-203(E)). However, if all people with equal priority have signed written consents, this gives highest priority to the person upon whom all have agreed. *See* Chapter 3 for a detailed discussion of this topic.
- Determine the validity of a contested will; this requires a formal probate proceeding.
- Consider admitting a **copy** of a will (Section 45-3-402(A)(1), (B)); this requires a **formal** probate proceeding.
- Preside over a trial in a contested probate matter (Sections 45-3-406, 407).
- Determine title to and value of real or personal property between the estate and any interested person, including strangers to the estate with an adverse claim. The district court has full power to make orders, judgments and decrees and to take all other action necessary and proper to administer justice in matters that come before it (Section 45-1-302(B)).
- Hear a "petition for allowance" of a disputed creditor's claim (Section 45-3-806(A)(C)).
- Remove a personal representative for cause (Section 45-3-611).
- In instances where conflicts of interest may be present, approve the sale or encumbrance of property to the personal representative, his spouse, agent, or attorney (Section 45-3-713(A)(2)).
- Open a probate case more than three years after death when a will exists (Section 45-3-108(A)(4)(5)).
- Enter an order restraining a personal representative from acting (Section 45-3-607).
- Make a specific determination of heirs (Section 45-1-302(A)(1).
- Appoint a personal representative in a limited capacity.
- Preside over guardianship and/or conservatorship cases (Sections 45-1-302(A)(3) and 45-5-101(B)).
- Appoint a "guardian *ad litem*" for a minor child who is the heir or devisee of an estate (Sections 45-1-302(A)(3) and 45-5-405.1).

Practical Tip:

Probate judges do **not** have jurisdiction to appoint a guardian or conservator for incapacitated persons or minors and should not sign any orders of appointment. The UPC clearly defines the "court" with jurisdiction over these matters as the district court or the children's or family division of the district court where such jurisdiction is conferred by the Children's Code, *see* Section 45-5-101(B). If a probate judge is asked to appoint a guardian or conservator, he or she should direct the parties to transfer the case to the district court.

1.3.3 Domicile

Domicile is important in determining venue, i.e., is the case being filed in the correct court? Venue is discussed below. "Domicile" is a person's usual and permanent place of abode. Questions that help determine a person's domicile include:

- Where does the person consider his or her permanent place of abode?
- If they do not currently reside there, do they intend to return?
- Where is the person registered to vote?
- Is this their permanent address?
- Where is their vehicle registered?
- From what state is their driver's license issued?
- Is this the place they intend to return to, even if they currently reside elsewhere?
- From which state do they file their income taxes?

Ways for the probate judge to check domicile include:

- Does the will say decedent is domiciled in your county (it may not if the will was written long ago or when the testator lived in another state)?
- Does death certificate say decedent lived in your county?
- Do initial application and death certificate match re: domicile?

> **Practical Tip:**
> If there is a conflict between what the application and death certificate indicate about the decedent's domicile, contact the applicant or attorney and ask them to explain any discrepancies. Discrepancies may result from the person having lived in a nursing home, been cared for by a family member in their home, died while on vacation, etc. The judge has discretion to decide if the decedent's domicile is in the county where the case has been filed. If the case is clearly filed in the wrong court, it should be transferred to the correct court (or not accepted in the first place).

1.3.4 Venue

"Venue" means the place where the case should be filed. Which county's probate court or which district court does one use when someone dies?

Section 45-3-201 governs venue. Venue for the first informal testacy or appointment proceedings after a decedent's death is:

(1) the county in New Mexico where the decedent was domiciled at the time of his death; or
(2) if the decedent was not domiciled in New Mexico, in any county in New Mexico where property of the decedent was located at the time of his death. ("Property" can be interpreted to mean real or personal property.)

1.3.5 Examples

Example 1: X dies domiciled in Bernalillo County. All of his property is located in Bernalillo County. Where should the Application for Appointment of Personal Representative be filed?
Answer: According to Section 45-3-201(A)(1), the personal representative must open the case in Bernalillo County – either in the Bernalillo County Probate Court or the Second Judicial District Court.

Example 2: X dies domiciled in Bernalillo County. He owns real property in Taos County. No other property requires a probate. Where should the Application for Appointment of Personal Representative be filed?
Answer: According to Section 45-3-201(A)(1), the personal representative must open the case in Bernalillo County Probate Court or Second Judicial District Court, and then record a Notice of Administration, Section 45-1-404, in Taos County Clerk's office. Some attorneys or applicants will argue that the personal representative can open the case directly in Taos County, but case law and the statute on venue do not support this!

Example 3: X dies domiciled in Durango, Colorado. All of X's property passes outside of probate, except for property he owns in Socorro County. Where should the Application for Appointment of Personal Representative be filed?
Answer: According to Section 45-3-201(A)(2), the personal representative opens the case in the county where the property is located. Therefore, the case may be opened in the Socorro County Probate Court or the Seventh Judicial District Court.

Example 4: X, who is domiciled in California, dies without a will. X's estate requires a California probate, which has already been opened there. But X also owns a piece of real property in Albuquerque, New Mexico. What should the personal representative do?
Answer: X's Californian personal representative has three options. 1) Pursuant to Section 45-4-204, the personal representative can file a "Proof of Authority" in Bernalillo County's Probate Court or Second Judicial District Court, including a) authenticated copies of the California appointment, b) any official bond that has been given; and c) a statement of the domiciliary foreign personal representative's address. 2) The personal representative could open an informal proceeding, but would need to modify the language in the application to indicate that another probate had already been opened. *See* Sections 45-3-301(A)(4), 45-3-301(B)(1), 45-3-303(D)(E), 45-3-308(C). 3) The personal representative could initiate a formal ancillary proceeding in the district court, pursuant to Section 45-4-207.

1.4 When is a Probate Required?

1.4.1 Probate Estate, Defined

The decedent's "probate estate" is the part of a deceased person's estate that is governed by the provisions of the Uniform Probate Code. The probate estate requires a court probate proceeding to pass that part of the estate to the decedent's heirs or devisees. The probate estate includes decedent's property, both real and personal, that is titled in decedent's **sole name** or as **tenants in common** (defined below**).** It does **not** generally include property held in **joint tenancy** (also

defined below), insurance policies (unless the estate, rather than an individual, is named as a beneficiary), payable on death accounts, transfer on death accounts, trusts, etc.

1.4.2 Gross Estate, Defined

The decedent's "gross estate" is the total value of ALL of decedent's property, no matter how titled, for purposes of calculating decedent's estate tax liability, if any. The gross estate may include a home, ranch, other real property, bank accounts, investment accounts, IRAs, annuities, retirement accounts, insurance policy proceeds, household goods, collectibles, and more. In 2012 $5,120,000 of a decedent's estate is exempt from estate tax. This figure decreases to $5,000,000 in 2013.

1.4.3 Various Ways to Title Property

Title to property is one of the things that controls whether or not a probate is necessary. There are many ways to title property:

- **Sole name** of a person (only decedent's name appears on bank account, house, or other assets).
- **Tenants in common** (each tenant owns his or her own portion as a separate, distinct interest in the property that cannot be transferred or legally destroyed by the other co-tenant(s). One tenant in common passes his/her share to his/her heirs or devisees at death. At decedent's death, decedent's tenant in common share requires a court probate proceeding. The decedent's heirs or devisees will then own the property with the surviving co-tenant(s).

The above two forms of property ownership require a court proceeding to pass ownership to a decedent's heirs or devisees. They are considered part of the decedent's probate estate. They are also part of the decedent's gross estate.

Other ways to title property include:

- **Joint tenants with right of survivorship** (at death of one joint tenant, property passes to surviving joint tenant(s) without a probate or court proceeding). Joint tenancy title may appear as "joint tenants," "joint tenants with right of survivorship," or "jtwros." Any of these is a permissible designation of a joint tenancy for deeds, financial accounts or other documents. In cases involving a joint tenancy deed to real property, the decedent joint tenant's death certificate should be recorded in the county clerk's office in the county where the property is located.

- **Payable on death (POD) accounts** (name a beneficiary for bank accounts or U.S. savings bonds; beneficiary automatically receives the property after the owner's death without a probate, *see* Sections 45-6-201 through 227).
- Other assets with **named beneficiaries**, such as life insurance, annuities, individual retirement accounts (IRAs) (owner names in writing a beneficiary and at owner's death, the property passes automatically to the named beneficiary without a probate, unless the

beneficiary has predeceased the owner). However, if the owner has named " my estate" as the beneficiary, a probate will probably be necessary,

- **Transfer on death (TOD) accounts** (name a beneficiary to receive stocks, bonds, and other investment securities; beneficiary automatically receives the property after the owner's death without a probate, *see* Sections 45-6-301 through 311).
- **Transfer on death deeds (TODD)** for real property (must be prepared and recorded properly **before** the owner's death to pass title to the real property automatically to the TODD beneficiaries after the owner's death without a probate, *see* Section 45-6-401).
- **Trusts** (trustor can create a written trust during his/her lifetime, transfer all property into the name of the trustee of the trust, and the trust property passes automatically to named trust beneficiaries upon trustor's death without a probate).
- **Life estates** (a person retains an ownership interest during his/her lifetime, then upon his/her death, the property passes automatically to designated remainder beneficiaries without a probate; life estates usually occur with real property and require a special deed to create this interest).

The above seven forms of property ownership usually do <u>not</u> require a court probate proceeding to pass ownership to a decedent's heirs or devisees. Therefore, they are not considered part of the decedent's probate estate, but are part of decedent's gross estate.

1.5 Intestate Succession

Intestate means dying without a valid will. Wills are discussed in Chapter 2. The laws about intestate succession appear in Sections 45-2-101 through 45-2-114.

If a decedent was married at the time of his/her death and died without a valid will, the distribution of a decedent's assets differ, depending on whether the decedent's property was separate or community. If an intestate decedent owned community property at death and had a spouse, then the surviving spouse receives all of the decedent's community property. Section 45-2-102(B). *See also* Section 45-2-807. If an intestate decedent had no spouse, then the decedent's heirs as set out in Section 45-2-103 would receive the decedent's property.

If an intestate decedent owned separate property at death and had only a spouse, but no children, then the surviving spouse receives all of the separate property in the intestate estate. Section 45-2-102(A)(1). If the intestate decedent owned separate property at death and had a spouse and children, then the surviving spouse receives one-fourth of the separate property in the intestate estate and the children receive the other three-fourths. Sections 45-2-102(A)(2), Section 45-2-103(A). If the decedent owned separate property at death and had no spouse or children, then the decedent's heirs as set out in Section 45-2-103 would receive the separate property.

Practical Tips:

Determining the shares of recipients of an estate is outside the scope of a probate judge's authority. Yet it is important for judges to understand the applicable laws. *Pro se* applicants often ask for help, and judges must know what they are and are not allowed to say.

Also, **remember that not all assets of an estate require a court proceeding**. Titles to property, discussed above, determine whether or not a court proceeding is necessary. This principle applies to both testate and intestate estates.

Section 45-2-103 lists the priority of heirs to inherit an intestate estate. This statute also provides guidance about which heirs must be listed in the initial application:

- If decedent is married, decedent's spouse is an heir.

- Decedent's children, by representation, include
  - all of decedent's biological children, if any; and
  - children adopted by decedent, if any.

- If one or more of decedent's children have died, all children of the deceased child or children are also heirs of the decedent's estate.

- If the decedent has no surviving spouse or children, decedent's parents are the heirs, if both survive, or the surviving parent if only one survives.

- If the decedent has no surviving spouse, children, or parents, then decedent's brothers and sisters (called "descendants of the decedent's parents" in Section 45-2-103), by representation, are the heirs; (if one or more of decedent's siblings has died, the children of the deceased sibling(s) are also heirs of the estate).

- If the decedent has no surviving children, parents or siblings, the decedent's grandparents are the heirs--if the grandparents are deceased, their children (decedent's aunts and uncles), are the heirs of the estate. Section 45-2-103A(4) of the law states, "If decedent has no surviving descendant, parent or descendant of a parent, but the decedent is survived on both the paternal and maternal sides by one or more grandparents or descendants of grandparents: (a) half to the decedent's paternal grandparents equally if both survive, to the surviving paternal grandparent if only one survives, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and (b) half to the decedent's maternal grandparents equally if both survive, to the surviving maternal grandparent if only one survives, or to the descendants of the decedent's maternal grandparents or either of them if both are deceased, the descendants taking by representation…"

- If decedent has no surviving descendant, parent, descendant of a parent, or descendants of grandparents, but the decedent has: (1) one deceased spouse who has one or more descendants who survive the decedent, the estate or part thereof passes to that spouse's descendants by representation; or (2) more than one deceased spouse who has one or more descendants who survive the decedent, an equal share of the estate or part thereof passes to each set of descendants by representation. "Deceased spouse" means an individual to whom the decedent was married at the individual's

death, and does not include a spouse who was divorced from, or treated pursuant to Section 45-2-802 or Section 45-2-804 NMSA 1978 as divorced from, the decedent at the time of the decedent's death. *See* Section 45-2-103B and 45-2-103C. Until 2012 the Uniform Probate Code has never allowed decedent's stepchildren to inherit by operation of law. In reality it will be impossible for a judge to know whether decedent's deceased spouse had any children who may be entitled to inherit. If this issue requires a factual determination, transfer the case to the district court for a formal proceeding.

If no relatives or stepchildren of the decedent can be found, an intestate estate "escheats" to the state school fund. Section 45-2-105.

Practical Tip:
The intestate provisions of the law contain new, extremely complex provisions relating to genetic parents, adoptive parents, children conceived by assisted reproduction, and children born to surrogate parents. These new laws are set out in Sections 45-2-115 through 45-2-122, which are not included in Chapter 14 of the manual. If the probate judge encounters a case with any of these issues, he or she should transfer the case to the district court for a formal proceeding.

1.6 Medical Records and Unclaimed Property Act

Due to privacy concerns under the federal HIPAA law (Health Insurance Portability and Accountability Act of 1996), courts are seeing many probates opened solely for the purpose of gaining access to medical records or other information about the decedent. This often happens even though the person died years ago. Once the court appoints a personal representative, he/she should have the same authority to access decedent's records as the decedent would have had.

If a personal representative opens a case under the Uniform Probate Code to gather information, he or she is still responsible for all duties of a personal representative, such as giving notices to heirs, devisees, and creditors, preparing inventories and accountings, etc.

In the alternative, a Special Administrator may be appointed for the sole purpose of obtaining medical records. This procedure might be appropriate if medical records are required for a lawsuit or other purpose, but all necessary consents to the appointment of a personal representative cannot be obtained or someone with equal priority for appointment is missing. A Special Administrator appointed in an informal proceeding does not have the authority to distribute assets of the estate. Special administrators are discussed in Chapter 3 of the manual.

The Unclaimed Property Division of New Mexico's Taxation and Revenue Department has various procedures to claim assets on behalf of a deceased person who has rights to unclaimed property. Chapter 10 contains more information about unclaimed property. The state's website at http://www.tax.newmexico.gov/Individuals/Unclaimed-Property/Pages/Home.aspx also has additional information.

CHAPTER 2

Wills

This chapter covers:

- Requirements for a valid will, including who may make a will, the definition of sound mind, witness requirements, and writing and signature requirements.
- Sections contained in wills.
- Other kinds of wills, such as holographic, joint, mutual and pourover wills.
- Locating the will in various places where it may have been left or recorded.
- Codicils to wills.
- Judge's review of the original will and codicils.
- How to revoke a will.
- Tangible personal property list.

2.1 Requirements for a Valid Will

2.1.1 Who May Make a Will?

An individual eighteen years of age or older who is of sound mind or an emancipated minor who is of sound mind may make a will. Section 45-2-501. An emancipated minor is a person sixteen years of age or older who: (1) has entered into a valid marriage, whether or not the marriage was terminated by dissolution; (2) is a member of the active or reserve components of the army, navy, air force, marine corps or coast guard of the United States who is on active duty or a member of the national guard who is on activated status; or (3) has received a declaration of emancipation pursuant to the Emancipation of Minors Act. Section 45-1-201(A)(14).

2.1.2 What is Sound Mind?

Testamentary capacity (being of sound mind) means someone knows:

- The objects of one's bounty (who one's immediate heirs are);

- The nature of one's bounty (what property one owns); and
- That one is making a will.

A **"lucid moment"** is all that New Mexico case law requires that if, at the moment the testator signed the will, he or she knows the above three things, then the testator meets the requirements of testamentary capacity, even if he or she does not remember making the will the next day. Someone under a court-appointed conservatorship may still have capacity to make a will! S*ee Matter of the Estate of Lucero*, 118 N.M. 636 (Ct. App. 1994).

2.1.3 Witness Requirements

The witness requirements for a valid will in New Mexico are:

- Two "competent" individuals. Section 45-2-505(A).
- No age requirement, although in practice attorneys who prepare wills use witnesses age 18 or older**;** *But* s*ee Matter of the Estate of Kelly*, 99 N.M. 482 (Ct. App. 1983), where a 13-year-old witnessed a will, and this was not part of the challenge to the will**.**
- In New Mexico, interested persons (those who inherit under the will) may serve as witnesses. Section 45-2-505(B). If the will was executed in another state, the judge may need to check the requirements for that state.
- The notary may also serve as a witness to the execution of the will. However, almost all wills that are notarized contain the signatures of two witnesses and a **separate** notary. *But see Martinez v. Martinez,* 99 N.M. 809 (Ct.App.1983).

2.1.4 Writing and Signature Requirements

Wills must be (Section 45-2-502):

- In writing.
- Signed by testator (or signed by someone else in the testator's conscious presence and by the testator's direction—this provision is used for testators with physical, not mental disabilities).
- Signed by two witnesses (testator and two witnesses, who must <u>all</u> be in each other's presence and watch each other sign).

The above requirements are the only ones necessary for a valid will. **Notarization is not required,** although wills prepared by lawyers are often notarized. Some people who prepare their own wills believe that the notary's signature makes the will valid and that no additional witnesses are required. They are incorrect; a will made in New Mexico must contain the signature of the testator and two witnesses.

Note: Wills that are not signed in the presence of two witnesses (or are not witnessed at all) are invalid if created in New Mexico. However, New Mexico has a case that says if a will only has one witness's signature, but is notarized, then the notary counts as the second witness, and the will is valid. *Martinez v. Martinez*, 99 N.M. 809 (Ct. App. 1983).

Practical Tip:
Probate judges have been asked whether an agent appointed under a power of attorney can sign a will on behalf of a testator. Remember that a testator must be "of sound mind" when signing a will. Only if the testator is of sound mind and able to direct the agent to sign on his or her behalf and in his or her conscious presence could an agent sign a will on behalf of the testator. A court-appointed conservator by law may **not** sign a will on behalf of an incapacitated person. Section 45-5-402.1(B)(3).

2.2 Sections Contained in Wills

Although there is no required form for a will, judges may see the following sections in wills that they review as part of a probate case:

The contents of wills vary depending on who prepares them. Common provisions of a will may include:

- Introductory statement. For example, "I, _____, of _____ County, State of New Mexico, being of sound mind, make, publish, and declare this to be my Last Will and Testament, hereby revoking all former wills and codicils made by me."
- Statement of family history, listing spouses, if any, and children by name.
- Appointment of a personal representative and an alternate personal representative.
- Summary of the personal representative's duties and powers.
- Directions on how estate debts will be paid.
- Instructions about family and personal property allowances (if testator is married or has minor or dependent children).
- Specific gifts to people, such as "I devise $100 to my friend Miguel Murphy." The will should state clearly what happens to Miguel Murphy's gift if he dies before the testator.
- Reference to a list of tangible personal property.
- Residuary clause stating who receives the rest of the estate and what happens to each gift if one of the beneficiaries (called "devisees") dies before the testator. These contingent devisees are only entitled to the devise if the primary devisee predeceases the testator. A trust may be named as the beneficiary in the will. This type of will is called a 'pourover will' (*see* below for more information). Remember that the people, charities, trustees of trusts, and other recipients named in a will to receive gifts are all **devisees** (Section 45-1-201(11)).
- Signature and date lines for testator and two witnesses.
- Clause attesting that the testator: (1) signed and executed the will, (2) signed willingly, (3) executed the will freely and voluntarily, and (4) was eighteen years of age or older, of sound mind and under no constraint or undue influence.
- Clause attesting that the two witnesses: (1) saw the testator sign and execute the will, (2) saw the testator sign willingly, (3) when signing the will, each were in the

presence of the testator and in the presence of each other, (4) witnessed the testator's signing, and (5) believed the testator was eighteen years of age or older, of sound mind and under no constraint or undue influence. Section 45-2-504(A).

- Self-proving clause that includes a signature line for a notary public, as well as signature lines for testator and two witnesses, plus a line for a notary public to sign and stamp or seal the will. Although rarely done, a self-proving clause can be executed on a different day than the day the will was signed. Section 45-2-504(B).

Many wills that judges encounter are prepared by attorneys. The will may have been created in another state, and judges may have to research the other state's laws regarding how to make a valid will there. An individual is allowed to prepare his or her own will. However, lack of familiarity with legal terminology, drafting, and problems with do-it-yourself wills may mean that preparing one's own will causes more problems than it solves.

Practical Tip:
Most wills contain an **attestation clause**, language (usually at the end of the will) that says the testator and witnesses were all in each other's presence, watched each other sign, and that the testator signed willingly and was under no undue influence. A will that appears to have the required signatures and which contains a proper attestation clause is admitted to probate without further proof. Section 45-3-303(C), NMSA 1978.

If further proof of the validity of the will is necessary, the judge has two options:

- The court can presume execution if the will appears to have properly executed; or
- The court may accept a sworn statement or affidavit of any person who knows the circumstances of execution, whether or not the person was a witness to a will. Section 45-3-303(C). This provision is useful especially for do-it-yourself wills that may not have all of the required language set out in Section 45-2-504.

2.3. Other Kinds of Wills

2.3.1 Holographic Wills

Holographic wills are wills in the handwriting of the testator and signed by the testator, but without the signatures of witnesses. **New Mexico does not recognize holographic wills made in this state.** In fact, the definition of "will" specifically excludes a holographic will. Section 45-1-201(A)(57).

If a holographic will was validly made in a state that recognizes them, and the testator then moved here and died, the judge could possibly admit that will. If a probate judge is presented with a handwritten, unwitnessed will from another state, he or she must do legal research about the other state's law on holographic wills. If the other state allows holographic wills, the judge should modify the order to explain why the holographic will is being admitted to probate.

A handwritten will that contains the signature of the testator and two witnesses is <u>not</u> a holographic will! New Mexico law does not require a will to be typed, only written, so a valid handwritten will signed by the testator and two witnesses should be admitted to probate.

2.3.2 Joint Wills

Joint wills mean one original will for two people. These are not favored in modern times and are no longer prepared by attorneys for clients. Each person signs his or her own will. However, judges may encounter an occasional joint will prepared many years ago. If the one joint will needed to be probated at the death of the first spouse, the judge would probably use an authenticated copy of the original will if a second probate were needed.

2.3.3 Mutual Wills

Mutual wills mean two almost identical wills for two people, usually spouses. These are also known as "I love you wills" or "mirror wills." Mutual wills leave property to each other, then to identical successor devisees.

2.3.4 Wills with a Contract Not to Revoke

Sometimes joint or mutual wills contain language that the wills cannot be revoked after the first person dies. The execution of a joint will or mutual will does not create a presumption of a contract not to revoke the will or wills. A contract to make a will or devise or not to revoke a will or devise can only be created by specific writings that make the testator's intent clear. *See* Section 45-2-514.

A New Mexico case, *In the Matter of the Estate of Kerr,* 121 N.M. 854 (Ct. App. 1996), discusses joint and mutual wills and contracts not to revoke.

2.3.5 Pourover Wills

Pourover wills are wills that are executed at the same time as a trust to ensure that all assets are transferred into the trust when the trustor dies. The pourover will states that any assets remaining outside of the trust at the time of the trustor's death shall 'pour over' from the decedent's estate into the trust. The residuary clause of a pourover will leaves the decedent's assets to "the Trustee of the X Revocable Living Trust dated _____" instead of to individual recipients.

A pourover will should not need to be used if a trust was properly and fully funded during the trustor's lifetime, but a trustor may die before transferring all assets into a revocable living trust that he or she has created or fail to transfer all assets prior to death. Or the trustor may acquire additional assets through inheritance, gift, lottery winnings or other means a long time after creating the trust and may forget to transfer those new assets into the name of the trustee of the trust. Failure to do so defeats one reason to have a trust: to avoid probate and court. Assets that were not properly transferred into the trust prior to the trustor's death must be transferred via the pourover will through a court probate procedure.

The probate judge has the power to admit a pourover will to probate when no dispute exists. However, only the district court has jurisdiction over trusts themselves, including trust administration or conflicts.

2.3.6 Living Wills

Living wills are health care directives that instruct decision-makers and health care providers not to provide extraordinary medical intervention to prolong life. Also called "Right to Die Statements." Living wills are not testamentary instruments like regular wills, but people often confuse the terms.

2.4 Locating the Will

2.4.1 Safe Deposit Box

When someone dies, the heirs of the estate do not always know where to look for the original will or if one even exists. One place a person might look for the original will is in the deceased person's safe deposit box. Specific banking regulations apply to the search of someone's safe deposit box after the death of that person.

Section 58-11A-4(A) outlines the search procedure upon the death of a lessee of a safe deposit box. A financial institution where the safe deposit box is located must permit the person named in a court order, or if no order exists, the spouse, parent, an adult descendant or a person named as a personal representative in a copy of a purported will produced by him, to open and examine the contents of a safe deposit box leased by a decedent or any documents delivered by a decedent for safekeeping, in the presence of an officer of the financial institution, and "upon execution of a receipt:

(1) any writing purported to be a will of the decedent;

(2) any writing purported to be a deed to a burial plot or burial instructions to the person making the request for a search; or

(3) any document purported to be an insurance policy on the life of the decedent to the person named as a beneficiary in the policy.

B. No other contents of a safe deposit box shall be removed pursuant to this section, except as provided in the Probate Code [Chapter 45 NMSA 1978]."

See also Section 58-10-108 (Saving & Loan Institutions).

> **Practical Tip:**
> Many New Mexico financial institutions are unfamiliar with this law and may need to be provided a copy. In rare instances a probate judge may enter an order directing the financial institution to comply with Section 58-11A-4 and release any original will contained in the safe deposit box of the decedent.

Judges should be aware that New Mexico's Uniform Unclaimed Property Act, Section 7-8A-3, states that tangible property held in a safe deposit box or other safekeeping depository in the ordinary course of the holder's business and proceeds resulting from the sale of the property permitted by other law, are presumed abandoned if the property remains unclaimed by the owner for more than five years after expiration of the lease or rental period on the box or other depository. Unclaimed property is discussed in Chapter 10 of this manual.

2.4.2 Placing a Will on Deposit with the District Court

A will may be deposited by the testator or his agent with the clerk of any district court in New Mexico for safekeeping pursuant to rules of that court. The will shall be kept confidential. During the testator's lifetime, a deposited will shall be delivered only to him or to a person authorized in writing signed by him to receive the will. A conservator may be allowed to examine a deposited will of a protected testator under district court procedures designed to maintain the confidential character of the document to the extent possible and to assure that it will be resealed and left on deposit after the examination. Upon being informed of the testator's death, the district court clerk shall notify any person designated to receive the will and deliver it to him on request, or the court clerk may deliver the will to the appropriate court. Section 45-2-515.

2.4.3 Do Not Record a Will with the County Clerk's Office

People who make a will sometimes mistakenly think they should record a notarized will with the county clerk's office during their lifetime. Recording a will prior to death is unwise and unnecessary. The will then becomes public record and even if the person revokes the will later, the recorded will stays in the public record.

2.4.4 Leaving Original Will with Attorney Who Prepared It

People sometimes leave the original will with the attorney who prepared it. However, it can be difficult or impossible to locate if the attorney moves, retires, becomes a judge, is disbarred, sells his or her law practice, or dies. Some attorneys prepare duplicate originals, giving one to the client and retaining the other. If only one original can be found after the testator dies, a question may arise about whether the will has been revoked.

2.5 Codicils to Wills

Codicils are amendments, updates, or changes to a will. Often a person has a valid will and just wants to modify the appointment of a personal representative, change a beneficiary, or indicate a change in marital status. Some people take their original will, cross out the old language, and write the changes on the original will. These changes are not valid because they were not executed in the presence of two witnesses.

The codicil should: (1) identify the will that is being amended, including the date the will was signed; (2) state the testator's name and domicile; (3) specify in detail what changes are being made; and (4) state which sections of the will remain in effect.

To be valid, the codicil must be executed in the same manner as a will. The testator must sign and date the codicil in the presence of two witnesses who also sign the codicil. New Mexico law does not require the codicil to be notarized, but attorneys (or their staff) usually notarize wills and codicils that they prepare.

> **Practical Tip:**
> An invalidly executed will can be "cured" by a properly executed codicil. For example, a will may lack the signatures of two witnesses, but a later codicil to the will may be properly executed. Because the definition of "will" includes a codicil (Section 45-1-201(A)(57)), the valid codicil may "cure" the improperly executed will. The judge should look for language in the codicil that says "In all other respects, I affirm my will dated _____." or similar language. If the codicil is validly executed, the judge may be able to admit the invalidly executed will to probate, but would need to slightly amend the order that the judge signs.

New Mexico law does not prohibit a person from adding a codicil to a will that was prepared and executed in another state. However, some attorneys prefer to prepare a new will rather than update a will made in another state.

Sometimes a testator's will includes more than one codicil. The judge should review each codicil to make sure it is valid and properly executed. Each codicil should be admitted to probate with a separate stamp. How to admit wills and codicils to probate is discussed in Chapter 4.

> **Practical Tip:**
> Section 45-2-516 requires any person who has custody of a decedent's will to deliver the will to a person to secure its probate or, if no such person is known, to an appropriate court. Contempt penalties are possible against someone who refuses to hand over a decedent's will. Sometimes the judge may find it useful to hand a copy of Section 45-2-516 to an applicant or family member.

2.6 Judge's Review of Original Will and Codicils, If Any

The judge's job in reviewing a will is important. The same procedure applies to codicils. The judge should carefully inspect the will and consider:

- Is the will original? Are all pages original?
- Are the signatures original?
- If notarized, is the notary seal or stamp original?
- Are all pages present and accounted for?

- Are there any signs of possible revocation, such as scratched out words, burn marks, etc.? If there is some question about whether the will has been revoked, the case should be filed in district court. Sometimes there are changes to the will (such as scratched out or changed words or names that are initialed by the testator). Unless these changes were signed in the same manner as a will, they are not valid **amendments**, but could be valid **revocations**. Invalid amendments do not necessarily affect the validity of the rest of the will unless someone challenges the will. If a will is challenged after the judge admits it, the judge will need to transfer the case to district court.
- Is the personal representative first named in the will the same one who is asking to be appointed? If not, is the successor personal representative named in the will applying and has he or she stated why the first choice cannot serve? If not deceased, has the first personal representative completed a proper renunciation and concurrence or consent?
- Do the names in the family history section of the will (listing spouse and children), if any, match the spouse and children's names listed in the application?
- Are all devisees listed in the will also listed in the application, including trustees, schools and charities?
- Does the date the will was signed match the date of the will in the application?

Practical Tip:
Wills do not expire, so old wills that have not been revoked and are properly executed should be admitted. New Mexico also accepts out-of-state wills that comply with our execution requirements OR complied with their own state's requirements at the time they were executed, *see* Section 45-2-506. Legal research about the other state's law on will executions might be necessary. Finally, there is no requirement that wills be typed. Handwritten wills are acceptable if they are properly signed and witnessed.

2.7 How to Revoke a Will

The most effective way to revoke a will is to make a new will that completely disposes of the testator's entire estate. The new will usually includes language, such as, "This will revokes all prior wills and codicils made by me." The date--month, day and year--that the testator signed the new will should also appear at the end of the new will.

Some people wish to revoke only a portion of their wills by making a codicil (amendment) to the will. As noted above, a codicil should: (1) identify the will that is being amended, including the date the will was signed; (2) state the testator's name and domicile; (3) specify in detail what changes are being made; and (4) state which sections of the will remain in effect.

A codicil must be executed in the same manner as a will. This means that the testator must sign and date a codicil in the presence of two witnesses who also sign the codicil. New Mexico law does not require a codicil to be notarized, but attorneys (or their staff) usually notarize wills and codicils that they prepare.

As of January 1, 2012, New Mexico law allows a separate writing to revoke a will. A testator can revoke a will by executing another subsequent document in the manner provided for in Section 45-2-502 or 45-2-504 NMSA 1978, or both, that expressly revokes the previous will or part of the will. Section 45-2-507(A)(2). This means that a separate writing revoking a will must be executed in the same manner as a will or codicil—signed by the testator in the presence of two witnesses. Notarization is optional. A separate writing expressly revoking a will that is not properly executed would not work, even if the testator's intent is clear. **If a probate judge is not certain whether a separate, written document revokes a will, the case should be transferred to the district court for an evidentiary hearing.**

Before this law went into effect, the New Mexico Court of Appeals has ruled that a separate, notarized document revoking a prior valid will does not constitute a valid revocation of the will under our state's laws. For attorneys who are shocked to learn this, the case cite is *In re: Estate of Martinez*, 127 N.M. 650 (Ct.App.1999).

New Mexico law sets out additional methods to revoke a will--"performing a revocatory act on the will if the testator [maker of the will] performed the act with the intent and for the purpose of revoking the will…." Another individual can perform this revocatory act in the testator's "conscious presence and by the testator's direction." Section 45-2-507(A)(3).

Revocatory acts on the will include "burning, tearing, canceling, obliterating or destroying the will or any part of it," even if the burn, tear or cancellation does not touch any of the words on the will. However, if the intent of the testator is not clear from the revocatory acts or there is some question about who actually performed the acts, a lawsuit could ensue.

Lawsuits can be long and expensive, and the more a family dislikes or distrusts each other, the more expensive lawsuits become. Creative arguments can be made to prove or disprove a testator's intent, soundness of mind, ability to be unduly influenced, etc. A testator may intend to destroy a will by shredding or burning it, but forgets to destroy a copy or duplicate original of the will. Arguments could then be made in court about whether the copy should be admitted or whether the will was actually revoked.

Another way to revoke a will is by divorce or annulment. Bequests made to an ex-spouse in a will executed prior to a divorce or annulment are revoked under New Mexico's laws. Section 45-2-804. Nominations of an ex-spouse to serve as a personal representative, executor, trustee, conservator, agent or guardian for the former spouse are similarly revoked upon divorce or annulment.

This method only revokes the portions of the will that pertain to the ex-spouse. The rest of the will would remain in effect unless it was revoked by a new will, codicil, or some other revocatory act discussed above.

Divorce or annulment also excludes an ex-spouse from inheriting under the terms of a payable on death (POD) accounts, transfer on death (TOD) accounts, other beneficiary accounts, such as life insurance, joint tenancy property, or a revocable trust. Specific to joint tenancies, New

Mexico law states that a divorce or annulment of a marriage "severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship, transforming the interests of the former spouses into equal tenancies in common." Section 45-2-804(B)(2).

There is an exception to the automatic revocation rule. The terms of a divorce decree, court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment may mandate that the ex-spouse receive life insurance, pension benefits, or other assets from a former spouse. The terms of court orders or contracts, such as pre-nuptial and post-nuptial agreements, should not be affected by the automatic revocation rule.

While revocation is the general rule, some people want to include an ex-spouse in a will. If this is the case, people should update their wills **after** a divorce to expressly state their wishes to include the ex-spouse in spite of the divorce.

Also, spouses who are separated, but not divorced, retain certain rights under the Uniform Probate Code.

Similarly, someone who is found guilty of feloniously and intentionally killing a decedent loses the right to inherit, collect as a named beneficiary, or serve as personal representative of the decedent's estate. Sections 45-2-803(B)(C). Specific to joint tenancies, New Mexico law states that the felonious and intentional killing a decedent "severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship, transforming the interests of the decedent and killer into equal tenancies in common." Section 45-2-803(C)(2).

Probate judges should be aware that in New Mexico, if the decedent was involved in a divorce proceeding at the time of his/her death, the judge should transfer the case to the district court for a formal proceeding. Chapter 3 of the manual addresses this issue in more detail.

2.8 Tangible Personal Property List

Disputes about inheritances can center on an item of furniture, piece of artwork, or jewelry. New Mexico law allows a testator to make a written statement or list of tangible personal property not otherwise specifically disposed of by a will to give special china, silver, musical instruments, furniture, jewelry, guns, boats, cars, artwork, and other personal items to certain people. As part of a will, a testator may prepare this separate list of tangible personal property and the recipients of each item.

Wills prepared by New Mexico attorneys usually contain language that refer to this list of tangible personal property, which does not include other types of personal property such as stocks or bank accounts. The language in the will may also say that if no list can be found within 30 days, presume that no list exists. To be valid, the list must be signed by the testator but does not need to be notarized. The list must also describe each item and recipient "with reasonable certainty." The list is often stored with the original will, so the personal representative does not

have to search for it later. A “letter of instructions” might be construed as a list of tangible personal property if it meets the legal requirements for the list listed below.

The list may be prepared before or after making the will. The list can be changed whenever the testator wants, without having to change the will and without the help of an attorney. Money may not be put on this list. This list must be signed by the testator, but does **not** need to be signed by witnesses. Dating the list is also important because the personal representative or court will look at the most recent list if a dispute arises. This list becomes part of the will and is admitted to probate with the will by the probate judge.

Section 45-2-513 contains the requirements of this list. A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. To be admissible under this section as evidence of the intended disposition, the writing must be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be:

A. referred to as one to be in existence at the time of the testator's death;
B. prepared before or after the execution of the will;
C. altered by the testator after its preparation; or
D. a writing that has no significance apart from its effect on the dispositions made by the will.

A New Mexico case, *In the Matter of the Estate of Russell*, 119 N.M. 43 (Ct. App. 1994) interprets this statute.

CHAPTER 3

Personal Representatives and Special Administrators

This chapter covers:

- Personal representatives, including priority, consent, co-personal and successor representatives, resignations, bonds, limited appointments and duties.
- Special administrators, including a sample order of appointment with limited powers.

3.1 Personal Representatives

A "personal representative," once appointed by the court, has legal authority to act on behalf of a decedent, settling the estate, paying taxes and creditors, distributing property, and other matters. A personal representative appointed by the court "stands in the shoes" of the decedent for all estate and tax matters. **Personal representatives must be eighteen years of age or older. *See* Section 45-3-203(F)(1).**

Practical Tip:
A person is not legally the "personal representative" until a court appoints him/her. People often phone the court and say, "I'm the personal representative of the estate of so-and-so." In reality, what they mean is the decedent's will has ***named*** them as personal representative. But until that person takes steps to file a case and is appointed by the court in a written order, he/she has no legal authority to act on behalf of the estate. The judge or court staff may help to clarify this situation by explaining that the will expresses the testator's intent about whom the court should appoint and how the personal representative should distribute the estate. But until a court order is signed by the judge, a personal representative named in the will has no legal authority.

3.1.1 Who Has Priority to Serve?

It is the probate judge's duty to appoint the personal representative who has the highest priority to serve. Section 45-3-203(A) sets out who has priority from first to last:

1. Personal representative named in the will [note: alternate personal representative has priority if first-named personal representative will not serve];
2. Surviving spouse who is a devisee named in the will;
3. Other devisees of decedent;
4. Surviving spouse of decedent, when there is no will;
5. Other heirs of decedent, when there is no will (if an heir is missing and that missing heir has equal priority to serve as personal representative, probate court lacks jurisdiction to appoint);
6. One nominated by those with priority to serve, when there is no will, or when all the heirs and devisees decline to serve.
7. Any interested person, such as a creditor or the state, (other than a spouse, devisee or heir) can apply to have any qualified person serve. Creditors who ask to be appointed as personal representative must wait **45 days** from decedent's death (Section 45-3-203(F)(3)). The probate court probably does not have the authority to appoint a creditor as personal representative unless those with higher priority to serve agree. But, if the decedent had no family members, it is possible that the creditor is the one with the highest priority for appointment.

Practical Tip:

A person entitled to appointment as personal representative may choose decline and nominate in writing a qualified person as personal representative. The person so nominated shall have the same priority as the one who nominated the person. The law states that a nomination or renunciation shall be signed by each person making it, the person's attorney or the person's guardian or conservator. Section 45-3-203C. A copy of document showing the guardian or conservator's authority should be included in the court file.

If someone without highest priority asks the court to appoint them as personal representative and has not obtained written consents from those with higher priority, a formal proceeding is required. Because probate judges do not have jurisdiction over formal proceedings, only the district court may appoint someone who does not have highest priority after notice and a hearing to all interested persons. The law about this issue states, "Appointment of one who does not have highest priority, including highest priority resulting from renunciation or nomination determined pursuant to this section, may be made only in **formal** proceedings. Before appointing one without highest priority, the court shall determine that those having highest priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment and that administration is necessary." Section 45-3-203(E). If a judge is asked to appoint someone who does not have highest priority for appointment and the judge has already docketed the case, the judge should transfer the case to district court for a formal proceeding.

Important Notes:

An individual who "feloniously and intentionally" kills a decedent is barred from serving as personal representative of decedent's estate, even if nominated in decedent's will. Section 45-2-803(C)(1)(c).

An ex-spouse is also barred from serving as personal representative of decedent's estate, even if nominated in decedent's will. Section 45-2-804(B)(1)(c). **Exception**: a decedent could execute a new will **after** the divorce date, naming the ex-spouse as personal representative. Spouses who are separated, but not divorced, retain rights under the Uniform Probate Code.

Since 1993, under domestic relations law Section 40-4-20(B), the rule in New Mexico is that if one spouse dies during the pendency of a divorce, the divorce and related proceedings continue to the conclusion as if both parties have survived. The New Mexico Supreme Court, in the case of *Oldham v. Oldham*, 2011-NMSC-007, 149 N.M. 215, ruled that appointing the surviving spouse as personal representative when a divorce was pending at the time of death would create an inherent conflict of interest. If a probate judge is aware that a divorce was pending when a decedent died, the judge should probably transfer the case to the district court for a formal proceeding to determine who should serve as personal representative. The *Oldham* case can be read at http://www.nmcompcomm.us/nmcases/NMSC/2011/11sc-007.pdf.

Example 1: Decedent, who was married at her death, dies with a will that names decedent's best friend as personal representative. Who has priority to serve?
Answer: Decedent's best friend named in the will has highest priority to serve. It does not matter whether Decedent has a spouse or children. The intent of the testator—to name her best friend as personal representative—controls. If the best friend does not want to serve, then the judge must look to Section 45-3-203(A) for guidance about who has next highest priority to serve as personal representative.

Example 2: Decedent, who was married at her death, dies without a will. Who has priority to serve as personal representative?
Answer: Decedent's spouse has highest priority to serve. If he does not want to serve, he can designate another to serve for him (more on this below).

Example 3: The will names the spouse to serve as personal representative. Spouse is now divorced from decedent. Child A is nominated as the alternate personal representative if the spouse is unable or unwilling to serve. Who has priority to serve?
Answer: Child A, since ex-spouses generally lose their right to serve as personal representative and their inheritance rights, unless the ex-spouse signed a new will after the divorce. Section 45-2-804.

Example 4: Stephanie and Joe were married for many years. Stephanie dies without a will. Joe signs a consent allowing his son Greg to be personal representative. Stephanie and Joe have three other children, none of whom are listed on the application. Greg appears in court to file the paperwork. What should the judge do?
Answer: Section 45-3-203C allows a surviving spouse to nominate a qualified person to act as personal representative, conferring the person's priority for appointment on the nominee. This means that Joe can renounce his right to serve as personal representative of Stephanie's estate and nominate in writing whoever he wants to serve as personal representative in his place. No

consents are required. Once Joe nominates Greg, Greg has the highest priority to serve as personal representative. Before signing an order appointing Greg, however, the judge can order Greg to submit the names and addresses of Joe's other children and give them notice of the proceeding, as the law requires. If Greg refuses to cooperate, the judge can decline to sign the order appointing Greg and transfer the case to the district court for a formal proceeding.

Example 5: Decedent dies without a will. There are four adult children, all living. Who has priority to serve?
Answer: All four have equal priority to serve because they are all decedent's heirs. All four must consent in writing to the appointment of one of them or someone else they all can agree upon in order for the probate court to have jurisdiction.

Example 6: Decedent dies without a will. There are four adult children, two of whom cannot be found. Who has priority to serve?
Answer: All four children have equal priority because they are all decedent's heirs. If the other two cannot be found to consent in writing to the appointment of a personal representative, the parties must proceed to district court. (Sometimes somebody in the family knows where the missing children or heirs are; they just do not like them or think they deserve an inheritance.)

Example 7: Decedent dies without a will. There is no surviving spouse, but there are four adult children, one of whom has died, leaving two adult children. Who has priority to serve?
Answer: The three living adult children and two adult children of the deceased child all have equal priority to serve. All must concur in the appointment of someone as personal representative because they all are heirs. *See* Sections 45-3-203(A)(5), 45-1-201(A)(20), 45-2-103(A), and 45-2-106(B).

Example 8: Decedent dies without a will. There are no surviving spouse, children, or parents, but decedent has twelve adult siblings, five of whom have died, leaving 22 adult children among them. Who has priority to serve as personal representative?
Answer: The seven living adult siblings and 22 adult children of the deceased siblings all have equal priority to serve because they are all heirs. All must consent in writing to the appointment of someone as personal representative. *See* Sections 45-3-203(A)(5), 45-1-201(A)(20), 45-2-103(A), and 45-2-106(B).

Example 9: Esperanza, age twelve, is the only child of decedent, who has no will and no spouse. Who has priority to serve?
Answer: Esperanza. A personal representative must be 18 to serve, but under Section 45-3-203(C), a minor child who has priority to serve (or her guardian) can nominate a qualified person to act as personal representative. If this is not done, then other heirs of decedent have equal priority to serve. Next in line (under Section 45-2-103) are decedent's parents. If both are alive, both have equal priority to serve. One could consent to the other serving, however.

Example 10: Yolanda and Heather are legally married in Iowa, a state that allows same sex marriages. The couple moves to New Mexico. Yolanda dies, and her will names Heather, the surviving spouse, to serve as personal representative. Who has priority to serve?
Answer: Heather. She is the first-named personal representative, whether or not she is a spouse. The person with named in the will has the number one priority to serve. Section 45-3-203(A)(1).

Although the status of spouse does not affect the appointment of personal representative, it could affect other issues. If a dispute arises, the case should be transferred to the district court.

Example 11: Decedent dies with a will that appoints her husband as personal representative. At the time of her death, decedent and husband were involved in ongoing divorce proceedings. Daughter is second-named personal representative. Who has priority to serve?
Answer: The New Mexico Supreme Court ruled in *Oldham v. Oldham*, 2011-NMSC-007, 149 N.M. 215 that, because a divorce proceeding was pending when husband died, the wife could not be appointed as the personal representative of the deceased husband's estate due to an inherent conflict of interest. The Supreme Court further stated that the district court in a formal proceeding must determine who is qualified to serve as personal representative. The judge should transfer the case to the district court for a formal proceeding and explain that a divorce was pending at the time of husband's death.

Example 12: Mark dies intestate. His surviving spouse Joy wants to wait a year to file a case in order to avoid creditors' claims. Bank of Wazoo files an Application for Informal Appointment of Personal Representative in the probate court. Who has priority to serve?
Answer: Joy has priority to serve. *See* Section 45-3-203(A)(2). If Joy refuses to sign a consent to the creditor serving as personal representative, the probate judge should decline to sign an order appointing the creditor as personal representative. The creditor must file a formal proceeding in the district court because the creditor does not have highest priority to serve. Section 45-3-203E.

3.1.2 What If Person With Highest Priority Does Not Want to Serve?

The person with highest priority does not have to agree to serve. He/she has two options under Section 45-3-203(C):

1. Nominate someone else to act in his/her place: The person with highest priority can "nominate a qualified person to act as personal representative by an appropriate writing filed with the court and thereby confer the person's relative priority for appointment on the person's nominee." This means the nominee now has the highest priority to serve. **This option does not apply to personal representatives named in a will,** but does apply to those listed in Section 45-3-203(A)(2) through (5). The do-it-yourself forms do not contain language for this option, so the initial application form would need to be modified; or

2. Renounce his/her right to serve and/or nominate another: A person can renounce his/her right to nominate [discussed in 1. above] or renounce his/her right to appointment as personal representative by filing an appropriate writing with the court. When two or more persons share equal priority, all those who do not renounce must concur in nominating another for appointment by an appropriate writing filed with the court. The person so nominated shall have the same priority as those who nominated the person. Section 45-3-203(C). The do-it-yourself forms contain language about "consenting to the appointment," which all others with equal priority to serve as personal representative must sign. **ALL people with equal priority must consent in writing to someone serving as personal representative, and if they do not agree, they must go to district court for a formal proceeding. (*see* Section 45-3-203(E)).**

3.1.3 When Consents are Required

Judges must look to Section 45-3-203 for guidance on who has highest priority to be appointed as personal representative. Written consents are required when someone who seeks appointment does not have the highest priority or has equal priority with others to serve as personal representative. The law uses the term "nominate" instead of "consent to" a qualified person to act as personal representative. The Probate Court Forms use the term "consent" for someone to agree to the appointment of a personal representative. The concept is the same: consents, renunciations, and nominations must all be in writing and signed by the people who are agreeing.

Often a case is filed with the court, and it does not include the required consents. The judge cannot sign the order until all people with equal priority have consented in writing to the appointment of a personal representative. **It is the applicant's job, not the judge's job, to obtain the consents.** The judge has the authority to write a letter to the applicant about the requirement for consents, citing the law. Any correspondence from the judge should be made a part of the court file. Many times consents are easy for the applicant to obtain, but other times there is disagreement. The judge may also do an order requiring the applicant to obtain the consents. If all required consents are not submitted to the probate court, the case must be transferred to the district court.

If the personal representative named in a validly executed will is willing to serve and submits the proper paperwork to the court, **the law does not require consents before that personal representative is appointed by the judge. Nor is the applicant required to provide notice of the application prior to his/her appointment**.

If the first personal representative named in a will does not want to serve, he or she would need to sign a renunciation. The second-named personal representative named in a will would then have next highest priority to be appointed. If the first-named personal representative has died or is incapacitated, it is up to the judge whether to ask for evidence of this or just to appoint the first alternate personal representative named in the will.

If there is no will, the surviving spouse, if any, of the decedent has priority to serve as personal representative. He or she is allowed to nominate another to act as personal representative by signing a written consent. If the decedent had no spouse, then all of the heirs have equal priority to serve as personal representative, and all must consent in writing to the appointment of a personal representative. Heirs are discussed in detail in Sections 1 and 4 of this manual.

If one of people who has highest priority to serve as personal representative is a minor (under age 18) or has been adjudged incapacitated by a court, a conservator may consent on the minor or incapacitated person's behalf. If no conservator is appointed, then a guardian of the minor or incapacitated person may exercise the same right to nominate, to object to another's appointment, or to consent to the appointment of a personal representative. Also, an incapacitated person may have a power of attorney designating an agent to handle their business matters. This agent can sign a consent on behalf of the incapacitated person. Putting a copy of the power of attorney in

the court file to show the signer had authority is a good idea. An attorney may not consent on behalf of a client, minor, or incapacitated person. *See* Section 45-3-203(D).

Practical Tips:

The law does not require consents to be notarized.

A "Waiver of Notice" signed by an heir, devisee or other interested person is not the same as a "Consent to Appointment of Personal Representative."

Probate courts lack jurisdiction to determine who the heirs of an estate are. But judges need to understand the laws about heirs so that the judges know which consents are required.

Example 1: Donna, decedent's daughter, is nominated as personal representative in decedent's will. Decedent has five other daughters. Donna agrees to serve. What consents are required?
Answer: Donna has priority to serve as personal representative. No consents are required prior to her appointment.

Example 2: Lori, decedent's spouse, is nominated as personal representative in decedent's will. Lori does not want to serve, so she asks her friend Tony to serve on her behalf. Who has priority to serve? What consents are required?
Answer: First, Lori must sign a written renunciation that she does not wish to serve, which is filed with the court. However, Tony does not have priority because someone nominated as personal representative cannot confer priority onto another nominee. Section 43-3-203(C). If a successor personal representative is named in the decedent's will, that successor has next highest priority to serve as personal representative. Otherwise, Section 43-3-203(A)(2) says the surviving spouse (if the spouse is a devisee in the will) has next priority. If there is no spouse, then all devisees named in the will have equal priority to serve as personal representative, Section 43-3-203(A)(3), and they would all need to consent in writing to the appointment of a personal representative.

Example 3: John dies with a will. He has three children. His will names his surviving spouse Betty as personal representative. The will names his son Bill as the alternate personal representative. Betty declines to serve. Who has priority to serve as personal representative? What consents are required?
Answer: Bill, because he is the alternate named in the will; those nominated in the will have first priority to serve. *See* Sections 45-3-203(A)(C). No consents are required if Bill is willing to serve, but Betty must sign a written renunciation that she does not wish to serve, which is filed with the court.

Example 4: John dies, but does not have a will. He is a widower with three living children. Who has priority to serve as or nominate a personal representative? What consents are required?
Answer: All three children have equal priority to serve as personal representative. They must all consent in writing to someone serving as personal representative. If the three children cannot agree on who will serve, the case must be filed in or transferred to the district court.

Example 5: Same as above, but none of the children are willing to serve as personal representative.
Answer: They must all consent in writing to another mutually agreeable person to serve as personal representative. If they cannot agree, the case must be filed in or transferred to the district court.

Example 6: Graciela dies without a will. She is a widow with eight children, two of whom have died and left five children, all of whom are over the age of 18. Who has priority to serve as personal representative? What consents are required?
Answer: The six surviving children and five children of the deceased children all have equal priority to serve or nominate another as personal representative. All eleven must consent in writing to one or more of them serving as personal representative or may nominate another mutually agreeable person to serve as personal representative. If they cannot agree, the case must be filed in or transferred to the district court.

Example 7: Juanita dies without a will. She is a widow with two living children and one deceased child. The deceased child had two children, one a minor and one an adult. Who has priority to serve as personal representative? What consents are required?
Answer: Juanita's children and the children of the deceased child have equal priority to serve or nominate another. The minor child cannot legally serve as personal representative but may still nominate another (depending on the age of the child, the judge may want to have the child's guardian sign on his or her behalf). As above, Juanita's children and adult grandchild (with the concurrence of the minor or his or her guardian) must all consent in writing to one or more of them serving as personal representative or may nominate another mutually agreeable person to serve as personal representative. If they cannot agree, the case must be filed in or transferred to the district court.

Example 8: Tom, who has no family, has a will that lists a bank to serve as personal representative. No alternate personal representative is listed. Four charities are listed as devisees under Tom's will. After Tom's death the bank renounces its right to serve as personal representative and concurs in Attorney Mary Jane serving instead. Who has priority to serve as personal representative under these facts? What consents are required?
Answer: Remember from Example 1 above that someone nominated as personal representative cannot confer priority onto another nominee. Section 43-3-203(C). Since no successor personal representative is named in the decedent's will and decedent has no family, then all of the devisees (in this case, the four charities) named in the will have highest and equal priority to serve as personal representative. Section 43-3-203(A)(3). If all devisees consent in writing to Attorney Mary Jane serving as personal representative, then the court can appoint Attorney Mary Jane as personal representative. If the charities do not all consent to Attorney Mary Jane serving, the charities could all agree to another person serving. Or the case could be filed in the district court for a formal proceeding that asks for the appointment of a personal representative who does not have highest priority. *See* Section 45-3-203(E). If the case is already filed in the probate court, and there is no agreement, then the probate judge would transfer the case to the district court for a **formal** proceeding.

Example 9: Mark dies intestate. His surviving spouse Joy wants to wait a year to file a case in order to avoid creditors' claims. Bank of Wazoo files an Application for Informal Appointment of Personal Representative in the probate court. Who has priority to serve? What consents are required?
Answer: Joy has priority to serve. *See* Section 45-3-203(A)(2). The creditor must obtain a written consent from Joy before it can be appointed personal representative of the estate. If Joy refuses to sign a consent to the creditor serving as personal representative, the probate judge cannot appoint the creditor as personal representative. The creditor must file a formal proceeding in the district court because the creditor does not have highest priority to serve. Section 45-3-203E.

3.1.4 Co-Personal Representatives

Sometimes a will names two or more individuals to serve as co-personal representatives. The will may also provide guidance about whether the signatures of both are required in all instances or in selected transactions. For example, a will might state, "Both signatures are required on court paperwork and on transactions involving over $500." If the will is silent, then Section 45-3-717 controls. Section 45-3-717 (Co-representatives; when joint action required) reads:

> A. If two or more persons are appointed co-representatives, the concurrence of all is required, unless the will provides otherwise, on all acts connected with the administration and distribution of the estate. This restriction does not apply when:
> (1) any co-representative receives and receipts for property due the estate;
> (2) the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate; or
> (3) a co-representative has been delegated to act for the others.
> B. Persons dealing with a co-representative, if actually unaware that another has been appointed to serve with him or if advised by the personal representative with whom they are dealing that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative.
> C. A co-representative who abdicates his responsibility to coadminister the estate by a blanket delegation breaches his duty to interested persons as provided by Section 3-703 [45-3-703 NMSA 1978].

The court's order appointing co-personal representatives and the Letters Testamentary or Letters of Administration issued by the court should reflect the statutory information regarding co-personal representatives. Sample language is included in Chapter 4.

It is also possible that people with equal priority to serve as personal representative could concur in two people serving as co-personal representatives, but this would be unusual.

3.1.5 Successor Personal Representatives

Sometimes the personal representative appointed by the court dies, resigns, or no longer wishes to serve. Additional paperwork must be submitted to the court asking to have a successor

personal representative appointed. If there is a will, hopefully it names a successor personal representative. If there is no will, then the applicant must follow the Priority of Personal Representative rules, discussed above. The same law that governs the priority for appointment of a personal representative applies to the selection of successor personal representatives. Section 45-3-203(H). If more than one person has equal priority to be appointed successor personal representative, written consents to the appointment by all those with equal priority must be submitted to the court before a successor personal representative can be appointed by the judge.

Sections 45-3-609, 45-3-610 and 45-3-613 govern successor personal representative appointments. Also, Section 45-3-301(F) contains some language that should appear in the pleading for a successor personal representative. The successor personal representative would also need to submit a notarized acceptance, Form 4B-105, and new Letters, Form 4B-106 or 4B-107.

On the next page is a sample order appointing a successor personal representative.

Sample Order Appointing a Successor Personal Representative

IN THE PROBATE COURT
COUNTY OF _____
STATE OF NEW MEXICO

No.

IN THE MATTER OF THE ESTATE OF
_____, DECEASED

ORDER APPOINTING SUCCESSOR PERSONAL REPRESENTATIVE

This Court has received an Application for Informal Appointment of Successor Personal Representative that seeks an Order appointing a successor personal representative. The Court FINDS:

1. Sections 45-3-303(F) and 45-3-613, NMSA 1978 govern the appointment of a successor personal representative of an estate.

2. The Court has reviewed the Application for Informal Appointment of Successor Personal Representative.

3. The personal representative _____, appointed by the Court on _____, 20____, has submitted a written resignation to the Court. [or can modify to say "Proof of the death of personal representative _____ has been submitted to the Court."]

4. _____ has priority to be appointed as successor personal representative and has submitted paperwork asking to be appointed. OR

_____ has consented in writing to the appointment of _____ as successor personal representative. NMSA 1978, Section 45-3-203.

THEREFORE, THIS COURT ORDERS that:

A. The Application is granted;

B. The appointment of _____ as personal representative of the estate is terminated due to his/her resignation [or death--modify order as needed]);

C. _____ shall deliver decedent's assets, receipts, accountings and other information pertaining to the estate to the successor personal representative;

D. _____ is informally appointed as the successor personal representative of the estate of the decedent, without bond, in an unsupervised administration;

E. Letters of Administration [or Letters Testamentary] shall be issued to _____ upon his/her acceptance of the office of successor personal representative.

THE HONORABLE _____

_____
_____ County Probate Judge

3.1.6 Resignation of Personal Representative

A personal representative may resign, but the resignation is not effective until a successor personal representative has been appointed and qualified, and the assets delivered to the successor. The personal representative who is resigning has a duty to protect the estate assets and make an accounting to the successor personal representative (Section 45-3-610).

3.1.7 Removal of Personal Representative

Probate judges lack the authority to remove a personal representative on the motion of the heirs (or any other interested party). A personal representative can only be removed **for cause** by the district court (Section 45-3-611).

3.1.8 Bond Required of Personal Representative

Most informal probate and/or appointment proceedings do not require the personal representative to be bonded, unless the will requires a bond. Sections 45-3-603 through 606 cover bonds. Bonds are discussed in Chapter 10.

3.1.9 Limited Appointment of Personal Representative

On occasion a probate judge is asked to appoint a personal representative for a limited purpose, such as to bring a wrongful death action in district court. Probate judges do not have authority to limit a personal representative's powers or duties. Once a personal representative is appointed under the Uniform Probate Code, that person must perform all duties required under the Uniform Probate Code. If someone insists that a judge should make a limited appointment, send him or her to district court.

Probate judges can limit or specify the powers of a court-appointed special administrator, discussed below.

3.1.10 Duties of Personal Representative

Section 45-3-703 states that a personal representative is a fiduciary who shall observe the same standards of care applicable to trustees. A personal representative is under a duty to settle and distribute the estate of a decedent in accordance with the terms of any probated and effective will and the Uniform Probate Code and as expeditiously and efficiently as is consistent with the best interests of the estate. Personal representatives who fail to perform their duties can be removed, their actions can be undone, they can be sued, and they can be held personally liable for misdeeds, *see* Sections 45-3-702 and 45-3-712. Only a district court can remove a personal representative for cause, see Sections 45-3-611.

Section 45-3-701, et seq. lists the duties of the personal representative. Within ten days of appointment, the personal representative is required to give Notice to Heirs and Devisees of the

Estate and to anyone who has demanded notice (Section 45-3-705). Within three months of appointment, the personal representative must give Notice to Creditors (Section 45-3-801) and prepare an inventory of the estate (Section 45-3-706). The Personal Representative may also want to publish a Notice to Creditors to limit the time an unknown creditor has to file a claim against the estate. (This cannot be used to avoid giving notice to known or reasonably ascertainable creditors—they must be given actual notice).

> **Practical Tip:**
> The law requires personal representatives to prepare an inventory of the property of the decedent owned at the time of death within three months after appointment. Filing this inventory with the court is optional. Some personal representatives do not file the actual inventory of the decedent's estate in the court file. Judges may instead see a "Notice of Preparation of Inventory and Appraisal" filed. The notice states that the personal representative has prepared the inventory as required by law and that the inventory is available to all interested persons who request it. *See* Section 45-3-706.

Section 45-3-715 lists some, but not all, of the specific transactions personal representatives are authorized to carry out. The personal representative must also pay valid creditor's claims, pay decedent's federal and state income and estate taxes, pay the New Mexico family and personal property allowances due (if any), prepare an accounting, and distribute the estate assets properly. The personal representative must follow the provisions of the will, if any, or intestate laws, if no will exists.

It is not the probate court's job to monitor the personal representative's acts. If this type of monitoring is needed, the estate can be a supervised administration, which only the district court can oversee in a formal supervised proceeding.

3.2 Special Administrators

Sometimes a special administrator needs to be appointed before a general personal representative can be appointed. Most often, special administrations are sought when a time-sensitive matter needs immediate attention, such as releasing a body for burial or cremation, cleaning out an apartment, protecting the estate assets, etc. Some attorneys will use a special administration as a discovery tool to find out whether a will exists and what property the decedent had. The process may also be used to force the personal representative to take action and open the probate. Finally, someone might need to start a probate before all renunciations, consents, or other paperwork can be obtained. This may also be useful when someone needs to open a probate for the sole purpose of obtaining medical records and it would be difficult to obtain the consents of all the people with priority for appointment.

The probate and district courts have jurisdiction to appoint special administrators to act on behalf of an estate before a regular personal representative is appointed. The special administrator has the duty to collect and manage the estate assets, to preserve them, to account for and deliver the assets to the personal representative once the personal representative is appointed. Sections 45-3-

614 through 618 discuss this topic. The do-it-yourself forms do not contain language for requesting a special administrator and would need to be modified by the applicant.

When appointing a special administrator, the probate judge does not have to follow the priorities for appointment that apply to personal representatives. Section 45-3-203(H). **The special administrator process should not be used to get around obtaining the consents of heirs with equal priority for appointment.** For example, suppose an intestate decedent has two sons. One son does not wish to consent to the appointment of the other son as personal representative. The judge should not appoint one son as a special administrator. Instead, send the parties to the district court for a formal proceeding.

Special administrators appointed in an informal proceeding do not have the power to distribute a decedent's assets. *See* Section 45-3-616. The special administrator serves more as a "babysitter" for decedent's property, collecting and protecting the property until a personal representative is appointed by the court. Special administrators appointed in formal proceedings have more powers. To make it clear that the Special Administrator cannot distribute decedent's assets, the order, a sample of which appears on the next page, should specifically state that the special administrator cannot distribute the decedent's assets. The Letters of Special Administration should also set out any restrictions on the powers granted to the special administrator.

The length of time that a special administrator serves may vary depending upon the needs of the decedent's estate and whether there is a delay in appointing a personal representative. For example, it may take some time to obtain all necessary consents to a personal representative's appointment. A special administrator can protect and manage the decedent's assets until the personal representative is appointed.

Although not required, judges can choose to put a time limit or expiration date in the order of appointment and Letters for the special administrator. Otherwise, the appointment of a special administrator terminates upon the appointment of a general personal representative. Section 45-3-618. The appointment of a special administrator is also subject to termination by resignation, or upon removal for cause, as provided in Sections 45-3-608 through 45-3-611.

Practical Tip:

If the applicant started a case with an Application for Appointment of Special Administrator, the court can use that same case file and number to convert the case to a regular probate and appointment of personal representative. The judge does not need to assign a separate case number or collect an additional docket fee. The order appointing the personal representative (often, but not always, the same person as the special administrator) should terminate the special administrator's appointment and revoke their Letters.

3.2.1 Sample Order for Informal Appointment of Special Administrator

STATE OF NEW MEXICO
IN THE PROBATE COURT
COUNTY OF _____

No.

IN THE MATTER OF THE ESTATE OF
_____, DECEASED

ORDER APPOINTING SPECIAL ADMINISTRATOR WITH LIMITED POWERS

Upon the application of _____, a person known to be interested in this estate, for the appointment of a special administrator pending the appointment of a general personal representative; date of death being confirmed by review of decedent's death certificate; and upon good cause shown, the Court finds that a special administrator should be appointed.

Judges can enter relevant reason(s) above, for example:

- *five days have not elapsed since decedent's death, but an immediate appointment is necessary to arrange decedent's burial/cremation; or,*
- *all written consents to the appointment of personal representative have not yet been obtained, but the appointment is necessary to preserve decedent's estate; or,*
- *an appointment is necessary to secure decedent's home or apartment; or,*
- *any other reason that shows "good cause."*

IT IS, THEREFORE, ORDERED that _____ is hereby appointed special administrator of the estate of _____, deceased, to collect and manage the assets of the estate, to preserve them, to account for and deliver such assets to the general

personal representative, once he or she is appointed by the Court, and until further order of this Court.

_____ shall not have the full powers of a personal representative, but shall have the power to:

[JUDGES MAY LIMIT OR MODIFY THIS LIST AS NEEDED]

1. access and secure the decedent's home;
2. search for and notify heirs of decedent;
3. locate and preserve, including storage, other assets of decedent;
4. access and handle decedent's mail;
5. pay decedent's debts, including but not limited to credit card debts, as they become due;
6. access decedent's bank accounts for the purpose of paying decedent's debts as they become due;
7. communicate with the Social Security Administration about decedent's benefits and the proper termination thereof;
8. communicate with taxing authorities, including, but not limited to, the Internal Revenue Service and New Mexico Taxation and Revenue Department;
9. access and acquire copies of decedent's medical records from hospitals or other health care institutions in accordance with HIPAA privacy regulations;
10. transfer title to decedent's vehicle with the New Mexico Department of Motor Vehicles; and
11. such other powers as may be necessary to preserve and protect decedent's estate.

_____ shall not have the power to liquidate or distribute decedent's assets. _____ shall keep and provide a full accounting of expenditures and income of the estate to all interested persons.

Optional, if needed: The Court shall treat _____'s Acceptance to serve as personal representative as an Acceptance to serve as special administrator of the estate of _____.

The Court shall issue Letters of Special Administration to _____ upon applicant's acceptance of the office of special administrator.

THE HONORABLE _____

_____
_____ County Probate Judge

3.2.2 Sample Letters of Special Administration

STATE OF NEW MEXICO
IN THE PROBATE COURT
_____ COUNTY

IN THE MATTER OF THE ESTATE OF No.
_____, DECEASED.

LETTERS OF SPECIAL ADMINISTRATION

TO WHOM IT MAY CONCERN:

Notice is now given _____ has been appointed to serve as the special administrator of the estate of _____, and has qualified as the decedent's special administrator by filing with the court a statement of acceptance of the duties of that office.

_____ shall not have the full powers of a personal representative, but shall have the power to:

Judges can list specific powers granted to the special administrator in the Order Appointing the Special Administrator in this space.

_____ shall not have the power to distribute decedent's assets, but shall collect and manage the assets of the estate, preserve them, account for and deliver such assets to the general personal representative, once he or she is appointed.

Issued this ____ day of _____, 20___.

_____
Clerk of the Probate Court

(Seal) by: _____
Deputy Clerk

3.2.3 Sample Order for Informal Appointment of Special Administrator, Medical Records Only

STATE OF NEW MEXICO
IN THE PROBATE COURT
COUNTY OF _____

No.

IN THE MATTER OF THE ESTATE OF
_____, DECEASED

ORDER APPOINTING SPECIAL ADMINISTRATOR WITH LIMITED POWERS

Upon the application of _____, a person known to be interested in this estate, for the appointment of a special administrator pending the appointment of a general personal representative; date of death being confirmed by review of decedent's death certificate; and upon good cause shown, the Court finds that a special administrator should be appointed.

IT IS, THEREFORE, ORDERED that _____ is hereby appointed special administrator of the estate of _____, deceased. _____ shall not have the full powers of a personal representative, but shall have only the power to:

Access and acquire copies of decedent's medical records from hospitals, health care providers, and other health care institutions or facilities that provided treatment of the decedent prior to death and to be treated as a "personal representative" in accordance with HIPAA privacy regulations for the sole purpose of obtaining decedent's medical records. **[Judge can list specific health institution(s) if known.]**

_____ shall **not** have the power to access, liquidate or distribute any other assets of decedent.

The Court shall treat _____'s Acceptance to serve as personal representative as an Acceptance to serve as special administrator of the estate of _____. The Court shall issue Letters of Special Administration to _____ upon entry of this order.

THE HONORABLE _____

_____
_____ County Probate Judge

3.2.4 Sample Letters of Special Administration, Medical Records Only

STATE OF NEW MEXICO
IN THE PROBATE COURT
_____ COUNTY

IN THE MATTER OF THE ESTATE OF No.
_____, DECEASED.

LETTERS OF SPECIAL ADMINISTRATION

TO WHOM IT MAY CONCERN:

Notice is now given _____ has been appointed to serve as the special administrator of the estate of _____, and has qualified as the decedent's special administrator by filing with the court a statement of acceptance of the duties of that office.

_____ shall not have the full powers of a personal representative, but shall have the power to:

> Access and acquire copies of decedent's medical records from hospitals, health care providers, and other health care institutions or facilities that provided treatment of the decedent prior to death and to be treated as a "personal representative" in accordance with HIPAA privacy regulations for the sole purpose of obtaining decedent's medical records. **[Judge can list specific health institution(s) if known.]**

_____ shall not have the power to distribute decedent's assets, but shall collect and manage the assets of the estate, preserve them, account for and deliver such assets to the general personal representative, once he or she is appointed.

Issued this ____ day of _____, 20___.

_____
Clerk of the Probate Court

(Seal) by: _____
Deputy Clerk

CHAPTER 4

Probate Procedures

This chapter covers:

- Docketing cases, including whether to docket, whether to sign the order, a docketing checklist and sequestered cases.
- Probate court forms.
- Proof of death.
- Format and handling of court pleadings.
- Initial probate application, including required elements and common errors.
- How to issue Letters Testamentary or Letters of Administration.
- Checklist of informal probate and appointment pleadings.

4.1 Docketing Cases

4.1.1 To Docket or Not Docket a Case?

A case is docketed once the docket fee is paid and a case number is assigned. A probate court case cannot be docketed until the $30 docket fee is submitted via cash, check, cashier's check or money order. The probate judge, in limited circumstances, may waive the docket fee for reasons of indigence. This option is rarely used.

Unless there is a substantive error in the initial application submitted by the personal representative, cases should be docketed without delay. Substantive errors might include a copy of a will, attempting to file a case in the wrong court, or a failure to fill out the verification on the application. The New Mexico Court of Appeals has ruled that court clerks do not have the jurisdiction to determine whether a case should be docketed.

In *Ennis v. KMart Corporation*, 131 N.M. 32 (Ct. App. 2001), a district court clerk refused to docket the case due to an error in the caption, even though the jurisdictional elements contained in the body of the case were correct. The statute of limitations on the case expired before an amended complaint could be filed. The Court of Appeals upheld the trial court's finding that the

clerk had erred in refusing to accept the complaint. The Appellate Court cited NMRA, Rule 1-005(E) (which is now Rule 1-005(F)), which prohibits a court clerk from "refusing to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices…" It also cited federal case law that removed from the clerk any discretion in the decision to accept a technically deficient pleading. "The advisory committee noted that the removal of discretion was necessary because the rejection of pleadings for technical violations or insufficiencies is "not a suitable role for the office of the clerk….." Id. at 35. "Instead the rule delegates to the trial court the task of evaluating the sufficiency of the pleadings and grants to the trial court the discretion to determine whether to permit a party to correct any defect or to order the pleading stricken…." Id. at 35. Further, the case states,

> We hold that, under Rule 1-005(E), a court clerk lacks the discretion to reject pleadings for technical violations and that a pleading will be considered filed when delivered to the clerk. It is then up to the trial court to decide whether to allow a party to correct any deficiencies or strike the pleadings.

Based on the *Ennis* case, the judge or staff should evaluate a case initially presented to the court, and if it is legally sufficient, should docket the case immediately. Court staff can use a checklist to check for critical elements before docketing a case. **The judge does not have to immediately sign the order if consents are needed or additional heirs or devisees need to be listed, but the case should be docketed.**

A sample of a Probate Court Docketing Checklist is provided below. The checklist should particularly help those judges who have the county clerk's office docket the probate cases before the judge ever sees the case.

The checklist is based, in part, on the findings the judge is required to make under Sections 45-3-302, -303 and -308 before entering a will into probate or granting an informal application for probate. This checklist allows the staff to review the case for the required elements and to identify any fatal flaws before accepting the applicant's docket fee. Standardizing the procedure for review of cases prior to docketing leads to consistency, and ensures that all cases are treated in an even-handed manner. It also expedites the process by identifying any issues that may cause delays in the appointment of a personal representative.

To avoid delays, probate judges may want to have several standard orders to use for issues that arise at the time the case is docketed, such as the need to obtain consents, provide the original will, etc.

If the application contains the required substantive elements listed on the checklist, the case should be docketed immediately and submitted to the judge for further review. If the case has substantive problems (such as lack of a notarized verification) the case cannot be docketed. *Pro se* applicants may handwrite necessary corrections on the forms, but some attorneys may want to take the case back to the office to make necessary corrections before submitting the case to the court.

The position that a judge cannot review a case until it has been docketed is supported by Rule of Civil Procedure for the District Courts 1-005(F) (there are also corresponding rules for the Metropolitan and Magistrate Courts) which states in part,

> "The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices."

Once the case has been docketed, the case is properly before the court if the judge needs to contact parties to the case prior to making any determinations or signing the order.

Practical Tips:

If the three-year statute of limitation during which the probate case can be filed is about to expire and if the application is verified and the docket fee paid, assign a file number to the case immediately, regardless of substantive or technical errors!

Some *pro se* applicants will submit the Verified Statement of Personal Representative (which closes the estate) at the same time they file the initial application. The court should **not** file the Verified Statement until the probate matter is complete. Once the Verified Statement if filed, the personal representative loses the authority to act on behalf of the estate!

4.1.2 Just Because a Case is Docketed, Must the Judge Sign the Order?

Docketing the case immediately still allows the probate judge to "…decline an application for appointment of personal representative for any reason," and provide a record of his or her actions. See Sections 45-3-305, 45-3-309. The need to decline the application might arise if the judge detects evidence of fraud, if all consents of those with equal priority to serve as personal representative cannot be obtained, if the will is not original, or any other number of problems that the judge identifies upon more careful review of the case.

Judges may find it useful to create a set of form orders that address common issues that delay the appointment of a personal representative. The orders should address what action needs to be done by the applicant to correct the issues. This helps move the case along and provides a record of the reasons for any delays in the case.

Make sure a case is docketed before signing an order or before declining to accept it. A judge has no power to take any action on a case until it is docketed. This also ensures that the court has the decedent's will (even if the will is questionable) and other documents as part of the record to transfer to the district court if necessary.

Once a case is docketed, a probate judge cannot sign the order appointing the personal representative and/or admitting a will to probate until all of the substantive requirements (findings) of a probate case are met. This means the judge may have to wait to sign the order

until receiving the original will, all consents, or a death certificate or other proof of death (if the court requires proof of death). Section 45-3-302 says that, "Upon receipt of an application requesting informal probate of a will, the probate or district court, upon making the findings required by Section 45-3-303, shall issue a written statement of informal probate if at least one hundred twenty hours have elapsed since the decedent's death." The findings are listed in the order that the judge signs. Section 45-3-307 contains similar language. These findings are discussed in more detail later in this chapter.

4.1.3 Documents Filed with Court & Redaction of Sensitive Information

Judges should also consider which documents must be docketed and placed in the file. Once the case is filed with the court, all pleadings properly submitted for filing should be docketed. Search requests and cover letters usually do not need to be placed in the file. However, most correspondence (including e-mail) that addresses issues concerning the case should be filed so that there is a record of events pertaining to the progress of the case. If judges are not sure, they might ask themselves, "would this help someone understand what happened in this case, and could this be important to the case in the future?" Correspondence that makes inflammatory, criminal, or hateful accusations may necessitate transfer of the case to the district court for a formal proceeding. Make sure that copies of these communications are sent to all parties involved and included in the court file.

Due to restrictions on public records, the judge and staff should make sure that no sensitive or protected medical information is included in the court file. Because of regulations restricting the disclosure of social security numbers, the judge or staff should carefully review documents submitted to the court for any social security numbers or other private information. The judge or staff may need to redact, or black out, social security numbers, bank account numbers, or other protected information. Some county clerks have computer software that redacts selected information, and the clerks may offer useful information to judges about redaction methods.

When possible, the redaction should be done on a copy of the document, leaving intact all the information contained in the original document. **Never redact information on an original will.**

It is good practice to make a second copy of the document after redacting the information to make sure that the information cannot be read when held up to the light, or in cases where correction fluid or tape is used, that it cannot be removed.

If an attorney or *pro se* party submits pleadings to the court that contain private information, the judge or staff may want to ask them to resubmit the pleadings or ask them to redact the information themselves. Protected information, public record and confidentiality issues are discussed in detail in Section 4.3.2 below and in Chapter 6 of the manual.

(See the next page for a Docketing Checklist.)

4.1.4 Docketing Checklist

PROBATE COURT DOCKETING CHECKLIST

Expedite?
Issues?

- ❑ Name of decedent
- ❑ Applicant's name
- ❑ Statement of applicant's relationship to decedent
- ❑ Date of decedent's death and age at time of death
- ❑ Statement of domicile is in _____ County **OR**
- ❑ Decedent did not live in New Mexico, but owned property in _____ County and 30 days or more have elapsed since decedent 's death (Section 45-3-307(A))
- ❑ Death Certificate has been submitted **or will be submitted_____**
- ❑ Information regarding domicile, marital status, date of death and age at time of death matches information provided in Application **or can be corrected**
- ❑ Spouse, children, heirs and devisees are listed **(even if incomplete addresses)_**
- ❑ If there is a will, the date the will was executed
- ❑ If a will is submitted, submitted will is **original**, not a copy
- ❑ The heirs and devisees listed in the will match the heirs and devisees listed in the application **or information can and will be corrected**
- ❑ Demand for Notice box is checked **or can be checked by court**
- ❑ Five days (120 hours) have elapsed since decedent's death (if not, case can be docketed, but judge **cannot** sign order appointing PR until 120 hours after death)
- ❑ No more than 3 years have elapsed since decedent's death; if there is no will and it has been more than 3 years, application needs to contain a statement that he/she is opening probate to confirm title to property
- ❑ Probate Court has jurisdiction to act, and case does not involve determination of heirs, missing heirs, trusts, formal probate (*see* Section 45-1-302)
- ❑ Any required consents are attached **or can be obtained**
- ❑ Application is signed by applicant or attorney
- ❑ Application includes a notarized verification with applicant's signature
- ❑ Docket fee is submitted or ❑ waived for indigence by the court (judge only)

If any of the above is NOT true, judges should not docket the case, but should inform the attorney, runner, or *pro se* applicant of the problem.

If a case meets the above requirements, judges should docket the case even if it contains any of the following technical errors:

- ❑ Lack of conformity of form, such as margins, style, etc.
- ❑ Technically deficient pleading
- ❑ Wrong forms, intestate instead of testate or vice versa
- ❑ Wrong court caption
- ❑ Ages of minor heirs/devisees/children missing
- ❑ Personal Representative failed to list self on application
- ❑ Incomplete addresses for heirs/devisees, etc.

4.1.5 Sequestered Cases

Probate case files are public record, open to anyone to view. Occasionally, a probate case may need to be sequestered (kept locked and confidential). This issue can arise in cases involving domestic violence or other safety issues where the identity and location of a personal representative or other interested party needs to be kept confidential. The person seeking to sequester the case should provide a police report, court order, or other evidence of the danger of revealing their identity. The judge must decide whether the safety of the person involved is more important than the public's right to view the case file.

Once the probate judge is convinced that the case should be sequestered, only the following information should appear on the docket sheet:

- Docket Number
- Date of Filing
- Judge's Name
- Payment of Docket Fee, if applicable
- The statement, "Case sequestered. May only be viewed pursuant to written court order."

The names of the decedent, personal representative, and attorney, if any, should not appear anywhere on the docket sheet or in the public record. The case file should be kept in a secure, locked cabinet, drawer, or other location. The case file can only be viewed by someone with a written court order from the probate court.

This issue arises rarely, and the sequestered status should be used sparingly, if at all.

4.2 Probate Court Forms

4.2.1 *Pro Se* (Do-It-Yourself) Probate Forms

The New Mexico Supreme Court approved do-it-yourself probate court forms for use by the public without the assistance of an attorney. These forms are published as part of the New Mexico Rules Annotated under Section 4B-001, et seq. Some attorneys also use these forms.

Copies of the do-it-yourself forms can be obtained:

- As packets, sold by the probate courts for $5 each packet.
- From the Internet, forms can be found at:
  www.nmcourts.com (Click on Legal Forms, then Probate Court).
  http://www.bernco.gov/probate-judges-office/ (click on "Probate Forms," then click on NM Supreme Court Probate Forms).
- From the New Mexico Rules Annotated, Volume 1, Probate Court Forms, Rules 4B.

The probate forms must be downloaded individually. People often have problems with this. They may appear at the probate court, having downloaded only the application. If the judge or staff speaks with them before they download the forms, make sure the applicants know that they will need the forms for the Application, Order, Acceptance and Letters. All four of these forms should be filed at the beginning of the case.

In addition to the actual probate forms, the rules contain many useful instructions and procedures that should aid applicants. It is helpful to explain the numbering process to people who inquire about the process. That is, Form 4B-003 contains instructions; 4B-101 or 4B-102 is the initial application. Make sure applicants understand that although the initial forms are what they need to open the case, once they have been appointed, they will need to use additional forms for notices, inventory, and to complete the probate process.

Judges may find it helpful to create a detailed checklist of what documents people need to submit at each stage of the proceeding to save time and help people better understand the probate process. When selling forms packets, it is helpful to put "STOP" signs between the different stages of the probate process to make sure that the proper forms are submitted at each stage of the proceeding.

Because the probate court staff signs documents on behalf of the court, they cannot notarize documents that applicants file with the court. If no one in the county offices notarizes documents, make sure people are aware of this before they visit the court. Banks, investment companies, office supply companies, and other businesses may provide notary services. Chapter 10 contains information about allowable notary fees.

Pro se parties often refer to the form number when asking questions. For clarity, ask them to refer to the name of the form.

Make sure people are using the correct forms:

- Testate Forms (for when there is a will).
- Intestate Forms (for when there is no valid will).

Here is a list of the rules governing probate forms approved by the New Mexico Supreme Court:

4B-001 Probate court forms; short title; limited purpose of forms; cautions regarding use of these forms.
4B-002 Probate definitions.
4B-003 General instructions for probate forms.
4B-011 General instructions for probates when there is no will.
4B-012 Explanation of forms and how to complete; specific steps if no will has been found.
4B-021 General instructions for probates when there is a will.
4B-022 Explanation of forms and how to complete; specific steps to probate a will.
4B-101 Application for informal appointment of personal representative (no will).
4B-102 Application for informal probate of will and for informal appointment of personal representative (will).
4B-103 Order of informal appointment of personal representative (no will).

4B-104 Order of informal probate of will and appointment of personal representative (will).
4B-105 Acceptance of appointment as personal representative (will) (no will).
4B-106 Letters of administration (no will).
4B-107 Letters testamentary (will).
4B-201 Notice of informal appointment of personal representative.
4B-202 Proof of notice.
4B-301 Notice to known creditors.
4B-302 Notice to creditors.
4B-401 Inventory.
4B-501 Accounting.
4B-502 Verified statement of the personal representative.
4B-503 Application for certificate of full administration.
4B-504 Certificate of full administration and release of property lien.
4B-601 Affidavit of poverty and indigency.
4B-602 Order allowing free process.

4.2.2 Other Probate Forms

Some attorneys may submit forms from old probate manuals, law seminar handouts or pleadings based upon the requirements set out in the probate code. Any forms that meet the requirements for informal probate or appointment proceedings in New Mexico may be accepted by the probate court. Two sample application forms the probate judge may encounter are included near the end of this chapter.

4.3 Proof of Death

4.3.1 How Does a Judge Know the Decedent has Died?

The judge has the following options:

- The judge can take the applicants' word for it since they signed the application under oath.

- The judge can require proof of death, usually a death certificate or letter from the Office of Medical Investigator (OMI).

- If other evidence is unavailable (or the judge wants further information) the judge may accept obituaries, funeral home documentation, etc. from the applicant.

- Judges have the power to require a death certificates in all probate cases filed, including cases submitted by attorneys and *pro se* applicants. Judges should be consistent in their requirements to show that they are acting in a fair and impartial manner.

4.3.2 Death Certificates

Funeral service practitioners who assume custody of a dead body have responsibilities under the law to (1) file the death certificate; (2) obtain the personal data from the next of kin or the best qualified person or source available, and (3) obtain the medical certification of cause of death. Section 24-14-20. Not all information is always accurate on the death certificate.

Although judges may review death certificates, Section 24-14-27A **NMSA prohibits a person from allowing the public to inspect the death certificate. It reads:**

> It is unlawful for any person to permit inspection of or to disclose information contained in vital records or to copy or issue a copy of all or part of any record except as authorized by law.

It is permissible for the probate judge to request and review the death certificate, but it should not be included in the court file. The Bernalillo County Probate Court has removed previously filed death certificates and replaced them with the Certificate of Review discussed below. The removed original death certificates are stored in a locked cabinet, secure from public view.

> **Practical Tip:**
> Section 24-14-29 sets fees that the New Mexico Vital Records Office can charge for producing certified copies of birth and death certificates. The fee for each search of a vital record to produce a certified copy of a death certificate shall be five dollars ($5.00) and shall include one certified copy of the record, if available, Section 24-14-29C.

Section 14-8-9.1F states, "Death certificates that have been recorded in the office of the county clerk may be inspected, but shall not be copied, digitized or purchased by any third party unless fifty years have elapsed after the date of death and the cause of death and any other medical information contained on the death certificate is redacted, in addition to redaction of protected personal identifier information. Death certificates and other vital records recorded in the office of the county clerk are exempt from the restrictions contained in Subsection A of Section 24-14-27 NMSA 1978. The act of recording a death certificate in the office of the county clerk is considered a convenience; provided that no person shall be required to record a death certificate in the office of the county clerk to effect change of title or interest in property."
Further, NMSA Section 57-12B-3D prohibits businesses from disclosing social security numbers to the public. The statute reads:

> D. A company acquiring or using social security numbers of consumers shall adopt internal policies that:
>
> (1) limit access to the social security numbers to those employees authorized to have access to that information to perform their duties; and
>
> (2) hold employees responsible if the social security numbers are released to unauthorized persons.

Although the probate courts are not technically a business, the New Mexico Administrative Code **(NMAC)** contains similar provisions for probate case files. See specifically 1.17.230.804.E

1.17.230.801 PROBATE CASE FILE:

A. Program: probate matters

B. Maintenance system: numerical by docket number

C. Description: record of probate proceedings before the court. File may contain *petition, will, death certificate, notice to creditors*, bonding documents, *letters of administration*, claims, proposed distributions, settlements, orders of appointments, orders of distribution, correspondence, memoranda, etc. File includes **probate court** case files forwarded from county clerk's office or probate judge.

D. Retention: permanent

E. Confidentiality: may contain materials covered by protective order or sealed materials

F. Nota bene: No *probate case file* shall be microphotographed without *probate docket sheet*.

[1.17.230.801 NMAC - Rp 1.17.230.191 NMAC, 2/18/2003]

1.17.230.802-1.17.230.803 omitted

1.17.230.804 PROBATE DOCKET SHEET:

A. Program: probate matters

B. Maintenance system: chronological by date of filing

C. Description: record of documents and events in a probate case. Record may show clerk, judge, court type, date filed, time filed, number of pages, case number, decedent's name, social security number, date of death, attorney, waiver, judgment, court cost, etc.

D. Retention: until filed in *probate case file*

E. Confidentiality: Social security numbers shall not be released to the public per supreme court order 8000, dated April 5, 2001 [emphasis added], and federal Privacy Act of 1974, 5 USC Section 552a note Section 7.

[1.17.230.804 NMAC - Rp 1.17.230.194 NMAC, 2/18/2003]

1.17.230.805 INDEX OF PROBATE DECEDENTS:

A. Program: probate matters

B. Maintenance system: alphabetical by decedent's name

C. Description: yearly alphabetical listing by decedent's name cross-referencing to docket number. Listing may show name of decedent, docket number, etc.

D. Retention: permanent

E. Nota bene:

(1) Courts having automated systems that provide access by defendant name, are not required to produce annual paper indexes. However, a five-year paper index shall be produced and forwarded to state archives.

(2) Paper indexes produced prior to automation shall be microphotographed (imaged) with a copy forwarded to state archives.

[1.17.230.805 NMAC - Rp 1.17.230.195 NMAC, 2/18/2003]

Because of above statutes and rules, the probate courts must maintain the confidentiality of death certificates submitted to the court. The original death certificate (or Pending Letter from the Office of the Medical Investigator) should be submitted to the court, but should not be filed in the court record.

Reviewing the death certificate is important to the probate judge in determining the decedent's death, as well as decedent's domicile, marital status, date of death, whether five days have passed since the death, etc. The probate judge reviews the death certificates in each case. The judge fills out two copies of the "Certificate Acknowledging Receipt and Review of Death Certificate" form, filing one copy in the court record and giving the other copy, endorsed by the court, to the attorney or applicant. Some attorneys familiar with the process submit their own certificate. The death certificate is then returned to the attorney or applicant. The actual date of death is no longer included in the certificate signed by the judge, although that date is required on the initial application.

STATE OF NEW MEXICO
IN THE PROBATE COURT
COUNTY OF _____

NO.

IN THE MATTER OF THE ESTATE OF

_____, **DECEASED**

CERTIFICATE ACKNOWLEDGING RECEIPT AND

REVIEW OF DEATH CERTIFICATE

I, _____, _____ County Probate Judge, acknowledge having reviewed the death certificate in the above-captioned probate action, having confirmed the date of decedent's death listed on the application is correct, and having returned said death certificate to the personal representative or attorney for the estate.

[In some cases, a death certificate is not available pending an investigation by the Office of the Medical Investigator into the cause of decedent's death. In those cases judges can modify the language to read: I, _____, _____ County Probate Judge, acknowledge having reviewed the Pending Letter from the Office of Medical Investigator in the above-captioned probate action, having confirmed the date of decedent's death listed on the application is correct, and having returned said Letter to the personal representative or attorney for the estate.]

WITNESS my hand and seal of the Probate Court on this _____ day of _____, 20___.

THE HONORABLE _____

(SEAL)

_____
_____ County Probate Judge

When the alleged deceased person is missing, only the district court has jurisdiction to hear the case. Section 45-1-302A(2). Probate judges may be asked to declare a person dead. Probate judges cannot accept these cases; only the district court has the power to declare someone dead. *See* Section 45-1-107.

The death certificate contains information that is useful when reviewing the initial application, such as the decedent's:

- Name.
- Date of death and age at time of death (which must be included in the initial application).
- Marital status (such as, whether there was a deceased spouse).
- Domicile.

> **Practical Tip:**
> Make sure the date of death and date of birth on the death certificate matches the date of death and age at time of death listed in the initial application.

4.4 Format and Handling of Court Pleadings

Estate papers (called pleadings), the original will, if any, and proper payment are presented together to the court for review and appointment of the personal representative and/or probate of the will, if any. The initial application must be signed by the applicant in the presence of a notary public and should include an original death certificate, if required by the judge. Applicants must submit complete, accurate, and truthful pleadings to the court.

If, for any reason, the court does not accept the estate, all payments and pleadings are returned to the applicant. After a case is accepted for filing, a receipt should be given to the filing party for all monies submitted to the court. After the court dockets the probate case, no refunds are possible.

Each pleading should be presented in order with exact copies clipped behind the original. Usually an original plus one to three copies are presented with each pleading filed throughout the case. Extra copies of Letters Testamentary or Letters of Administration are often submitted. The court keeps the original and returns endorsed copies to the filing party.

The original pleading is file-stamped in the upper right hand corner of the first page in substantially the following manner:

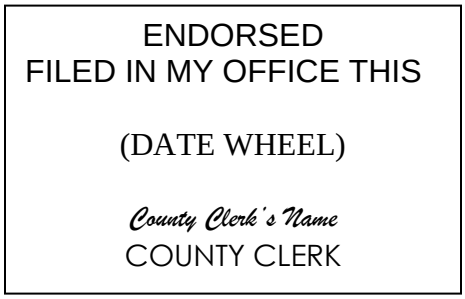
FILED IN MY OFFICE THIS

(DATE WHEEL)

County Clerk's Name
COUNTY CLERK

Some courts use a stamp with a 'date wheel' that allows the date to be changed daily.

Copies of all pleadings are endorsed-stamped in the upper right hand corner of the first page in substantially the following manner:



Unless specifically provided to the contrary in the Probate Code, or unless inconsistent with its provisions, the Rules of Civil Procedure govern formal and informal proceedings under the code. Section 45-1-304. The do-it-yourself probate court forms follow the Rules of Civil Procedure for the district courts. Other forms and paperwork submitted by attorneys, applicants, or others should follow the basic rules for the format of court pleadings.

HOWEVER, remember that technical errors and errors in the form of the pleadings are not grounds to reject a case from being filed. Cases that meet the basic substantive requirements listed on the Docketing Checklist discussed above should be docketed.

Form of papers.
Rule 1-100 of the Rules of Civil Procedure for the District Courts states that all pleadings and papers should:

(1) be clearly legible;
(2) be printed on one side of the page;
(3) be on good quality white, 8 ½ by 11" paper;
(4) have left margin 1"; top and bottom margins 1 1/2"; right margin 1;"
(5) have consecutive page numbers at the bottom;
(6) be stapled at the upper left hand corner;
(7) leave a space of 2 1/2" by 2 ½" on upper right-hand corner of the first page of each pleading for the clerk's recording stamp;
(8) typed or printed by using at least a 12-point typeface; and
(9) be double-spaced, except for quotations and footnotes.

Pleadings and papers; captions.
Rule 1-008.1 of the Rules of Civil Procedure for the District Courts states that all pleadings and papers shall have a caption or heading which includes the name of the court. According to Rule 1-008.1, for district courts the caption should read as follows:

State of New Mexico
County of _____
In the Probate Court

However, the *pro se* Probate Court forms list the caption as:

STATE OF NEW MEXICO
IN THE PROBATE COURT
_____ COUNTY

Pleadings shall also include the name of the parties, such as:

In the Matter of the Estate of
_____(name of decedent), Deceased.

Finally, the caption should include a title that describes the cause of action such as – Application for Informal Probate of Will and for Informal Appointment of Personal Representative.

Rule 1-011 of the Rules of Civil Procedure for the District Courts governs the signing of pleadings, motions and other papers. When filing official documents in the courts, all pleadings and others papers shall be signed by the applicant, or the attorney representing the applicant or personal representative. If the applicant/party *pro se* submits the paperwork, he/she must include the complete mailing address and telephone number under each original signature. If the attorney submits the paperwork, then he or she must sign the pleading below the applicant's signature to indicate that he or she represents the applicant. By doing this, if there are any questions, all inquiries will go to the attorney representing the personal representative or the party *pro se*.

Practical Tip:
Remember that the Supreme Court rules (i.e., the *pro se* probate forms) require the initial Application, Acceptance and Verified Closing Statement to be signed and notarized.

The statutory docket fee to file for informal probate in the probate court is $30.00. Judges or staff should not charge any other fee to file a probate.

Fees can be charged for copies and certifications. Probate court may charge $0.50 per page for copies and $.50 per document certification. An authentication fee is $1.50 for each packet of documents that is authenticated. However, judges should check with their county clerk's office to verify the amount charged for photocopies, etc. Judges need to be consistent in the fees that they charge and who gets charged for copies. Governmental agencies are generally exempt from these fees. Depending on the county, probate courts may accept cash, checks, money orders, cashier's checks, debit/credit cards, or online payments.

4.5 Initial Probate Application

Reviewing the accuracy and completeness of court pleadings is one of the probate judge's most important duties. Once the judge determines that the initial application is correct and complete, he or she can admit the will, if any, and sign the order opening the probate and appointing the personal representative**. Section 45-3-301, a key section of the Probate Code, outlines the required contents of the initial informal probate or appointment application.** The do-it-yourself forms and other probate forms were created based on Section 45-3-301.

In a ***testate*** (with a valid will) case, the first pleading is called the ***"Application for Informal Probate of Will and for Informal Appointment of Personal Representative*.**"

In an ***intestate*** (no valid will) case, the first pleading is called the **"*Application for Informal Appointment of Personal Representative.*"**

> **Practical Tip:**
> Applicants may ask to submit one probate application for two related decedents, such as a husband and wife. Although this used to be done in earlier times, tracking two decedents in one case is difficult. Problems also arise when the decedents died at different times, sometimes years apart; or different laws apply due to the length of time since death; or decedents have children from prior marriages, etc. Probate courts should require a separate case for each decedent.

4.5.1 Required Elements

On the initial application, the probate judge should make sure the following elements are present:

1. Is the court caption correct? It should read:

STATE OF NEW MEXICO
IN THE PROBATE COURT
_____ COUNTY (with correct county name filled in)

or similar language.

- Sometimes the court captions on all the forms incorrectly say DISTRICT COURT.

2. Name of Decedent

- Does decedent's name (in the caption and within the pleading) match the name on the death certificate?
- Sometimes lawyers who use forms from past clients inadvertently list the names from the prior case.

- The death certificate and/or pleadings may also indicate any AKAs used by the decedent.

3. Applicant's Statement of Interest in the Estate

The applicant is almost always the same person as the Personal Representative. The Personal Representative (who will conduct the decedent's estate business once he/she is appointed by the court), must obtain legal authority from the court before acting. Once the judge signs the order and issues the Letters, the personal representative can proceed with estate business.

The applicant must state his/her name, the decedent's name, and the applicant's relationship to the decedent (the reason he/she is qualified to apply to start the probate). The do-it-yourself forms list several reasons, which the applicant can check off. They should only check off the first thing that applies. Other forms may state these details in paragraph form.

4. Things for the Judge to Check re: Personal Representatives

- If there is a will, is the personal representative who is applying named as first choice?
  - If no, have proper renunciations/consents been filed? (For more details, *see* information about Personal Representatives in Chapter 3.)
- If no will, are there several people who have equal priority?
  - If yes, have they all signed proper renunciations and concurrences?
  - If not, have they at least signed the "I consent to the appointment of the personal representative listed above" section of the do-it-yourself forms?
  - The do-it-yourself forms do not allow for this, but all persons with equal priority can nominate a third party to serve as personal representative.
- Is the personal representative with highest priority applying?
  - If no, must go to **formal** probate, *see* Section 45-3-203(E).

5. Decedent's Date of Death and Age at Time of Death

- Both the date of decedent's death and decedent's age at death must be stated in the application.
- The death certificate is a way good to "double check" this information (i.e., do the date of death and age on death certificate match date of death and age listed in application?).

6. Domicile

The county and state of domicile at the time of decedent's death must be listed in the application.

- Does the death certificate say that the decedent was domiciled in your county?
- Does domicile on the death certificate match the domicile stated in the application?
- Does the will, if any, say that the decedent is domiciled in your county? (It's okay if the will doesn't because judges can admit valid wills from other states, counties, or countries.)

Practical Tip: If the decedent was not domiciled in New Mexico, then a statement showing venue is required. Section 45-3-301(A)(3).

7. List of Spouse, Children, Heirs and Devisees

The application must list decedent's spouse, children, heirs and devisees, together with their complete address, city, state, and zip code. Ages of minor children should be listed but no other ages are required. If the applicant is a spouse, child, heir or devisee of the decedent, then the applicant must also list himself/herself.

Who are the Heirs?

Section 45-2-103 lists the priority of heirs to inherit an intestate estate. This statute also gives guidance about which heirs must be listed in the initial application:

- If decedent is married, decedent's spouse is an heir.
- Decedent's children, by representation, include
  - all of decedent's biological children, if any; and
  - children adopted by decedent, if any.
- If one or more of decedent's children have died, all children of the deceased child or children are also heirs of the decedent's estate.
- If the decedent had no spouse or children, decedent's parents are the heirs, if both survive, or the surviving parent if only one survives.
- If the decedent also has no surviving spouse, children, or parents, then decedent's brothers and sisters are the heirs; (if one or more of decedent's siblings has died, the children of the deceased sibling(s) are also heirs of the estate).
- If the decedent has no children, parents or siblings, the decedent's grandparents are the heirs--if the grandparents are deceased, their children (decedent's aunts and uncles), are the heirs of the estate.
- If the decedent has no children, parents, siblings, or grandparents, or descendants of grandparents, then the children of decedent's deceased spouse or spouses may be the heirs of the estate, *See* Section 45-2-103B and 45-2-103C.

If none of the above people exist or can be found, the estate "escheats" to the state school fund (Section 45-2-105). In cases where it is impossible for the probate judge to determine who the heirs are, the case should be transferred to the district court for a formal proceeding.

Practical Tips:

Often the applicants (personal representatives) fail to name themselves, even if they are a spouse, child, heir or devisee.

If the will leaves property to a trust, the trust/trustee should be listed in the application along with the spouse, children, and devisees.

The names and complete addresses of the surviving spouse, children, heirs and devisees *must* be listed in the application, along with the ages of any minor children. The heirs are determined according to the above criteria.

For example, if the decedent had no spouse, but had children, the applicant lists the children (and children of any deceased children) and stops. If the decedent had no spouse or children, the applicant lists the parents, if any. If the applicant had no parents, then the applicant lists the next level of heirs, and so on. All devisees (people or entities named as beneficiaries in a Will) must also be listed, but not alternate devisees.

If the applicant does not know who or where some of the heirs are, he has a duty to perform a reasonably diligent search for them. In New Mexico, any heir who fails to survive a decedent by 120 hours (5 days) is deemed to have died before the decedent. See Chapter 10 for more information regarding missing heirs.

Important Notes:

An individual who feloniously and intentionally kills a decedent is barred from inheriting decedent's estate, even if included in decedent's will. Section 45-2-803(C).

An ex-spouse is also barred from inheriting decedent's estate, unless a court order or contract states otherwise. Section 45-2-804(B). **Exception**: a decedent could execute a new will **after** the divorce date, including the ex-spouse as a devisee. Remember the rule, discussed in Chapter 3, in New Mexico is that if one spouse dies during the pendency of a divorce, the divorce and related proceedings continue to the conclusion as if both parties have survived. A case with this issue should be transferred to the district court for a formal proceeding.

<u>Other Possible Heirs</u>?

- Spouse from whom the decedent was separated—Yes
- Divorced spouse—No (but terms of the divorce decree may stipulate otherwise)
- Fiancée or Significant other—No
- Adopted child—Yes
- Children adopted by strangers—No
- Children of the half blood—Yes
- Children adopted by spouse of natural parent—Yes (*see* Sections 45-2-115 and -118)

- Foster children—No
- Biological children born outside of marriage—Yes
- Children born after the death of a parent—Yes

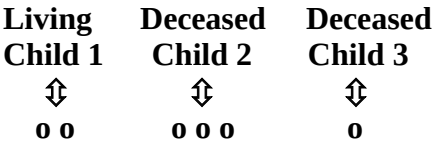
> **Practical Tip:**
> When people share only one parent in common, they are of the half-blood. For example, Tom married Didi and had a son by that marriage. After Didi's death Tom married Evangeline and had another son with her. The two sons are half-brothers. In New Mexico the half-brothers would inherit from Tom's estate the same share they would inherit if they were of the whole blood. *See* Section 45-2-107.

A child may inherit from the estate of a parent who refused to support them, but a parent who has refused to support a child cannot inherit from the estate of that deceased child. *See* Section 45-2-114 for details.

Some judges review decedents' obituaries to determine whether all of the decedent's heirs have been listed on the initial application submitted to the court. The Code of Judicial Conduct, Rule 21-209C states, "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." It is unknown whether "judicially noticed" would include obituaries. If a judge was concerned that an applicant had not listed all of the heirs, the judge could order the applicant to submit the decedent's obituary and to list all of the heirs before the judge would sign an order appointing a personal representative. Rule 21-209, commentary [6] further states, "The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic." appears to prohibit computer searches, as well as paper searches.

Judges will probably see the terms ***per stirpes*** (the share of each deceased child is divided among his/her surviving descendants, *see* Section 45-2-709) or ***by representation*** (the shares of deceased descendants are pooled and divided into equal shares based on number of surviving descendants of deceased descendants on that level, *see* Section 45-2-106) when reviewing cases. **By Representation** is the concept used in New Mexico when there is no will, but judges may also see the term *per stirpes* used in a will.

Per Stirpes/By Representation Example: Bob died, leaving an estate of $300,000. He had no surviving spouse. Bob had three children, two of whom are deceased. Child 1 is living and has 2 children; Child 2 had three children; Child 3 had one child.



Under either concept, Child 1 inherits $100,000. Child 1's children inherit nothing because Child 1 is still alive.

Under ***per stirpes***, Child 2's three children would split Child 2's $100,000, each receiving $33,333.33. Child 3's child would receive Child 3's entire share of $100,000.

Under ***by representation***, the shares of Child 2 and Child 3 ($200,000) would be added together and then split equally among their four children, each receiving $50,000.

Being able to identify the heirs is important because New Mexico law requires the heirs of an estate to be listed in the application even if the heir is omitted from a will or specifically disinherited. Personal Representatives of the Estate are also required to give decedent's spouse, children, heirs, and devisees notice of their appointment within ten days of their appointment.

This is required so that heirs are informed about the probate and have an opportunity to challenge the will or appointment of personal representative. If a will were proved to be invalid, the heirs would inherit the estate.

> **Practical Tip:**
> Probate courts do not have jurisdiction to preside over contested cases. If an heir decided to challenge the informal probate filed in probate court, the judge would need to transfer the case to district court (*see* Chapter 7 for information on transferring cases to the district court) for a formal proceeding.

8. Check Information about Will, if any

- Is it the original will or an authenticated copy probated in another jurisdiction (Section 45-3-301(B)(1))?
  - If no, must go to formal probate, *see* Section 45-3-402(A)(B).
- Does date on will match date of will stated in application?
  - Check date will is signed—sometimes they accidentally pick up notary's expiration date listed at very end of will instead of date will was signed;
  - Do not worry if notary's commission has expired by the time the judge sees the will. As long as the notary's commission was current at the time the will was signed, it is OK.
- Sometimes the will is undated, has two different dates, or the date in the application is wrong (an undated will is not invalid, but it makes it difficult to determine which is the current will).
- Is will signed by testator or someone in the testator's conscious presence and by the testator's direction?
- Did two witnesses also sign?
- Is there language in will that says the witnesses and testator were all in each other's presence and watched each other sign, as required by Section 45-2-502? If not, the judge has the discretion to enter an order for a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will. Section 45-3-303(C).

- Probate court staff should stamp all original wills that are admitted with a stamp that says "Approved and Duly Admitted to Probate this ____ day of _____, 20__. _____ Probate Judge." Other probate courts record the original will in the county clerk's records after a case is filed, but this is not recommended.
- A will must be declared in the order to be valid by the probate or district court (Section 45-3-102).

Probate judges may be asked to admit both a will and a codicil to probate. Since the codicil only amends a prior will, the judge can amend the order of appointment to read, "The will of the decedent _____, dated _____, as amended by codicil dated _____, is informally probated;"

Note: The application should contain several statements about the will, its being validly executed, and that there is no evidence of revocation (*see* Section 45-3-301(B)).

What if the Will is Invalid?

Probate judges may be presented with wills that are not valid. Perhaps the will is was not witnessed or only contains the signature of one witness. The judge can enter an order requesting a sworn statement or affidavit from anyone who has knowledge of the circumstances of execution, whether or not the person was a witness to the will. Section 45-3-303(C). If no further evidence is submitted, the judge should include the will as an exhibit in the case file but not admit it to probate. The judge should amend the intestate order appointing the personal representative and state why the will is invalid and was not admitted to probate. Letters of Administration should be issued. If a dispute arises over whether or not the will is valid, the probate judge should transfer the case to the district court for a formal proceeding.

9. Additional Intestate Requirements

If no will exists, then the application must state, "after the exercise of reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in New Mexico…." *See* Section 45-3-301(D)(1) What this means in English is, "I looked really hard and could not find a valid will." The do-it-yourself forms say, "I have looked carefully and thoroughly for a will of the decedent and did not find one. I believe that the decedent died without a will."

Intestate applications must also include (per Section 45-3-301(D)(2)):

- The priority of the person whose appointment is sought; and
- The names of any other person having a prior or equal right to the appointment.

10. Statement re: Other Personal Representatives

The application includes language identifying and indicating the address of any personal representative of decedent appointed in New Mexico or elsewhere. Usually, there is not one, so

the application will instead state "No other personal representative has been appointed in New Mexico or elsewhere" or similar language.

11. Demands for Notice

The application should state whether any demands for notice of the probate have been received or filed. While the forms currently say that the applicant checked with the district court and the probate court, probate courts do not accept demands for notice until a case is opened. But the district court can accept a demand before a probate is filed. The applicant is required to check with the district court before filing the initial application to ask whether any demands for notice have been filed concerning the decedent. *See* Section 45-3-204. If the applicant has not checked for demands for notice at the district court, the probate judge or staff can call the district court and inquire if any demands for notice have been filed for the decedent. Some district court employees are not familiar with this process. The judge or staff may need to inform the applicant that his/her duty is fulfilled by inquiring about a demand for notice.

12. Time Limits

- Have 120 hours (5 days) passed since decedent's death? If not, the judge must hold the case until five days have elapsed, *see* Sections 45-3-302, 45-3-307(A). If an emergency situation exists, the judge may appoint a Special Administrator to protect the assets of the estate (*see* Chapter 3 for information on special administrations.)
- **If decedent is non-resident, court shall delay order of appointment for thirty days**, with limited exceptions**,** following the date of death (Section 45-3-307(A)).
- Have more than 3 years elapsed since decedent's death?
  - If "yes," the judge may have jurisdiction under Section 45-3-108(A)(4) in an intestate proceeding;
  - If "yes," and a will exists, applicant must proceed in district court in a formal testacy proceeding

The Uniform Probate Code covers four types of probate cases:

1. Informal probate (a will is submitted).
2. Informal appointment (no will is submitted).
3. Formal testacy (a will is submitted).
4. Formal appointment (no will is submitted).

These four distinctive terms appear throughout the probate code. *See* Sections 45-3-108, 45-3-301, 45-3-303, 45-3-308, 45-3-401, 45-3-414 as examples.

More than Three Years Since Decedent's Death—Section 45-3-108

The general rule is that probate cases must be filed within three years of a decedent's death. Section 45-3-108(A) contains some exceptions to the three-year rule. Section 45-3-108(A)(4) gives probate courts jurisdiction to open an informal appointment in an intestate proceeding more than three years after a decedent's death. **This exception can only be used in the probate**

courts for intestate estates without a valid will. The personal representative has no right to possess estate assets other than to confirm title to the appropriate successors. Confirming title might include preparing a personal representative's deed to pass real property to the decedent's heirs, changing the name on decedent's account to the names of the heirs, or obtaining medical records. Paragraph 8 of Form 4B-101 of the do-it-yourself probate forms contains this option, and the applicant would need to check the correct box in Paragraph 8 if more than three years have passed since the decedent's death. Because more than three years have passed since the decedent's death, the personal representative does **not** need to give creditors notice of the proceeding.

The probate judge's authority is the same as for any other probate. The judge signs the order, Form 4B-103, and can modify Paragraph 7 to read, "It appears from the application that this proceeding was commenced within the time limitations prescribed by the laws of the State of New Mexico due to the exception listed in Section 45-3-108(A)(4), NMSA 1978, allowing the personal representative to confirm title to the successors to an estate more than three years after a decedent's death." The court then issues Letters of Administration to the personal representative. The Letters give the personal representative the power to transfer decedent's asset(s) to the successors, i.e. the people, other than creditors, who are entitled to the property of the decedent. See Section 45-1-201(A)(50). The Letters should mirror the language of 45-3-108(A)(4) stating that "the personal representative has no right to possess estate assets beyond that necessary to confirm title in the successors to the estate and claims other than expenses of administration may not be presented against the estate."

A "formal testacy" or "formal appointment" may be commenced more than three years after death for certain purposes, but only the district courts have jurisdiction over formal cases. The district court judge must decide whether to admit a will to probate more than three years after a testator's death. Probate judges lack jurisdiction to make this determination since they are limited to presiding over informal cases.

13. Ending Requests

At the end of the application, the applicant will ask the court for certain things:

- To enter an order informally probating decedent's will, if a testate case;
- To informally appoint the applicant as personal representative;
- (usually) To allow the personal representative to serve without bond, in an unsupervised administration (**Note**: the probate court does not have jurisdiction over supervised probates);
- To issue Letters Testamentary or Letters of Administration to the personal representative.
- Some catch-all phrase about "any other relief as the court believes appropriate."

14. Verification (Section 45-3-301(G))

All applications must be verified! This means the applicant must state, under oath, that the statements in the application are true to the best of his/her knowledge. The verification must be

signed by the applicant in the presence of a notary public, who also signs and notarizes the verification.

Note: The do-it-yourself forms only ask for the <u>name</u> of the applicant in the verification section. Nevertheless, the verification should be <u>signed</u> by the applicant and not just include a printed name.

> **Practical Tip:**
> Probate judges **cannot** appoint a personal representative unless the application includes a notarized verification!

4.5.2 Common Errors on Initial Application

<u>*Pro Se* Applicant Errors</u>

- Using wrong set of forms.
- Failure to list all heirs, including themselves.
- Failure to submit all required consents.
- Not understanding what information goes in the blanks, for example. Putting in "son" where the decedent's name should go.
- Listing wrong date of will in application.
- Listing wrong age at time of death or incorrect date of death in the application.
- Failure to include complete addresses (since personal representative has duty to give notice of appointment to heirs within 10 days [Section 45-3-705], they need complete addresses for all the heirs).
- Failure to call district court and/or to check box re: demand for notice in application (*see* Section 45-3-204).
- Failure to sign application in presence of a notary public.
- Filling out all paperwork, including the Verified Statement that closes the estate, before they've ever opened the estate.

<u>Attorney Errors</u>

- Wrong court caption.
- Wrong names in pleadings (using an old pleading and failing to update it completely.
- Listing wrong date of will in application.
- Failure to list all heirs with complete addresses.
- Failure to ask for Letters Testamentary in testate case (due to error in standardized probate form).
- Omitting applicant's verification at end of application.
- Failure to notarize verification of applicant.
- Leaving out some of the elements required in application or order.

- Asking probate court to do something it lacks jurisdiction to do, such as determine heirs.

Practical Tip:
A judge should not make changes to the application. This must be done by the applicant or the attorney, who should initial any handwritten changes that are made to the application. The judge can make changes to the order before signing it, or can draft his or her own order.

4.6 Initial Probate Order

The probate judge must sign an order appointing the personal representative and admitting the will, if any, to probate. The do-it-yourself forms packet contain orders, which are authorized in Rules 4B-103 (no will) and 4B-104 (will). The judge cannot sign either of these orders until the initial application is complete.

4.6.1 Testate Orders, Form 4B-104

Section 45-3-303 lists the findings that, based on the initial application, the order in a testate case must include all of the following:

- The application is complete.
- The applicant made oath or affirmation that the statements made in the application are true and correct to the best of his knowledge and belief (this is the verification, discussed above).
- The applicant is an interested person.
- Jurisdiction is proper (Section 45-3-303 does not list this finding, but it is important to include anyway).
- Venue is proper.
- The original will is in the possession of court and will be entered into probate.
- Any notice required has been given (this has to do with the demand for notice, not the Notice of Appointment that has to be given within 10 days of appointment).
- The time limit for original probate has not expired and the probate is filed within the time limits of the probate code.

Judges will also see language in the order that:

- The applicant has priority to serve as personal representative; and
- No other personal representative has been appointed in New Mexico or elsewhere.

At the end of the order the judge orders that:

- ✓ The application is granted.
- ✓ The will of decedent is informally probated.

- ✓ The applicant is informally appointed as personal representative.
- ✓ Letters Testamentary will be issued to the personal representative upon qualification and acceptance.

4.6.2 Intestate Orders, Form 4B-103

Section 45-3-308 lists findings that the order in intestate case must include all of the following:

- The application is complete.
- The applicant made oath or affirmation that the statements made in the application are true and correct to the best of his knowledge and belief (this is the verification, discussed above).
- The applicant is an interested person.
- Jurisdiction is proper (Section 45-3-308 does not list this finding, but it is important to include anyway).
- Venue is proper.
- Applicant is unaware of any unrevoked last will and testament or other testamentary instrument, and the request for the appointment does not relate to any will.
- Any notice required has been given (this has to do with the demand for notice, not the notice of appointment that has to be given within 10 days of appointment).
- The time limit for original probate has not expired and the probate is filed within the time limits of the probate code.
- The applicant is an interested person.
- The applicant has priority to serve as personal representative.
- No other personal representative has been appointed in New Mexico or elsewhere (or a finding that another personal representative has been appointed, in what state and court, and the other case number).

Practical Tip:
If it has been more than three years since a decedent's death and the estate is intestate, the judge may want to amend Paragraph 7 of the order, Form 4B-103, to read "It appears from the application that this proceeding was commenced within the time limitations prescribed by the laws of the State of New Mexico, due to the exception listed in Section 45-3-108(A)(4), NMSA 1978, allowing the personal representative to confirm title to the successors to an estate more than three years after a decedent's death."

At the end of the order the judge orders that:

- ✓ the application is granted;
- ✓ the applicant is informally appointed as personal representative;
- ✓ Letters of Administration will be issued to the personal representative upon qualification and acceptance.

Note: Check judge's signature line on order (it should say Probate Court Judge, not District Court Judge). Also, if an attorney is representing applicant, the attorney's signature, name and complete address should appear on the order. Otherwise, the applicant should sign the order.

> **Practical Tip:**
> A judge can make changes or amendments to an order submitted by an attorney or *pro se* applicant, but some attorneys may prefer to "re-do" the order. If the order submitted does not comply with the forms in Rules 4B-103 or 4B-104, the judge may draft his or her own order. The judge may draft his or her own order if something needs to be added to the form order. For example, if an order is appointing co-personal representatives, the judge may state in the order that "As co-personal representatives, the applicants are governed by Section 45-3-717, NMSA 1978."

Remember that judges have the option not to sign the order appointing the personal representative. Judges may decline an application "for any reason." Sections 45-3-305, 45-3-309. **The case must be docketed before the judge can sign an order declining to act.** A proceeding for appointment of a personal representative is concluded by an order making or declining the appointment. Section 45-3-107.

If a case is docketed after meeting all of the criteria on the docketing checklist, and the judge then discovers an irregularity in the paperwork, the judge can decline to make the appointment. The order declining the appointment can include the reasons. Reasons might include 1) the original will appears fraudulent and judge thinks a formal district court proceeding will provide more scrutiny; 2) a second will has been presented to the court; 3) evidence of untrue statements; 4) wrong venue; 5) family members or others show up in court making allegations against the proposed personal representative before the judge has appointed him or her; or 5) other situations that makes the judge reluctant to proceed. Once a probate judge declines an application, the parties can still proceed with a formal proceeding in the district court. Some district court judges prefer that the probate judge list the reasons for the transfer to give the district court the history of the case.

4.6.3 Other Orders Signed by the Judge

In addition to orders appointing a personal representative in a testate or intestate case, judges may draft and sign other orders in a case. The judge may need to draft and sign an order that:

1. Directs the applicant to obtain more consents required by law.
2. Directs the applicant to list all of the decedent's heirs and/or devisees, as required by law.
3. Directs a person to submit the original of decedent's will to the court.
4. Directs a person to submit further proof of execution of a decedent's will in accordance with Section 45-3-303(C).
5. Directs a person to submit proof of the decedent's death.
6. Appoints a special administrator (see Chapter 3).
7. Appoints a successor personal representative.

8. Reopens an estate that has been closed.
9. States the court lacks jurisdiction to do something that has been requested, such as a formal closing, resolve a creditor dispute, declare someone dead, appoint a guardian or conservator, determine heirs, etc.
10. Transfers a probate court case to district court (*see* Chapter 7).

4.7 How to Issue Letters

The Letters Testamentary or Letters of Administration are the documents that give Personal Representatives the authority to act on behalf of estates. New Mexico law states, "…to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the district court or probate court, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters." Section 45-3-103.

Letters can only be issued after:

- The probate judge has signed an order admitting a will, if any, to probate and/or appointing a Personal Representative; and,
- The court has received an acceptance of appointment from the personal representative (some people combine the Letters and the acceptance into one form, although for purposes of e-filing, district courts are now requiring that the documents be separate). *See* Sections 45-3-102, 45-3-103, 45-3-601. The probate forms approved by the New Mexico Supreme Court require the acceptance to be signed by the personal representative in the presence of a notary public, who then notarizes the acceptance.

- **Letters Testamentary** are issued when there is a will.
- **Letters of Administration** are issued if there is no will.

Personal representatives sometimes submit the incorrect Letters, for example, submitting Letters of Administration for a testate estate. This mistake should not delay the issuance of the Letters. Judges or their clerks can amend the Letters form to reflect the proper title or create their own Letters for the personal representative, using Form 4B-106 or 4B-107. This is usually the better option since some financial institutions refuse to accept Letters that have any typed or handwritten changes on them.

Note: Make sure all the information on the Letters is correct---attorneys and others sometimes submit Letters naming the deceased as the Personal Representative, or using names from a completely different estate proceeding. The Court Clerk signature line should say "Probate Court Clerk," or "Clerk of the Probate Court," not "District Court Clerk."

After the order has been signed and an acceptance of appointment has been submitted, the judge (or county clerk or deputy clerk):

1. Signs and dates the Letters; when signed by a deputy clerk, all documents must indicate the Letters are issued by himself/herself with the name of the county clerk; i.e. county clerk's name, by (name of deputy clerk), deputy clerk (Section 34-7-24).
2. Puts the court seal the court is required to keep under Section 34-7-3, on the Letters and on all copies submitted to the court.
3. "File" stamps the original Letters and files the original Letters with the other pleadings submitted to the court.
4. "Endorsed-Filed" stamps each copy of the Letters and returns them to the applicant or attorney who submitted them.
5. The personal representative or attorney may ask that the copies of the Letters be certified, for which the judge or clerk can charge the allowed fees.

Practical Tip:
Anyone, including financial institutions, can request certified copies of Letters. When a party requests additional certified copies of Letters, the court clerk should certify Letters that already include the "Endorsed-Filed" stamp or "Filed" stamp in the upper right-hand corner of the Letters. The "Endorsed-Filed" stamp should appear on all copies of pleadings (documents filed in the court case file) that are returned to applicants, attorneys or others. **Certifications are in addition to endorsements.** Filed stamps and Endorsed-Filed stamps are discussed in detail in Section 4.4 of this chapter.

4.7.1 How to Issue Updated Certified Letters

Personal representatives or attorneys often ask for "new" or "current Letters"(many financial institutions require that the Letters be dated within 30-90 days of use) and will submit new blank copies of the Letters. For example, the court first issued Letters when the original order was signed on January 7, 2013. The personal representative appears at the court on March 4, 2013, seeking "new Letters" with a current date. **The court should not issue "new Letters" if the original Letters are still in full force and effect. Instead the court should issue certified copies of the original Letters** by:

1. Reviewing the file or docket sheet to make sure that the personal representative still has the authority to act on behalf of the estate (make sure that no verified closing statement has been filed so that the estate is still open).
2. Making a copy or copies of the original Letters filed in the court file. Sometimes the personal representative or attorney will bring in their copies of their "Endorsed-Filed" Letters that were first issued by the court. The court can choose to make copies of those Letters instead of the original Letters from the court file.
3. Stamping each copy of the Letters with a stamp that says that the copy is a true and correct copy of the Letters filed with the court and that they are still in full force and effect (see sample certification stamp below).
4. Filling in the current date as part of the certification stamp.
5. Signing the certification and stamping each certification with the court seal.

The certification stamp for certified Letters should look something like this:

I, _____, County Clerk and Ex-Officio Clerk of the Probate Court of _____ County, hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out, remaining in full force and effect, as appears of record in my office.

Dated this _____ day _____
(signature or name stamp of County Clerk)
_____County Clerk

By::(original signature of Deputy Clerk)
Deputy Clerk

Probate court may charge $0.50 per page for copies and $.50 per document certification.

4.7.2 Sample Letters Testamentary—Original in Court File

4B-107

FILED IN MY OFFICE THIS
(DATE WHEEL)
County Clerk's Name

STATE OF NEW MEXICO
IN THE PROBATE COURT
County where filed COUNTY

IN THE MATTER OF THE ESTATE OF No. *Probate Case #*
Doris Decedent, DECEASED.

LETTERS TESTAMENTARY
(WILL)[1]

TO WHOM IT MAY CONCERN:

Notice is now given that *Peter Personal Representative (name of personal representative),* has been appointed to serve as the personal representative of the estate of *Doris Decedent*, and has qualified as the decedent's personal representative by filing with the court a statement of acceptance of the duties of that office.

The personal representative has all of the powers and authorities provided by law and specifically, by Section 45-3-715 NMSA 1978.

Issued this 23rd day of January, 2013.

Carla County Clerk
Clerk of the Probate Court

[STAMP COURT SEAL]

By: David Deputy Clerk
Deputy Clerk

USE NOTE

1. *See* Section 45-3-103 NMSA 1978 and Section 45-3-601 NMSA 1978 for issuance of letters.

[Approved, effective September 15, 2000.]

4.7.3 Sample Letters Testamentary—Returned to Personal Rep or Attorney
4B-107

STATE OF NEW MEXICO

ENDORSED
FILED IN MY OFFICE THIS

(DATE WHEEL)

County Clerk's Name
COUNTY CLERK

IN THE PROBATE COURT
County where filed COUNTY

IN THE MATTER OF THE ESTATE OF No. *Probate Case #*
Doris Decedent, DECEASED.

LETTERS TESTAMENTARY
(WILL)[1]

TO WHOM IT MAY CONCERN:

Notice is now given that *Peter Personal Representative (name of personal representative)*, has been appointed to serve as the personal representative of the estate of *Doris Decedent*, and has qualified as the decedent's personal representative by filing with the court a statement of acceptance of the duties of that office.

The personal representative has all of the powers and authorities provided by law and specifically, by Section 45-3-715 NMSA 1978.

Issued this 23rd day of January, 2013.

Carla County Clerk
Clerk of the Probate Court

[STAMP COURT SEAL]

By: David Deputy Clerk
Deputy Clerk (can add court certification if needed, see Chapter 10 for details)

USE NOTE

1. *See* Section 45-3-103 NMSA 1978 and Section 45-3-601 NMSA 1978 for issuance of letters.

[Approved, effective September 15, 2000.]

4.8 Probate Case Checklist—Things to Watch For

1. Does the court caption say Probate Court and not District Court?
2. Does the name of the decedent match the name on the death certificate and will, if any?
3. Is the personal representative with highest priority to serve asking for appointment?
   - If there is a will, is the personal representative who is applying named as first choice?
     - If no, have proper renunciations/consents been filed?
   - If no will, are there several people who have equal priority?
     - If yes, have they **all** signed proper renunciations and concurrences?
     - If not, have they signed the "I consent to the appointment of the personal representative listed above" section of the do-it-yourself forms?
4. Is decedent's date of death and age at time of death correct?
5. Was decedent domiciled in your county or own property in your county?
6. Are all people required to be listed, spouse, children, heirs and devisees, listed with complete addresses? Ages of minor children should also be listed. If personal representative is spouse, child, heir or devisee, he/she should list himself/herself.
7. If a will was submitted, is it original or an authenticated copy probated in another jurisdiction?
   - If no, must go to formal probate, *see* Section 45-3-402(A)(B).
   - Does date on will match date of will stated in application? (It is not required that a will be dated, but a date can help distinguish which will is the most recent if an issue arises.)
   - Is will signed by testator or someone in the testator's conscious presence and by the testator's direction?
   - Did two witnesses also sign?
     IF WILL IS VALID, ADMIT IT TO PROBATE (see Sec. 4.5.1, paragraph 8 for details)
8. Has it been more than three years since decedent's death? If so, probate court only has jurisdiction for **intestate** estates.
9. Is the application properly verified (signed by applicant in presence of notary public or signed by attorney)?

If all of the above items are correct, the judge can **sign the order** appointing the personal representative. If the judge does not like the order submitted by the applicant, he or she can draft his or her own order, using Form 4B-103 or Form 4B-104.

Has personal representative submitted a signed, notarized Acceptance of Appointment, Form 4B-105? If so, the judge or staff can **issue Letters Testamentary (will) or Letters of Administration (no will)**. See Section 4.7 for details about Letters.

After the judge signs the order and issues Letters, his/her responsibility in the case usually ends unless a dispute arises. The personal representative or attorney often files other paperwork in the case—notices, inventory, verified statement, but the judge does not usually sign further paperwork unless updated Letters need to be issued or a successor personal representative needs to be appointed. If a dispute arises, the judge should transfer the case to the district court for a formal proceeding, using the information in Chapter 7 of the manual.

4.9 Alternative Probate Application Forms

4.9.1 Sample Probate Application Form, Intestate (Commonly Used by Attorneys)

STATE OF NEW MEXICO
COUNTY OF _____
IN THE PROBATE COURT

IN THE MATTER OF THE ESTATE OF No. _____
_____, DECEASED

APPLICATION FOR INFORMAL APPOINTMENT

OF PERSONAL REPRESENTATIVE

_____, applicant, states:

1. Applicant is the _____ (statement of interest or relationship to decedent) of decedent and is, therefore, a person interested in the settlement of the estate of decedent, is not disqualified to serve as personal representative, and there are no other persons having a prior or equal right to the appointment.

2. _____ (name of decedent) died on _____ (date of death), at the age of _____ years. At death decedent was domiciled in _____ (city), _____ County, New Mexico thus giving rise to venue. The names and addresses of the spouse, children, and heirs of the decedent, so far as known or ascertainable with reasonable diligence by the applicant, are:

NAME	ADDRESS	RELATIONSHIP TO DECEDENT	AGE (if a Minor)

The decedent died intestate and left no devisees.

3. No personal representative of the decedent has been appointed in New Mexico or elsewhere.

4. Applicant has not received and is not aware of any demand for notice of any probate or appointment proceeding concerning the decedent filed in New Mexico or elsewhere.

5. The time for informal appointment proceedings has not expired because three years or less have passed since the decedent's death. [NOTE: If more than three years have passed, reason why appointment is proper based on Section 45-3-108(A)(4) should be stated.]

6. After the exercise of reasonable diligence, applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in New Mexico under the laws of New Mexico.

WHEREFORE, the applicant prays for appointment as personal representative of the estate, without bond, in an unsupervised administration; that Letters of Administration be issued to applicant, and for such other and further relief as may be proper.

_____ (signature of Applicant)
Name of Applicant
Street Address
City/State/Zip
Phone Number

_____ (signature of attorney, if any)
Attorney Name
Street Address
City/State/Zip
Phone Number

STATE OF NEW MEXICO)
) ss.
COUNTY OF _____)

_____ (name of Applicant), upon oath, states that all of the representations in the application are true as far as applicant knows or is informed, and that such application is true, accurate and complete to the best of applicant's knowledge and belief.

_____ (signature of applicant)
Name of Applicant
Street Address
City/State/Zip
Phone Number

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 20__ by _____ (name of applicant).

_____
NOTARY PUBLIC

My Commission expires:

4.9.2 Sample Probate Application Form, Testate (Commonly Used by Attorneys)

STATE OF NEW MEXICO
COUNTY OF _____
IN THE PROBATE COURT

IN THE MATTER OF THE ESTATE OF _____, DECEASED

No. _____

APPLICATION FOR INFORMAL PROBATE OF WILL
AND FOR INFORMAL APPOINTMENT OF PERSONAL REPRESENTATIVE

_____, applicant, states:

1. Applicant is the _____ (statement of interest or relationship to decedent) of decedent and is, therefore, a person interested in the settlement of the estate of decedent.

2. _____ (name of decedent) died on _____ (date of death), at the age of _____ years. At death decedent was domiciled in _____ (city), _____ County, New Mexico thus giving rise to venue. The names and addresses of the spouse, children, heirs, and devisees of the decedent, so far as known or ascertainable with reasonable diligence by the applicant are:

NAME	ADDRESS	RELATIONSHIP TO DECEDENT	AGE (if a Minor)

3. No personal representative of the decedent has been appointed in New Mexico or elsewhere.

4. Applicant has not received and is not aware of any demand for notice of any probate or appointment proceeding concerning the decedent filed in New Mexico or elsewhere.

5. The original of decedent's last will and testament executed on _____ (date will was signed) is filed with this application.

6. The applicant believes the will to have been validly executed.

7. After the exercise of reasonable diligence, applicant is unaware of any instrument revoking the will, and the applicant believes that the instrument that is the subject of this application is the decedent's last will.

8. The time for informal appointment proceedings has not expired because three years or less have passed since the decedent's death. [NOTE: If more than three years have passed, reason why appointment is proper based on Section 45-3-108(A)(4) should be stated.]

9. The applicant is nominated in the last will of the decedent as personal representative without bond, is not disqualified to serve as personal representative of the decedent, and is therefore entitled to be appointed personal representative

WHEREFORE, the applicant prays that the will be informally probated; applicant be informally appointed personal representative of the estate, without bond, in an unsupervised administration; that Letters Testamentary be issued to applicant; and for such other and further relief as may be proper.

_____ (signature of applicant)
Name of Applicant
Street Address
City/State/Zip
Phone Number

_____ (signature of attorney, if any)
Attorney Name
Street Address
City/State/Zip
Phone Number

STATE OF NEW MEXICO)
) ss.
COUNTY OF _____)

_____ (name of applicant), upon oath, states that all of the representations in the application are true as far as applicant knows or is informed, and that such application is true, accurate, and complete to the best of applicant's knowledge and belief.

_____ (signature of applicant)
Name of Applicant
Street Address
City/State/Zip
Phone Number

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 20___ by _____ (name of applicant).

_____
NOTARY PUBLIC

My Commission expires:

4.10 Checklist of Informal Probate and Appointment Pleadings

(open and close informally; can file informal proceedings in probate court or district court)

Informal Probate (testate)	**Informal Appointment** (intestate)
4B-102. Application for Informal Probate of Will and for Informal Appointment of Personal Representative, Section 45-3-301 (must attach **original** will)	4B-101. Application for Informal Appointment of Personal Representative, Section 45-3-301
4B-104. Order for Informal Probate of Will and for Informal Appointment of Personal Representative, Section 45-3-303, -308	4B-103. Order for Informal Appointment of Personal Representative, Section 45-3-303, -308
4B-107. Letters Testamentary and 4B-105. Acceptance, Section 45-3-103, -601	4B-106. Letters of Administration and 4B-105. Acceptance, Section 45-3-103, -601
4B-201. Notice of Informal Probate of Will and Appointment of Personal Representative (within **ten** days of Personal Representative's appointment), Section 45-3-306, -705; see also Section 45-1-401	4B-201. Notice of Informal Appointment of Personal Representative (within **ten** days of Personal Representative's appointment), Section 45-3-306, -705; see also Section 45-1-401
4B-202. Proof of Notice (notarized), Section 45-1-401C	4B-202. Proof of Notice (notarized), Section 45-1-401C
4B-301. Notice to Known Creditors (within **three months** of Personal Representative's appointment), Section 45-3-801***	4B-301. Notice to Known Creditors (within **three months** of Personal Representative's appointment), Section 45-3-801***
4B-302. Notice to Creditors (published)	4B-302. Notice to Creditors (published)
4B-401. Inventory and Appraisal (Personal Representative must prepare **within three months** of appointment; must give to any interested person who requests it; **may** file with court, not required), Section 45-3-706	4B-401. Inventory and Appraisal (Personal Representative must prepare **within three months** of appointment; must give to any interested person who requests it; **may** file with court, not required), Section 45-3-706
4B-501. Accounting, Section 45-3-1003(A)(3)	4B-501. Accounting, Section 45-3-1003(A)(3)
4B-502. Verified Statement of Personal Representative, Section 45-3-1003	4B-502. Verified Statement of Personal Representative, Section 45-3-1003
4B-503. Application for Certificate of Full Administration, Section 45-3-1007, **optional**, must wait one year after Verified Statement is filed to apply for this	4B-503. Application for Certificate of Full Administration, Section 45-3-1007, **optional**, must wait one year after Verified Statement is filed to apply for this
4B-504. Certificate of Full Administration	4B-504. Certificate of Full Administration
4B-601. Affidavit of poverty and indigency	4B-601. Affidavit of poverty and indigency
4B-602. Order Allowing Free Process (rare)	4B-602. Order Allowing Free Process (rare)

*** Creditor then has **two months** to present claims, Section 45-3-801. Personal representative then has **60 days** to allow or disallow creditor's claim. **Silence (failure to disallow within 60 days) = allowance!!!** Section 45-3-806; creditor has **60 days** to file request for allowance after claim is disallowed, Section 45-3-804.

Important Note:
Creditors' claims are discussed in more detail in Chapter 10 of this manual.

CHAPTER 5

Closing the Estate

This chapter covers:

- Options for closing the estate in probate court.
- Certificate of full administration from the court.
- Formal closing of the estate.
- Newly discovered property.
- Reopening old cases due to mistake or inadvertence.

5.1 Options for Closing the Estate in Probate Court

Once the personal representative has performed all duties required under the probate code and done everything necessary to administer the estate, the personal representative can close the estate.

In the probate court this can be accomplished in one of two ways.

5.1.1 Verified Statement

The Personal Representative files a verified statement pursuant to Section 45-3-1003 stating that:

- He or she has determined that the time for presentation of creditors' claims has expired.
- He or she has fully administered the estate of the decedent by:
  - making payment, settlement or other disposition of all claims presented; and
  - paid all expenses of administration and estate and death taxes, except as may be specified in the statement.
- He or she has distributed the assets of the estate to persons entitled.
- If any claims remain unpaid, he or she has distributed the assets of the estate subject to possible liability with the agreement of the distributees or other arrangements made to accommodate outstanding liabilities.
- He or she has sent a copy of the statement to:
  - all distributees of the estate; and

    - all creditors and other claimants of whom the personal representative is aware whose claims are neither paid nor barred.
- He or she has furnished a full account in writing of their administration of the estate to those distributees whose interests are affected thereby.

The Verified Statement must be signed by the personal representative under oath in the presence of a notary public. Section 45-3-1003(A) says this can be done "no earlier than three months after the date of original appointment of a general personal representative for the estate." If no proceedings involving the personal representative are pending in district court one year after the verified statement is filed, the appointment of the personal representative terminates.

> **Important Note:**
> A Verified Statement should not be accepted for filing until at least three (3) months after the original appointment of the personal representative. Section 45-3-1003(A). If the Verified Statement is submitted in person, make sure the personal representative has completed transfer of title to all property, both real and personal. Some title companies inform people not to transfer property until after the estate is closed, but this is incorrect.

5.1.2 Summary Administration

If it appears from the inventory and appraisal that the value of the estate does not exceed expenses and applicable allowances, the personal representative may, without notice to creditors, immediately disburse the assets of the estate and file a closing statement pursuant to Sections 45-3-1203 and 45-3-1204 that states the following:

- To the best of their knowledge, the value of the entire estate, less liens and encumbrances, did not exceed:
    - the family allowance;
    - personal property allowance;
    - costs and expenses of administration; and
    - reasonable and necessary medical and hospital expenses of last illness of the decedent; and reasonable funeral expenses.
- The personal representative has fully administered the estate by disbursing and distributing it to the persons entitled thereto.
- The personal representative has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred.
- The personal representative has furnished a full account in writing of his administration to all distributees whose interests are affected.

If no proceedings involving the personal representative are pending in district court one year after the verified statement (or statement of summary administration) is filed, the appointment of the personal representative terminates. Section 45-3-1003B.

Practical Tip:
The personal representative **must** have completed all estate tasks, including filing decedent's income taxes and selling or transferring any real property belonging to decedent, **before** the estate can be closed. **Once the personal representative files a Verified Statement, he or she loses the authority to act on behalf of the estate.** Nevertheless, many personal representatives attempt to file the Verified Statement before they have completed all estate tasks. For example, the personal representative comes in, files the Verified Statement, and then asks, "Now can I sell the house?" Without giving legal advice, when explaining the use of the *pro se* forms, the judge or staff should carefully point out that the Verified Statement should not be filed until all estate business is complete, including transferring all assets of the estate to the appropriate person(s).

Title companies and other entities may tell people they need to close the probate before they can transfer title to real property. **This is incorrect.** Once a personal representative closes the estate, he/she no longer has the legal authority to act on behalf of the estate!

5.2 Certificate of Full Administration from the Court

The personal representative of the estate may submit to the court an Application for Certificate of Full Administration one year or more after filing the Verified Statement or Statement of Summary Administration. The probate judge can sign the Certificate of Full Administration one year after the Verified Statement was filed. Sections 45-3-1003(B), 45-3-1007.

The Certificate of Full Administration releases any liens on property posted by the personal representative in lieu of bond, but does not preclude any action against the personal representative. *See* Section 45-3-1007. In reality, this is more of a formality, since a bond is usually not required of the personal representative in the probate court. The case is considered closed whether the court issues this Certificate or not. But some people prefer to have an actual order closing the case. These two forms are optional; personal representatives may choose not to file them at all.

5.3 Formal Closing

Informal appointments and probate proceedings may be closed in the district court in formal proceedings. S*ee* Sections 45-3-1001 and 45-3-1002; however probate courts do **not** have jurisdiction over formal closings. **If an estate requires a formal closing, the parties must transfer the case to the district court.**

- The Personal Representative may petition the district court for a formal closing at any time after the time for the presentation of claims which arose prior to the death of the decedent has expired.
- A devisee or other interested person may also petition the district court for a formal closing one year after the appointment of the original personal representative.

- The petition may request that the district court compel or approve a final account.
- The district court may make other determinations as to heirship and distribution of the estate.

In formal proceedings, which require notice and a hearing before the order is signed, the Personal Representative can be discharged immediately after determination of these matters. This is one reason why some attorneys choose to open a probate in an informal proceeding and then go to the district court for a formal closing.

Practical Tip:
Remember that if a personal representative or attorney submits formal closing papers, such as a Petition and Order for Complete Settlement of Estate, probate judges do not have jurisdiction to hear or sign the order. The judge or staff may direct the personal representative or attorney to Form 4B-502, which is the form to use to close an informal proceeding or direct the attorney to transfer the case to the district court for a formal closing.

5.4 Estate Never Closed

Nothing in the probate code requires that the estate be closed. Many estates are never closed. Sometimes, the personal representative (or his/her attorney) files the initial paperwork and then never files anything else. In these cases, the personal representative retains the authority to act on behalf of the estate indefinitely but also remains liable for his actions as personal representative of the estate.

The Rules of Civil Procedure, Rule 1-041 governs the dismissal of actions filed in courts. Some district court judges close civil cases on their own motions, either to clear their dockets or for statistical purposes. Rule 1-041 does not apply to probate cases. Rule 1-041F(3).

As a practical matter, probate court files must be retained indefinitely, even if they are closed. Keeping a case open can be useful if it is discovered that some piece of property was not transferred (*see* additional discussion below). If an asset was part of the original estate (that is, if the item of property that wasn't transferred was listed on the original inventory), a closed case can be reopened in the probate court. If the case has been closed and then a new asset of the estate that needs to be transferred is discovered, the case would need to be reopened in the district court. Section 45-3-1008.

Practical Tip:
Probate judges CANNOT close cases on their own motions. Rule 1-041F(3).

5.5 Newly Discovered Property

On occasion, years after a probate case is closed, someone will discover that decedent owned other property that was not included as part of the original probate. If it has been more than one year since the verified closing statement has been filed, a new case will have to be filed in the district court. **If this property is discovered after an estate is settled and the personal representative discharged, only the district court has jurisdiction to appoint the original personal representative or a successor personal representative to administer the subsequently discovered property.** Section 45-3-1008.

Example 1: A decedent who died in 1982 owned six lots of real estate. A case was opened in the probate court in 1982, and new deeds conveying the six lots to the decedent's heirs were created and recorded by the personal representative. The case was closed in 1983. A seventh lot titled in the decedent's sole name is discovered in 2013.
Answer: Because the estate was closed more than a year ago and because the seventh lot is "other property of the estate…discovered after an estate has been settled and the personal representative discharged…," "any interested person" may file a case in the district court to administer the newly discovered lot. Section 45-3-1008.

Example 2: A decedent who died in 1982 owned six lots of real estate. A case was opened in the probate court in 1982, and new deeds conveying the six lots to the decedent's heirs were created and recorded by the personal representative. No verified closing statement was ever filed in the probate court. A seventh lot titled in the decedent's sole name is discovered in 2013.
Answer: Because the estate was never closed, the probate court may issue new certified Letters with a current date to the original personal representative if he or she is still alive and willing to serve. If the original personal representative is unable to serve, the probate judge could sign an order appointing a successor personal representative and issue certified Letters with a current date to the successor personal representative. Before doing so, the judge should make sure the successor personal representative has the highest priority for appointment and that all required consents have been filed with the court.

5.6 Reopening Old Cases for Mistake or Inadvertence

A different scenario might occur if property was included in the original probate, but for some reason, proper title was not transferred or another mistake occurred. In that instance, an applicant can ask the court to reopen the old case and reappoint a former personal representative or appoint a successor personal representative to fix the mistake. The pleadings submitted to the court must indicate this information.

Example 1: Mr. Z died in 1971. A probate was opened in probate court. An inventory of Mr. Z's property was prepared and filed with the court. The personal representative failed to complete a personal representative's deed for one lot listed on the inventory. The estate was closed. Thirty years later, when the property is about to be sold, the title company discovers that clear title was never passed to the lot. Can this case be reopened?

Answer: Yes, if proper pleadings are submitted. A docket fee is not required, but the judge must sign an order reopening the previously filed case and new Letters must be issued The personal representative will then have legal authority to complete the personal representative's deed and clear the title to the lot.

Example 2: Ms. X died in 1981. A probate was opened in probate court. An inventory of Ms. X's property was prepared and filed with the court, but failed to include Lot 47, which the personal representative did not know about. The estate was closed. Twenty years later, when the property is about to be sold, the title company discovers that clear title was never passed to Lot 47. Can this case be reopened?
Answer: No, Lot 47 is "newly discovered property" and the case must be filed in district court, according to Section 45-3-1008, discussed in the previous section. (This same result could also apply to personal property such as newly discovered stocks, bonds, or bank accounts.)

Example 3: Ms. Y died in 2009. A probate was opened in probate court. No inventory was filed with the court. The estate was never officially closed. Four years later, a certificate of deposit is discovered at a local bank. Can this case be reopened?
Answer: The judge does not need to reopen the case. Because it was never closed, the personal representative, if still living, continues to have authority to act. If a successor personal representative is needed, additional paperwork must be filed. The court should issue certified Letters with a current date showing the personal representative still has authority to act.

CHAPTER 6

Records, Fees and Reporting

This chapter covers:

- Docket sheets and index.
- Court costs and fees.
- Retention and public record requirements for storing cases.
- Inspection of Public Records Act (IPRA) requirements.
- Rule 1-079 NMRA re: public inspection of court records.
- Reports to district court.

6.1 Docket Sheets and Index

Most of the docketing information in a probate case is required by statute. Although judges may not actually deal with this part of the probate process, they should be aware of the requirements.

Section 45-1-305A states that "…the clerk of the probate court shall keep a record for each decedent…. and **shall establish and maintain a system for indexing, filing and recording that is sufficient to enable users of the records to obtain adequate information."**

Section 34-7-20 states that the county clerk shall keep a record or docket additional to the other records required by law, showing the following:

A. The **name of every decedent whose estate is administered** and the **date of his death**;
B. The **names of all the heirs, devisees and surviving spouse of the decedent** and their **ages** and **places of residence**, so far as can be ascertained, and;
C. A note of every sale of real estate made under order of the court with a reference to the volume and page of the court record where a complete record thereof may be found.

The <u>Docket Sheet</u> sets out some of this required information, along with other pertinent information about the probate case that can be accessed without having to look at the file.

A probate court docket sheet should contain the following information:

- Docket Number
- Filing Date
- Name of Deceased
- Date of Death
- Attorney for the Estate (complete name address and telephone number)
- Docket Fee Paid
- The title and date of all pleadings filed with the court (and microfilm reel # if applicable)

The entry for the application also sets out the name, address and telephone number of the applicant (the application itself contains the required information about the spouse, children, heirs and devisees--but the Probate Code only requires the ages of minor children)

Probate court can also maintains a monthly Daily Worksheet of pleadings filed with the court that sets out what pleadings were filed with the court, on what date and in which case. A copy of that worksheet is included in its monthly report to the district court.

The Index allows judges and clerks to search for probates by name, date of filing, etc., so that they can easily access the files when someone does not have a case number.

Note: In some counties, the probate pleadings are recorded in the county clerk's office. Real Estate transactions (Personal Representative Deeds) need to be recorded with the County Clerk's office. It is helpful for the Personal Representative to file a copy of the deed with the probate court, but not required.

6.2 Court Costs and Fees

The current probate court filing fee (or docket fee) is Thirty Dollars ($30.00) and is set by statute (Section 34-7-14).

The statewide association of New Mexico probate judges has agreed to charge a flat fee of Five Dollars ($5.00) for the Probate Court Form Packets so that all the probate courts charge the same fee for the forms.

Section 34-7-15 sets out allowable fees for other costs—historically, the probate court's fees were tied to the county clerk's fees. But the county clerk changed the fees charged for copies, etc. to the statutory maximum allowed for public records. Those changes had to be approved by the county commission. However, the fees probate courts are allowed to charge appear in a separate statutory category. The charges allowed for probate courts are:

> **Copies**--$0.50 per page, NMSA 1978, Section 34-7-15 (actually says ten cents ($0.10) per folio of 100 words).
>
> **Certifications**--$0.50 per document certified, NMSA 1978, Section 34-7-15.

Authentications--$1.50 per authentication (this usually has several documents attached, but is only one fee), NMSA 1978, Section 34-7-15 (is equivalent to 3 certificates and seals authenticating a document (or group of documents) as (a) true and correct copy/copies).

6.3 Retention and Public Record Requirements for Storing Cases

Chapter 14 NMSA covers the preservation, recording and retention of records, as well as the inspection of public records. Judges should be aware of the procedures their county has in place for handling these matters, what changes need to be made, if any, and the correct procedure for doing so.

The state regulation that covers retention of probate court records is New Mexico Administrative Code (NMAC) Section 1.19.3.203.

The Compliance Guide for the Inspection of Public Records Act (Sections 14-2-1 through 14-2-12 and Sections 14-3-1 through 14-3-25) is available online from the Attorney General's website at :

http://www.nmag.gov/consumer/publications/inspectionofpublicrecordsactcomplianceguide2009

The Attorney General's office also provides periodic presentations throughout the state that address these regulations.

6.3.1 Storage of Old or Closed Files

Probate court case files are perpetual, meaning they need to be retained forever. Case records cannot be destroyed. Some counties may store old case files "off site" away from the court, but staff needs to be able to access the files or copies of them in some manner.

There are statutory restrictions on how far files can be taken from the court. Section 34-7-7 states, "The archives of said offices shall be under the charge of the clerks of said probate courts, and said clerks are prohibited from taking from said offices any document or book pertaining to said offices beyond six miles from said offices." Some probate courts receive quite a few requests for documents from very old (early 1900s) files, so court staff needs need access to the files, even after the files are closed and even if the files are stored off-site.

6.3.2 Microfilm

Courts should have a "backup" copy of everything filed with the court. Older cases may have been backed up on microfilm as they were filed with the court. This was cumbersome, because the court had to search through several rolls of microfilm to find the contents of one file. Some probate courts now digitally scan all documents, but because microfilm is still considered the most archivally stable medium, the digital files must then be converted to microfilm. There are

other technologies available, but be sure that any method chosen meets state requirements. The authorization and standards for reproducing documents is found in Section 14-3-15.

The Commission of Public Records is the governing body of the State Records Center and Archives, which can provide guidance on how to create archivally appropriate backups. Access the State Records Center and Archives online at http://www.nmcpr.state.nm.us/index.htm. The mailing address is:

New Mexico State Records Center and Archives
1205 Camino Carlos Rey
Santa Fe, New Mexico 87507

The State Records and Archives phone number is (505) 476-7900. The State Records and Archives division provides periodic workshops about record retention and other issues. Information about upcoming workshops is at:
http://www.nmcpr.state.nm.us/training/trainschedule.asp.

6.3.3 Securing Files

Courts should be especially careful about the storage of original wills. The original wills can be stored in a separate, locked, and fireproof filing cabinet. A certified copy of the will would then be placed in the court file. Court files should also be in a secure area, where no one other than county staff has access to them when the judge or staff are not in the office. When members of the public ask to see court files, staff should make sure that no documents, especially an original will, have been removed from the file before the person leaves the court.

6.3.4 Confidentiality v. Public Record

Unless specifically placed under seal (or sequestered), all documents filed with the court are public record. Although it would be unusual for a probate court to seal records (usually this would happen in the district court), it is possible.

The general public is allowed to view anything that has been filed with the court, whether they have an interest in the case or not. Under Rule 1-079, NMRA, any person asking to view a court file is **required** to provide the court a government-issued identification, but is not required to prove why they have an interest in a particular case. Section 6.3.6 below contains details about the requirements of Rule 1-079.

Sometimes judges may get a "funny feeling" about someone requesting information about a case. They may need to monitor the case for anything that indicates a potential problem with the case that would require a transfer to district court. Train staff to note any unusual requests, but do not withhold records.

The dissemination of information concerning the case should be restricted to documents that have been filed with the court, i.e. what a person could find out by viewing the file and not what

may have been discovered through conversations or correspondence with parties to the case. If a document is not in the file, it is not part of the case as far as public record is concerned.

Judges and staff should tell anyone calling the court that any concerns they have must be placed in writing to make them part of the court's record.

Always keep in mind the prohibition against *ex parte* communications, discussed in detail in Chapter 8, the Inspection of Public Records Act, and the reporting requirements of Rule 1-079, discussed below.

> **Practical Tip:**
> Personal representatives may want to consider deleting information on the application that is not required and should not be made public. Sometimes people do not want their home phone number, cell phone number, or home address listed on the applications. In that case, they may opt to list a work phone number or a P.O. box on court paperwork.

6.3.5 Accessibility to the Public—Inspection of Public Records Act

While probate court case files are public record, consider limiting access to files by not allowing the public to remove files from filing cabinets themselves. Courts may want to allow title companies and other entities that do frequent searches more access to the files, but judges or staff can require them to sign out each file they access and limit how many files they are allowed to view at one time. These limits will help keep files from disappearing or being misfiled. **Never allow anyone to remove a file from the probate court.** Even the court staff is prohibited from taking any documents or books pertaining to the court further than 6 miles from the court, *see* Section 34-7-7. Exceptions include repairs to old docket books, etc.

Visitors to the court should never be allowed access to probate court records that have not been made part of the file. People can now request records in writing, which includes email. State law, Section 14-2-8, sets out the procedure for people who are requesting records.

Section 14-2-8. Procedure for requesting records. (2009)
A. Any person wishing to inspect public records may submit an oral or written request to the custodian. However, the procedures set forth in this section shall be in response to a written request. The failure to respond to an oral request shall not subject the custodian to any penalty.

B. Nothing in the Inspection of Public Records Act [14-3-1 NMSA 1978] shall be construed to require a public body to create a public record.

C. A written request shall provide the name, address and telephone number of the person seeking access to the records and shall identify the records sought with reasonable particularity. No person requesting records shall be required to state the reason for inspecting the records.

D. A custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request. If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request. The three-day period shall not begin until the written request is delivered to the office of the custodian.

E. In the event that a written request is not made to the custodian having possession of or responsibility for the public records requested, the person receiving the request shall promptly forward the request to the custodian of the requested public records, if known, and notify the requester. The notification to the requester shall state the reason for the absence of the records from that person's custody or control, the records' location and the name and address of the custodian.

F. For the purposes of this section, "written request" includes an electronic communication, including email or facsimile; provided that the request complies with the requirements of Subsection C of this section.

Remember the requirement set out in Section 14-8-9.1(F) about limiting public access to death certificates. "Death certificates that have been recorded in the office of the county clerk may be inspected, but shall not be copied, digitized or purchased by any third party unless fifty years have elapsed after the date of death and the cause of death and any other medical information contained on the death certificate is redacted, in addition to redaction of protected personal identifier information. Death certificates and other vital records recorded in the office of the county clerk are exempt from the restrictions contained in Subsection A of Section 24-14-27 NMSA 1978. The act of recording a death certificate in the office of the county clerk is considered a convenience; provided that no person shall be required to record a death certificate in the office of the county clerk to effect change of title or interest in property."

Important Note:

Under the Inspection of Public Records Act, Section 14-2-8E, if the probate court receives a request for records that belong to another court (i.e., district court), the probate court has an affirmative responsibility to forward the request to the proper custodian, if known, and notify the requestor, or if the court is unable to determine the proper custodian, to inform the requestor.

For example, the probate court may receive a claim against the estate of a decedent, but no case has been filed in the probate court for that decedent. The court should return the creditor's claim to the creditor with a signed notification "No probate filed as of _____ (x date)." Or, if the probate court knows that the claim should be filed in an existing district court case, the probate court should forward the claim to the district court clerk.

6.3.6 Court Rule re: Public Inspection of Court Records

NMRA Rule 1-079 provides specific guidance to courts regarding the public inspection of court records. **People who request to view court records must provide their name, address, telephone number, plus show a government-issued ID before viewing the records.** It is the probate judge or staff's responsibility to keep a log of all people who request and review court records. A sample log appears below.

NMRA 1-079. Public inspection and sealing of court records.
A. Presumption of public access; scope of rule. Court records are subject to public access unless sealed by order of the court or otherwise protected from disclosure under the provisions of this rule. This rule does not prescribe the manner in which the court shall provide public access to court records, electronically or otherwise. No person or entity shall knowingly file a court record that discloses material obtained from another court record that is sealed, conditionally under seal, or subject to a pending motion to seal under the provisions of this rule.

B. Definitions. For purposes of this rule the following definitions apply:
(1) "court record" means all or any portion of a document, paper, exhibit, transcript, or other material filed or lodged with the court, and the register of actions and docket entries used by the court to document the activity in a case;
(2) "lodged" means a court record that is temporarily deposited with the court but not filed or made available for public access;
(3) "protected personal identifier information" means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, or driver's license number, and all but the year of a person's date of birth;
(4) "public" means any person or entity, except the parties to the proceeding, counsel of record and their employees, and court personnel;
(5) "public access" means the inspection and copying of court records by the public; and
(6) "sealed" means a court record for which public access is limited by order of the court or as required by Paragraphs C or D of this rule.

C. Limitations on public access. In addition to court records protected pursuant to Paragraphs D and E of this rule, all court records in the following proceedings are confidential and shall be automatically sealed without motion or order of the court:
(1) proceedings commenced under the Adoption Act, Chapter 32A, Article 5 NMSA 1978. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Subsection A of Section 32A-5-8 NMSA 1978;
(2) proceedings to detain a person commenced under Section 24-1-15 NMSA 1978;
(3) proceedings for testing commenced under Section 24-2B-5.1 NMSA 1978;
(4) proceedings commenced under the Adult Protective Services Act, Sections 27-7-14 to 27-7-31 NMSA 1978;
(5) proceedings commenced under the Mental Health and Developmental Disabilities Code, Chapter 43, Article 1 NMSA 1978, subject to the disclosure requirements in Section 43-1-19 NMSA 1978;

(6) wills deposited with the court pursuant to Section 45-2-515 NMSA 1978 that have not been submitted to informal or formal probate proceedings. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Section 45-2-515 NMSA 1978;
(7) proceedings commenced for the appointment of a person to serve as guardian for an alleged incapacitated person subject to the disclosure requirements of Subsection I of Section 45-5-303 NMSA 1978; and
(8) proceedings commenced for the appointment of a conservator subject to the disclosure requirements of Subsection M of Section 45-5-407 NMSA 1978. The provisions of this paragraph notwithstanding, the docket number and case type for the categories of cases listed in this paragraph shall not be sealed without a court order.

D. Protection of personal identifier information.
(1) The court and the parties shall avoid including protected personal identifier information in court records unless deemed necessary for the effective operation of the court's judicial function. If the court or a party deems it necessary to include protected personal identifier information in a court record, that is a non-sanctionable decision. Protected personal identifier information shall not be made available on publicly accessible court web sites. The court shall not publicly display protected personal identifier information in the courthouse.
(2) The court clerk is not required to review documents for compliance with this paragraph and shall not refuse for filing any document that does not comply with this paragraph. The court clerk is not required to screen court records released to the public to prevent disclosure of protected personal identifier information.
(3) Any person requesting public access to court records shall provide the court with the person's name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification.

On the next page is a sample log to keep track of people who view court records. **The judge or clerk, not the requester, should fill in the log.**

PUBLIC ACCESS TO PROBATE COURT FILES—SAMPLE LOG
Required Information plus Government-issued ID
NMSC Rule 1-079D(3)

#	Date	Name	Address	Phone Number (area code) -	File No.	Gov.-Issued ID Type Shown
1.				( ) -		
2.				( ) -		
3.				( ) -		
4.				( ) -		
5.				( ) -		
6.				( ) -		
7.				( ) -		
8.				( ) -		
9.				( ) -		
10				( ) -		
11				( ) -		
12				( ) -		
13				( ) -		
14				( ) -		
15				( ) -		

6.3.7 Fees Allowed for Copies under Inspection of Public Records Act

The probate court or clerk's office can charge certain fees to provide copies of records to the requestor. Section 14-2-9 states:

Section 14-2-9. Procedure for inspection. (2011)
A. Requested public records containing information that is exempt and nonexempt from disclosure shall be separated by the custodian prior to inspection, and the nonexempt information shall be made available for inspection. If necessary to preserve the integrity of computer data or the confidentiality of exempt information contained in a database, a partial printout of data containing public records or information may be furnished in lieu of an entire database. Exempt information in an electronic document shall be removed along with the corresponding metadata prior to disclosure by utilizing methods or redaction tools that prevent the recovery of exempt information from a redacted electronic document.

B. A custodian shall provide a copy of a public record in electronic format if the public record is available in electronic format and an electronic copy is specifically requested. However, a custodian is only required to provide the electronic record in the file format in which it exists at the time of the request.

C. A custodian:
(1) may charge reasonable fees for copying the public records, unless a different fee is otherwise prescribed by law;
(2) shall not charge fees in excess of one dollar ($1.00) per printed page for documents eleven inches by seventeen inches in size or smaller;
(3) may charge the actual costs associated with downloading copies of public records to a computer disk or storage device, including the actual cost of the computer disk or storage device;
(4) may charge the actual costs associated with transmitting copies of public records by mail, electronic mail or facsimile;
(5) may require advance payment of the fees before making copies of public records;
(6) shall not charge a fee for the cost of determining whether any public record is subject to disclosure; and
(7) shall provide a receipt, upon request.

D. Nothing in this section regarding the provision of public data in electronic format shall limit the ability of the custodian to engage in the sale of data as authorized by Section 14-3-15.1 NMSA 1978, including imposing reasonable restrictions on the use of the database and the payment of a royalty or other consideration.

6.3.8 Other Public Records

The probate court is specifically required to make its accounts (i.e. monies received, etc.) open to the public, *see* Sections 34-7-17 and 34-7-18. Personnel files, salary, budget, etc. are also public records and must be produced upon request; however, anyone requesting these records should be directed to make their request to the respective departments that keep these records, not the court itself (i.e., Finance Department, Human Resources (Personnel, etc.).

6.3.9 Other Record Retention

The State of New Mexico has record retention requirements for documents produced by state agencies (or the political subdivisions thereof). There are also retention requirements for courts. Most records, including correspondence that does not go into the case file, need to be retained for **three years or more**. If judges are involved in purchasing items for the court, payroll, budget, etc., judges should also be aware that retention requirements for these records also exist.

6.4 Reports to District Court

Probate judges should be aware of this requirement, even if they do not personally deal with it. It is the responsibility of the probate judge, court clerk or other staff to provide to the district court this information for each case filed in the probate court.

1-095B. NMRA requires states "**Initial pleadings.** At the time an informal probate proceeding is filed the probate court shall advise the clerk of the district court in writing of the style of the case and the names and addresses of the party filing the initial pleading and his attorney, if any. Upon the appointment of a personal representative in an informal proceeding, the probate court shall advise the clerk of the district court in writing of the names and addresses of the personal representative and his attorney, if any. When the informal probate proceeding is closed, the probate court shall furnish to the clerk of the district court a copy of the docket sheet for said proceeding showing all entries. The district court shall retain such information as a part of its records."

1-095C. NMRA further requires "**Filing of documents.** After furnishing a copy of the docket sheet, the probate court shall, promptly upon the filing of any document with the probate court, cause to be furnished to the clerk of the district court notice of the type of document so filed and date of filing. If any such document shall evidence the appointment of a personal representative or any change in the name or address of a personal representative, the notice shall include the name and address of the personal representative, or any change therein. The clerk of the district court shall enter such information on its copy of the appropriate docket sheet."

Some probate courts send a monthly report to the district court that includes a cover sheet with the following attached documents:

- Copies of the docket sheets for each case filed in the previous month.
- Copy of the daily worksheet showing what pleadings have been filed (in all cases) for that month.
- Copies of the docket sheets for cases where a Verified Statement (which closes the case) or Certificate of the Court was filed.

Practical Tip:
Depending on the court's caseload, judges may want to file reports as soon as a case is opened. Check with the district court in each county regarding what procedure to follow.

CHAPTER 7

How to Transfer a Case to District Court

This chapter covers:

- Reasons for transferring a case to district court.
- Methods of transfer based on which court initiated the transfer.
- Sample orders and forms for transferring a case.

7.1 Reasons for Transferring a Case

Reasons a case may need to be transferred to district court by the probate judge include:

- Conflict of interest.
- Upon the petition of an interested party, *see* Section 34-7-9, *also see* 45-1-303C.
- Conflicts that have arisen between the parties.
- One or more of the parties exhibits mental health or criminal behavior that appears to require district court intervention or oversight.
- Guardianship and trust issues.
- Determination of the validity of claims against the estate.
- Dispute over creditor's claim.
- Dispute over validity of a will.
- Removal of a personal representative for cause.
- Need for a formal closing.

7.2 Methods of Transfer

There are three ways to transfer a probate court case to the district court:

1. The probate court initiates the transfer upon its own motion.
2. The probate court initiates the transfer upon the motion of an interested person.
3. An interested person files a petition with the district court (this way the party pays the district court filing fee at the time the petition is filed). The probate court then transfers the case upon receipt of a certified copy of the district court order to transfer the case.

Note: Payment of a district court filing fee is required before the case is transferred; *see* NMRA 1-099(A); however, in some cases, if the probate judge is seeking the transfer, he/she can ask that the district court waive payment of the filing fee. Otherwise, the filing fee must be paid by the party requesting the transfer. District court filing fees vary among judicial districts, ranging from $107 to $132 ($137 for domestic issues).

7.2.1 Transfer Initiated by Probate Court Order

In a case where the transfer is initiated in the probate court with an order of the probate judge:

- Probate judge signs order transferring the case to district court, **usually for a formal proceeding**. As part of the order, the probate judge may require the parties to submit a check or money order payable to the _____ Judicial District Court in the amount of the district court docket fee.
- The original probate court order goes in the case file.
- The probate court clerk or judge delivers an endorsed-filed certified copy of the probate court's order for transfer, along with the entire probate file (excluding the original transfer order) to the district court. The probate court should retain a copy of the will, if any, for its records.
- The court clerk also prepares and delivers the original and one copy of a Transmittal Memorandum to the district court. The Transmittal Memorandum is set up like a pleading. In it the clerk of the probate court certifies that the original documents were delivered to the district court on ____ date. The Transmittal Memorandum sets out the title of each pleading being delivered, and the date it was filed with the probate court. The court clerk or deputy clerk signs and dates the Memorandum, and affixes the court seal.
- The district court clerk opens a new file (case) with the original Transmittal Memorandum and attached pleadings filed as one document.
- The district court clerk returns an endorsed-filed copy to the probate court that includes a certification that the district court received the documents. (This provides proof that the documents were actually transferred, and is a record of what was done for anyone who looks at the case in the future.)
- The certified copy of the Transmittal Memorandum is then file-stamped by the probate court clerk and placed in the probate court file.
- The docket sheet and the Index should reflect that the case was transferred to district court as Case #_____ and on what date.

Four sample order forms for transferring a case from probate court to district court are included at the end of this chapter.

Note: The need to transfer a case to another probate court can also arise. The same procedure should be followed to ensure continuity of records.

7.2.2 Transfer Initiated by District Court Order

Sometimes a transfer is initiated by the personal representative or other interested person in the district court with the filing of a petition. In that case, once the probate court has received a **certified copy** of the order transferring the case, the probate court clerk files the order and proceeds as set out above.

The general rule is that the district court filing fee must be paid before the case can be transferred to the district court (*see* Rule 1-095(E)). A March 1996 version of the District Court Administrative Procedures Manual, Chapter 4 on fees, states in Section 4.3-4, "Note: If an attorney files a petition for transfer from probate court, a filing fee is accessed [sic]. **If the case is transferred by the probate judge on his/her own order, no fee is required.**" [emphasis added]. Probate judges should ask their district courts about whether this "waiver of fee" rule applies in their district.

The most comprehensive way to transfer a case to the district court is through the use of a Transmittal Memorandum or similar document. The Transmittal Memorandum should state "upon the order of the Probate/District Court, filed on _____ the probate court hereby transfers the following documents to the district court." Then list each document and the date it was filed with the probate court. Make an extra copy of the Memorandum, which includes a Certification of Receipt, i.e. the district court certifies that they have received the documents listed on the Memorandum. (This document will be file-stamped and placed in the probate file for the case.) After receiving a certified copy of the transfer memorandum back from the district court, indicate that the case has been transferred to the district court "as Case #…" on the docket sheet for that probate case and in the court index.

Some probate courts have experienced problems with concurrent cases being opened in the district court after the case has already been filed with the probate court. Parties may open a new case in the district court without transferring the case from the probate court. Problems arise, especially when there are two different personal representatives, one appointed in each court. The district court judge may order that the original probate court case be transferred or closed, but often no one notifies the probate court. This can also become an issue when the probate court still has the original will in its possession and someone needs the original will. It is a difficult situation if the probate judge does not know another case for the same decedent has been filed in the district court.

Probate judges should be aware that this sometimes occurs and, once they learn about the case in district court, to either close the case with an order stating the district court case number that now controls and that the Letters issued to the personal representative in the probate court case are revoked. In the alternative, the probate judge, on his or her own motion, can transfer the probate file contents to the district court.

Probate judges may need to discuss this issue with their district court to find a way to resolve the problem. After communicating with the staff of the district court and its judges, the

district court may agree to send the probate court a certified copy of all district court orders that relate to the transfer of a probate court case.

Here is a suggested procedure to transfer a case from the probate court to the district court:

1. The district court judge issues an order transferring the case from the probate court to the district court.

2. The party requesting the transfer provides a certified copy of the order to the probate court.

3. The probate court prepares a Transmittal Memorandum listing the pleadings being submitted to the district court and hand-delivers the pleadings from the file to the district court clerk.

4. The district court clerk certifies having received the pleadings from the probate court.

The probate court is responsible for transferring the case file to the district court. The judge or staff should deliver the file to the district court. **Do not allow anyone else (i.e., attorneys or parties to the case) to deliver the case file to the district court.**

7.3 Sample Orders and Forms

7.3.1 Sample District Court Order to Probate Court to Transfer Case

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

Filed stamps from both courts appear in this corner

No. PB-2006 00579 (*District Court Case Number goes here*)

IN THE MATTER OF THE ESTATE OF
_____, Deceased

ORDER FOR TRANSFER TO DISTRICT COURT

Petitioner, Personal Representative of the Estate of _____, Personal Representative _____, by and through her counsel _____, has filed a Petition for the Transfer to District Court of this intestate proceeding from the Probate Court of Bernalillo County in order that there may be a formal closing of the estate and determination of heirship and the Court being fully advised;

IT IS ORDERED that the Clerk of the Probate Court of Bernalillo County, New Mexico, transfer the file for this intestate proceeding, which is Probate No. 2006 183 in the Probate Court, to the Clerk of this Court with this Court taking jurisdiction of the proceedings.

_____
District Court Judge _____

Submitted by:

_____
Attorney Name
Attorney for Petitioner _____
Address
City, State, Zip
Telephone: (505) 000-0000

District Court Clerk certifies the order to be true and correct copy of the original in this space.

7.3.2 Sample Form of Transmittal Memorandum for Transfer to District Court

> **Practical Tip:**
> It is important that judges or the court clerk can trace or account for all documents that are transferred from the probate court to the district court. This is so that in future years, someone searching probate court records will know what happened to the documents in the probate court case file. This Transmittal Memorandum makes a record of the documents transferred. The district court clerk should sign the bottom of the Memorandum and return it to the probate court for inclusion in the probate court case file.

STATE OF NEW MEXICO
IN THE PROBATE COURT
COUNTY OF BERNALILLO

Probate Court No. _____
District Court Case # _____

IN THE MATTER OF THE ESTATE

OF _____, Deceased

TRANSMITTAL MEMORANDUM

I, _____Clerk of the Probate Court and Ex-Officio Recorder of the County of_____, New Mexico, pursuant to an order of the ***(select one)***

[_____ County Probate Court] OR [_____ Judicial District Court] entered _____ (date of order), do hereby transmit to the Clerk of the _____Judicial District Court the following papers, which comprise all of the **ORIGINAL RECORDS** filed in the Probate Court relating to said Estate; to wit*:*

Document	**Date Filed**
Application for Informal Probate of Will and for Informal Appointment of Personal Representative	**Oct. 20, 2000**
Last Will and Testament of_____	**Oct. 20, 2000**
Clerk's Certificate of Judgment Approving Last Will and Testament	**Oct. 20, 2000**
Certificate of Review of Death Certificate	**Oct. 20, 2000**

Order for Informal Probate of Will and for Informal Appointment of Personal	**Oct. 20, 2000**
Letters Testamentary and Acceptance	**Oct. 20, 2000**
Notice to Creditors	**Nov. 21, 2000**
Notice of Denial of Claims	**Dec. 1, 2000**
Affidavit of Publication	**Jan. 8, 2001**
Petition for Transfer to District Court	**Feb 17, 2000**
Order Transferring Cause to District Court	**Feb. 19, 2000**

WITNESS MY HAND AND SEAL OF THE PROBATE COURT THIS _____ DAY OF _____, 20__.

_____

CLERK OF THE PROBATE COURT

By:

_____

Deputy Clerk

Received from the Clerk of the Probate Court, the papers listed above. Witness my hand and seal of the District Court this _____ day of _____, 20___.

_____

CLERK OF THE DISTRICT COURT

By:

_____

Deputy Clerk

7.3.3 Sample Order for Permanent Transfer to District Court

STATE OF NEW MEXICO
IN THE PROBATE COURT
COUNTY OF _____

No.

IN THE MATTER OF THE ESTATE
OF _____, DECEASED

TRANSFER ORDER

This matter came before the Court on review of the file. The Probate Court of _____ County, New Mexico has determined that it is declining to oversee this case due to the fact that there is a dispute between family members concerning the distribution of the estate [or insert other reasons/findings]. The Probate Court finds that this case should be transferred from the Probate Court of _____ County to the _____ (insert number of the district court, such as Second, Thirteenth, etc.) Judicial District Court for _____ County, New Mexico for a formal proceeding. This transfer is subject to any District Court docket fee or other fees that may apply.

IT IS HEREBY ORDERED that the case In the Matter of the Estate of _____, Deceased, Probate # _____ filed in the Probate Court of _____ County be transferred to the _____ (insert number of the district court, such as Second, Thirteenth, etc.) Judicial District Court of _____ County, New Mexico, for a formal proceeding.

_____
Judge's Name
_____ County Probate Judge
Address
City/State/Zip

7.3.4 Sample Order of Recusal and Transfer to District Court

STATE OF NEW MEXICO
IN THE PROBATE COURT
COUNTY OF _____

No.

IN THE MATTER OF THE ESTATE
OF _____, Deceased

TRANSFER ORDER

This matter came before the Probate Court on review of the file. _____, Probate Judge, recuses himself/herself from the above-referenced cause.

The Probate Court finds that this case should be transferred from the Probate Court of _____ County to the _____ (insert number of the district court, such as Second, Thirteenth, etc.) Judicial District Court for _____ County, New Mexico.

IT IS HEREBY ORDERED that the case In the Matter of the Estate of _____, Deceased, Probate # _____ filed in the Probate Court of _____ County be transferred to the _____ (insert number of the court, such as Second, Thirteenth, etc.) Judicial District Court for _____ County, New Mexico.

_____
Judge's Name
_____ County Probate Judge
Address
City/State/Zip

7.3.5 Sample Order for Transfer to District Court with Remand to Probate Court after Resolution of Dispute

STATE OF NEW MEXICO
IN THE PROBATE COURT
COUNTY OF _____

No.

IN THE MATTER OF THE ESTATE
OF _____, Deceased

TRANSFER ORDER

This matter came before the Probate Court on review of the file. The Probate Court of _____ County, New Mexico has determined that it has lost jurisdiction due to the fact that there is a dispute concerning the distribution of the estate. The Probate Court finds that this case should be transferred from the Probate Court of _____ County to the _____ (insert number of the district court, such as Second, Thirteenth, etc.) Judicial District Court for _____ County, New Mexico for the determination of all disputed issues.

IT IS HEREBY ORDERED that the case In the Matter of the Estate of _____, Deceased, Probate # _____ filed in the Probate Court of _____ County be transferred to the _____ (insert number of the district court, such as Second, Thirteenth, etc.) Judicial District Court for _____ County, New Mexico for determination of all disputed issues, subject to remand back to the Probate Court for completion following resolution of the disputed issues.

_____
Judge's Name
_____ County Probate Judge
Address
City/State/Zip

7.3.6 Sample Order to Decline Jurisdiction "for any reason"

STATE OF NEW MEXICO
IN THE PROBATE COURT
COUNTY OF _____

No.

IN THE MATTER OF THE ESTATE
OF _____, Deceased

TRANSFER ORDER

This matter came before the probate court on review of the file. The probate court of _____ County, New Mexico has determined that it should exercise its statutory right to decline the application pursuant to Sections 45-3-305 and 45-3-309, NMSA 1978. The probate court finds that this case should be transferred from the probate court of _____ County to the _____ (insert number of the district court, such as Second, Thirteenth, etc.) Judicial District Court for _____ County, New Mexico for a formal probate proceeding.

In support of this order, the probate court finds:

Judge may insert facts and cites to statutes here that will help the district judge understand the reasons why the probate judge is declining to act. Number each finding with a separate number.

IT IS HEREBY ORDERED that the case in the matter of the estate of _____, deceased Probate # _____ filed in the probate court of _____ County be transferred to the _____ (insert number of the district court, such as Second, Thirteenth, etc.) Judicial District Court for _____ County, New Mexico for a formal probate proceeding.

_____
Judge's Name
_____ County Probate Judge
Address
City/State/Zip

7.3.7 Sample Order of Recusal for "ex parte" Communications

STATE OF NEW MEXICO
IN THE PROBATE COURT
COUNTY OF _____

No.

IN THE MATTER OF THE ESTATE
OF _____, Deceased

TRANSFER ORDER

This matter came before the probate court on review of the file. The probate court of _____ County, New Mexico is declining the application due to repeated attempts by _____ (name of person initiating ex parte communications) at ex parte communications with the judge. _____, Probate Judge, recuses himself/herself from the above-referenced cause.

The probate court finds that this case should be transferred from the probate court of _____ County to the _____ (insert number of the district court, such as Second, Thirteenth, etc.) Judicial District Court for _____ County, New Mexico for a formal probate proceeding.

In support of this order, the probate court finds:

1. _____ (name of person who initiated ex parte communications) has made or attempted to make ex parte communications with the court.

2. These communications make it impossible for the court to preside over this case in a fair and impartial manner, as required by law.

3. Under Section 34-7-9, NMSA 1978, whenever the probate judge shall, for any reason, be interested or disqualified from acting in any proceeding coming within the jurisdiction of the probate court, he shall upon his own motion or that of any interested party, forthwith enter an order transferring such proceeding to the district court having jurisdiction in that county and directing the probate clerk to deposit forthwith within the office of the clerk of said district court a certified copy of said order together with all original.

IT IS THEREFORE ORDERED that the probate court recuses itself from hearing this matter.

IT IS FURTHER ORDERED that the case in the matter of the estate of _____, deceased Probate # _____ filed in the probate court of _____ County be transferred to the _____ (insert number of the district court, such as Second, Thirteenth, etc.) Judicial District Court for _____ County, New Mexico for a formal probate proceeding.

_____
Judge's Name
_____ County Probate

Judge

Address
City/State/Zip

CHAPTER 8

Judicial Conduct

This chapter covers:

- Overview of ethical requirements for probate judges.
- *Ex parte* communications by the judge and staff with the parties.
- Staff contact with self-represented applicants.
- Behavior in and outside of court.
- Political and community activity.
- Unauthorized practice of law.
- Judicial Standards Commission and disciplinary action against judges.
- Safety valves for probate judges.

8.1 Overview of Ethical Requirements

The Code of Judicial Conduct, Rules 21-100 through 21-406 (New Mexico Rules Annotated, Volume 2), contains ethics rules that apply to probate judges. Judges must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

The Code underwent major revisions in 2012. Probate judges should carefully read and familiarize themselves with all sections of the Code of Judicial Conduct. Chapter 13 of the manual contains a list of the rules, with instructions on how to access the text electronically.

Not all sections of the Code of Judicial Conduct apply to all judges. The "Application" provisions at the beginning of the Code (before Rule 21-100) address these limitations. A probate judge is a "Continuing Part-Time Judge."

Judges are held to a high standard of ethical public service. According to the preamble of the Code, judges should maintain the dignity of judicial office at all times and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They

should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

8.1.1 Code of Judicial Conduct Canons

The Code contains four Canons and many rules. The four Canons are:

21-100. Canon 1.
A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety.

21-200. Canon 2.
A judge shall perform the duties of judicial office impartially, competently, and diligently.

21-300. Canon 3.
A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

21-400. Canon 4.
A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.

8.1.2 Code of Judicial Conduct "Golden Rules"

Three "golden rules" of the Code below provide general guidance to all judges. Even though probate judges serve part-time, the Code applies to them full-time. Before doing anything that might invite public scrutiny or negative press coverage, judges should ask themselves, "Do I want to read about what I am about to do on the front page of the newspaper or hear about this on the evening news?"

Rule 21-101 states, "A judge shall respect and comply with the law, including the Code of Judicial Conduct."

Rule 21-102 states, "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety."

Rule 21-103 states, "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."

If a judge encounters a particular problem or request, first ask if saying "yes" will violate any of these three rules.

The commentary after each of these sections includes more specific guidance for judges.

8.1.3 General Do's and Don'ts

According to the Code of Judicial Conduct, probate judges must:

- Follow the Uniform Probate Code and other laws that apply to their cases.
- Uphold the integrity and independence of the judiciary.
- Avoid impropriety and the appearance of impropriety; i.e., conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. Rule 21-102 and Terminology "appearance of impropriety."
- Perform their job duties fairly and impartially. Rule 21-202.
- Disqualify themselves when a conflict of interest exists or arises.
- Avoid *ex parte* communications.
- Follow election and political activities restrictions that apply to probate judges.
- Follow campaign fund-raising rules that apply to probate judges.
- Act carefully with respect to activities outside of their judgeship.

Probate judges may:

- Ask judges, attorneys, or other disinterested experts for advice, subject to the new restrictions set out in 8.2.3 below.
- Practice law if they are licensed attorneys in New Mexico. But they may **not** practice law in their own courts. Section IIB of the Application provisions of the Code, which applies to part-time judges, states that a part-time judge "shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto."
- Engage in certain political activity EXCEPT while serving as a judge. See Section IIA(1) of the Application, which exempts probate judges from complying with Rules 21-401C(1) through (6), except while serving as a judge.
- Speak, write, lecture and teach about the law, the legal system, or the administration of justice.

Probate judges shall not:

- Abuse the prestige of judicial office by using one's judicial status for favorable or deferential treatment. Rule 21-103[1].
- Accept any payment or gratuities for performing a marriage ceremony. Rule 21-312, Commentary [3].
- Appear at a public hearing except in connection with matters concerning the legal system or the administration of justice (judges **may** appear before government bodies *pro se* in matters involving the judge's legal or economic interest, for example, a zoning hearing). Rule 21-302A.
- Engage in financial and business dealings that exploit the judge's judicial position. Rule 21-311C(4).

- Accept gifts, bequests, favors, or loans from anyone except friends, relatives and a few other exceptions. Rule 21-313.

8.2 Communications by Judge with Parties

8.2.1 *Ex Parte* Communications by Judge and Staff

Under the Code of Judicial Conduct, "**[a] judge shall not initiate, permit, or consider *ex parte* communications or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter…"**Rule 21-209A, New Mexico Rules Annotated (NMRA). The full text of Rule 21-209 states (provisions particularly applicable to probate judges appear in **boldface**),

Rule 21-209. Ex parte communications.

A. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.
(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.
(3) **A judge may consult with** court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or **with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record and does not abrogate the responsibility personally to decide the matter.**
(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.
(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law, rule, or Supreme Court order to do so.

B. If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

C. A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

D. A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

Based on Rule 21-209:

- Probate judges and their staffs should be careful not to talk to one party or family member alone about a case.
- Copies of any letters or other communications should be directed to all people affected or only to the attorneys who have entered an appearance in the case, if any. The judge may choose to file a duplicate original of letters or other communications in the court's case file.
- Telephone callers asking about a case need to be informed by the judge or staff about the prohibition against *ex parte* communications.
- Judges and staff should also be careful about e-mail communications.

If an estate is open in the probate court, any "objections" raised by parties to the case should be in writing and filed with the court so that: (1) the issue is in the court record, and, (2) the judge is not accused of any impropriety through improper contact with any of the parties.

Sometimes a judge (or staff person) does not realize at the time of a conversation that the person is connected to a case filed with the court and will end up talking with one party without the knowledge of other interested persons. E-mail can be particularly problematic.

To avoid the appearance of impropriety judges should make everyone aware of their duty to make all communications available to all other parties.

A simple introductory procedure can help eliminate this problem. If a person's questions seem general and related to procedure, rather than disputes, the judge may not need to inquire further. But if the person is complaining about the personal representative, or asking "What if so-and-so has not done so-and-so?" or seems to be involved in a dispute about an estate, more inquiry may be advisable.

Before proceeding further in conversations about cases involving potential disputes, the judge or staff can ask: (1) "Is this case already filed in the probate court?" and, (2) "Are you a party to the case?" If the person answers "yes" to either question, then the judge or staff can say something like, "I am not allowed to give legal advice about specific cases to anybody; I can only tell you generally what the law requires. Nor am I allowed to talk with one party in the case without talking to all parties. Please talk directly to the personal representative or hire an attorney to assist you." If the case has been filed in another court, judges should advise the person that they are not allowed to comment on what another court may or may not have done. Even if a probate case has not been filed, remind the person that judges and staff are not allowed to give legal advice.

Court and county clerk staff should also be aware that they should not comment on how the probate judge or another judge or court might proceed in a matter that comes before the probate court or any other court.

> **Practical Tip:**
> If a judge inadvertently receives an unauthorized *ex parte* communication about the substance of a matter in the court, the judge shall promptly notify all parties of the substance of the communication and provide the parties with an opportunity to respond. Rule 21-209B. The judge should include the original *ex parte* communication and the court's original written notification in the court file, along with a list of who received the notification, to help prevent accusations that the judge was more partial to one party than another.

8.2.2 Staff Contact with Self-Represented Applicants

The New Mexico Supreme Court passed a rule that addresses providing court information to self-represented litigants (*pro se* applicants). The rule provides excellent, specific guidance about communicating with *pro se* litigants. The rule applies to all judicial branch employees except judges, settlement facilitators, and mediators. Probate judges should make sure that the probate court staff and county clerk's staff are familiar with and understand this rule. Although judges are not bound by the rule, they are bound by other laws that prohibit them from giving legal advice. **Judges should strongly consider using the rule for guidance in their own communications with *pro se* applicants to avoid violating the Code of Judicial Conduct.** The full text of Rule 23-113, New Mexico Rules Annotated (NMRA) reads:

Rule 23-113. Providing court information to self-represented litigants.

A. **Self-represented litigant, court staff; defined.** For purposes of this rule, a self-represented litigant is any person who appears, or is contemplating an appearance, in any court in this state without attorney representation and court staff includes all judicial branch employees except judges, settlement facilitators, and mediators.

B. **Permitted information.** When communicating with a self-represented litigant, court staff are permitted to:

(1) encourage the self-represented litigant to obtain legal advice from a licensed New Mexico attorney without recommending a specific attorney;

(2) provide information about available pro bono, free or low-cost civil legal services, legal aid programs and lawyer referral services without endorsing a specific service;

(3) provide information about available statutory or court-approved forms, pleadings and instructions without providing advice or recommendations as to any specific course of action;

(4) answer questions about what information is being requested on forms without providing the self-represented litigant with the specific words to put in a form;

(5) provide, orally or in writing, definitions of legal terminology from widely accepted legal dictionaries or other dictionaries, if available, and without advising whether a particular definition is applicable to the self-represented litigant's situation;

(6) provide, orally or in writing, citations to constitutions, statutes, administrative rules or regulations, court rules and case law, but are not required to search for the citation and are not permitted to perform legal research as defined in Subparagraph (4) of Paragraph C of this rule or advise whether a particular provision is applicable to the self-represented litigant's situation;

(7) provide publically available, non-sequestered information on docketed cases;

(8) provide general information about court processes, procedures and practices, including court schedules and how to get matters scheduled;

(9) provide information about mediation, parenting courses, courses for children of divorcing parents and any other appropriate information approved by the court for self-represented litigants;

(10) provide, orally or in writing, information on local court rules and administrative orders;

(11) provide information regarding proper courtroom conduct and decorum; and

(12) provide general information about community resources without endorsing a specific resource.

C. **Prohibited information.** When communicating with a self-represented litigant, court staff are prohibited from:

(1) providing, orally or in writing, any interpretation or application of legal terminology, constitutional provisions, statutory provisions, administrative rules or regulations, court rules and case law based on specific facts or the self-represented litigant's particular circumstances;

(2) providing, orally or in writing, information that must be kept confidential by statute, administrative rule or regulation, court rule, court order or case law;

(3) creating documents or filling in the blanks on forms on behalf of self-represented litigants;

(4) performing direct legal research by applying the law to specific facts or expressing an opinion regarding the applicability of any constitutional provisions, statutes, administrative

rules or regulations, court rules, court orders or case law to the self-represented litigant's particular circumstances;

(5) explaining court orders or decisions except as permitted by Subparagraph (8) of Paragraph B of this rule;

(6) telling the self-represented litigant what to say in court;

(7) assisting or participating in any unauthorized or inappropriate communications with a judge on behalf of the self-represented litigant outside the presence of the other party;

(8) indicating, orally or in writing, whether the self-represented litigant should file a case in court;

(9) predicting the outcome of a case filed in court; and

(10) indicating, orally or in writing, what the self-represented litigant should do or needs to do.

D. Immunity. Despite any information provided to self-represented litigants pursuant to this rule, self-represented litigants remain responsible for conducting themselves in an appropriate manner before the court and representing themselves in compliance with all applicable constitutional and statutory provisions, administrative rules or regulations, court rules, court orders and case law. Court staff shall be immune from suit, as provided by statute or common law, for any information provided to a self-represented litigant.

Practical Tip:
Judges and their staffs should strongly consider keeping written records of all conversations they have regarding court business. This includes telephone calls, walk-in visitors, e-mails, and other contacts. The date, name of the person spoken to, the person's phone number or other contact information, and a summary of the discussion can prove invaluable in refreshing the judge's memory if necessary at a later date. A simple phone log or other record should provide sufficient documentation.

8.2.3 Obtaining Advice about a Case

Judges may have a case with troubling or unique issues, and the judge may want to consult with someone else about the applicable law and proper course of action. Current provisions of the Code do **not** allow probate judges to obtain advice from disinterested experts unless the judge gives advance notice to all parties and allows the parties to participate.

If a judge seeks advice from a disinterested expert, the current Code states, "A judge may obtain the **written** [emphasis added] advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to

be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received." 21-209A(2). Commentary [3] to Rule 21-209 states, "The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this rule. An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae."

Practical Tip:
If a probate judge wishes to consult with a lawyer, law teacher, or other disinterested expert in probate law, the judge **must** give advance written notice to the parties that comply with Rule 21-209A(2). The advice from the disinterested expert must be written, not verbal. A probate judge should not obtain verbal advice from a disinterested expert. The new rule with the written requirement allows the parties to comment on specific issues for which advice was obtained. This levels the playing field for all parties because they are all relying on the same set of information.

When asking another **judge** for advice, the Code does not require that notice be given to the parties, *see* Rule 21-209A(3). The rule states, "A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record and does not abrogate the responsibility personally to decide the matter." Commentary [5] to Rule 21-209 states, "A judge may consult with other judges on pending matters, but must avoid *ex parte* discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter."

8.3 Behavior at Court

The judge's job is to act impartially and fairly and not to treat or appear to treat one person or attorney more favorably than another. A judge shall perform the duties of judicial office, including administrative duties, without bias, prejudice or harassment. Rule 21-203. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, religion, color, national origin, ethnicity, ancestry, sex, sexual orientation, gender identity, marital status, spousal affiliation, socioeconomic status, political affiliation, age, physical or mental handicap or serious medical condition; and shall not permit court staff, court officials, or others subject to the judge's direction or control to do so.

Probate judges should not:

- Make off-color or ethnic jokes.
- Engage in banter with court staff that makes anyone uncomfortable or inclined to file a sexual harassment complaint.

- Delay in acting on cases that meet all legal requirements.
- Allow their non-court activities to interfere with their judicial duties.
- Drink, use illegal drugs, or nap on the job.

> **Practical Tip:**
> If a probate judge sees a magistrate judge regularly drinking at his or her desk at the courthouse, what should the judge do? The Code states, "A judge who has a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to the Lawyer's Assistance Committee of the State Bar, Alcoholics Anonymous, Narcotics Anonymous, or other support group recognized by the New Mexico Disciplinary Board or the New Mexico Judicial Standards Commission, Rule 21-214A."

Judges who know that another judge has violated the Code also have a duty to inform the Judicial Standards Commission in certain cases that do not involve substance abuse. This duty is mandatory when the violation of the Code raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge. Rule 21-215A.
Probate judges should:

- Give precedence to judicial duties over the judge's personal and extrajudicial activities. Rule 21-201.
- Perform their judicial and administrative duties competently and diligently. Rule 21-205.
- Be available to act on cases that meet all legal requirements. Rule 21-207.
- Be patient, dignified and courteous to everyone who contacts the court, as well as court staff. Rule 21-208. Judges should strive to be courteous and even-handed with *pro se* applicants and attorneys, even those who are rude or difficult.
- Disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. Rule 21-211.

A judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity. Rule 21-210D. However, probate judges should not testify before legislative committees except in matters concerning the legal system or the administration of justice. Matters of substantive law have a different analysis. If a judge's state senator introduces a bill that adjusts probate law and asks the judge to testify at the legislature, the judge should decline. Rule 21-302A.

Practical Tip:
Probate judges should not delay in acting on cases. When a magistrate judge delayed in signing and filing written judgments and sentences and had *ex parte* communications, the judge was disciplined for willful misconduct in office. *In re Perea*, S.Ct. No. 25,822 (Filed August 17, 1999) decided prior to the 2011 recompilation.

8.4 Behavior Outside of Court

A judge is stopped by a police officer for speeding. He or she should, (a) exclaim loudly "give me a break, I'm a judge!" or (b) say nothing about being a judge, but cooperate fully by providing a driver's license and any other documents requested by the police officer. The answer is (b).

Rule 21-103[1] clearly states that it is improper for a judge to allude to judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge should not seek special treatment or discounts at restaurants, parking facilities, or any other businesses. Rule 21-103 prohibits a judge from abusing the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so on the judge's behalf. A spouse, passenger or friend of the judge in the car should not "play the judge card" either.

Separating judicial work from personal life should help the judge avoid trouble. Judges should not:

- Talk about cases at home, at parties, at the gym, place of worship or anywhere else. What happens at the court should stay at the court.
- Use judicial letterhead for personal business.
- Use their judicial status to gain preferential treatment.
- Use judicial resources, such as copy and fax machines, for personal business.
- Violate any criminal laws.

Practical Tip:
The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Rule 21-102, commentary [7]. A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applies to other citizens. Rule 21-102, commentary [2].

Suppose a judge learns as part of a probate proceeding that the recently-deceased decedent made a lot of money buying and selling shares of a certain stock. Can the judge buy some of that stock? If the judge acquires information of commercial or other value that is unavailable to the public, the judge cannot use that information for personal gain or for any purpose unrelated to his or her judicial duties. Rule 21-305, commentary [1]. If the information the judge uses to buy the stock is public information, the judge can arguably buy the stock. However, given the general rule to avoid the appearance of impropriety, the judge should probably refrain from buying the stock.

8.5 Community Activity for Probate Judges

The duties of judicial office take precedence over all of a judge's personal and extrajudicial activities. Rule 21-201. However, judges are members of their communities and are allowed by the Code to take part in selected activities. The Code recognizes that a judge's participation in community activities provides important benefits to both society and to judges personally. The Code tries to balance activities that may create an appearance of impropriety or bias and those activities that are a part of necessary and healthy public life.

Judges may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit. Rule 21-307. Judges often are asked to participate in activities on behalf of charitable **non-profit** organizations. The Code permits such activities with certain limitations, primarily relating to fund-raising activities.

Judges may not be members of organizations that practice invidious discrimination. Rule 21-306 states, "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, religion, color, national origin, ethnicity, ancestry, sex, sexual orientation, gender identity, marital status, spousal affiliation, socioeconomic status, political affiliation, age, physical or mental handicap, or serious medical condition." If the judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization. Rule 21-306, commentary [3]. Membership in a religious organization as a lawful exercise of freedom of religion is not a violation of this rule, commentary [4].

Keeping in the mind the prohibition against using the prestige of the judicial office to advance the personal or economic interests of the judge or others, probate judges may:

- Write a letter of recommendation to a prospective employer or college for a friend's daughter, based on the judge's personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office. Rule 21-103, commentary [2]. (The cautious approach would be **not** to use court letterhead for the letter.)
- Participate in certain activities of non-profit organizations.
- **Assist** in planning fund-raising activities. Rule 21-307A(1).
- Solicit contributions only from members of the judge's family or other judges. Rule 21-307A(2).
- Serve as an usher or a food server or preparer, be part of a theatrical or musical performance with others, introduce speakers or present awards and perform similar functions, at fund-raising events. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office. Rule 21-307, commentary [3].

- Accept reasonable compensation for extrajudicial activities permitted by the Code, **but not for performing marriage ceremonies**. Rule 21-312.
- Accept gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, unless doing so undermine the judge's independence, integrity, or impartiality, or if the source is who has come or is likely to appear before the judge. Rule 21-313.

> **Practical Tip:**
> Compensation received from extrajudicial activities and reimbursement of expenses may be subject to annual public reporting requirements. *See* Rule 21-315 for details.

Probate judges may **not**:

- Use court premises, staff, stationery, equipment, or other resources for non-court activities. Rule 21-301E.
- Testify as a character witness for anyone unless the judge is "duly summoned" by subpoena. Rule 21-303.
- Be a member in an organization that practices invidious discrimination. Rule 21-306.
- Personally or expressly solicit financial support during an event. Rule 21-307A(3). Mere attendance at the event does not violate the rule.
- Accept any remuneration, including a gratuity, for performing marriage ceremonies. Rule 21-312, commentary [3].

8.5.1 Exemptions for Probate Judges

Probate judges are **not** required at any time to comply with:

- Rule 21-304 (Appointments to governmental positions)
- Rule 21-308A (Appointments to fiduciary positions)
- Rule 21-309 (Service as arbitrator or mediator)
- Rule 21-310 (Practice of law)
- Rule 21-311B (Financial or business activities).

8.5.2 Examples

1. Can a probate judge serve on the board of directors of a local hospital? **Answer:** Yes, if the hospital is non-profit, no, if the hospital is private? *See* Rule 21-307.
2. Can a probate judge serve on the board of the local food bank, a not-for-profit organization? **Answer:** Yes.
3. Can a probate judge be named in a will to serve as personal representative of his or her parent's estate? **Answer:** Yes. *See* Rule 21-308A.

4. Can a probate judge speak at a fundraiser for the Friends of the Public Library, a 501(c)(3) non-profit organization? **Answer:** Yes, the judge can speak but cannot personally solicit funds, See Rule 21-307A(3).
5. Can a probate judge serve as a part-time tribal judge during the evening? **Answer:** Yes, if the evening job does not conflict with the hours and duties required for probate court. Rule 21-312B.
6. Can a probate judge accept a gift card, box of candy, or other gift as thanks for performing a marriage ceremony? Answer: No, no matter where or when the ceremony occurs, the judge may not accept any compensation, except for reasonable travel expenses, for performing a marriage ceremony. Rule 21-312 commentary [3].

8.6 Political Activity for Probate Judges

The Code of Judicial Conduct limits political activity by judges. Some of the rules do not apply to probate judges, but many do. In general, probate judges who are not currently running in an election may:

- Engage in political activity on behalf of the legal system, the administration of justice, and measures to improve the law. Rule 21-401A.
- Attend non-fund-raising political gatherings. Rule 21-401B.
- Except while serving as a judge, may participate in the activities listed in Rule 21-401C(1) through (6).
- Purchase tickets and attend dinners or other fund-raising events sponsored by political organizations or candidates. Rule 21-401D. *See also* Rule 21-401, commentary [9].

Practical Tip:
A magistrate judge who allowed the use of the judge's name for an endorsement, published in a local newspaper, of a candidate for reelection as mayor of a municipality violated the Code of Judicial Conduct. *In re Vincent*, 2007-NMSC-056, 143 N.M. 56, 172 P.3d 605 (decided prior to 2011 recompilation).

Although Rule 21-401C(2) about political endorsements does not apply to probate judges "except while serving as a judge," the cautious approach would be to follow this rule anyway. Doing so ensures that the probate judge maintains the appearance of even-handedness in the community. Private political endorsements are permitted by the Code. Rule 21-401, commentary [8].

8.6.1 Probate Judges as Judicial Candidates

Judicial candidates are allowed to campaign publicly and attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office. Rule 41-402A(3)(a)(b).

The Code contains specific rules for political and campaign activities of judicial candidates in public elections, mostly relating to fund-raising activities. Candidates for judicial office, in both partisan and retention elections, shall not personally solicit or personally accept campaign contributions from any attorney, or from any litigant in a case pending before the candidate. Contributions from attorneys and litigants shall be made only to a campaign committee, and are subject to all the requirements of this rule. Campaign committees may solicit contributions from attorneys. Campaign committees cannot disclose to the judge or candidate the identity or source of any funds raised by the committee. Rule 21-402E.

8.6.2 Exemptions for Probate Judges

Probate judges are not currently required to comply with Rules 21-401C(1) through (6) NMRA (Political activity and elections for judges who are not currently running in either a partisan or retention election) **except while serving as a judge.**

8.6.3 Examples

1. Before your final fundraiser, you check your opponent's last fundraising report because you do not want to call anyone who has contributed to your opponent. Can you do this? Answer: No, judicial candidates are not allowed to discover who has contributed to the campaign of either the judge or the judge's opponent. Rule 21-402A(2)(a).
2. A probate judge decides to run for county assessor. Must he or she resign to run for a public non-judicial office? **Answer:** No. Rule 21-405C imposes a "resign to run" requirement on all full-time judges in New Mexico. Since probate judges are not full-time, it appears that they could run for a public, non-judicial office without resigning as probate judge.
3. Is a probate judge required to form a campaign committee in a reelection campaign? **Answer:** Yes, if the judge plans to raise and spend more than $1,000, a campaign committee must be formed (Rule 21-402A(1)(e). The requirements for campaign committees set out in Rule 21-404 must also be followed.
4. An attorney who appears before you offers you a campaign contribution. Can you accept it? **Answer:** No. Direct the attorney to the campaign treasurer or member of the campaign committee. *See* Rule 21-402E.
5. The county chair of your political party calls and asks you to attend a fundraiser and to sell tickets. Can you? **Answer:** You may attend. Probate judges are allowed to "solicit funds for…or make a contribution to a political organization or candidate," but doing so is probably unwise if you wish to avoid the appearance of impropriety. *See* Rules 21-401A and 21-402.

8.7 Disciplinary Action Against Probate Judges

The Code of Judicial Conducts applies to all judges, both at court and outside of court. All judges who violate the Code of Judicial Conduct are subject to disciplinary action recommended by the Judicial Standards Commission to the New Mexico Supreme Court. The New Mexico Judicial Standards Commission accepts and investigates complaints about

judges from all courts in New Mexico. If the Commission finds a judge has violated the Code of Judicial Conduct, the Commission may impose a variety of sanctions ranging from informal reprimands; formal, published reprimands; suspension; or, in cases with severe violations, removal from the bench.

The Judicial Standards Commission and the New Mexico Supreme Court have disciplined many judges, including probate judges. In 2001 a probate judge resigned from the bench after the Commission found she had failed to file and pay gross receipts and income taxes, used county facilities for personal business, and issued bad checks. In 2004 a probate judge resigned from the bench after being found legally incompetent to stand trial in a DWI incident.

In 2012 the Supreme Court removed a probate judge from office. The state's Judicial Standards Commission had found the judge guilty of willful misconduct by a unanimous vote of all 10 members present following a trial and petitioned the Supreme Court for his removal from judicial office. The Supreme Court unanimously agreed to the order of removal, effective immediately. The judge had accepted a copy of a will in lieu of the original document, and then issued an order of informal probate of the will and an appointment of a personal representative. The judge falsely indicated the original will was in the court's possession. He knew his order was invalid and that the personal representative lacked authority to act in the case, but he signed the order because she was his neighbor. To correct his mistake, he asked the clerk if she could shred all documents in the case. The commission found that the judge violated numerous provisions of the Code of Judicial Conduct. Although the judge's action was an isolated instance, the commission said that the multiple instances of dishonesty reflected on the judge's character and fitness for judicial office.

Summaries of judicial disciplinary actions are online at:
http://www.nmjsc.org/docs/disciplinaryactions.pdf

Probate judges should be very careful not to exceed their authority. They do not have jurisdiction over contested probates, formal proceedings, missing persons, minors, property disputes, trusts, guardianships or conservatorships and should not act on these issues. The best way to avoid investigation by the Judicial Standards Commission is to follow the law and conduct oneself with integrity, honesty, and humility at all times, not just while at court. The Code of Judicial Conduct should provide ample guidance so that judges can determine what activities are allowed and prohibited.

Practical Tip:

A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code without giving notice to anyone. See Rule 21-209, commentary [7]. Judges who have questions about the Code of Judicial Conduct should contact Judge James J. Wechsler, New Mexico Court of Appeals, P.O. Box 2008, Santa Fe, NM 87504-2008, (505) 827-4908.

8.8 Unauthorized Practice of Law

There is a fine line between providing legal information and giving legal advice. Providing information is allowed; giving legal advice is not. Be careful!

8.8.1 Providing Forms v. Filling Out Forms

Judges and their staff can answer questions about the do-it-yourself probate forms and procedural requirements of the court. They can explain court procedures and talk about laws in general, but should not interpret the law for the public. They can explain the difference between testate and intestate estates without giving legal advice and assist *pro se* applicants in identifying the correct packet to purchase. They can cite basic laws regarding titles to probate and property. They can hand out copies of New Mexico laws and samples of affidavits, which the applicant can then interpret or fill out. The judge or staff can allow a person with questions to examine a previously filed probate case file to see how the paperwork is filled out. NEVER ALLOW ANYONE TO REMOVE A COURT FILE FROM THE COURT!

These issues often arise at the county clerk and assessor's offices, as well as the probate courts. **It is almost always more appropriate to answer questions in general terms and not as they apply to specific situations.** For example, it is appropriate for a judge to say, "I am not allowed to give you legal advice, but I can tell you that the law says that a joint tenancy deed to a house means that the house passes to the surviving joint tenant at the death of the first joint tenant and should not require a court probate," instead of saying "I think the joint tenancy would pass the house to your mother." It is probably also appropriate to say, "I am not allowed to give you legal advice, but New Mexico law says that a bank account with a 'payable on death' beneficiary designation passes to that beneficiary upon the death of the account owner. A financial institution will have information about how to claim a bank account."

While it is appropriate to explain basic probate law requirements and the use of probate forms, judges and their staff cannot fill out the forms, prepare deeds, or prepare affidavits or other documents for anyone.

> **Practical Tip:**
> Judges and their staff are often asked by *pro se* applicants and other members of the public for guidance and advice. Often questions relate to real property, such as houses and ranches. The judge and staff should **not** give legal advice about real property to anyone. Instead, suggest the person seek information and guidance from a reputable attorney or title company.

8.8.2 Paralegals

Probate judges who have paralegals helping them with court business should be aware that the New Mexico Supreme Court approved a rule about using paralegals. The rule allows court paralegals to explain forms but not to fill them out for a *pro se* applicant. NMRA Rule 20-103 reads:

> A paralegal shall not:
>
> A. provide legal advice;
> B. represent a client in court except to the extent authorized by law;
> C. select, explain, draft, or recommend the use of any legal document to or for any person other than the attorney who supervises the paralegal, unless the supervising attorney or judge, in the case of paralegals employed by the courts, so directs; or
> D. engage in conduct that constitutes the unauthorized practice of law;
> E. contract with, or be employed by, a natural person other than an attorney to perform paralegal services except to the extent authorized by law;
> F. in connection with providing paralegal services, induce a person to make an investment, purchase a financial product or service or enter a transaction from which income or profit, or both, purportedly may be derived;
> G. establish the fees to charge a client for the services the paralegal or the attorney performs. Such fees shall be established by the attorney who supervises the paralegal's work. This paragraph does not apply to fees charged by a paralegal in a contract to provide paralegal services to an attorney, law firm, corporation, governmental agency or other entity; or
> H. perform any services for a consumer except as performed under the supervision of the attorney, law firm, corporation, government agency, or other entity that employs or contracts with the paralegal. Nothing in this paragraph shall prohibit a paralegal who is employed by an attorney, law firm, governmental agency, or other entity from providing services to a consumer served by one of these entities if those services are expressly allowed by statute, case law, court rule or federal or state administrative rule or regulation. As used in this paragraph, "consumer" means a natural person, firm, association, organization, partnership, business trust, corporation or public entity.

8.8.3 Unauthorized Practice of Law (UPL) Statutes

Non-lawyers can prepare their own legal documents, but **cannot** prepare legal documents for anyone else. Updated laws have added damages recoverable by those injured, as well as civil penalties up to $5,000 that can be imposed on those who violate the unauthorized practice of law laws.

New Mexico’s laws about the unauthorized practice of law state:

Section 36-2-27 Practice without admission; contempt of court; foreign attorneys.
No person shall practice law in a court of this state, except a magistrate court, nor shall a person commence, conduct or defend an action or proceeding unless he has been granted a certificate of admission to the bar under the provisions of Chapter 36 NMSA 1978. No person not licensed as provided in that chapter shall advertise or display any matter or writing whereby the impression may be gained that he is an attorney or counselor at law or hold himself out as an attorney or counselor at law, and all persons violating the provisions of that chapter shall be deemed guilty of contempt of the court in which the violation occurred, as well as of the supreme court of the state; provided, however, that nothing in this section shall be construed to prohibit persons residing beyond the limits of this state, otherwise qualified, from assisting resident counsel in participating in an action or proceeding.

Section 36-2-28.1 Unauthorized practice of law; private remedies.
A. A person likely to be damaged by an unauthorized practice of law in violation of Section 36-2-27 NMSA 1978 may bring an action for an injunction against the alleged violator. An injunction shall be granted pursuant to the principles of equity and on terms that the court considers reasonable. Proof of monetary damage or loss of profit is not required for an injunction to be granted pursuant to this subsection.

B. A person who suffers a loss of money or other property as a result of an unauthorized practice of law in violation of Section 36-2-27 NMSA 1978 may bring an action for the greater of actual damages or one thousand dollars ($1,000) and for the restitution of any money or property received by the alleged violator, provided that if the court finds that the alleged violator willfully engaged in the unauthorized practice of law, the court may award up to three times the actual damages or three thousand dollars ($3,000), whichever is greater.

C. A person bringing an action pursuant to Subsection A or B of this section shall, if the person prevails, also be awarded attorney fees and costs.

D. The relief provided by this section is in addition to other remedies available at law or equity.

Section 36-2-28.2 Unauthorized practice of law; action by attorney general or bar association.
A. Whenever the attorney general, the state bar of New Mexico or a local bar association authorized by the state bar of New Mexico to prosecute actions related to the unauthorized practice of law has reason to believe that a person has engaged in the unauthorized practice of law in violation of Section 36-2-27 NMSA 1978 or has aided or abetted another person in the unauthorized practice of law and the initiation of legal proceedings would be in the public interest, the attorney general or bar association may bring an action in the name of the state against the alleged violator. The action may be brought in the district court for the county in which the alleged violator resides or has a principal place of business or in the district court for a county in which the alleged violation took place. In an action brought pursuant to this section, in addition to civil penalties, the attorney general or bar association may petition the court for a temporary or permanent injunction and restitution and, if seeking a temporary or

permanent injunction, the attorney general or bar association shall not be required to post bond.

B. In lieu of filing or continuing an action pursuant to this section, the attorney general or bar association may accept a written assurance of discontinuance of the unauthorized practice of law from the alleged violator. The assurance may contain an agreement by the alleged violator that restitution of money or property received from them in any transaction related to the unauthorized practice will be made to all persons, provided that a person harmed by the unauthorized practice is not required to accept restitution. If the offer of restitution is accepted, the person accepting the restitution is barred from recovering damages from the alleged violator in an action based upon the same unauthorized practice.

C. In an action brought by the attorney general or bar association pursuant to this section, if the court finds the alleged violator engaged in the unauthorized practice of law, the court may impose a civil penalty not to exceed five thousand dollars ($5,000) per violation. In addition, if the court finds that a person has aided or abetted another to engage in the unauthorized practice of law, the court may impose a civil penalty not to exceed one thousand dollars ($1,000) for the first violation and a civil penalty not to exceed five thousand dollars ($5,000) for each subsequent violation.

8.8.4 Examples of Unauthorized Practice of Law Related to Probate

Probate judges may encounter people who are engaging in the unauthorized practice of law in their courts. Individuals who are not attorneys but who assist others in:

- preparing probate forms for an applicant
- preparing a deed to real property
- telling an applicant who the heirs are or giving other legal advice
- drafting a will, whether or not the will is invalid
- preparing a small estate or homestead affidavit

are engaging in the unauthorized practice of law.

> **Practical Tip:**
> Probate judges who are not attorneys should not give legal advice or assist others in preparing any legal documents. Probate judges who are licensed attorneys may practice law, but may not give legal advice to or prepare legal documents for people who have filed cases in their courts.

When a non-lawyer prepares legal documents for others without being supervised by an attorney licensed in New Mexico, it is the "unauthorized practice of law." It is a violation in New Mexico for a non-lawyer to prepare a will, trust, probate form, or other legal document without an attorney's help or supervision. New Mexico’s laws impose damages and civil penalties upon those who are found guilty of violating the law.

Individuals, including personal representatives, may prepare their **own** wills, living trusts, and probate forms. If a paralegal or other non-lawyer prepared a will, trust, or probate form without the supervision of an attorney licensed in New Mexico, the documents might be valid if they were properly drafted and notarized. **But any non-lawyer who prepares legal documents for another person is still violating state law in doing so.**

If a judge encounters a paralegal or other non-lawyer individual who is practicing law without a license and drafting legal documents without the supervision of an attorney, the judge should notify State Bar of New Mexico, Office of the General Counsel P.O. Box 92860, Albuquerque, NM 87199-2860, (505) 797-6050. The State Bar, with the help of the Disciplinary Board, is tracking complaints, providing information, and developing procedures to implement its provisions under the UPL statute.

8.8.5 Pro Hac Vice (Non-New Mexico Attorneys)

Probate judges may encounter an out-of-state attorney who is filing a case for a client in the probate court. For example, an attorney licensed in Texas may wish to file a case in a New Mexico probate court or district court. Practice by non-admitted lawyers before state courts is allowed if certain rules and procedures are followed.

A non-admitted attorney wishing to appear in a state court is governed by Rule 24-106 NMRA. The non-admitted attorney may appear on behalf of a party in any civil proceeding if the attorney meets certain requirements and follows an application procedure. The pro hac vice requirements are:

- The non-admitted attorney must be authorized to practice law before the highest court of record in any state or country;
- The non-admitted attorney must associate with an active member, in good standing, with the State Bar of New Mexico;
- The non-admitted attorney must certify they will comply with applicable statutes, laws, procedurals rules and the rules for Professional Conduct and Discipline; and,
- The non-admitted attorney must submit to the jurisdiction of the New Mexico courts and disciplinary board with respects to acts or omissions occurring during the attorney's admission under this rule.

Currently there is no limit on the number of times an attorney can appear under this rule, but the attorney must apply separately for each civil action suit or proceeding in which the attorney intends to appear. Also note that the Rules of Professional Conduct, specifically Rule 16-505 (D) NMRA, do not allow a non-admitted attorney to establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

The pro hac vice application procedure is a three-step process that is covered under Rule 24-106 NMRA and the Rule of Civil Procedure 1-89.1 NMRA.

1. File a Registration Certificate with the State Bar of New Mexico – Office of General Counsel. The registration certificate contains contact information, case and local counsel information and the required certifications.
2. Pay a non-refundable fee – currently $250 which is held by the State Bar in a special fund to support the delivery of civil legal services to the poor. Fee waiver requests can be made in the following situations:
    - certification that the attorney is employed by a governmental authority and will be appearing on behalf of a governmental authority;
    - certification that the attorney is employed by and agency providing legal service to indigent clients and will be appearing on behalf of an indigent client;
    - certification that the attorney is appearing on behalf of an indigent client and will be charging no fee for the appearance.
3. File an affidavit with the Court stating they are admitted to practice law and are in good standing to practice law in another state or country and that they have complied with Rule 24-106 NMRA. The affidavit shall be files with the first paper filed in the court or as soon as practicable after a party decides on representation by a non-admitted counsel.

Information, including copies of the rules, registration certificate and a sample affidavit can be obtained online at www.nmbar.org or by calling the Office of General Counsel at the State Bar of New Mexico, (505) 797-6050.

8.9 Safety Valves for Probate Judges

Probate judges may find the following suggestions helpful:

- Use the sample alternative forms in Chapter 4 or *pro se* forms as templates, i.e., compare the submitted paperwork to the forms.

- The Code of Judicial Conduct, Rule 21-209A(2) allows judges to obtain the written advice of a disinterested expert on the applicable law but must give written notice to the parties involved.

- Section 45-3-305 allows judges to decline an application for any reason. The case can still proceed as a formal probate in the district court.

- Section 45-3-309 allows a judge to decline an application for appointment of personal representative for any reason. The case can still proceed as a formal probate in the district court.

- If people complain that a judge is doing or not doing something, judges can explain that probate courts are courts of limited jurisdiction and that judges have sworn to follow the Constitution and laws of New Mexico.

- **Judges should not allow an attorney or anyone else to pressure them to do something that the judge knows is not within the scope of a probate judge's job or is contrary to the law. It is the judge's responsibility to review the case, apply the law, and not exceed his/her jurisdiction. The judge can transfer any case for any reason to the district court for a formal proceeding.**

CHAPTER 9

Real Property as Part of Estate

This chapter covers:

- Overview of estates with real property.
- Probates with real property in New Mexico but outside of the probate court's county.
- Probates with real property located outside of New Mexico, including simultaneous probates, ancillary proceedings and proof of authority.
- Manufactured (mobile) homes as part of an estate.
- Flowcharts on decedents with real property as part of the estate, and out-of-state decedents.
- Differences between proof of authority and an ancillary/dual proceeding.

9.1 Overview of Estates with Real Property

Note: Throughout this chapter, the term "probate" applies to probates of estates with wills and also administration of estates without wills**.**

Estates that own real property (such as land, houses, farms, ranches, mobile homes that have been made into real property, leases, oil, gas, and other minerals, water rights and timber rights) may require additional court procedures to pass clear title to the heirs or devisees.

The general rule is that change of title to real property, including all assignments or other instruments of transfer of royalties in the production of oil, gas or other minerals on any lands in this state, **must be recorded in the clerk's office of the county of the state where each piece of real property is located.**

This includes real property titled as joint tenants with right of survivorship. Upon the death of one joint tenant, the property passes to surviving joint tenant(s) without a probate or court proceeding. Joint tenancy title may appear as "joint tenants," "joint tenants with right of survivorship," or "jtwros." Any of these is a permissible joint tenancy designation on a deed to real property. In cases involving a joint tenancy deed to real property, the decedent joint tenant's death should be evidenced by an affidavit of death recorded in the county clerk's office in the county where the property is located. The title companies that record the affidavit of death will

often review the original death certificate and will file an affidavit showing the name of the decedent, the location of death, the name of the spouse, if any, and the name of the informant of the death. This recording gives notice of the death to others searching the history of the real property that one joint tenant is deceased.

Unless restricted by the terms of a decedent's will (or the terms of a supervised administration), the personal representative may use, sell, or restrict the use of a property's natural resources, such as timber or minerals lying beneath the surface. However, natural resources, such as surface and underground water, oil, and gas, move about without regard to property lines. Use and removal of the rights to the natural resources is subject to state and federal regulations. The personal representative dealing with or passing title to such property should consult an attorney regarding these matters.

The personal representative appointed by a district court or probate court has legal authority to sell real property or to transfer title to it via a "Personal Representative's Deed**"** from the estate to the new owner(s). This deed must be signed by the personal representative in the presence of a notary public, who then notarizes the deed. The notarization must be in the form of an "acknowledgment." The deed should be delivered to the new owner who should record it. The authority for the personal representative to execute this deed is found in Section 45-3-907.

> **Practical Tip:**
> Probate judges should never assist anyone in filling out a Personal Representative's Deed or any other deed or legal documents!

It is the responsibility of the new owner(s) of the real property to inform the county assessor's and treasurer's offices about the change in ownership of the property.

9.2 Probate Opened in Your County, with Real Property Located in New Mexico but Outside of Your County

Section 45-1-404 pertains to real property outside the county of administration of the estate. It states:

> A. If real property is included in an estate and is situate in a county other than the county wherein the estate is being administered, the personal representative shall, or any other interested person may, record with the county clerk of the other county a notice of administration setting forth:
>
> (1) the name of the decedent;
> (2) the title and docket number of the administration proceedings;
> (3) a description of the type of administration;
> (4) the court wherein instituted;
> (5) the name, address & title of the personal representative; and\
> (6) a complete description of the real property situate in such county.

9.3 Real Property Located Outside of New Mexico

If the estate involves real property, including oil, gas and other mineral rights, located outside of New Mexico, the personal representative of the estate may need to file a separate probate in the county in the state where the real property is located. These kinds of probates are sometimes called **ancillary proceedings.** The personal representative could contact the court and/or the county clerk's office in the state where the property is located for more information about how to proceed, but most often contact will need to be made with an attorney in the other state to determine what needs to be done. The Internet can provide access to some of this information. Researching the procedure necessary to pass real property located outside of New Mexico is beyond the scope of the probate judge's duty!

For instance, suppose the decedent died domiciled in New Mexico, but owned real estate, oil, gas or other mineral rights, in Oklahoma, New York, Texas, or another location outside of New Mexico. This situation is different than when a decedent died domiciled outside of New Mexico, but owned real estate, oil, gas or other mineral rights within New Mexico. In the first circumstance, an ancillary proceeding would probably be required in the other state, depending on that state's law. In the second circumstance, the personal representative could file a probate action in New Mexico where venue would be proper under Section 45-3-201(A)(2) if no other probate had been opened in the state of domicile. However, if a probate is already opened in the state of domicile, then filing a proof of authority, authorized by Section 45-4-204, and providing the required authenticated copies of documents should give the personal representative authority to transfer the New Mexico property. Also, it appears that reading Sections 45-3-303(D) and 45-3-308(C) allow dual probates in two states at the same time, which is different than an ancillary probate. Dual probates are discussed in the next section.

> **Practical Tip:**
> Remember that New Mexico law now allows judges to accept certified copies of documents from other states. The definition of authenticated copies includes certified or exemplified documents. Section 45-1-201A(3). Other states may contain to require triple certification, authenticated copies of documents from the probate court for use in the out-of-state court.

9.3.1 Simultaneous (Dual) Probates in Two Different States

The Uniform Probate Code allows two probates in two different states to proceed at the same time under certain circumstances. If a decedent is not a resident of New Mexico, the probate court shall delay the order of appointment of a personal representative until 30 days have elapsed since the decedent's death. Section 45-3-307. However, this 30-day delay does not apply if the personal representative appointed in the other state is also the applicant in the probate case filed in the New Mexico court. Section 45-3-307. *See also* Section 45-3-815, which addresses claims against an estate that is being administered in more than one state.

An informal probate of a will that has been previously probated in another state or foreign country may be granted at any time upon written application by any interested person, together with an authenticated copy of the will and of the order or statement probating it from the office

or court where it was first probated (*see* Section 45-3-303D). At least one reputable attorney has interpreted this section to be used to admit a foreign will to probate in New Mexico. However, this attorney did not think that Letters Testamentary would be issued by the New Mexico court in this instance. Other attorneys disagree, and think that the case would proceed like a regular probate, with the will admitted to probate, a personal representative appointed, and Letters issued.

However, if the applicant is the domiciliary personal representative (a personal representative appointed in the jurisdiction where the decedent was domiciled at the time of his death) and the decedent was not domiciled in New Mexico, informal appointment proceedings may be allowed. Section 45-3-308(C). In this instance, Letters Testamentary or Letters of Administration would be issued by the court.

9.3.2 Ancillary Proceedings

Ancillary proceedings are probate proceedings conducted in a state other than the state where the decedent resided at the time of death. Ancillary proceedings are usually necessary if the decedent owned real property in another state. For example, suppose a decedent was domiciled in New Mexico at the time of death, but owned real property in Colorado. A probate is filed in New Mexico. An ancillary proceeding could be opened in Colorado to pass title to the Colorado property to the decedent's heirs or devisees.

Section 45-4-207 discusses ancillary proceedings in a formal proceeding. Under this section, the district court could issue Letters to a foreign personal representative who needed power to act in New Mexico. Probate judges do not have jurisdiction over formal ancillary proceedings. Ancillary proceedings are rarely necessary because proofs of authority, discussed below, are usually sufficient.

9.4 Proof of Authority

If an **out-of-state** decedent owned real or personal property located in New Mexico that needs New Mexico authority to transfer, a domiciliary foreign personal representative of a nonresident decedent or his/her attorney can use a proof of authority, pursuant to Section 45-4-204. The proof of authority is documentation filed with the court that shows a person has been appointed as personal representative by a court in another state. Requirements to use a proof of authority are:

- Personal representative appointed in another state.
- Need to transfer real or personal property in New Mexico.

The personal representative from other state files in the court in the county where the property is located:

- Authenticated copies of his appointment and of any bond he has given.
- A statement of the domiciliary foreign personal representative's address.

A personal representative or his/her attorney files a proof of authority with the probate or district court. A case number is assigned and docket fee is collected, using the same procedure as any other appointment or probate proceeding filed with the court. The documentation required for a proof of authority is filed with the court, and the court clerk keeps the original copies, file-stamping the originals as outlined in Chapter 4, Section 4.4. Copies of documents should be endorsed-filed stamped and returned to the applicant, the same as any other pleading filed with the court.

Proof of authority does not involve opening a full probate, although the person filing the proof of authority pays the usual court filing fee. The applicant does not need to submit a death certificate for the decedent if a court case has already been opened in another state.

No order is signed and no Letters are issued. Even if a person asks for Letters, the probate judge should **NOT** issue Letters Testamentary or Letters of Administration in a proof of authority case! Filing the proof of authority with the probate court gives a personal representative appointed in another state the authority to act in New Mexico to transfer real property located in New Mexico.

A proof of authority is usually sufficient for some title companies. If it is not sufficient authority for the transaction, then an ancillary proceeding can be used. Charts outlining the procedures to use for out-of-state decedents and the differences between Proof of Authority and ancillary proceedings are at the end of this section of the manual.

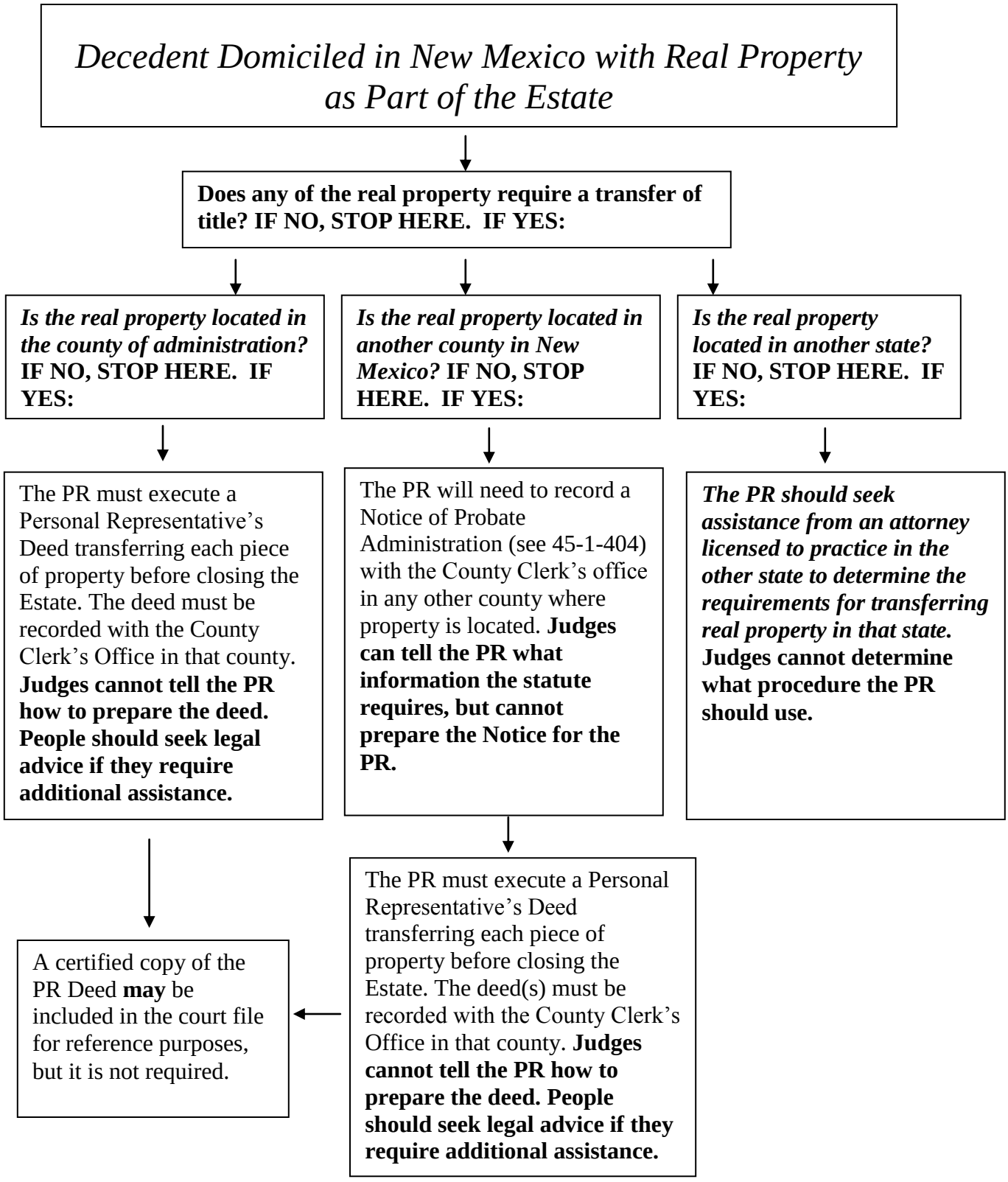
> **Practical Tip:**
> Proofs of authority could also be used to transfer oil and gas rights in New Mexico that were owned by a nonresident decedent.

9.5 Manufactured (Mobile) Homes as Part of Estate

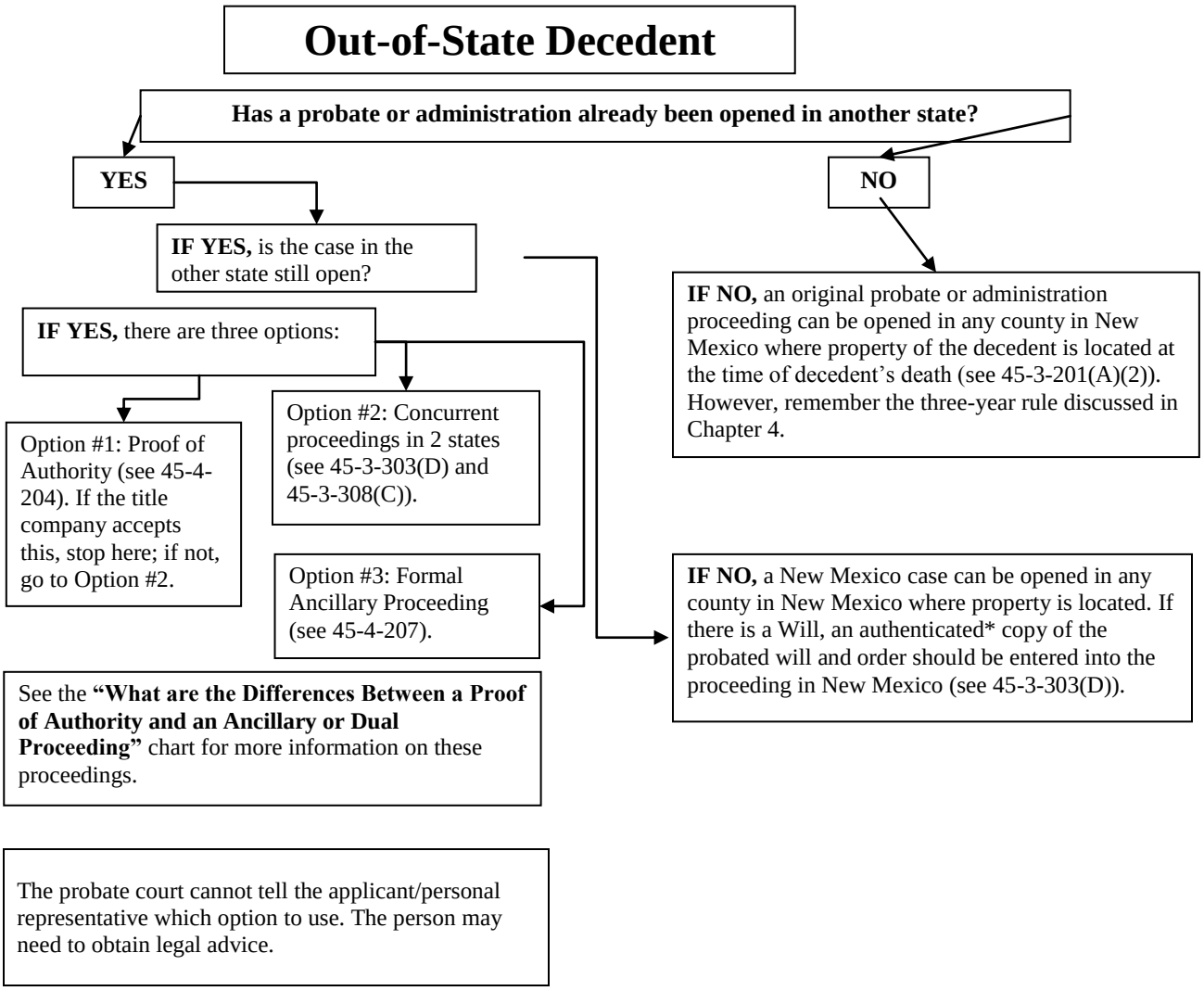
Some people think that manufactured (mobile) homes are real property, and in some cases they are. Since most manufactured (mobile) homes are moveable, they are considered personal property like automobiles and must be registered and licensed like motor vehicles. They originally have license plates like motor vehicles. Unless they are permanently affixed to the ground, manufactured (mobile) homes receive a title from the Motor Vehicles Division (MVD). If they are permanently affixed to the ground and no longer have a license, then they are real property.

Often, if a manufactured (mobile) home is still personal property and is titled in the sole name of the decedent, MVD will allow the personal representative to transfer title through a form, called "Certificate of Transfer Without Probate," Form Mvd10011. This Certificate is similar to an "Affidavit of Successor in Interest," discussed in the Judge's Glossary, above, and in Section 45-3-1201. MVD employees aren't always aware that this form exists, so check MVD's website, **http://www.mvd.newmexico.gov/forms.aspx.** The "Certificate of Transfer Without Probate" form can be found by clicking on the "Vehicle Forms" folder, and then the "Transfer, Sale or Gift" folder. *See also* Sections 66-1-4.11, 66-6-10.

9.6 Flowchart: Decedent Domiciled in New Mexico with Real Property as Part of the Estate



9.7 Flowchart: Out-of-State Decedent



***Authentication** in New Mexico means certified or exemplified. New Mexico courts can accept certified copies of court documents from other states. In states other than New Mexico, authentication may require a triple certification used to prove the authenticity of a document so that it can be used as evidence. *See* Chapter 10 for instructions for authenticating documents required by another state.

9.8 Table: Differences Between Proof of Authority and Ancillary or Dual Proceeding

WHAT ARE THE DIFFERENCES BETWEEN A PROOF OF AUTHORITY AND AN ANCILLARY OR DUAL PROCEEDING?		
Key Questions	**Proof of Authority**	**Ancillary or Dual Proceeding**
WHERE is it filed?	Filed in each county where property is located.	Filed in any county where property is located.
WHEN is it filed?	Filed while original domiciliary probate is open.	Filed while original domiciliary probate or administration is open.
WHO files it?	Domiciliary foreign personal representative files the Proof of Authority.	Usually foreign PR but could be someone else if proper consent is provided.
IS A CASE OPENED?	No probate or administration proceeding occurs but the court filing fee is paid and a case number is assigned.	Probate or administration proceeding is open.
WHAT DOCUMENTS need to be filed?	Proof of Authority with a statement including domiciliary foreign personal representative's address (*see* 45-4-204).	Pleadings filed are the same as for a New Mexico resident, with some modifications to language on the *pro se* probate forms.
WHAT DOCUMENTATION is required?	Authenticated copies of any bond given and appointment documents are attached to Proof of Authority (*see* 45-4-204).	Authenticated copies of appointment documents are submitted with Application for Appointment.
ARE LETTERS ISSUED?	No Letters Are Issued.	Letters are Issued.
HOW IS IT CLOSED?	No probate or administration was opened, so no Verified Statement is filed. The domiciliary PR may file a copy of any closing documents from the domiciliary proceeding in the other state, but this is not required.	An Ancillary Proceeding is closed in the same manner as a regular probate or administration proceeding.
The probate court cannot advise the personal representative on which proceeding is appropriate, only the differences between them.		

CHAPTER 10

Miscellaneous Topics

This chapter covers:

- Bonds.
- Agreements among successors and disclaimer statutes.
- Family/personal property allowances and omitted spouse or children.
- Collection of the decedent's final paycheck and creditors' claims and demands for notice.
- Trusts, cremation law and wrongful death claims.
- Notarial acts and oaths, and powers of attorney.
- Missing heirs and unclaimed property.
- Authenticated v. certified copies with a sample form.
- Small estate affidavits and transfer of homestead affidavits.

10.1 Bonds

Generally, no bond is required of a personal representative who is appointed in an informal proceeding. Section 45-3-603.A decedent's will may require the personal representative to post a bond to insure proper execution of his or her fiduciary duties. Someone may demand a bond. Bonds are usually only imposed by district courts in formal proceedings involving contested or supervised cases. However, a personal representative can file any required bond with either the probate or district court. Section 45-3-601.

Any interested person, including a creditor, with an interest in the estate in excess of $7,500 may demand that a personal representative give bond, even when the decedent's will did not require a bond. Section 45-3-605. The demand may be filed with either court. The personal representative shall then post a bond. If he or she does not want to do so, then the personal representative must petition the **district court** to determine the bond requirement. Section 45-3-605.

Terms and conditions of bonds are spelled out in Section 45-3-606.

10.2 Agreements Among Successors

Despite the principle that the intent of the testator is all-important, New Mexico law allows successors to the estate to agree among themselves to alter the interests, shares or amounts to which they are entitled under the will of the decedent, or under the laws of intestate succession, subject to the rights of creditors and taxing authorities, competent successors. **All** affected must sign a written contract to alter their shares. While the law does not require it, a copy of this agreement should be filed in the court file. Otherwise, problems could arise later if a dispute occurred over the distribution of the property. Section 45-3-912.

This agreement is not used very often. One example might be if one child of decedent provided care during the decedent's lifetime and the other children wanted to alter the intestate share to give the caretaker child more than the law allowed. All of the children could decide what percentages each of them were to receive and all could sign a written agreement outlining the percentages. This agreement might also be used when a personal representative of the estate, with the consent of all other heirs or devisees, deeds the real property to himself/herself, perhaps after buying out the other heirs' or devisees' shares. A written agreement would help to avoid future challenges.

The probate judge cannot draft this agreement for the successors, but can only accept it as part of a probate filing. The judge should not help people modify the initial probate application forms to refer to an agreement. Hiring a reputable lawyer to help draft the agreement would be the best approach. Further, judges should not advise people to disregard a testator's intent. A judge or staff might hand out copies of Section 45-3-912 without giving a legal opinion or advice. Remember that the Judicial Standards Commission disciplines judges for not following the law, including the unauthorized practice of law, so be very careful to avoid giving legal advice to people.

10.3 Disclaimer Statutes

Disclaimer means the refusal to accept an interest in or power over property. Section 45-2-1102C. Disclaimers are used when someone who is supposed to receive decedent's property does not want it (for tax or other reasons). Disclaimers must comply with federal Internal Revenue Code requirements and New Mexico's Uniform Disclaimer of Property Interests Act, Sections 45-2-1101 through 45-2-1116.

A disclaimer must be in a writing or other record, declare the disclaimer, describe the interest or power disclaimed, be signed by the person making the disclaimer, and be delivered or filed in the manner provided in Section 12 [45-2-1112 NMSA 1978] of the Uniform Disclaimer of Property Interests Act. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. Section 45-2-1105C. The person making the disclaimer cannot use or benefit from the disclaimed property.

The delivery or filing provisions of New Mexico's disclaimer law are listed in Section 45-2-1112. Disclaimers are not something a probate judge should be involved in, other than referring

people to New Mexico's disclaimer statutes. **People who are making a qualified disclaimer for tax purposes must also comply with the requirements of the Internal Revenue Code, which may contain time limits for making a disclaimer.** This topic is outside the scope of the manual.

It is possible that someone could open a case in probate or district court for the sole purpose of filing a disclaimer. The docket fee would still be paid and the case would be docketed as if it were a regular probate case. No further filings relating to the disclaimer appear to be required. The probate court can require an original death certificate as part of the disclaimer paperwork.

10.4 Family/Personal Property Allowances

New Mexico law contains two sections that reserve a certain amount of money, called "allowances," from the estate for spouses and children of decedents who lived in New Mexico.

New Mexico law allows a <u>family allowance</u> of **$30,000 of decedent's estate for the surviving spouse** (Section 45-2-402). If decedent has no surviving spouse, then decedent's ***minor and dependent children*** share the $30,000 in equal shares. This family allowance is exempt from and has priority over all claims against the estate, including creditors' claims. Even if the estate has debts, creditors cannot touch this $30,000, if the decedent left a spouse and/or minor and dependent children. The family allowance is in addition to any inheritance that passes to the spouse and minor/dependent children, unless a will states otherwise. **Adult** children are not entitled to the family allowance.

New Mexico also allows a $15,000 <u>personal property allowance</u> for decedent's surviving spouse (Section 45-2-403). Items of household furniture, automobiles, appliances and personal effects worth $15,000 can satisfy this allowance. Other types of decedent's estate property, both real and personal, such as cash or other assets of the estate, can be used to satisfy this allowance if decedent's personal effects are not worth $15,000. If decedent has no surviving spouse, then decedent's (1) children named in a will, (2) any omitted children of decedent, or (3) children who are decedent's intestate heirs share the $15,000. Children specifically and intentionally omitted from a will are not eligible for a portion of the $15,000. This personal property allowance is exempt from and has priority over all claims against the estate, except for the family allowance. This means that the spouse or children have priority over creditors to the $15,000. This personal property allowance is in addition to any inheritance that passes to the spouse and children, unless a will or other governing instrument states otherwise. Minor, dependent, and adult children are all entitled to share the personal property allowance, if there is no surviving spouse. They do not each receive $15,000, but instead split $15,000 among however many recipients there are.

The family and personal property allowances apply whether or not a will exists. The allowances may also apply in the case of a legal separation, although deciding this issue is outside the scope of the probate judge's powers. In the case where a couple is informally separated, but no legal action has occurred, the allowances would apply.

Practical Tip:
The recipients of the allowances do not have to file a claim to receive the allowances. It is the personal representative's job, and not the judge's job, to make sure the allowances are paid to the proper recipients, if any, *see* Section 45-3-703D. Judges and staff can give people copies of the laws governing allowances, but should not advise people on who is entitled to receive the allowances.

A New Mexico case, *In re the Estate of Jewell*, 130 N.M. 93 (Ct. App. 2001), interprets these allowances, to be absolute, and to supersede any contrary intentions expressed in the will of the decedent; they can only be overridden by expressed written waiver signed by the surviving spouse. The *Jewell* case ruled that the surviving spouse is absolutely entitled to the allowances even if the decedent's will expresses contrary intentions. Thus, a spouse cannot, through language in a will, unilaterally disinherit the other spouse from receiving the allowances.

Another New Mexico case, *Bell v. Estate of Bell*, 143 N.M. 716 (Ct. App. 2008), ruled in part that a decedent's surviving spouse was entitled to statutory allowances even though she received other transfers of property and even though most of the decedent's estate passed through a trust, rather than probate. The case implies that a trust can be invaded to pay statutory allowances. Section 46A-5-505A(3) of New Mexico's Uniform Trust Code states that the property of a trust is subject to claims for the statutory allowances.

If a spouse voluntarily agrees in writing, before or after marriage, to waive his or her right to the allowances, they could be waived. One may still state in one's will that the surviving spouse may not receive more than the family and personal property allowances.

The assets of decedent's probate estate may be insufficient to pay the allowances. If so, beneficiaries of "payable on death" accounts, property passing through a "transfer on death" deed, and possibly "transfer on death" stock and security accounts can be compelled to return those assets to pay the allowances.

If a decedent's gross estate were worth less than $45,000, the allowances received by the surviving spouse or children would only be the amount in the estate. Creditors would be out of luck, and a short-cut, called a summary administration, could be used to close the estate. Sections 45-3-1203, 1204.

A 2012 New Mexico case ruled that the family and personal property allowances can only be claimed by a surviving spouse. If the surviving spouse does not claim the allowances during his/her lifetime, the allowances do not transfer to his/her heirs. *See Duran v. Vigil*, 2012-NMCA-121 (Ct.App. 2012). The case can be read at http://www.nmcompcomm.us/nmcases/NMCA/2012/12ca-121.pdf.

Important Note:
The family and personal property allowances only apply to the estates of decedents who are domiciled in New Mexico. The rights to allowances for out-of-state decedents are determined by the laws of the decedent's domicile state. Section 45-2-401.

10.5 Omitted Spouse and Children

Sections 45-2-301 and 45-2-302 discuss the entitlements of decedents' spouses and children who may have been omitted from decedent's will. If a testator's surviving spouse married the testator **after** the testator executed his will, the surviving spouse is entitled to receive an intestate share unless that share is devised to a child of the testator born before the marriage. This provision gives greater rights to children from another marriage than to new spouses. However, spouses and minor children are still entitled to the family allowance, and spouses and children are entitled to the personal property allowance.

The law also contains provisions about omitting children born **after** a will is made. The law is silent about omitting children born **before** the will is made. If someone intends to omit a child born before the will was made, that omission does not have to be in writing. However, having a written omission in a will or trust can prevent lawsuits later on.

Children born or adopted **after** a will is made may be entitled to a portion of a testator's estate unless the will is clear about the testator's intention to omit the child. Probate judges may encounter wills that contain a statement, "I specifically intend to omit Child A as a beneficiary under this will." Child A is still entitled to notice of the probate proceeding,

The New Mexico case, *Bell v. Estate of Bell*, 2008-NMCA-045, 143 N.M. 716 (Ct.App. 2008), discusses this issue at length. The New Mexico Supreme Court originally granted certiorari on the case, but later quashed certiorari. This means the Court of Appeals version of the case is the current interpretation of New Mexico's law governing omitted spouses.

> **Practical Tip:**
> If a dispute arises over omitted spouses' or children's shares, only the district court has jurisdiction to resolve the dispute.

10.6 Collection of Decedent's Final Paycheck

The surviving spouse of a decedent may, without a probate proceeding, collect decedent's final paycheck pursuant to Sections 45-3-1301 and 45-3-1302.

10.7 Creditors' Claims and Demands for Notice

Probate courts cannot accept a demand for notice unless a probate proceeding has already been opened with our court. If a probate has not been opened, the demand must be filed in the district court. Section 45-3-204.

The demand for notice must contain:

- The name of the decedent.
- The nature of the demandant's interest in the estate.
- The address of the demandant or his/her attorney.

Once the court receives a demand for notice, the court is required to mail a copy of the demand to the personal representative of the estate.

Once the demand for notice is filed, "no order or filing to which the demand relates shall be made or accepted without notice" to the demandant or his/her attorney. Absence of such notice does not invalidate any order granted in such a hearing or any filing, but the person granted the order or making such a filing may be held liable for any damages to the demandant.

While the statute does not appear to require the court to provide these copies to the demandant, it is good practice for the court to do so.

Who Pays for Copies? Probate courts have a duty to be consistent in their policy regarding fees for copies (courts can't charge one person for copies, but not another), so courts should ask all people requesting the records to pay for them. Section 34-7-15 authorizes specific fees for clerks of probate courts. However, there are some prohibitions against charging other governmental entities for copies. In general see the Inspection of Public Records Act, Section 14-20-1, et. seq., which is discussed in more detail in Chapter 6.

What are Courts Required to Give to the Public? Since court files are public records, courts are required to provide anyone copies of anything they want from the files. If the demand relates to specific filings, they may not care about everything filed. Often, someone demanding copies of records wants things like the inventory. Since inventories often are not filed with the probate court, the court can tell the person requesting this information to contact the personal representative or his/her attorney.

Creditors' Claims Generally. Although it is not the judge's job to supervise personal representatives in properly performing their duties, it is important to study and understand the statutes governing creditors' claims. *See generally* Sections 45-3-801 through 45-3-816. Creditor's claims can be debts incurred before or after the decedent's death. Credit cards, utility bills, medical bills, funeral expenses, taxes, and more qualify as debts. Creditors are the persons or institutions to whom decedent's debts are owed. Creditors file claims against the decedent's estate. For claims arising before a decedent's death, creditors have a one-year time period to make claims. Section 45-3-803A(1).

Section 45-3-801 requires personal representatives, within three months of their appointment, to give written notice to known and reasonably ascertainable creditors. The creditor has two months to present a claim, either to the personal representative or to the court. Section 45-3-804(A). The personal representative has sixty days to act on the claim, allowing or disallowing it. Section 45-3-806(A). **If the personal representative does not respond to a claim against the estate within sixty days, the claim is deemed allowed.**

Important Note:
Under the Inspection of Public Records Act, Section 14-2-8E, if the probate court receives a request for records that belong to another court (i.e., district court), the probate court has an affirmative responsibility to forward the request to the proper custodian, if known, and notify the requestor, or if the court is unable to determine the proper custodian, to inform the requestor.

For example, the probate court may receive a claim against the estate of a decedent, but no case has been filed in the probate court for that decedent. The court should return the creditor's claim to the creditor with a signed notification "No probate filed as of _____ (x date)." Or, if the probate court knows that the claim should be filed in an existing district court case, the probate court should forward the claim to the district court clerk. The court staff may want to check the district court case lookup site before returning a claim. The case lookup function is at https://caselookup.nmcourts.gov/caselookup/app.

Probate courts cannot hold evidentiary hearings for creditor's disputes. If a personal representative disallows a creditor's claim, the creditor can file a petition for allowance in the district court within sixty days after the mailing of the notice of disallowance. Section 45-3-806. Some district judges will just resolve the creditor's dispute, and a copy of any court order of resolution should be placed in the probate court case file. The probate court would then keep jurisdiction over the rest of the case. Other district courts may order the probate court to transfer the case to the district court. The district court would then have jurisdiction over both the creditor's claim and the rest of the case.

Claims must be paid by the personal representative in a certain order. *See* Section 45-3-805. Section 45-3-803(A)(1) generally mandates that all creditors' claims are barred against the estate unless presented within one year following the decedent's death. Thus, if a probate is not opened until one year after decedent dies, creditors would be out of luck. Personal representatives need to be aware that the court does not make these determinations. It is the personal representative's duty to check to see if there are any claims against the estate, evaluate the validity of all claims against the estate, and to respond in a timely manner. Failure to do so is a breach of the personal representative's fiduciary duty. *See* Section 45-3-703A.

Practical Tip:
New Mexico law allows creditors to receive payment not just from estate assets, but also from certain assets that passed outside of probate, such as transfer on death deeds and trusts. *See* Sections 45-6-401(J) and Section 46A-5-505A(3).

Certain assets of a decedent are exempt from creditors' claims. For example, Section 42-10-5 exempts most life insurance proceeds from creditors' claims. *See also* Sections 42-10-1 through 42-10-13.

10.7.1 Estate Recovery Law in New Mexico

Federal law requires every state to enact an estate recovery law that allows each state to recover certain benefits paid on behalf of an individual for services rendered after the recipient reaches age 55. New Mexico's Human Services Department (HSD) may be a creditor of a decedent's estate if the state paid certain benefits on behalf of the decedent prior to death. If a person has spent down all of his or her resources, the state could not recover anything. New Mexico's estate recovery laws are contained in Sections 27-2A-1 through 27-2A-9.

Estate recovery rules apply to recipients who were fifty-five (55) years of age or older when medical assistance payments were made on their behalf for nursing facilities services, home and community based services, and/or related hospital and prescription drug services. Recovery from a recipient's estate will be made only after the death of the recipient's surviving spouse, if any, and only at a time that the recipient does not have surviving child(ren) who are less than twenty-one years of age or blind or disabled.

Under the estate recovery law, after the recipient of benefits dies, the state could recover monies paid on behalf of the individual who received benefits by filing a claim in probate, selling the home, or liquidating other assets. Certain undue hardship exceptions also exist. New Mexico's law allows recovery from probate estate assets. Real property that passed subject to a Transfer on Death Deed and other property held in joint tenancy or with "payable on death" or "transfer on death" beneficiaries may also be subject to estate recovery laws in an involuntary probate.

HSD may be a creditor, entitled to be given notice of the probate by the personal representative and an opportunity to file a claim against the decedent's estate. HSD might ask to be appointed personal representative. It is unlikely that HSD would have the highest priority to be appointed personal representative, so a formal proceeding in the district court would probably need to be filed. *See* Section 45-3-203E.

The probate court's involvement in cases with estate recovery issues is very limited. Filing a claim from HSD in the court file is the most likely involvement the court or staff will have. The probate judge cannot appoint HSD as personal representative if it does not have highest priority or unless all those with higher priority consent in writing. If issues arise that are outside of the probate judge's jurisdiction, the judge should transfer the case to the district court for a formal proceeding.

10.8 Trusts

The New Mexico legislature passed the Uniform Trust Code (UTC), which governs trust documents in New Mexico. Sections 46A-1-101 through 46A-11-1105. Only the district court has jurisdiction over disputed trust matters. Probate judges can accept probate cases involving pourover wills, discussed in Chapter 2, when there is no dispute. Valid pourover wills should be admitted to probate using the same procedure as for other wills.

The UTC contains many provisions about creating and managing a trust, as well as provisions regarding trustees' duties and liabilities. The UTC refers to the person making the trust as the "settlor."

Trusts are legal documents that set out provisions for the management of property and for the distribution of property upon someone's death. A person (who may also be called a trustor or grantor) creates a trust, transfers assets into the trust, and then may choose to manage the trust.

The manager of the trust is called the trustee. If the settlor serves as the initial trustee and later becomes incapacitated, a successor trustee manages the trust. Upon the settlor's death, assets remaining in the trust pass to beneficiaries named in the trust document. Beneficiaries can be spouses, children, grandchildren, pets, charities, or other entities or people.

A revocable living trust (sometimes called an inter vivos trust) is created during one's lifetime. Trust income and principal can be used for the settlor's benefit during the settlor's lifetime, then passed to designated beneficiaries after the settlor dies.

The settlor creates a written revocable living trust by signing a trust document (usually signed once as settlor and once as trustee) in the presence of a notary public, who then notarizes the trust document.

Once a trust is created, the settlor or the settlor's attorney must transfer assets into the trust. Legal title to transferred assets is held in the name of the trustee of the trust, so no probate is necessary when the settlor dies. The trustee (who could be the settlor, a bank or trust company, a friend, or a relative) manages the trust assets for the benefit of a beneficiary or beneficiaries (who could be the settlor during the settlor's lifetime, then the children of the settlor, etc.).

The living trust is established and becomes effective during the lifetime of the settlor. Revocable living trusts may be amended at any time and can be terminated at any time by the settlor, as long as the settlor is mentally competent.

The trust remains in effect when the settlor dies, and the settlor's assets are then distributed according to the terms of the trust. If more than one settlor has created a joint trust, the surviving settlor could change the trust unless the express provisions of the trust state otherwise. After both settlors died, the trust could not be changed unless all beneficiaries consented.

Only the district courts have jurisdiction to resolve disputes involving trusts or problems with the administration of trusts. Probate judges' involvement with trusts is limited to:

1. Admitting a pourover will into probate. Usually this occurs because the settlor neglected to transfer an asset into the name of the trustee of the trust.
2. Admitting a will that contains a testamentary trust, which becomes effective upon the death of the testator.

Probate judges should not give legal advice about whether or not a trust is better than or preferable to a will. Unless judges are also attorneys licensed in New Mexico, they cannot prepare trusts or other legal documents for family members, friends, neighbors or others.

10.9 Cremation Law

Since 1993 New Mexico has had a law that allows an individual to authorize his or her own cremation in a will or a separate written statement either signed by the individual and notarized or signed by the individual and two witnesses. Funeral homes, crematories and others are immune from liability for relying on the statement. If a person has put his or her wishes in the proper written form, funeral homes and others cannot require next of kin to sign permission for the cremation. Although the law clearly states that the permission of next of kin is not required if a valid cremation statement exists, some funeral establishments still will not honor cremation statements. This is a clear violation of the law.

If a person does not leave written instructions, but still wishes to be cremated, the law allows a decedent's next of kin to give permission. If a decedent is married, his or her spouse is the next of kin. If a decedent has no spouse, a majority of the decedent's surviving adult children must sign the authorization form. If a decedent has no spouse or children, a majority of the decedent's surviving siblings must sign. If a decedent has no next of kin, a close friend who is familiar with the decedent's wishes may sign permission for the cremation.

If a decedent left no written instructions regarding the disposition of the decedent's remains, died while serving in any branch of the United States armed forces, the United States reserve forces or the national guard and completed a United States department of defense record of emergency data form or its successor form, the person authorized by the decedent to determine the means of disposition on a United States department of defense record of emergency data form shall determine the means of disposition, not to be limited to cremation. Section 24-12A-2B.

The cremation law appears in two sections of New Mexico's laws, Sections 24-12A-1 through 3 and Section 61-32-19, which is part of the Funeral Services Act. Although Section 61-32-19 main statute says "Repealed effective July 1, 2012," the 2012 Cumulative Supplement extends the repeal date to July 1, 2018.

> **Practical Tip:**
> Although New Mexico law allows a person to leave cremation or burial instructions in a will, the reality is that often the will is not found or reviewed until after the funeral, cremation, or burial. Having a separate written statement of one's wishes should help ensure that one's wishes are followed. A person could have instructions in both a will and a separate statement; in that instance, make sure the instructions are identical to avoid future problems!

10.10 Wrongful Death Claims

On occasion a probate judge will receive a probate case asking for the appointment of a personal representative for the sole purpose of bringing a wrongful death action on behalf of a decedent. Judges should be aware that the term "personal representative" as used in the Wrongful Death Act is different than a "personal representative" appointed under the Uniform Probate Code. Further, the law provides that wrongful death proceeds are not part of the probate estate.

Section 41-2-3 of the Wrongful Death Act provides:

> Every action mentioned in Section 41-2-1 NMSA 1978 shall be brought by and in the name of the personal representative of the deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they deem fair and just, taking into consideration the pecuniary injury resulting from the death to the surviving party entitled to the judgment, or any interest in the judgment, recovered in such action and also having regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased; provided the decedent has left a spouse, child, father, mother, brother, sister or child or children of the deceased child, as defined in the New Mexico Probate Code [Chapter 45 NMSA 1978], but shall be distributed as follows:
> A. if there is a surviving spouse and no child, then to the spouse;
> B. if there is a surviving spouse and a child or grandchild, then one-half to the surviving spouse and the remaining one-half to the children and grandchildren, the grandchildren taking by right of representation;
> C. if there is no husband or wife, but a child or grandchild, then to such child and grandchild by right of representation;
> D. if the deceased is a minor, childless and unmarried, then to the father and mother who shall have an equal interest in the judgment, or if either of them is dead, then to the survivor;
> E. if there is no father, mother, husband, wife, child or grandchild, then to a surviving brother or sister if there are any; and
> F. if there is no kindred as named in Subsections A through E of this section, then the proceeds of the judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons.

The case *In the Matter of the Estate of Sumler* 133 N.M. 319 (Ct. App.2002) has caused further confusion on this issue. *Sumler* states, "In view of our holding that appointment as the personal representative of Kirsten's estate [appointed in a probate proceeding] is neither necessary nor sufficient authority for Appellants to serve as Section 41-2-3 personal representatives in prosecuting an action for her wrongful death, we conclude that this appeal is moot to the extent it seeks review of the district court's order appointing Father as personal representative of Kirsten's estate."

Some attorneys ignore the *Sumler* case and continue to seek appointment of a personal representative in the probate court. Others ask the district court to appoint a personal

representative as part of the wrongful death action. Wrongful death cases are filed in the district court as *civil* cases, not *probate* cases. In that instance, a party can ask for a personal representative to be appointed for the purpose of bringing a wrongful death action.

The bottom line is that there is no provision in the Uniform Probate Code for a limited appointment of a personal representative. Personal representatives appointed under the Uniform Probate Code in either the probate or district court must meet all of their duties to give notice, prepare inventories, notify creditors, etc. even if their sole desire is to conduct discovery of medical records for a possible wrongful death action. If an attorney insists that a probate judge can appoint a personal representative with limited powers to handle only a wrongful death claim, ask that attorney to provide the section of the Uniform Probate Code that permits this. There isn't one!

10.11 Notarial Acts and Oaths

Initial probate applications, acceptances to serve as personal representative, and the verified closing statements must be signed in the presence of a notary public. Wills may also be notarized, although this is not required.

Probate judges may also administer oaths. *See also* Section 14-13-3, which allows clerks of the probate courts to administer oaths. Probate judges are occasionally asked to administer an oath to a personal representative who has opened a probate in another state but lives in New Mexico. The judge may receive a letter and packet from a court outside of New Mexico. The letter may include a "Commission" or other authorization to the probate judge to administer an oath to a personal representative or administrator who was appointed in the other state's court. The other state's law may require the personal representative to personally appear to take the oath of office. But instead of requiring the personal representative to travel, for example, to Pennsylvania, the Pennsylvania court empowers a New Mexico judge to administer the oath locally. The judge, or clerk of the court, if allowed, would make an appointment with the personal representative to appear at the probate court to take the oath.

The other court will usually provide the probate judge with instructions on returning the paperwork to that court. The **court**, not the personal representative, must return the completed oath, including court seal, to the out-of-state court. Follow the instructions in the cover letter carefully. Before administering the oath, check the person's photo identification. The judge should keep a copy of the oath paperwork for his or her records.

Probate judges or probate clerks should not notarize or administer oaths for probate cases filed in their court, because this would be considered a conflict of interest. Although the Uniform Law on Notarial Acts allows a judge, clerk or deputy clerk of any court of this state to perform notarial acts, caution and restraint should be exercised when using the court seal. For additional guidance about notarial acts within New Mexico, *see* Sections 14-12A-1 through 14-12A-26 and Section 14-14-3. The definitions contained in Section 14-12A-2 are particularly helpful. For judges with limited access to the multiple volumes of New Mexico Statutes Annotated (NMSA), remember that all New Mexico statutes and rules are available online for free at:

http://www.nmonesource.com/nmpublic/gateway.dll/?f=templates&fn=default.htm Click in upper left corner "+ Statutes, Rules, Const." to drop down a menu.

The most important job of a notary public is to verify that the person signing the document is who they claim to be and personally signed the document in the notary's presence. The person signs the document, the notary signs the notarial certificate, and then the notary either seals an impression on the document or stamps it with a rubber stamp approved by the Secretary of State. From a practical standpoint, an inked rubber stamp photocopies much more easily than a seal impression, (but is much harder to identify as an original document). Some office supply stores have round ink stamps that notaries (or the court) can apply over a seal to make seal show up in a photocopy.

A person who is not personally known to the notary public must provide satisfactory evidence of identity, such as a driver's license or other photo ID. It is also the notary's responsibility to decide whether a person is signing willingly and seems competent to sign.

To make sure that notaries properly perform their duties, New Mexico's law requires a $10,000 surety bond for all notaries. Section 14-12A-9. A person may not become a notary until an oath of office and the bond have been provided and the secretary of state approves the oath and bond. Notaries should never notarize a document that was not signed in their presence. Under the law, those who violate this requirement can be convicted and fined up to $1,000, or imprisoned for up to six months, or both.

In New Mexico notaries may perform the following notarial acts:

- Acknowledgments.
- Oaths and affirmations.
- Jurats (defined in Section 14-12A-2(F).
- Copy certifications.
- Other acts allowed by law.

New Mexico notaries may **not** perform marriages.

Notaries public shall:

- Be New Mexico residents.
- Be eighteen or older.
- Read and write English.
- Have no felony convictions.
- Not have had a notary public commission revoked during the past five years.

The law governing notaries contains detailed provisions about their duties and obligations. Although the law does not require it, keeping a journal of all notarial acts, along with the date, title of the document, and names of the people whose signatures were notarized is wise.

The law also sets fees that notaries can charge. A notary can charge a maximum fee of $5.00 for each acknowledgment, oath, or jurat. If a notary charges more than $5.00 per seal or stamp, the notary is probably unaware of the laws that regulate fees. Some notaries charge no fee, especially if they work at businesses that provide free notary services to customers.

The Secretary of State oversees notary appointments, which expire after four years. The application fee is $20. Information about notaries is available on the Secretary of State's Office website at http://www.sos.state.nm.us/Business_Services/Notary_Division.aspx. For more information or to obtain a pamphlet about notary requirements, call the Secretary of State's office at 505-827-3600 (Santa Fe) or toll-free at 1-800-477-3632.

The laws governing notaries can be found at Sections 14-12A-1 through 26. Laws about acknowledgments and oaths are found at Sections 14-13-1 through 25. The Uniform Law on Notarial Acts is found at Sections 14-14-1 through 11.

10.12 Missing Heirs and Unclaimed Property

Sometimes an attorney or personal representative searches diligently for an heir or devisee and is unable to locate them. For example, suppose a decedent has five children, one of whom cannot be found. Many people think that the other four children end up sharing the missing child's share of the estate. They are incorrect.

Section 45-3-914 of New Mexico's Uniform Probate Code states, "If an heir, devisee or claimant cannot be found, the personal representative shall distribute the share of the missing person to his conservator, if any. Otherwise, the personal representative shall sell the share of the missing person and distribute the proceeds to the state treasurer as prescribed by the Uniform Unclaimed Property Act [UUPA]."

If a court has not declared a missing person dead or appointed a conservator for him or her, then UUPA applies. UUPA only covers intangible property, such as bank accounts, stocks, insurance policies, and annuities, and intangible property that may be contained within a safe deposit box. UUPA does not allow the state to accept real property, guns not found in safe deposit boxes, vehicles, animals, boats and other objects. The contents of safe deposit boxes are sorted to dispose of valueless objects, and the more valuable objects may later be auctioned and converted to cash.

New Mexico's taxation and revenue department is charged with receiving and managing unclaimed property. Property is presumed abandoned if it is unclaimed for a certain amount of time. These time periods vary from one to fifteen years depending on the type of property. For example, the time period for:

- Utility deposits, one year
- Certain IRAs, three years.
- CDs and stocks, five years, in general.
- Traveler's checks, fifteen years after issuance.
- Money orders, seven years after issuance.

- Contents of safe deposit box, five years after expiration of rental period of box.

The holder of abandoned property must prepare reports and publish notices about the abandoned property. After the specified time periods have elapsed, the holder of the property must pay, deliver or arrange the payment or delivery of unclaimed property to the taxation and revenue department.

Upon payment or delivery of property, the state assumes custody and responsibility for the safekeeping of the property. Taxation and revenue must deposit the funds as set out in the law, reserving a certain amount for claims and keeping records of the property received.

If a person finds out that the state is holding their property, the person can file a claim with the taxation and revenue department. Once the department verifies the claimant's identity and right to the property, the department will allow the claim and must pay it within 30 days.

UUPA does not specifically address inheritances, but does address amounts distributable from trusts or custodial funds. Since the probate code directs missing heirs' shares to be governed by UUPA, that is the route to take unless a conservator has been appointed for the missing person.

People may wonder why the probate code directs a missing recipient's share to be held by a conservator or the state instead of being distributed to the decedent's other heirs. One reason may be that if the law allowed other heirs to split a missing person's share, the heirs might withhold information about a person's whereabouts to gain a larger share of the estate. Another is that the state is the only entity that has the ability to preserve the property for the heir indefinitely without cost to the estate or the heir. Entrusting the missing person's share to a neutral agency ensures that the share will be available if the person is ever located.

A court proceeding is usually not necessary to claim unclaimed property. New Mexico's Tax and Revenue Department, Unclaimed Property Division, which oversees UUPA, may release unclaimed property to a claimant who uses the division's own administrative claims procedure. Or the division may accept a small estate affidavit (discussed below) to claim property on behalf of a decedent if the claimant provides substantive entitlement to funds under applicable heirship laws and a copy of the owner's death certificate if the circumstance is such that a diligent personal representative has discovered some unclaimed property when searching for other assets of the estate, In this circumstance, the small estate affidavit may be accepted on a case-by-case basis. The Department usually requires that its own administrative claims procedure be used if the claim is the only substantial asset of the estate, or if it appears that a probate has been opened to "end run" the Department's claim procedures.

The Unclaimed Property Division generally accepts what a claimant would provide to the probate court to claim the money or other property under UUPA. The division looks for a documented chain of title. If there is a will, a copy of the will should be provided. If there is no will, the division follows the intestacy laws in effect in the appropriate jurisdiction at the time of death as much as possible. The claimant should provide an affidavit that he or she knows of no later wills or codicils. The claimant must also show why he or she has priority to claim the unclaimed property of the decedent. If the distribution is made on a generational basis, i.e., a will

leaves to John Doe I and then John Doe I dies after the decedent, but before getting a distribution, the claimant should expect to describe who would take. For example, a claimant could state, "John Doe I was not married, was a widower, and left no will. He had left five children, Rebecca, Michael, Tommy, Gilbert and Grace and to my knowledge, no others. I am Rebecca."

The claimant must prove his or her identity, including official birth certificates if possible. The longer it has been since the property is unclaimed, the more difficult it may be to prove a right to claim the property. New Mexico's Unclaimed Property Division may adjust what documents of proof it requires and the supporting affidavit to account for the circumstances of each case.

As described above, the division will generally honor a probate proceeding if it appears that the unclaimed property is ancillary to the ongoing probate. For example, sometimes a personal representative, as part of a probate, will check with New Mexico's Unclaimed Property Division and find some. If that appears to be the case, the division will generally go along with processing the claim through the probate proceeding. If the single or most substantial asset is unclaimed property, the division will require the personal representative to go through the division's own administrative process to make sure the correct people receive the unclaimed property and to help prevent fraud. The Department will require complete compliance with its administrative claims procedure if the probate appears to be opened as a means to avoid the Department's required process.

Accordingly, the division does not honor claims made by personal representatives in their capacity years after the fact. The reason for this is that an heir-finder is often behind the claim and attempting to charge a finder's fee against the other heirs who did not sign the heir-finder contract. The division may be willing to deal with a single family representative, who undertakes to distribute claim forms to other claimants and to process the claim on behalf of other relatives.

For more information on UUPA or to search for names of people for whom the state is holding unclaimed property, visit http://ec3.state.nm.us/ucp/ or missingmoney.com. New Mexico's Tax and Revenue Department's Unclaimed Property Division can be reached by telephone at (505) 827-0762 or stephanie.dennis@state.nm.us.

Practical Tip:
Probate judges may encounter possible heirs to unclaimed property held by the state of New Mexico. "Heir finders" who charge a fee may have informed the heir about potential unclaimed property. It is permissible for the judge to give the heir contact information to the state's Unclaimed Property Division so that the heir can contact the division directly and not pay a fee for services that are free.

10.12.1 Federal Letter Forwarding Services

Although it is not a probate judge's job to help locate a missing heir, it is good for judges to know about the process. If someone has a person's social security number, the Internal Revenue

Service and Social Security Administration can forward notice of an inheritance to the recipient at the last address on record.

The Social Security Administration (SSA) or Internal Revenue Service (IRS) will not give someone's address without his or her permission. But both agencies have a "letter forwarding service" that can be used to attempt to contact a missing person. I used the IRS's service long ago to successfully locate two missing heirs.

These agencies will help in limited circumstances that do not interfere with their regular business. The requestor must give a good reason to forward the letter, such as a death or serious illness in the missing person's immediate family, or a large amount of money that is due the missing person.

SSA does not charge to forward letters with a humanitarian purpose. SSA charges a non-refundable $35 fee to cover costs when the letter is informing the missing person about money or property due him or her.

SSA reviews each letter that they forward to ensure that it will not embarrass the missing person if read by a third party. Letters sent for forwarding should be in a plain, unstamped, unsealed envelope that only shows the missing person's name.

SSA needs the missing person's social security number or identifying information to help find the SSA number. Identifying information would include the person's date and place of birth, the father's name, and the mother's full birth name.

Requests to SSA must be in writing. Include the missing person's name and identifying information; the reason for wanting to contact the missing person; the last time the person was seen; and information about other attempts to contact the person.

Mail requests to Social Security Administration Letter Forwarding, P.O. Box 33022, Baltimore, MD 21290-3022. For questions about SSA's letter forwarding service, call the toll-free number, 1-800-772-1213 or visit the website at http://www.socialsecurity.gov/foia/html/ltrfwding.htm.

The IRS will help employers, state agencies, commercial locator services, individuals, attorneys, estate administrators, or others who directly control assets to try to locate a missing person, while safeguarding the privacy rights of the taxpayer who is sought.

The IRS's Letter-Forwarding Program helps individuals who have the social security numbers of the person they wish to contact, but whose address or whereabouts currently are unknown to the inquirer.

For humanitarian purposes, which include financial entitlement, the IRS will search its database for a recent address and forward the inquirer's letter to the missing person. Like the SSA, the IRS needs a good reason to cooperate, such as a matter of life and death and entitlements to assets. The IRS will not help locate a party to pending litigation, for service of process, or for genealogical searches.

IRS employees may screen letters submitted for forwarding to make sure they meet one of its purposes. The IRS may also charge a fee for its letter forwarding service, but does not charge for all searches.

For confidentiality reasons, the SSA or IRS will not inform the inquirer about the results of any searches. Letters intended for individuals for whom the IRS has no current records and letters forwarded by IRS and then returned as undeliverable are destroyed without informing the inquirer of the action taken.

Requests for letter forwarding assistance from the IRS should be directed to the Disclosure Scanning Unit in Chamblee, GA, at the following address:

Internal Revenue Service
Disclosure Scanning Operation —
Stop 93A
Chamblee GA 30341

The Disclosure Scanning Unit will handle these requests as its workload permits. There is no charge for this service, except for high volume requests. Revenue Procedure 2012-35 contains details and is available online at http://www.irs.gov/irb/2012-37_IRB/ar06.html.

10.13 Powers of Attorney

A financial power of attorney allows the maker, called the principal, to appoint an agent (also called an "attorney in fact") to make business decisions on the principal's behalf. Principals must be mentally competent to create a power of attorney. Financial powers of attorney should be signed in the presence of a notary public, who then notarizes the document. Health care powers of attorney authorize an agent to make personal and health care decisions on behalf of a principal.

New Mexico law does not require the agent to be a New Mexico resident. Appointing a trustworthy agent is vital, however.

A power of attorney may become effective immediately or it can "spring" into action only if the principal becomes incapacitated. To remain in effect if the principal becomes incapacitated, a power of attorney must contain specific language of "durability."

New Mexico has a "do it yourself" power of attorney form, but many attorneys use their own form. New Mexico law generally recognizes powers of attorney made in other states. Some financial institutions will not honor a power of attorney; some prefer that the person use the institution's in-house power of attorney form. Showing the power of attorney to a bank, stockbroker, insurance company, or other company before the agent must use the power of attorney could prevent problems later.

Usually powers of attorney do not need to be recorded. If, however, the agent uses the power of attorney to handle real estate transactions, the power of attorney must be recorded in the office of the county clerk where the real estate is located.

The Internal Revenue Service (IRS) prefers its own power of attorney Form 2848 for taxes. IRS Forms are available free by calling 1-800-829-3676. The Social Security Administration requires a representative payee to be appointed to handle benefit payments.

All powers of attorney end at the principal's death and should not be used to liquidate bank accounts or other assets of decedent after death. The decedent's will or trust or laws of intestate succession would control the disposition of decedent's property after death, not a power of attorney.

Probate judges usually will encounter powers of attorney only in the context of consents. If an heir or other person who has priority to serve as personal representative of an estate is unable to serve due to incapacity, the agent can sign a consent on behalf of the incapacitated person. Including a copy of the power of attorney in the probate court file will show that the agent had authority to sign on behalf of the heir or devisee.

New Mexico's Uniform Power of Attorney Act is located in Sections 45-5B-101 through 45-5B-403. A statutory form for a financial power of attorney is included in Section 45-5B-301. New Mexico's Uniform Health Care Decisions Act is located in Sections 24-7A-1 through 18. A statutory form for an "Optional Advance Health-Care Directive" is included in Section 24-7A-4.

10.14 Authenticated v. Certified Copies

A**uthentication** in New Mexico means certified or exemplified, Section 45-1-201(A)(3). Copies certified by a court to be true and correct are considered "authenticated" under New Mexico's current law. In some states, however, authenticated copies are not the same as certified copies. For example, a court from another state may require an authenticated copy of a will from a case filed in the probate court. In that other state, authentication may require a triple certification. Only the county clerk and court, not attorneys or members of the public, can attest that documents are authenticated copies.

Practical Tip:

Although New Mexico probate courts can accept certified copies as authenticated copies (certification and authentication now appear to be the same thing for purposes of the Uniform Probate Code), out-of-state courts may require authenticated copies of documents from the probate court file. If an out-of-state court requests authenticated copies, the probate judge may need to call the out-of-state court to ask what formality is required. Because another state may require something more than certified copies, sample authentication forms are included below.

For authenticated copies issued by the probate court, the county clerk first certifies that the copies attached are true and correct copies of the documents on file with the court. The probate judge then certifies that the county clerk has the authority to act in his/her capacity. The county clerk then certifies that the probate judge has the authority to act in his/her capacity. Some states call this an **Exemplification or Exemplified Copy.** A sample authentication form follows.

SAMPLE AUTHENTICATION FORM

STATE OF NEW MEXICO)

)ss.

COUNTY OF _____)

I, _____, County Clerk and Ex-Officio Clerk of the Probate Court of the State of New Mexico, within and for the County of _____, do hereby certify the following to be a true, correct and complete copy of (insert name and # of Estate and list of pleadings attached (or state that it is a complete copy of the file starting with 1st document filed on xx date and ending with last document, filed on xx date_____

_____

_____

_____

as the same remains on file and of record in my said office.

IN WITNESS WHEREOF, I have set my hand and affixed the seal of said Court this _____ day of _____, 20____.

_____

Signature of _____ County Clerk

(Affix seal here)

UNITED STATES OF AMERICA

STATE OF NEW MEXICO

COUNTY OF _____

I, _____, Judge of the Probate Court of the State of New Mexico, within and for the County of _____, do hereby certify that

____(insert name of County Clerk)_____, whose name is subscribed to the foregoing Certificate of Attestation, now is, and was at the time of the signing and sealing of the same, the County Clerk and Ex-Officio Clerk of the Probate Court of the State of New Mexico, within and for the County of _____, and keeper of the seal and records thereof, duly elected, commissioned and qualified to office; that full faith and credit are and of right ought to be given to (his/her) official acts as such, in all Courts of Record in the United States and elsewhere, and that (his/her) attestation is in due form of law and by the proper officer.

IN WITNESS WHEREOF, I have set my and affixed the seal of said Court at (insert name of City), in said County of _____ and State of New Mexico, this _____ day of _____, 20____.

(affix seal here)

_____
Signature of Judge of the Probate Court of
the State of New Mexico within and for
the County of _____

UNITED STATES OF AMERICA
STATE OF NEW MEXICO
COUNTY OF _____

I, (insert name of county clerk), County Clerk and Ex-Officio Clerk of the Probate Court of the State of New Mexico, within and for the County of _____, do hereby certify that (insert name of probate judge), whose name is subscribed to the foregoing Certificate of Attestation, now is, and was at the time of signing and sealing the same, Judge of the Probate Court of the State of New Mexico, within and for the County of _____, and was duly elected, commissioned and qualified to office; that full faith and credit are and of a right ought to be given to all (his/her) official acts as such, in all Courts of Record in the United States and elsewhere, and that (his/her) attestation is in due form of law and by the proper officer.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at (insert name of City), in said County of _____ and state of New Mexico, this ____ day of _____, 20___.

(Affix seal here) _____

Signature of _____County Clerk

Certified copies may also be requested from the probate court. A party might request a certified copy of a will, application, order or any other document in the court file. Each individual document requires a separate certification, while one authentication could apply to the entire contents of a court file. The statutory authority for the court's issuance of certified copies is Section 45-1-305(A), Records and Certified Copies, which reads:

> A. The clerk of the district court and the clerk of the probate court shall each keep a record for each decedent, protected person or trust involved in any document that may be filed with the clerk's respective court under the Uniform Probate Code including petitions and applications, demands for notices or bonds and orders by the respective court, and responses relating thereto, and shall establish and maintain a system for indexing, filing or recording which is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law, the clerk shall issue certified copies of any probated wills, letters issued to personal representatives or any other record or paper filed or recorded. Certificates relating to probated wills shall indicate whether the decedent was domiciled in New Mexico and whether the probate was formal or informal. Such certificates shall also indicate the names and addresses of any known heirs. Certificates relating to letters shall show the date of appointment.

The certification stamp for Letters looks something like this:

I, _____, County Clerk of _____ County, New Mexico, hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out and remaining in full force and effect, as appears of record in my office.

Dated this ____ day of _____, 20___.

(Signature or name stamp of County Clerk)
_____County Clerk

By: (original signature of Deputy Clerk)_____
Deputy Clerk

10.15 Small Estate Affidavits

Estates consisting of personal property valued at $50,000 or less may be able to use a "Collection of Personal Property Affidavit," set out in Sections 45-3-1201 and 45-3-1202. Some financial institutions will not accept the affidavit; then, it may be easier for the person to open a probate.

The affidavit cannot be used to transfer title to real property. The requirements for the affidavit (under Section 45-3-1201) are that:

- The value of the entire (probate) estate, less liens and encumbrances, does not exceed $50,000.00.
- It has been more than 30 days since the person has died.
- No probate is filed or pending in any jurisdiction.
- The person submitting the affidavit is the person entitled to transfer of the asset.

All successors entitled to the property must sign the affidavit in the presence of a notary public. The person or entity that transfers the property based on the affidavit is released from liability as if they had dealt with a duly appointed personal representative of the estate; *see* Sections 45-3-1201 and 1202. Judges can give a copy of these laws to people to give to the financial institution holding the decedent's personal property, but should not participate in persuading the institution to honor the affidavit. If an institution refuses to accept the affidavit, the person entitled to be the decedent's personal representative can file a case with the probate or district court asking to be appointed or file another proceeding to claim the property, *see* Section 45-3-1202.

This affidavit cannot be used if a probate case has been opened in any court. If a case is already open, the personal representative would use the Letters Testamentary or Letters of Administration to claim and pass the decedent's personal property to the rightful successors.

The Motor Vehicles Division has its own version of this form, MVD Form 10011, "Certificate of Transfer without Probate." It can be found at **http://www.mvd.newmexico.gov/forms.aspx.** Click on the "Vehicle Forms" folder, and then the "Transfer, Sale or Gift" folder.
See the next page for a sample affidavit form.

10.15.1 Sample Affidavit Form

STATE OF NEW MEXICO)
) ss.
COUNTY OF _____)

AFFIDAVIT OF SUCCESSOR IN INTEREST TO
_____ (Name of Decedent)

_____, the affiant herein, having been duly sworn, states upon oath:

1. The affiant(s) is/are the successor(s) of _____ (name of decedent), deceased.
2. The value of the entire estate of the decedent, wherever located, less liens and encumbrances, does not exceed $50,000.
3. Thirty days have elapsed since the death of the decedent.
4. No application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction.
5. Pursuant to NMSA Section 45-3-1201 (2012 Cum. Supp.), the affiant(s), as successor(s) of the decedent, is/are entitled to the payment of any sums of money due and owing to the decedent, to the delivery of all tangible personal property belonging to the decedent and in the possession of another, and to the delivery of all instruments evidencing a debt, obligation, stock or chose in action belonging to the decedent.

DATED: _____, 20___.

_____
AFFIANT*

*Each affiant should sign on a separate line and also sign a separate acknowledgement below.

_____, Affiant, being first duly sworn, states on oath that all of the representations in this affidavit are true as far as affiant knows or is informed, and that such affidavit is true, accurate and complete to the best of affiant's knowledge and belief.

_____
AFFIANT*

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 20___ by _____, Affiant.

_____
NOTARY PUBLIC

My Commission Expires:

10.16 Transfer of Homestead Affidavits

Sometimes a home acquired during the marriage as community property was titled only in decedent's name (rather than both spouses' names) or listed both spouses' names, but only as "husband and wife," and not as "joint tenants." Normally if this were the case, the surviving spouse would open a court probate proceeding to transfer the home into his or her name. But when only a community home needs to be probated, New Mexico has a special law that allows the surviving spouse to complete an "affidavit of transfer of title to homestead."

When a husband and wife own a homestead as community property and when either the husband or wife dies intestate or dies testate and by the husband's or wife's will devises the husband's or wife's interest in the homestead to the surviving spouse, the homestead passes to the survivor and no probate or administration is necessary. Section 45-3-1205. Instead the law allows the transfer of title to the homestead to the surviving spouse by an affidavit. The affidavit must be signed by the surviving spouse in the presence of a notary public.

Section 45-3-1205 provides this shortcut transfer of title to the community homestead to the surviving spouse when no probate proceeding is required for any other property or assets. This means that all of decedent's other assets must have passed outside of probate through joint tenancy, payable on death (POD) accounts, transfer on death (TOD) accounts, or named beneficiaries on accounts. Only title to the community homestead needs to pass to the surviving spouse.

If no court proceeding is required for other assets, the transfer of homestead affidavit may be used. If there is no will or if the deceased spouse's will leaves the home to the surviving spouse, the home transfers by using the affidavit instead of a court proceeding. **This affidavit cannot be used to transfer title to real property other than the marital home.** The affidavit **must** be recorded in the county clerk's office where the property is located and must be accompanied by the original will of the decedent, if any, and a copy of the deed to the homestead. A surviving spouse must wait at least **six months** after the death of the spouse to use this affidavit, which must also include statements about the payment of debts and tax.

To use this affidavit:

- the home must be community property;
- the value of the home for property tax purposes cannot exceed $500,000; and
- the home involved must be the principal place of residence of the decedent or surviving spouse.
- at least six months must have elapsed since the death of the decedent spouse.

The affidavit must contain particular language, such as:

- the surviving spouse and deceased spouse were married at the time of death and owned the home as community property;
- except for the home, no probate of the decedent's estate is necessary;

- no one has applied to be personal representative or started a probate proceeding in any court;
- all funeral expenses and other debts have been paid; and
- no federal or state taxes are due.

Additional language, outlined in Section 45-3-1205, must be included as well.

If these requirements are met, clear legal title to the home passes to the surviving spouse without a probate. To complete the transfer of title, the surviving spouse **records** the affidavit, deed, and original will, if any, in the office of the county clerk in the county where the home is located. If a person is unsure about how to prepare and record this affidavit, they should hire an attorney for assistance.

This affidavit helps only husbands and wives who do not have a joint tenancy deed to their community home. If the marital home were the separate property of one spouse, this affidavit could not be used.

Also, the current version of the law defines "homestead" as the principal place of residence of the decedent or surviving spouse or the last principal place of residence if neither the decedent nor the surviving spouse is residing in that residence because of illness or incapacitation and that consists of one or more dwellings together with appurtenant structures, the land underlying both the dwellings and the appurtenant structures and a quantity of land reasonably necessary for parking and other uses that facilitates the use of the dwellings and appurtenant structures, and provided the full value of this property as assessed for property taxation purposes does not exceed five hundred thousand dollars ($500,000).

(See the next page for a sample affidavit form).

10.16.1 Sample Affidavit Form

AFFIDAVIT OF TRANSFER OF HOMESTEAD TO SURVIVING SPOUSE

PURSUANT TO NMSA SECTION 45-3-1205 (2012 Cum. Supp.)

The undersigned, _____, (name of surviving spouse, hereinafter "affiant") being first duly sworn, deposes and says that:

1. Six months have elapsed since the death of _____(name of deceased spouse, hereinafter "decedent") as shown on the death certificate.
2. At the time of death of the decedent, affiant and decedent were married and owned their homestead described as:

   (insert legal description of home here)

   as community property.
3. A copy of the deed with the legal description of the homestead is attached hereto.
4. But for the homestead, the decedent's estate is not subject to any judicial probate proceedings in district court or probate court.
5. No application or petition for appointment of a personal representative or for admittance of a will to probate is pending or has been granted in any jurisdiction.
6. Funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid.
7. The affiant is the surviving spouse of the decedent and is entitled to title to the homestead by intestate succession or by devise (if devised under a valid last will of decedent, the original will is attached to the affidavit).
8. No other person has a right to the interest of the decedent in the described property.
9. No federal or state tax is due on the decedent's estate.
10. The property was the homestead of decedent and affiant as defined in Section 45-3-1205, NMSA 1978, and the full value of the property as assessed for property taxation purposes does not exceed five hundred thousand dollars ($500,000).

The affiant affirms that all statements in the affidavit are true and correct and further acknowledges that any false statement herein may subject affiant to penalties relating to perjury or subornation of perjury.

Dated: _____

_____

Affiant (Print Name Here, Sign on Line Above)

A C K N O W L E D G E M E N T

STATE OF NEW MEXICO)
)ss.
COUNTY OF _____)

This instrument was subscribed, sworn to and acknowledged before me this _____ day of _____, 20____, by _____, Affiant.

_____
NOTARY PUBLIC

My commission expires:

10.17 Out-of-State Personal Representative Shortcut

It is possible that a New Mexico financial institution will not accept Letters Testamentary or Letters of Administration issued to a personal representative appointed in another state. An affidavit from the personal representative may work instead.

Section 45-4-201 allows payment of debt and delivery of **personal property** to a domiciliary foreign personal representative without local administration in limited circumstances. This is similar to the small estate affidavit, but instead of being used by the successors to claim personal property, it is used by a personal representative for a decedent domiciled in another state, but who has personal property in New Mexico. This statute may apply if a personal representative has been appointed in another state.

At any time after the expiration of sixty days from the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession or control of personal property, or of an instrument evidencing a debt, obligation, stock or chose in action belonging to the estate of the nonresident decedent, may pay the debt, deliver the personal property, or the instrument evidencing the debt, obligation, stock or chose in action, to the domiciliary foreign personal representative of the nonresident decedent upon being presented with proof of his appointment and an affidavit made by or on behalf of the representative stating:

A. the date of the death of the nonresident decedent;
B. that no local administration, or application or petition therefor, is pending in this state; and
C. that the domiciliary foreign personal representative is entitled to payment or delivery.

The affidavit containing the above information would be presented to the party holding the personal property. If the institution holding the personal property or instrument of the nonresident decedent releases the property, then the personal representative would not need to file a probate proceeding in New Mexico. **Probate judges should not be involved in preparing an affidavit for a foreign personal representative, but may hand out a copy of the statute as general information about this procedure.**

CHAPTER 11

Weddings Performed by Probate Judges

This chapter covers:

- Who may perform weddings.
- Marriage license requirement.
- Limits on fees for performing weddings.
- Wedding ceremony.
- Certain restrictions or prohibitions on marriages.

11.1 Who May Perform Weddings

The following people may perform weddings:

- Any ordained clergy.
- Authorized representatives of a federally recognized Indian tribe.
- New Mexico judges, justices, and magistrates, including probate judges. *See* Section 40-1-2.

Practical Tip:
Probate judges may perform weddings within their county only.

11.2 Marriage License Required

The following conditions apply for marriage licenses:

- The bride and groom **must** present the probate judge with a properly sealed marriage license issued by the county clerk prior to the ceremony. Section 40-1-14.
- The marriage license need not be from the county where the wedding takes place; it can be from any county. Section 40-1-10.

- Once the license is issued it remains valid until the marriage is performed.
- The county clerk charges a $25.00 fee for each marriage license issued. Section 40-1-11(E).
- Currently, there are no health requirements or blood tests required to obtain a marriage license in New Mexico.

> **Practical Tip:**
> In 2009 the New Mexico county clerks' affiliate issued a policy resolution re: marriage licenses. County clerks' offices will currently issue marriage licenses only if both parties are personally present to obtain the license. Exceptions, with additional requirements, may apply for military personnel and very ill applicants. Although incarcerated individuals have a right to marry, obtaining a license may be more difficult under this policy. Contact the county clerk for details or with questions.

The **Marriage License** is on one side of the document, and it authorizes the judge to perform the marriage ceremony. The county clerk (or the marriage clerk in the county clerk's office) fills out the names of the bride and groom and their city/state of residence on the Marriage License. It is the county clerk's responsibility to verify the identity and age of the applicants. The county clerk then fills out the "WITNESS my hand and seal" part at the bottom of the Marriage License. The bride and groom must present this Marriage License to the judge prior to the ceremony. Marriage licenses do not expire.

On the reverse side of the license is the **Marriage Certificate**. Except for the recording language, it is the judge's job to fill out all information on the Certificate including the day, month and year of the ceremony, city/state where the marriage ceremony occurred, the official's title, names and city/state of the bride and groom (this is the same information from the Marriage License on the reverse side). After the ceremony the bride, groom, two witnesses and judge sign the certificate. The "Recorded this _____ day of_____..." section is filled out by the county clerk's office, which then records the marriage certificate into the public record. The county clerk can issue certified copies of the marriage certificate in case the newlyweds need to provide proof of a name change or wedding to social security, employers, insurance companies, and others.

> **Practical Tip:**
> There is no requirement that the bride take the last name of the groom. It is a personal choice to be made by the couple. The judge should inform the bride that she needs to sign the marriage certificate with the name she wants to be known by. If she wants to change her last name to that of the groom, she should sign her new name on the marriage certificate.

11.3 New Limits on Fees for Performing Weddings

The following rules apply to wedding fees:

When performing a wedding on county property during a judge's regular work hours, state and county rules **prohibit** the judge from taking additional compensation for weddings other than the judge's usual salary.

Under the current Code of Judicial Conduct, a judge cannot even accept a box of candy or gift card for performing a wedding ceremony. No matter where or when the wedding is performed, judges may not accept "any remuneration, including a gratuity" for performing a marriage ceremony. Rule 21-312, commentary [3].

For weddings performed outside of the building and during non-regular work hours, such as weekends, effective January 1, 2012, probate judges may **not** charge a fee for performing weddings. The Code of Judicial Conduct, Rule 21-312, states:

21-312. Compensation for extrajudicial activities.
A. A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. **[This section does NOT apply to weddings; see commentary [3] below.]**
B. Conflicting compensated activities. A judge shall not hold any other paid position, judicial or otherwise, that conflicts with the hours and duties the judge is required to perform for every judicial position. A judge shall devote the number of hours that is required by any judicial position held. In no event shall other paid employment or compensable activity hours be performed simultaneously.
Committee commentary. -
[1] A judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing, and other extrajudicial activities, provided the compensation is reasonable and commensurate with the task performed. The judge should be mindful, however, that judicial duties must take precedence over other activities. See Rule 21-201 NMRA.
[2] Compensation derived from extrajudicial activities may be subject to public reporting. See Rule 21-315 NMRA.
[3] No judge may receive any remuneration, including a gratuity, for performing a marriage ceremony. For reasonable travel expenses, see Rule 21-314 NMRA.

Rule 21-314, Reimbursement of expenses and waivers of fees and charges, states:

A. Unless otherwise prohibited by Rules 21-301 and 21-313A NMRA or other law, a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.
B. Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner, or guest.

C. A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, domestic partner, or guest shall publicly report such acceptance as required by Rule 21-315 NMRA.

> **Practical Tip:**
> Judges should carefully read the current Code of Judicial Conduct, including the committee commentary after each rule, to make sure their conduct does not violate any of the rules. It is the judge's responsibility to know and follow the Code to avoid disciplinary action by the Judicial Standards Commission.

11.4 Ceremony

The following guidelines apply to the wedding ceremony:

- Two competent witnesses, in addition to the probate judge, are required. *See generally*, Sections 40-1-1 through 40-1-20.
- There is no established language for a marriage ceremony, but the ceremony should include the agreement to marry. Marriages can be performed in English or in Spanish (or other language); some judges note on the Marriage Certificate if a wedding was performed in Spanish (or other language) for the benefit of the couple.
- It is the duty of the probate judge to certify the marriages to the county clerk within ninety (90) days from the date of the marriage. Certifying the marriage means filling out the Marriage Certificate discussed above and presenting it to the county clerk. By law the county clerk must record the license **in the county clerk's records in the county that issued the license.** Section 40-1-15. Often the couple does this themselves, but be sure and tell them that recording the certificate is required and that they should have the license recorded before they leave the building. If the wedding is performed offsite, the judge can take the license to the clerk for recording and then call the couple after the county clerk has recorded it.)
- Medical tests are not currently required for issuance of marriage licenses.
- Proxy marriages are allowed in New Mexico (i.e. one party is overseas or incarcerated). Judges may decline to perform a proxy marriage (for example, one party is personally present and one party is "present" by telephone or computer video) if the judge feels uncomfortable with the arrangement.
- New Mexico does not allow common law marriages, but if a couple has a valid common law marriage from another state, New Mexico should honor that marriage.

Practical Tips:
Make sure the parties have a valid marriage license before performing the marriage.

Have the witnesses be at least eighteen (18) to ensure reliability. Although New Mexico's marriage laws do not require witnesses to marriages to be 18, it is probably a good idea. Witnesses do not have to be U.S. citizens, just anyone competent to observe the ceremony and sign the marriage license. If it is important to the couple, more than two witnesses can sign the license in the white spaces around where the "official" witnesses sign or at the top of the marriage certificate.

11.5 Certain Marriages Restricted or Prohibited

The following restrictions on marriage apply:

- Minors between the ages of sixteen and eighteen can marry with the consent of one parent or guardian. The consent should be acknowledged by a notary or judge.
- Minors under the age of sixteen can marry only if authorized by a district judge. A probate judge **cannot** authorize the marriage of a person under age sixteen. Section 40-1-6. If the judge is in doubt about the age of the couple, he or she can ask for proof of age.
- Marriages between certain relatives are absolutely void. *See* Section 40-1-7 for list of specific relatives.

Practical Tips:
Make sure that all blanks on the marriage license are properly filled in before the couple leaves. Although it is not required, keeping a log of the couples' name, the date of the ceremony, and the marriage license number may be a good idea.

Persons authorized to perform marriage ceremonies who violate the provisions governing marriage can be tried and convicted of a misdemeanor and fined or sent to jail. Section 40-1-19.

CHAPTER 12

Glossary

This chapter provides:

- Glossary of terms used in probate court.

"Acceptance/Acceptance of Appointment" is the notarized statement where the applicant agrees to undertake the duties of personal representative of the estate, and abide by the laws of New Mexico. *See* Probate Form 4B-105. Judges must have a notarized Acceptance from the applicant before they can issue the Letters.

"Administration of an Estate" is the process of managing and settling the estate of a deceased person. This usually involves:

a) giving notice of the administration of the estate;
b) collecting the assets of an estate;
c) paying the valid debts of an estate and expenses of administration;
d) paying any taxes owed; and
e) distributing the remainder of the estate to those who are entitled to it.

"Affidavit of Successor in Interest" or **"Small Estate Affidavit"** is a sworn, notarized statement, created pursuant to **Section 45-3-1201**, which is used to collect assets of a small estate ($50,000 or less), without going through the probate process. Go to www.abogadapress.com and click on the link for "legal forms" for a sample affidavit.

"Affidavit of Surviving Spouse" is a sworn, notarized statement created pursuant to Section 45-3-1205, and is used to transfer title of a marital home that is community property, but is held as sole property or as tenants in common, to a surviving spouse without the need for a probate. This affidavit is recorded in the county clerk's office where the property is located, and must be accompanied by the will of the decedent, if any, and a copy of the deed to the subject property. Also known as a **"Homestead Affidavit."**

"Ancillary Proceeding" is one of the methods used to transfer ownership of property located in New Mexico when the decedent was domiciled in another state and a probate or administration proceeding is already open in the state where the decedent was domiciled. This requires the filing of authenticated copies of certain documents from the original probate proceeding along with the paperwork normally required for an informal proceeding, s*ee* Section 45-4-207 (formal ancillary proceeding). *See also* **"Proof of Authority"** for another means of

transferring ownership. If a probate was opened in a formal proceeding in the original jurisdiction, a formal proceeding may also be required in New Mexico.

"Applicant" is the person who makes a written application to the probate court for an informal probate of a will and/or informal appointment of a personal representative, *see* Section 45-1-201(A)(2).

"Application" is the written request to the probate court for an informal probate or appointment. For more information, *see* Section 45-1-201(A)(2), Chapter 4 of this manual and Probate Forms 4B-101 and 4B-102.

"Authenticated" means certified or exemplified. Section 45-1-201(A)(3). Copies certified by a court to be true and correct are considered "authenticated" under New Mexico's current law. Other states may have different requirements for authenticated copies, such as a triple certification. Some states call authentication an **"Exemplification" or "Exemplified Copy."** *See* Chapter 10 for a sample authentication form.

"Beneficiary" is a person who is given a gift by a will (*See* Section 45-1-201(4)) or another governing instrument (*See* Section 45-6-201C.). The probate code and the forms use the word **"Devisee"** when referring to a will. *See* Section 45-1-201(A)(11)).

"Beneficiary Designation" is a designation on an insurance policy, bank account, transfer on death deed, etc. regarding who receives the property after death of the owner. This designation takes precedence over any terms set out in a will. Section 45-1-201(A)(4).

"Bond" is a financial security provided to the court by the personal representative and/or a bonding company to ensure that the personal representative of the estate faithfully does the job of personal representative. A bond is usually not required in an informal proceeding. However, a bond may be required if the will requires it, or if a person with an interest in the estate asks the court to require it and the court orders that a bond be posted. For more information, *see* Sections 45-3-603 to 45-3-606.

"Certification" is an attestation by the court clerk (or deputy clerk) that a copy of a document is a true and correct copy of the document on file with the Court. Certified Letters usually also state that the document remains in full force and effect. Many financial institutions require that a certification be "current" (i.e. within 30-90 days of the issue date depending on the financial institution). *See* Chapter 10 for a sample certification.

"Claim" is a claim against the estate of the decedent, including those for debts of the decedent that arise before or after the death of the decedent, including the last medical bills and the funeral costs. The time period during which a claim can be made against the estate can be shortened from the statutory time limit of one year from the death of the decedent to two (2) months after actual notice or the publication of a Notice to Creditors. Actual notice to known or reasonably ascertainable creditors is required. (*See* Step 3 of Probate Form 4B-012 NMRA for more information) *See also* Probate Form 4B-302 NMRA, Sections 45-1-201(A)(7), 45-3-801, 45-3-802 and 45-3-803. Section 45-3-805 addresses the priority for payment of creditors' claims.

"Claimant" is the person or entity (usually, but not always, a creditor) making a claim against the decedent's estate. *See also* Claim.

"Codicil" is an amendment to a will. The testator must be at least 18 (or an emancipated minor) and of sound mind to make a codicil. To be valid, a codicil must be executed (signed and witnessed) in the same manner as a will. *See generally* Section 45-2-502 and Chapter 2 of this manual.

"Creditor" is a person or entity to whom a debt is owed by the decedent. The decedent's estate is the **"debtor."** Normally, a creditor has one (1) year from the death of the decedent to file a claim against the estate, *see* Section 45-3-803(A)(1). Once a known creditor is given actual notice of the appointment of the personal representative (Probate Form 4B-301), the creditor has two (2) months to file a claim against the estate (Sections 45-3-801(A), 45-3-803(A)(2)). An unknown creditor has two months after the first publication of the Notice to Creditors, (Probate Form 4B-302 NMRA), to file a claim against the estate (Sections 45-3-801(B), 45-3-803(A)(2)).

"Death Certificate" is a document that provides corroborating evidence that the person whose estate is being filed is actually deceased. It also provides evidence of date of death, marital status, and decedent's domicile at death. Because probate records are public record and the death certificate contains protected information, such as social security numbers, it should not be placed in the court file. (*See* Section 45-1-107; also *see* Chapter 4 of this manual.)

"Decedent" is the person who has died and whose will is being probated or whose intestate estate is being administered.

"Deed" is a document that conveys title to real property from one owner to another. *See* Chapter 9.

"Demand for Notice" is a written document filed in the court where the probate has been filed, or in district court of the county where the proceedings would be pending if commenced. The document must state (1) the name of the decedent, (2) the nature of the filing person's interest in the decedent's estate, and (3) that person's address. A personal representative filing an action in probate court is required to ask the district court clerk of that county if any person has filed a demand for notice relating to the decedent's estate. If a demand for notice has been filed with the district court, the personal representative is required to send a copy of everything filed with the court, including every order the judge signs, to the person who has demanded notice. Any interested person can also file a "demand for notice" with the probate court **after** an estate has been filed with the court. After such demand has been filed, no order or filing to which the demand relates shall be made or accepted without notice as prescribed in Section 45-1-401. For more information, *see* Section 45-3-204.

"Descendant" is a decedent's child, grandchild, great-grandchild, etc., with the relationship of parent and child set out in the UPC. For more information, *see* Section 45-1-201(9); *see also* **"Issue"** and **"Heirs,"** and Chapter 4 of this manual.

"Devise," when used as a noun, is a gift of real property (land, ranch, house, etc.) or personal property (other assets) given by a will. When used as a verb, "devise" means to give a gift of real or personal property. For more information, *see* Section 45-1-201(10).

"Devisee" means a person, charity, school, church, or other entity named in a will to receive assets of an estate. Also see **"beneficiary.** For more information, *see* Section 45-1-201(11).

"Disclaimer" is a written statement where an heir or devisee declines to accept an asset of the estate. This statement must be filed with the court in certain circumstances and provided to the personal representative of the estate. If real property is involved, the disclaimer may also need to be filed with the county clerk's office where the property is located. This is generally done for tax purposes. The Uniform Disclaimer of Property Interests Act, Sections 45-2-1101 through 45-2-1116, contains details.

"Distributee" is any person who receives assets from the estate of the decedent, other than a creditor or purchaser. For more information, *see* Section 45-1-201(A)(12).

"Docket" when used as a noun is the court's case files. When used as a verb, docketing is the process of entering the case and subsequent pleadings into the court's case log.

"Docket Fee" is the thirty dollar ($30.00) fee for filing a case with the probate court. This fee is statutory (meaning it is set by state law and cannot be changed by individual probate judges), *see* Section 34-7-14(A). Payment of the docket fee is required before opening the case unless the court determines that the applicant has provided sufficient proof of Poverty and Indigency. See Probate Forms 4B-601 and 4B-602.

"Domicile" is a person's usual and permanent place of abode. Evidence of domicile includes voter registration location, using the address as a permanent address, etc. It is the place the person intends to return to, even if currently residing elsewhere. The death certificate usually indicates where the decedent was domiciled at the time of his/her death. Domicile is important when determining the venue of the case. *See* Section 45-3-201(A) and its annotations, as well as Chapter 1 of this manual.

"Duties of a Personal Representative" are the tasks that a personal representative is required to do under the probate code, as well as any other responsibilities he/she may have to the heirs or devisees of the estate as a "**fiduciary."** *See* Sections 45-3-705 through 45-3-721 and Sections 45-3-306 and 45-3-310.

"Estate" is the property of the decedent that is subject to the New Mexico Uniform Probate Code, Chapter 45 NMSA 1978. For the purposes of probate, an estate generally does not include things that pass automatically to a listed beneficiary, such as land held as joint tenants, life insurance proceeds, payable on death accounts or retirement benefits that have a beneficiary designation. For more information, *see* Section 45-1-201(15). **This is not the same as the taxable or gross estate, which includes all assets owned by the decedent at the time of his or her death for purposes of calculating estate tax liability.**

"*Ex Parte* Communication" is a prohibited communication between the court and one party without the consent of, or notice to, another party who would be adversely affected by the communication. In the interest of impartiality and giving every party the right to be heard, judges are prohibited from permitting or even considering such communications outside of the presences of all parties concerned. (*See* Code of Judicial Conduct Rule 21-209 governing *ex parte* communications and Chapter 8.)

"Executor" is another term for "personal representative."

"Family Allowance" is a $30,000.00 allowance given to a decedent's surviving spouse (or minor or dependent children if no spouse) that is exempt from and has priority over any claims against the estate. *See* Section 45-2-402 and Chapter 10 of this manual.

"Fiduciary" is a person or entity, who acts primarily for another's benefit in matters connected with that duty. A fiduciary is held to the highest degree of good faith in performing his or her duties. A personal representative is a fiduciary. *See* Section 45-1-201(14) for a list of who are considered to be fiduciaries.

"Filing Fee" is the Thirty Dollar ($30.00) fee required for filing a case with the probate court. *See also* **"Docket Fee,"** Section 34-7-14(A).

"Formal Probate" is a court proceeding to probate a will and/or appoint a personal representative of an estate. Formal probates are started by filing a Petition with notice to interested persons required to be given at least 14 days prior to the hearing before a judge for the appointment of the personal representative. Formal probates may **only** be filed in district court and may include determinations of heirship and the validity of wills. May also be called "Formal Testacy" or "Formal Appointment" proceedings. S*ee* Sections 45-3-401 through 45-3-414.

"Gross Estate" is the entire estate of the deceased person, no matter how the assets are titled, and includes the total fair market value of the decedent's assets at the time of death, without any deductions.

"Heirs" are those persons who are entitled to inherit the property of the decedent under the laws of intestate succession. Section 45-1-201(A)(23). This usually includes the surviving spouse, children, and, if any of them are deceased, their heirs. Heirs are always entitled to notice in probate proceedings, even if a will excludes them from inheriting, although they can decline notice by filing a written Waiver of Notice with the court. For information on priority among heirs, *see* Sections 45-2-102 to 45-2-108. *See also* Chapter 4.

"HIPAA" is the Health Insurance Portability and Accounting Act of 1996 and addresses the privacy of medical records. Many hospitals interpret this act to mean that that the privacy of medical records extends beyond a person's death and use HIPAA as a way to deny the heirs of an estate access to a decedent's medical records unless they open a probate to step into the shoes of the deceased person.

“Holographic Will” is a will entirely handwritten document, dated and signed by the testator, but not signed by the required witnesses. Although New Mexico does not recognize holographic wills made in New Mexico, the court may accept a holographic will if it was validly made in a state that allows them. *See* Chapter 2 for details.

"Homestead Affidavit" is an affidavit used to transfer title to a marital home, which is community property, to a surviving spouse without the need for a court proceeding. For more information, *see* Section 45-3-1205 and Chapter 10.

“Informal Appointment” is a court proceeding to appoint a personal representative when the decedent had no valid will. Informal appointment proceedings may be filed in probate court or district court and are started by filing an application. No notice to interested persons and no hearings are required prior to the appointment of the personal representative. S*ee* Sections 45-3-301 through 45-3-311 and Chapter 4 of this Manual.

“Informal Probate” is a court proceeding to probate a will and usually includes a request to informally appoint a personal representative of an estate. Informal probates may be filed in probate court or district court and are started by filing an application. No notice to interested persons and no hearings are required prior to the appointment of the personal representative. S*ee* Sections 45-3-301 through 45-3-311 and Chapter 4 of this manual.

“Inspection of Public Records Act,” also known as IPRA, states that every person has a right to inspect public records of this state. New Mexico’s law is set out in Sections 14-2-1 through 14-2-9. *See also* Section 34-7-20

"Interested Person" includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, a minor protected person or an incapacitated person. Creditors and the state, in certain circumstances, are interested persons. Section 45-1-201(26). After the filing of the initial application, heirs and devisees are “interested persons” entitled to notice regarding the probate proceedings. *See* Section 45-3-705.

"Intestate" means having died:

(a) without a will;
(b) without a valid will; or,
(c) with an incomplete will.

"Issue" is all of a decedent’s descendants, of all generations, with the relationship of parent and child set out in the UPC, of a deceased person. Section 45-1-201(A)(27).

“Jurisdiction” is the authority for a court to act on a matter. Probate courts are courts of "limited jurisdiction," and only have the authority to act over informal probate/appointment proceedings. *See* 45-1-302(C) and Chapter 1.

“Letters” is the document issued by the court, which gives the personal representative the authority to act on behalf of the estate. Letters Testamentary are issued in a testate case;

Letters of Administration are issued in an intestate case. There are also Letters of Special Administration (for the appointment of a Special Administrator, Letters of Successor Personal Representative, etc.). (*See* probate forms 4B-106 and 4B-107.)

"Missing Heir" is an heir who cannot be located. If an heir cannot be found, the personal representative shall distribute the share of the missing person to his conservator, if any. Otherwise, the personal representative shall sell the share of the missing person and distribute the proceeds to the state treasurer as prescribed by the Unclaimed Property Act. (*See* Section 45-3-914 and Chapter 10.)

"Missing Person" means a person whose whereabouts are unknown to the person's custodian or immediate family member. Only the district court has jurisdiction over the estates of missing persons (*See* Section 45-1-302).

"**NMSA**" stands for New Mexico Statutes Annotated, the 'official' name of the laws of our state.

"Notarization" is the attestation by a notary public that a document was signed under oath and that the person whose signature appears on the document is that person. Notaries in New Mexico must be authorized by the Secretary of State to act in this capacity. To notarize is the act of the notary verifying the signer's identity, attesting to the signature, and affixing the notary's signature and seal to the document. *See* Sections 14-14-1 through 14-14-11 for further information on notarial acts. Certain documents filed in a probate case must be notarized before being accepted by the court for filing.

"Notice" or "giving notice" is a written "announcement" to persons entitled to know what has transpired or will transpire in a case. When personal representatives comply with notice requirements, they give interested persons information about what is happening in the case, and protect the estate (and themselves) from claims that proper procedures were not followed. Generally, notice should be sent to:

(a) all the heirs or devisees of an estate;
(b) persons who have or may have an interest in the estate of the decedent;
(c) known creditors
(d) anyone who asks for notice; and,
(e) anyone who has filed a demand for notice.

"Omitted Children" is, for the purpose of the Uniform Probate Code, children who were born or adopted after the execution of the testator's will. *See* Section 45-2-302 and Chapter 10 of this manual.

"Omitted Spouse" is for the purpose of the Uniform Probate Code, a spouse who married the testator after the testator executed his will, *see* Section 45-2- 301. This can also apply to a spouse who is entitled to family and personal property allowances despite provisions in the will to the contrary (*See* annotations to updates for Section 45-2-402 and Chapter 10 of this manual.

"Open Records Act" is the **Inspection of Public Records Act**, Sections 14-2-1 through 14-2-9. Also *see* Section 34-7-17 through 34-7-21 for records that specifically pertain to probate courts.

"Order for Informal Probate of Will/Appointment of Personal Representative" is the document signed by the judge making findings that the requirements of the probate code have been met, entering a will, if any, into probate and/or appointing a personal representative. The order usually also stipulates that Letters be issued "upon qualification and acceptance." **The issuance of the Letters gives the personal representative the authority to act, not the order.** A probate judge may also need to sign orders concerning other matters that arise in the case. (*See* Section 45-303 and 45-3-308; a*lso see* probate forms 4B-103 and 4B-104.)

"***Per Capita***" is one method of determining the distribution of the assets of an estate to the heirs. *See* "(by) Representation" below and Section 45-2-709(B).

"***Per Stirpes***" is one method of determining the distribution of the assets of an estate to the heirs. In *per stirpes* the descendants of a deceased heir or devisee split that person's share. *See* 45-2-709(C).

"Personal Property" is all property that is not land, real estate or real property. Some examples are bank accounts, stocks, bonds, insurance policies, pension plans, jewelry, furniture and motor vehicles.

"Personal Property Allowance" is a $15,000.00 allowance given to a decedent's surviving spouse (or children if no spouse) that is exempt from and has priority over any claims against the estate. (*See* Section 45-2-403, supplement and Chapter 10 of this manual.)

"Personal Representative" is the person appointed by the court to administer the estate of the decedent. The personal representative must give notice of his/her appointment, pay claims of the estate, and then distribute the estate according to the will or to the laws of intestate succession, if there is no will. This person is sometimes called an **"executor/executrix"** or **"administrator."** A personal representative appointed in an informal proceeding generally has the authority to do almost anything the decedent could have done with his/her property during his/her lifetime, *see* Section 45-3-715.

"Personal Representative's Deed" is a deed from the personal representative transferring real property to the person(s) entitled to receive it under a will or the laws of intestate succession or to a person (or entity) that has purchased the property from the estate. The deed must be recorded with the county clerk's office in the county where the property is located. A certified copy of the deed may also be filed with the probate court. *See* Chapter 9 for additional information.

"Pleading" is a legal document filed with the court. Pleadings and papers filed in the court include a caption or heading that identifies the state, county, and name of the court; the names of the parties; and a title describing the type of paperwork being submitted.

"POD" means "payable on death" and is a beneficiary designation for bank accounts, U.S. savings bonds, and other accounts. Upon proof of death, the beneficiary/POD designee should be able to receive these accounts without a probate proceeding, unless the beneficiary/POD designee is "my estate" or the beneficiary has predeceased the owner. *See* Section 45-6-201(H) and Section 45-6-212.

"Power of Attorney" means a writing or other record that grants authority to an agent to act in the place of the principal during the principal's lifetime. A power of attorney terminates upon the death of the person (the principal) who granted the power of attorney. The fact that a person had power of attorney does not give that person priority for appointment as personal representative. *See* Sections 45-5B-101 to 45-5B-403. *See* Section 45-5B-301 for a statutory power of attorney form.

"Practicing Law without a License," also known as the "Unauthorized Practice of Law" is providing legal advice to someone or preparing legal documents or pleadings for them without being an attorney licensed in New Mexico. Court personnel must be careful to make sure they are providing **only** information and not legal advice.

"*Pro Se*" is the Latin phrase that means acting without an attorney or "on one's own."

"Probate" technically is the court procedure by which a will is proved to be valid or invalid. Common usage of this term, however, includes all matters relating to the administration of an estate, including estates with wills and intestate estates.

"Probate Code" is the body of law within the New Mexico statutes that governs the estates of deceased persons. The Probate Code also deals with the administration of trusts and the protection of minors and persons under disability, but probate courts do not have jurisdiction (authority) to act in these matters. The New Mexico Probate Code is based upon the Uniform Probate Code (UPC)--a national model system that is used, at least in part, in 16 states. The New Mexico Uniform Probate Code is Section 45 (Pamphlet 67) of the New Mexico Statutes Annotated. The current version is the 2008 Replacement Pamphlet with a 2012 Cumulative Supplement. Judges should always have the most current edition of the UPC, which is available from the New Mexico Compilation Commission, New Mexico Compilation Commission, PO Box 15549, Santa Fe NM 87592-5549, (505) 827-4821.

"Probate Estate" is that part of a deceased person's estate that is governed by the provisions of the Uniform Probate Code. It does not generally include property held in joint tenancy or assets with named beneficiaries, such as insurance policies, payable on death accounts, etc.

"Proof of Authority" is documentation filed with the court showing that a person has been appointed by a court in another state to act on behalf of the estate of a deceased person. Proof of authority does not involve the opening of a full probate (although the person filing the proof pays the usual filing fee) and does not involve the issuance of Letters. Filing the proof of authority with the probate court gives a personal representative appointed in another state the

authority to act in New Mexico, *see* Section 45-4-204. However, depending on the degree of authority needed, an **Ancillary Proceeding** may be required. *See* Chapter 9.

"Property" includes both real and personal property or any right or interest therein and means anything that may be the subject of ownership. Section 45-1-201(A)(40).

"Real Property" includes land, houses, farms, ranches, leases, oil, gas, mineral, water and timber rights.

"(by) Representation" is the method used by New Mexico's Uniform Probate Code for intestate distribution of the estates of deceased heirs. It involves pooling the shares of deceased heirs on each level of heirship and dividing it into equal shares for each survivor on that level. *See* Sections 45-2-106 and 45-2-709(B) and Section 4.5.1 of Chapter 4 for more detailed information and examples.

"Revoked or Revocation" when used with these forms refers to a will or other document that the decedent canceled during his/her lifetime. If a will is revoked, it has no effect. *See* Section 45-2-507 and Chapter 2 of this manual for more information about revoking wills.

"Safe Deposit Box" is a secure storage compartment at a financial institution where people may store their original wills and other important documents during their lifetime. For regulations concerning accessing safe deposit boxes after a person's death, *see* Sections 58-1-14 (Banking Generally); Section 58-10-109 (Saving & Loan Institutions); Section 58-11A-4 (Leasing of Safe Deposit Facilities) and Chapter 2 of this manual.

"Seal" means a notary seal or stamp, seal of the court, etc., which proves the authenticity of a document.

"Sign" means with present intent to authenticate or adopt a record other than a will: (a) to execute or adopt a tangible symbol; or (b) to attach to or logically associate with the record an electronic symbol, sound or process. Section 45-1-201(A)(46).

"Small Estate Affidavit" is the affidavit used to collect personal property of the decedent when a court proceeding for the transfer of estate assets is not necessary and the total value of the estate is worth less than $50,000.00. Also called **Affidavit of Successor in Interest**, defined in detail above

"Special Administrator" is a person who has been appointed by the court to act in a limited capacity when an appointment is needed immediately. A special administrator who is informally appointed does not have the full powers of a personal representative and cannot distribute estate assets. *See* Sections 45-3-614 through 45-3-618 and Chapter 3 for further information and sample forms.

"Statute of Limitation" is a law that sets a time limit for starting a case. Certain civil claims must be filed within three or four years, depending on the law that governs the claim. In

general, probate cases must be filed no more than three years after a decedent's death (***but see*** Section 45-3-108 for certain exceptions to this three-year limit).

"Successors" means persons, other than creditors, who are entitled to property of a decedent under the decedent's will or the Uniform Probate Code. Section 45-1-201(A)(49).

"Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative. Section 45-1-201(A)(49).

"Testate" means having a valid will. *See* 45-2-502 and Chapter 2 for what constitutes a valid will.

"Testator" is someone making, or who has made, a will, or someone who dies leaving a valid will. Under New Mexico law, "testator" includes an individual of either gender. Section 45-1-201(A)(54). Other states may call a female testator a **"testatrix."** *See* Section 45-2-501 for who may make a will.

"TODD: is a Transfer on Death Deed that grants ownership rights upon the death of grantor. TODDs, to have effect, **must** be recorded with the County Clerk's office during the grantor's lifetime. *See* Section 45-6-401 for statutory requirements and sample form.

"Trust" is an entity set up during a person's lifetime through a written trust agreement. Trust assets must be transferred into the name of the trustee of the trust. If a trust is properly funded, a court proceeding usually is not required upon the death of the trustor, as the trustee holds the assets of the estate (and not the decedent). *See also* Section 45-1-201(A)(55) and Chapter 10.

"Unauthorized Practice of Law" also known as "Practicing Law without a License" is providing legal advice to someone or preparing legal documents or pleadings for them without being an attorney licensed in New Mexico. Court personnel must be careful to make sure they provide only information and not legal advice. *See* Chapter 8 for specific statutory cites and examples.

"Uniform Probate Code" for our purposes, is the New Mexico Statutes Annotated (NMSA) (laws) governing probates, also known as Chapter 45, Pamphlet 67. **Judges should also be sure they have the most recent supplement to the Probate Code!** *See* "Probate Code" definition for specific information.

"Unrevoked," when used in these forms, refers to a will or other document that has not been invalidated or canceled.

"Venue" is the place where the case should be filed. Generally, a probate is either filed in the probate court or the district court in the county where the decedent died or, if the decedent did not live in New Mexico, in the probate court or the district court in the county where the decedent owned property. For more information, *see* Section 45-3-201 and Chapter 1.

"Verification" is a formal written declaration made in the presence of an authorized person, including a notary, where one swears to the truth of the statements made in the preceding document.

"Verified Statement of Personal Representative" is a sworn statement from the personal representative of the estate that they have completed all duties necessary to administer the estate of decedent and that they are ready to close the estate. For specific requirements *see* Section 45-3-1003 and Probate Form 4B-502.

"**Wedding"** is a ceremony to solemnize the contract of matrimony. *See* Section 40-1-1 through 40-1-3 and Chapter 11 for marriage license requirements.

"Will" is a document that provides for the distribution of the assets of a person's estate upon death. New Mexico's definition of "will" includes a codicil, but does not include a holographic will. Section 45-1-201(A)(57). A will also typically designates a personal representative and can appoint a guardian for minor children. Certain formalities must be followed when executing the will to make sure the will is valid according to New Mexico law. A will is sometimes referred to as **"Last Will and Testament."** For more information, *see* Section 45-2-502 and Chapter 2.

"Witnesses" are, for purposes of the Uniform Probate Code, persons attesting to having been present when a testator signed his/her will. An individual generally competent to be a witness may act as a witness to a will. *See* Section 45-2-505 and Chapter 2. In New Mexico an interested person may witness a will. The notary may also serve as one of the witnesses to a will. There also must be two competent witnesses when judges perform a wedding ceremony.

"Wrongful Death Act" is the section of New Mexico's statutes that governs the procedures one must follow when filing a claim for wrongful death. In New Mexico, a personal representative is the only one with the authority to file a wrongful death claim on behalf of the estate of a deceased person. However, the distribution of any proceeds from the wrongful death claim is not governed by the probate code, but by the terms of the Wrongful Death Act. *See* Section 41-2-3 and Chapter 10.

CHAPTER 13

Code of Judicial Conduct

This chapter provides:

- A list of the Rules in the Code of Judicial Conduct.
- Instructions on how to access the Code of Judicial Conduct on the New Mexico Compilation Commission website.

Important notes:

- The Code is issued by the New Mexico Supreme Court and is binding on the New Mexico judiciary. The New Mexico Compilation Commission provides free access to the Code. This version includes Committee Commentary, but does not include annotations.
- Not all sections of the Code of Judicial Conduct apply to all judges. The "Application" provisions at the beginning of the Code (before Rule 21-100) address these limitations. A probate judge is a "Continuing Part-Time Judge."
- The Code of Judicial Conduct Advisory opinions are another useful resource for judges. The Judicial Education Center has compiled all advisory opinions since 1991. They are available on the JEC website, as listed in Chapter 15. They are indexed by number, topic, date, Code section, and summary.

New Mexico Code of Judicial Conduct
(effective Jan. 1, 2012)

Rules

How to Access the Code of Judicial Conduct
New Mexico Compilation Commission Website

1. Go to www.nmcompcomm.us.
2. Hover over the Public Access Law tab.
3. Click on "Search Statutes and Court Rules."
4. Select whether you are accessing from a Desktop or Tablet/Smartphone.
5. Press OK.
6. There are several ways to search at this point. You can:
    a. Use the index on the left to open folders (click on +) until you find the section you are looking for. The Code of Judicial Conduct is found under Statutes, Rules and Const.→ NMRA (Unannotated) → Code of Judicial Conduct.
    b. Click the blue link "Search New Mexico Rules" and type in search terms, the name of the specific rule, or the number of the rule.
    c. Type search terms, the name of the rule, or the number of the rule into the search bar on the start page.

CHAPTER 14

Selected New Mexico Statutes

This chapter provides:

- A list of statutes concerning probate courts.
- A list of statutes from the Uniform Probate Code.
- A list of statutes concerning safe deposit boxes.
- Instructions on how to access these statutes on the New Mexico Compilation Commission website.

14.1 Statutes Concerning Probate Courts

Chapter 34, Court Structure and Administration
Article 7, Probate Courts

Section

34-7-1	Probate judge; authorized.
34-7-2	Probate judge and sheriff elected at each general election.
34-7-3	Seal of probate court.
34-7-4	Place of holding court and keeping clerk's office.
34-7-5	Failure to hold court or keep clerk's office at county seat; penalty.
34-7-6	County must furnish office and supplies for judge.
34-7-7	Custody of archives, documents and books.
34-7-8	Probate courts; hours of business; notice.
34-7-9	Probate judge interested or disqualified; transfer to district court.
34-7-10	Proceedings in district court after transfer.
34-7-11	Probate judge absent or unable to attend to duties; powers of district judge.
34-7-12	Repealed.
34-7-13	Judges may issue process and make rules.
34-7-14	Fees of probate court clerks.
34-7-15	Additional fees of clerk.
34-7-16	Fees exclusive.
34-7-17	Record of receipts and disbursements.
34-7-18	Current accounts; public inspection.
34-7-19	Penalty for violation of Sections 34-7-17 and 34-7-18 NMSA 1978.
34-7-20	Record of decedent's [decedents'] estates.
34-7-21	Record of bonds and wills.

34-7-22	Deputy clerks; appointment; powers.
34-7-23	Oath of deputy clerks.
34-7-24	Authority of deputies; responsibility; signing papers.
34-7-25	Compensation of deputies to be paid by clerk.

14.2 Statutes from the Uniform Probate Code

Chapter 45, Uniform Probate Code,
Articles 1 through 4

Section	
45-1-107	Evidence of death or status.
45-1-302	Subject matter jurisdiction of district and probate courts.
45-1-302.1	Concurrent jurisdiction.
45-1-303	Venue; multiple proceedings; transfer.
45-1-305	Records and certified copies.
45-1-307	Probate court; powers.
45-1-404	Real property outside county of administration; notice required; contents; effect.
45-2-101	Intestate estate.
45-2-102	Share of the spouse.
45-2-103	Share of heirs other than surviving spouse.
45-2-104	Requirement of survival by one hundred twenty hours; individual in gestation.
45-2-105	No taker.
45-2-106	Representation.
45-2-107	Kindred of half blood.
45-2-114	Parent barred from inheriting in certain circumstances.
45-2-301	Entitlement of spouse; premarital will.
45-2-302	Omitted children.
45-2-401	Applicable law.
45-2-402	Family allowance.
45-2-403	Personal property allowance.
45-2-501	Who may make will.
45-2-502	Execution; witnessed wills.
45-2-503	Reserved.
45-2-504	Self-proved will.
45-2-505	Who may witness.
45-2-506	Choice of law as to execution.
45-2-507	Revocation by writing or by act.
45-2-513	Separate writing identifying devise of certain types of tangible personal property.
45-2-515	Deposit of will with court in testator's lifetime.
45-2-516	Duty of custodian of will; liability.
45-2-709	Representation; per capita at each generation; per stirpes.
45-2-803	Effect of homicide on intestate succession, wills, trusts, joint assets, life insurance and beneficiary designations.
45-2-804	Revocation of probate and nonprobate transfers by divorce; no revocation by other changes of circumstances.
45-2-807	Death of spouse; community property.

45-3-108 Probate, testacy and appointment proceedings; ultimate time limit.
45-3-201 Venue for first and subsequent estate proceedings; location of property.
45-3-203 Priority among persons seeking appointment as personal representative.
45-3-204 Demand for notice of order or filing concerning decedent's estate.
45-3-301 Informal probate or appointment proceedings; application; contents.
45-3-302 Informal probate; duty of court; effect of informal probate.
45-3-303 Informal probate; proof and findings required.
45-3-304 Reserved.
45-3-305 Informal probate; court not satisfied.
45-3-306 Informal probate; notice requirements.
45-3-307 Informal appointment proceedings; delay in order; duty of court; effect of appointment.
45-3-308 Informal appointment proceedings; proof and findings required.
45-3-309 Informal appointment proceedings; court not satisfied.
45-3-310 Informal appointment proceedings; notice requirements.
45-3-311 Informal appointment unavailable in certain cases.
45-3-613 Successor personal representative.
45-3-614 Special administrator; appointment.
45-3-615 Special administrator; who may be appointed.
45-3-316 Special administrator; appointed informally; powers and duties.
45-3-617 Special administrator; formal proceedings; powers and duties.
45-3-618 Termination of appointment; special administrator.
45-3-702 Priority among different letters.
45-3-703 General duties; relation and liability to persons interested in estate; standing to sue.
45-3-705 Duty of personal representative; notice to heirs and devisees.
45-3-706 Duty of personal representative; inventory and appraisement.
45-3-712 Improper exercise of power; breach of fiduciary duty.
45-3-713 Sale, encumbrance or transaction involving conflict of interest; voidable; exceptions.
45-3-715 Transactions authorized for personal representatives; exceptions.
45-3-716 Powers and duties of successor personal representative.
45-3-717 Co-representatives; when joint action required.
45-3-719 Compensation for personal representatives.
45-3-720 Expenses in estate litigation.
45-3-721 Proceedings for review of employment and compensation.
45-3-801 Notice to creditors.
45-3-802 Statutes of limitations.
45-3-803 Limitations on presentation of claims.
45-3-804 Manner of presentation of claims.
45-3-805 Classification of claims.
45-3-806 Allowance of claims.
45-3-907 Distribution in kind; evidence.
45-3-912 Private agreements among successors to decedent binding on personal representative.
45-3-914 Disposition of unclaimed assets.

45-3-1003 Closing estates; by sworn statement of personal representative.
45-3-1007 Certificate discharging liens securing fiduciary performance.
45-3-1008 Subsequent administration.
45-3-1201 Collection of personal property by affidavit.
45-3-1203 Small estates; summary administrative procedure.
45-3-1204 Small estates; closing by sworn statement of personal representative.
45-3-1205 Small estates; transfer of title to homestead to surviving spouse by affidavit.
45-3-1206 Effect of affidavit.
45-4-201 Payment of debt and delivery of property to domiciliary foreign personal representative without local administration.
45-4-202 Payment or delivery discharges.
45-4-203 Resident creditor notice.
45-4-204 Proof of authority; bond.
45-4-205 Powers.
45-4-206 Power of representatives in transition.
45-4-207 Ancillary and other local administrations; provisions governing.

14.3 Statutes Concerning Safe Deposit Boxes

Chapter 58, Financial Institutions and Regulations,
Articles 1 and 11A

Section
58-1-11. Access by fiduciaries.
58-1-14. Search procedure on death.
58-11A-4. Search procedure upon death of lessee.

How to Access Probate Statutes
New Mexico Compilation Commission Website

1. Go to www.nmcompcomm.us.
2. Hover over the Public Access Law tab.
3. Click on "Search Statutes and Court Rules."
4. Select whether you are accessing from a Desktop or Tablet/Smartphone.
5. Press OK.
6. There are several ways to search at this point. You can:
    a. Use the index on the left to open folders (click on +) until you find the section you are looking for. The probate statutes are found under Statutes, Rules and Const.→ NMSA (Unannotated) → Chapter 34, 45, or 58.
    b. Click the blue link "Search New Mexico Statutes" and type in search terms, the name of the specific rule, or the number of the rule.
    c. Type search terms, the name of the statute, or the number of the statute into the search bar on the start page.

CHAPTER 15

Resources

This chapter provides:

- Probate resource materials and sources.
- Additional state and federal government resources.

15.1 Probate Resource Materials

Materials	Source
Uniform Probate Code	New Mexico Statutes Annotated Website for free access to New Mexico laws and rules: http://public.nmcompcomm.us/nmpublic/gateway.dll/?f=templates&fn=default.htm or purchase a copy from: New Mexico Compilation Commission 4355 Center Place Santa Fe, NM 87507-9706 Phone: (505) 827-4821 Website: www.nmcompcomm.us
Probate Forms	New Mexico Supreme Court General Website: http://nmsupremecourt.nmcourts.gov Click on "Rules, Forms and Opinions" then "Forms" then "Probate Court." Direct link to probate forms is: http://nmsupremecourt.nmcourts.gov/legal-forms/vprobate_code.php

Code of Judicial Conduct Advisory Opinions	New Mexico Judicial Education Center MSC11 6060 1 University of New Mexico Albuquerque, NM 87131-0001 Website: http://jec.unm.edu/ Advisory Opinions online at: http://jec.unm.edu/manuals-resources/advisory-opinions
New Mexico Probate Judges Manual	New Mexico Judicial Education Center MSC11 6060 1 University of New Mexico Albuquerque, NM 87131-0001 Website: http://jec.unm.edu/ Probate Judges Manual online at: http://jec.unm.edu/manuals-resources
New Mexico Association of Counties	Website: http://www.nmcounties.org/ 613 Old Santa Fe Trail Santa Fe NM 87505 Phone: (505) 983-2101 or 877-983-2101 (toll free) Email: info@nmcounties.org
National College of Probate Judges	Website: http://ncpj.org/ Email: ncpj@ncsc.org

15.2 Additional State and Federal Government Resources

New Mexico Agencies	Contact Information
Disciplinary Board of State Bar (complaints against attorneys)	20 First Plaza Center NW # 710 Albuquerque, NM 87102 Phone: (505) 842-5781 Website: www.nmdisboard.org/
Judicial Standards Commission	P.O. Box 27248 Albuquerque, NM 87125-7248 Phone: (505) 222-9353 Website: http://www.nmjsc.org

Motor Vehicle Division, Taxation and Revenue Department	Phone: 1-888-683-4636 Website: http://www.mvd.newmexico.gov/Pages/Home.aspx
Taxation and Revenue Department	Phone: (505) 841-6200 (Albuquerque) Phone: (505) 827-0700 (General Inquiries & Santa Fe) Website: http://www.tax.newmexico.gov/Pages/TRD-Homepage.aspx
Unauthorized Practice of Law Reports	State Bar of New Mexico, Office of the General Counsel P.O. Box 92860 Albuquerque, NM 87199-2860 Phone: (505) 797-6050
Unclaimed Property Division	Phone: (505) 827-0762 Email: uproperty@state.nm.us or stephanie.dennis@state.nm.us Website: http://www.tax.newmexico.gov/Individuals/unclaimed-property.aspx or directly to http://missingmoney.com/
Vital Records and Health Statistics Office (for death certificates) of N.M. Department of Health	Phone: (505) 841-4183, (505) 841-4185 (Albuquerque) Phone: (505) 827-0121 (Santa Fe), (866) 534-0051 (toll free) Website: www.health.state.nm.us or http://vitalrecordsnm.org/ (click on "Death Certificates") or link directly at: http://vitalrecordsnm.org/death.shtml
Federal Agencies	**Contact Information**
Internal Revenue Service (IRS)	Phone: 1-800-829-1040 Website: www.irs.treas.gov
Medicare (U.S. Department of Health and Human Services)	Phone: 1-800-633-4227 Website: www.medicare.gov
Social Security Administration	Phone: 1-800-772-1213 Website: www.ssa.gov
U.S. Department of Veterans Affairs	Phone: 1-800-827-1000 Website: www.va.gov