

New Mexico Probate Judges Manual

2011 Edition

By Judge Merri Rudd

with assistance from Lori Frank

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New Mexico Judicial Education Center

Institute of Public Law, UNM School of Law

MSC11 6060, 1 University of New Mexico, Albuquerque, NM 87131-0001

New Mexico Probate Judges Manual

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New Mexico Judicial Education Center
Institute of Public Law
University of New Mexico School of Law
MSC11 6060
1 University of New Mexico
Albuquerque, NM 87131-0001
Phone: 505-277-5006
Fax: 505-277-7064

This Manual is intended for educational and informational purposes only. It is not intended to provide legal advice. Readers are responsible for consulting the statutes, rules and cases pertinent to their issue or proceeding. Readers should keep in mind that laws and procedures may change.

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I 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 the 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 review and assistance in creating and updating this Manual:

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Please let me know what future topics we might include in the Manual. Good luck and enjoy!

The Honorable Merri Rudd
Bernalillo County Probate Judge
2001-2010

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 is a probate required, including definitions of probate and gross estates, different ways to title property, and 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 (**decendent'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 recipients of an estate named in a decedent's will. 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 like 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 or supplements, contact the New Mexico Compilation Commission, PO Box 15549, Santa Fe NM 87506; (505) 827-4821.

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 said 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 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 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 the 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 it should happen rarely in probate court).

- Appoint a successor personal representative, 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 your county can sign orders on your behalf. 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).
- Trusts (*but see* discussion of “pourover wills” in Chapter 2).

Only 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 that all have agreed upon. *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 which 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 heirship (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 45-5-101B).
- 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).

1.3.3 Domicile

Domicile is important in determining venue, i.e., is the case being filed in the correct court? Venue is discussed next. “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 will say decedent is domiciled in your county (it may not if the will was written long ago or when 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, call 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 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 file a Notice of Administration, Section 45-1-404, in Taos County. 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.

Examples 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, 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. Currently, the first \$2,000,000 of a decedent's estate is exempt from estate tax in 2006 through 2008. This figure rises in subsequent years. With proper planning, spouses can currently pass \$4,000,000 without estate tax liability.

1.4.3 Various Ways to Title Property

Title to property 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 and can pass it to his or her heirs at death; at decedent's death, decedent's tenant in common share must pass through a court probate proceeding).

The above two forms of property ownership require a court probate 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 automatically passes to surviving joint tenant(s) without a probate).

- **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) (name 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).
- **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 (TODD 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 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 not 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. The laws about intestate succession appear in Sections 45-2-101 through 45-2-114. Chapter 14 of the Manual includes Sections 45-2-101 through 45-2-106.

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). If an intestate decedent owned community property at death and had no spouse, then the decedent's heirs as set out in Section 45-2-103 would receive the community 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. However, it is important for judges to understand the applicable laws. *Pro se* applicants often ask the judge 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 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 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 no relatives of the decedent can be found, an intestate estate "escheats" to the state school fund, Section 45-2-105.

1.6 Medical and Other Information

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 many 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.

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 also currently requires a probate court proceeding in order to claim assets on behalf of a deceased person who has rights to unclaimed property.

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?

Anyone who is 18 or older and of sound mind may make a will (Section 45-2-501).

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! *See Matter of the Estate of Lucero*, 118 N.M. 636 (Ct. App. 1994).

2.1.3 Witness Requirements

The witness requirements 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 see 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.
- Interested persons (those who inherit under the will) may serve as witnesses, Section 45-2-505(B).
- 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 all be in each other’s presence and watch each other sign).

Notarization is not required! But wills prepared by lawyers are often notarized.

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, i.e., who gets the bulk of the estate and what happens to each gift if one of the beneficiaries dies before 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(10)).
- Signature and date lines for testator and two witnesses.
- Self-proving clause with signature lines for testator and two witnesses and, optionally, a place for a notary public to sign and stamp or seal the will.

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 is a bad idea.

Practical Tip:

Most wills contain an **attestation clause**, language procedure can create that says the testator and witnesses were all in each other's presence and watched each other sign, which makes the probate judge's job easier. 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 proper signatures of witnesses. New Mexico does not recognize holographic wills made in this state! However, 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. Legal research about the other state's law on holographic wills would be necessary. **A will that contains the signature of the testator and two witnesses is not a holographic will, even if the entire document is handwritten!**

2.3.2 Joint Wills

Joint wills mean one original will for two people. These are not favored in modern times. 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. Such a contract requires additional writings making 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 in order 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 fail to transfer all assets into a revocable living trust that he or she has created. Or the trustor may acquire additional assets through inheritance, gift, lottery winnings or other means a long time after creating the trust. He or she 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). Since these assets were not properly transferred into the trust prior to the trustor's death, they need to be transferred via the pourover will through a regular probate procedure.

The probate court may 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 58-10-109 (Saving & Loan Institutions).

Practical Note: Many New Mexico financial institutions are unfamiliar with this law and may need to be provided a copy.

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 Recording the Will with the County Clerk's Office

While someone can record a notarized will with the county clerk's office during his or her lifetime, this is not recommended. The will then becomes public record and even if the person revokes the will, the recording still exists.

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. Sometimes an attorney prepares 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 your 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:

Sometimes a will is invalidly executed. For example, it 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)(53)), a valid codicil may “cure” an 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.

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 safest 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 complete date that the testator signed the new will-month, day and year-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 in prior columns, 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.

New Mexico law sets out another way 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.

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 of the will. Arguments could then be made in court about whether the copy should be admitted or whether the will was actually revoked.

Some people write and sign a separate document stating that they wish to revoke their will. Probate Judges, make note: **THIS METHOD DOES NOT CURRENTLY WORK IN NEW MEXICO!!** Even if a written revocation is signed in the presence of a notary public and the testator's intent is clear, 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).

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, or joint tenancy property. 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 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 rights under the Uniform Probate Code.

Finally, 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).

2.8 Tangible Personal Property List

As part of a will, a testator may prepare a list of tangible personal property (such as furniture, jewelry, guns, boats, cars, artwork, personal effects, etc.) and the recipients of each item. 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. This list becomes part of the will and can be admitted to probate by the probate judge. Section 45-2-513 contains the requirements of this list. 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 (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, he/she has no legal authority to act on behalf of the estate.

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:

“Appointment of one who does not have the highest priority, including highest priority resulting from renunciation or nomination..., may only be made in **formal** proceedings.” Section 45-3-203(E). If you are asked to appoint someone who does not have highest priority for appointment and you have already docketed the case, you should transfer the case to district court.

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. *See also* Section 40-4-20(B), part of the Domestic Affairs law.

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 Court of Appeals, in a recent case *Oldham v. Oldham*, 147 N.M. 329 (Ct.App.2009), ruled that appointing the current spouse as personal representative would create an inherent conflict of interest. If a probate judge is aware of that a divorce was pending when a decedent died, he/she would need to appoint someone other than the surviving spouse as personal representative or transfer the case to the district court. At the very least, additional consents might be required. The *Oldham* case is currently on appeal to the New Mexico Supreme Court, which has not yet ruled.

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.

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, Section 45-2-804 (unless the person did a new will after the divorce).

Example 4: 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 5: 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 6: 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 7: 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 8: 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.

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 and thereby confer his relative priority for appointment to his 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, those who do not renounce must consent to another acting on their behalf, or in applying for appointment. 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, they must go to district court (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. 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.

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].

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. 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.

Here is a 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. A probate judge does 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.

A probate judge can limit or specify the powers of a court-appointed special administrator, discussed below.

3.1.10 Duties of Personal Representative

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 in order 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).

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 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.

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 Bernalillo County Probate Court created the order on the next page. The Letters of Special Administration should also set out any restrictions on the powers granted to the special administrator.

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.

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 _____, DECEASED.

No. _____

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.
- 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. But this option is rarely used.

In the past, because there are certain elements of the Probate Code that must be met before an estate can be informally entered into probate, some probate judges would review the pleadings submitted to the court prior to docketing the case to ensure that these elements were met before signing the order and docketing the case. That way applicants didn't have to pay a filing fee if the probate court did not have jurisdiction over the case or if venue wasn't proper. This view is supported by NMSA Section 45-3-301(A), which states:

"Every application for informal probate.... shall contain the following...", and then sets out the required elements for the application.

However, 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 Bernalillo County Probate Court developed a system to evaluate a case initially presented to the court. The court staff uses a checklist to check for critical elements before docketing a case. A sample of this Probate Court Docketing Checklist is provided below. The checklist should particularly help those judges who have the county clerk's office file 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.

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 is 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.

Make sure a case is docketed before signing an order or before declining to accept it. A judge has no power over 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 your 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.

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, correspondence (including e-mail) that addresses issues concerning the case should probably be filed so that there is a record of events pertaining to the progress of the case. If judges are not sure, they might want to ask themselves, “would this help someone understand what happened in this case, and could this be important to the case in the future?” Make sure that copies of these communications are sent to all parties involved.

Practical Tip:

Make sure that no sensitive or protected medical information is included in the court file. The court may also need to redact social security numbers, bank account numbers, etc.

(See the next page for a Docketing Checklist.)

4.1.3 Docketing Checklist

PROBATE COURT DOCKETING CHECKLIST

- 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 Bernalillo County **OR**
- Decedent did not live in New Mexico, but owned property in Bernalillo County and 30 days or more have elapsed since Decedent 's death (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 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 5 days 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, *See* Form 4B-101, Paragraph 8
- Probate Court has jurisdiction to act, and case does not involve determination of heirs, missing heirs, trusts, formal probate (see 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 Application 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.

4.1.4 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 has only arisen once in the Bernalillo County Probate Court 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).
 - www.bernco.gov/probate (click on "Probate Forms").
- From the NM Rules Annotated, Volume 1, Probate Court Forms.

Practical Tips:

The probate forms must be downloaded individually. People often have problems with this and come in and have just downloaded the Application. If the judge speaks with them before they download the forms, make sure they know that they will need the forms for the Application, Order, Acceptance and Letters. Later they will need the forms for notices, inventory, etc.

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.

Because the probate court staff signs documents on behalf of the court, they cannot notarize documents filed with the court. If you do not have someone in your office to notarize documents, make sure people are aware of this before they visit your court.

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).

4.2.2 Other Probate Forms

Other 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.
- The Bernalillo County Probate Court (and other probate courts) requires death certificates in all probates filed, including cases submitted by attorneys and *pro se* applicants. Judges have the power to require a death certificate as part of the probate case if they think it is wise.
- Judges should be consistent in their requirements in order to show that they are acting in a fair and impartial manner.

4.3.2 Death Certificates

Section 24-14-27(A) 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.

While it is still appropriate for the probate judge to request and review the death certificate, it should not be included in the court file. The Bernalillo County Probate Court is in the process of removing all previously filed death certificates and replacing them with the Certificate of Review discussed below. We store the death certificates in a locked cabinet, secure from public view.

Further, NMSA Section 57-12B-3(D), effective January 1, 2004, 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:

- Program:** probate matters
- Maintenance system:** numerical by docket number
- 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.
- Retention:** permanent
- 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]

In light of the above statutes and rules, the Bernalillo County Probate Court has changed its policy concerning the handling of the original death certificates that are presented to the court with each probate case filed. We still require the death certificate (or Pending Letter from the Office of the Medical Investigator) to be submitted to the court, but we no longer include these documents in the court record.

However, reviewing the death certificate is important to prove the decedent's death and to determine decedent's domicile, marital status, date of death, whether five days have passed since the death, etc. The Bernalillo County Probate Judge reviews the death certificates in each case. We then return the death certificates to the attorney or applicant and fill out two copies of the following "Certificate Acknowledging Receipt and Review of Death Certificate" form, filing one copy in the court record and giving the other copy to the attorney or applicant.

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 as _____, 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 as _____, 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.

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 on the death certificate matches the date 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. A receipt should be given to the filing party for all monies submitted to the court. Once the court docketed the probate case, no refunds are possible.

Each pleading is 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. 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

The Bernalillo County Probate Court uses a stamp with a ‘date wheel’ that allows the date to be changed daily.

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

<p>ENDORSED FILED IN MY OFFICE THIS</p> <p>(DATE WHEEL)</p> <p><i>County Clerk's Name</i> COUNTY CLERK</p>
--

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. See Section 45-1-304 NMSA 1978. 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 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*.

Remember that certain pleadings, such as the initial Application, Acceptance and Verified Closing Statement must be signed and notarized.

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

Fees can be charged for copies and certifications. The Bernalillo County probate court charges \$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 get charged for copies. Governmental agencies are generally exempt from these fees. The Bernalillo County probate court accepts cash, checks, money orders, or cashier’s checks, but is not set up to accept 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. The Bernalillo County Probate Court requires a separate probate 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.

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.

Practical Tip:

The current online version of Paragraph 8 of the do-it-yourself **intestate** application includes language for probates started more than three years after a decedent's death. However, if the Applicant is using a different or older version, the Application would need to be modified if more than three years have passed (discussed later).

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* separate section on Personal Representatives)
- 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 persons with equal priority can nominate someone else.
- 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 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 it doesn't because we accept wills from other states, counties, or countries.)

Note: 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. 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 should 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 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 no relatives of the decedent can be found, the estate "escheats" to the state school fund (Section 45-2-105).

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(B).

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.

Other Possible Heirs?

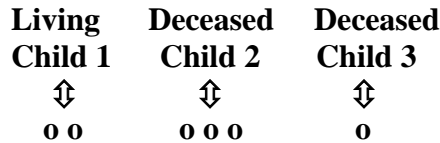
- Spouse from whom the decedent was separated—Yes
- Divorced spouse—No (but terms of the divorce decree may stipulate otherwise)
- Fiancée or Significant other—No
- Adopted child—Yes
- Children adopted by strangers—No
- Children adopted by spouse of natural parent—Yes (*see* Section 45-2-114(B))
- Stepchildren and foster children—No
- Biological children born outside of marriage—Yes
- Children born after the death of a parent—Yes

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.

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).

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 or make an oral request 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).
- The Bernalillo County Probate Court stamps 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.
- 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)).

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.

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) (the do-it-yourself forms do not include this option, so *pro se* applicants will need to amend the form);
 - If “yes,” and a will exists, applicant must proceed in district court in a formal testacy proceeding

As mentioned in the introduction, 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.

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 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. The do-it-yourself probate forms do not contain this option, so the applicant would need to modify the initial intestate application if more than three years have elapsed with language such as “The decedent died more than three (3) years ago, but an informal appointment is necessary to confirm title in the successors to 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 we 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 name of the applicant in the verification section. Nevertheless, the Verification should be signed 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

Pro Se Applicant Errors

- Using wrong set of forms.
- Failure to list all heirs, including themselves.
- 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.

Attorney Errors

- 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 we lack jurisdiction to do.

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.

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 judge cannot sign this Order unless the initial Application is complete.

4.6.1 Testate Orders

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 to the personal representative will be issued upon qualification and acceptance.

4.6.2 Intestate Orders

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.

Important Note:

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. 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, he or she 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 probate in the district court.

4.7 How to Issue Letters

The Letters are the documents that give Personal Representatives the authority to act on behalf of Estates. Letters can only be issued after:

- The probate judge has signed an Order admitting a will 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). See Sections 45-3-102, 45-3-103, 45-3-601.
- **Letters Testamentary** are issued when there is a will.
- **Letters of Administration** are issued if there is no will.

Note: This is a technicality that should not hold up the issuance of the Letters. Judges or their clerks can amend the Letters form to reflect the proper title or make your own Letters. 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 form is correct---attorneys and others have submitted 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.”

Once the Order has been signed, 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 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 they are required to keep under Section 34-7-3, on the Letters and on all copies submitted to the court.
3. "File" stamps the original copy of the Letters and docket the Letters with the other pleadings submitted to the court.
4. "Endorsed-Filed" stamps the copies and returns them to the applicant or Attorney who submitted them.

Personal Representatives often require "current Letters"(many financial institutions require that the Letters have been issued within 30-90 days). **Instead of issuing "new Letters" when the original Letters are still in full force and effect, the court issues Certified Copies** 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. 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.
3. Signing and dating 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 _____ <u>(signature or name stamp of County Clerk)</u> _____ County Clerk By: <u>(original signature of Deputy Clerk)</u> Deputy Clerk

4.7.1 Sample Letters Testamentary

4B-107

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

No. Probate Case #

IN THE MATTER OF THE ESTATE OF
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, 2011.

Carla County Clerk
Clerk of the Probate Court



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.]

4.8 Alternative Probate Application Forms

4.8.1 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
_____, DECEASED

No. _____

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:

4.8.2 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 _____ No. _____
_____, DECEASED

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

4.9 Checklist of Informal Probate and Appointment Pleadings

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

Informal Probate (testate)

- 4B-102. Application for Informal Probate of Will and for Informal Appointment of Personal Representative, Section 45-3-301 (must attach **original** will)
- 4B-104. Order for Informal Probate of Will and 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-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-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-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-501. Accounting, Section 45-3-1003(A)(3)
- 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-504. Certificate of Full Administration
- 4B-601. Affidavit of poverty and indigency
- 4B-602. Order Allowing Free Process (rare)

Informal Appointment (intestate)

- 4B-101. Application for Informal Appointment of Personal Representative, Section 45-3-301
- 4B-103. Order for Informal Appointment of Personal Representative, Section 45-3-303, -308
- 4B-106. Letters of Administration and
4B-105. Acceptance, Section 45-3-103, -601
- 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-301. Notice to Known Creditors (within **three months** of Personal Representative's appointment), Section 45-3-801***
- 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-501. Accounting, Section 45-3-1003(A)(3)
- 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-504. Certificate of Full Administration
- 4B-601. Affidavit of poverty and indigency
- 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.

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).

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.

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 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 feel better if they 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. *See* Sections 45-3-1001 and 45-3-1002; however probate courts do **not** have jurisdiction over formal closings.

- 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 for Complete Settlement of Estate, probate judges do not have jurisdiction to hear or sign such an 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.

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).

Some judges close cases on their own motions, either to clear their dockets or for statistical purposes. When this occurs in district court, the Petitioner or applicant must take affirmative action to ask that the case remain open. However, probate judges do not usually close cases on their own motions. Judges may consider doing this to get movement on cases where nothing has been filed since the original pleadings. But this would require a means of tracking the status of cases filed with the court. 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.

5.4 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, the case will have to be reopened 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 a successor**

personal representative to administer the subsequently discovered property. Section 45-3-1008.

5.5 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 Mr. Z'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. (This same scenario could also apply to personal property such as newly discovered stocks, bonds, or bank accounts.)

Example 3: Ms. Y died in 1991. A probate was opened in probate court. No inventory was filed with the court. The estate was never officially closed. Eleven years later, a certificate of deposit is discovered at a local bank. Can this case be reopened?

Answer: You do 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.
- 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 probate court shall keep a record for each decedent... and **shall maintain a system for indexing, filing and recording which 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 Docket Sheet 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.

Bernalillo County's Probate Court Docket sheet contains 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)

The Bernalillo County Probate Court 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 Bernalillo County Probate Court's fees were tied to the County Clerk's fees. But the County Clerk recently 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 Bernalillo County Probate Court charges 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/pdf/AGO%20IPRA%20Guide%206th%20Ed.pdf>

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"-- but staff needs to be able to access the files or copies of them in some manner. The Bernalillo County Probate Court receives quite a few requests for documents from very old (early 1900s) files, so we really do need access to the files, even after they are closed. While courts may rely on microfilm (or digital) copies for most purposes, some title companies require that the title searcher be able to access the original file.

6.3.2 Microfilm

Courts should have a "backup" copy of everything filed with the court. In the past, the Bernalillo County Probate Court microfilmed documents as they were filed with the court. This was cumbersome, because we have to search through several rolls of microfilm to find the contents of one file. We currently scan all our documents, but because microfilm is considered the most archivally stable medium, the digital files then have to be converted to film. 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 State Archives and Records Division can provide guidance on how to create archivally-appropriate backups. Access the Archives and Records Division online at <http://www.nmcpr.state.nm.us/index.htm>. Their mailing address is:

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

General Information (Agency Menu): (505) 476-7900. The State Records Administrator is Sandra Jaramillo, whose email address is sandra.jaramillo@state.nm.us or phone (505) 476-7911.

The State Records and Archives division provides periodic workshops about record retention and other issues. You can sign up for these workshops by going to their website: <http://www.nmcpr.state.nm.us/>.

6.3.3 Securing Files

Courts should be especially careful about the storage of original wills. The Bernalillo County Probate Court stores the original will in a separate, locked, and fireproof filing cabinet. A certified copy of the will is placed in the court file. Court files should also be in a secure area, where no one (other than court staff) has access to them when the judge or staff are not in the office.

6.3.4 Accessibility to the Public

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 might want to 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, except as discussed below.

6.3.5 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.).

6.3.6 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 need to be aware of this requirement, even if they do not personally deal with it.

1-095 B. NMRA requires that "... 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 part of its records."

1-095 C. NMRA further requires that "...after furnishing 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 the 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 district court shall enter such information on its copy of the appropriate docket sheet."

The Bernalillo County Probate Court sends a monthly report to the Second Judicial 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.

Note: 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 assessed [sic]. **If the case is transferred by the probate judge on his/her own order, no fee is required.**” [emphasis added] However, we have been unable to confirm with the Second Judicial District Court whether this waiver of fee is still in effect. Probate judges might check with their own district courts about whether this 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.

The Bernalillo County Probate Court has experienced some problems with concurrent cases being opened in the district court after the case has already been filed with the probate court. Over the past couple of years, the Bernalillo County Probate Court has had several cases where the parties opened a new case in the district court without transferring the case from the probate court. This can be a problem when there are two different personal representatives. While the district court judge may order that the original case be closed, 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 wants to see the original will. This has resulted in a delay of at least one hearing in the district court. We have discussed this issue with the district court and are trying to find a way to resolve the problem. After corresponding with the staff of the district court and its judges, we created a procedural policy for the district court to send the probate court a certified copy of the district court order to transfer. Judges need to be aware that this does occur and make sure to close the case (and revoke the letters) if this happens.

The Bernalillo County Probate Court currently uses the following procedure for transferring 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.

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
MAX M. PEREA, Deceased

ORDER FOR TRANSFER TO DISTRICT COURT

Petitioner, Personal Representative of the Estate of Max M. Perea, Mary L. Perea, by and through her counsel Walter L. Reardon, Jr., 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 Linda M. Vanzi

Submitted by:

WALTER L. REARDON, JR., P.A.

WALTER L. REARDON, JR.
Attorney for Petitioner Mary L. Perea
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:

<u>Document</u>	<u>Date Filed</u>
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 Letters Testamentary and Acceptance	Oct. 20, 2000
Notice to Creditors	Oct. 20, 2000
Notice of Denial of Claims	Nov. 21, 2000
Affidavit of Publication	Dec. 1, 2000
Petition for Transfer to District Court	Jan. 8, 2001
Order Transferring Cause to District Court	Feb 17, 2000
	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. 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

CHAPTER 8

Judicial Conduct

This chapter covers:

- Overview of ethical requirements for probate judges.
- *Ex parte* communications by the judge with the parties.
- Staff contact with self-represented applicants.
- Confidentiality v. public records.
- Unauthorized practice of law.
- Safety valves for probate judges.

8.1 Overview of Ethical Requirements

The Code of Judicial Conduct, Canons 21-001 through 21-901 (New Mexico Rules Annotated, Volume 2), contains ethics rules that pertain to probate judges. Canon 21-901(C) lists which provisions of the Code of Judicial Conduct do not apply to probate judges. Chapter 13 contains the complete text of the Code of Judicial Conduct.

Probate judges should carefully read and familiarize themselves with all sections of the Code of Judicial Conduct and determine which ones apply to them.

In general, probate judges must:

- Uphold the integrity and independence of the judiciary.
- Avoid impropriety and the appearance of impropriety.
- Perform their job duties impartially and diligently.
- Disqualify themselves when a conflict of interest exists or arises.
- Act carefully with respect to activities outside of their judgeship.
- Follow election and political activities restrictions.
- Follow campaign fund-raising rules that apply to probate judges.

Probate judges may:

- Ask judges, attorneys, or other disinterested experts for help without informing the parties in the probate (21-300(B)(7)(b), 21-901).
- Practice law if they are licensed attorneys in New Mexico.
- Personally solicit attorneys for campaign contributions (although it may not be a good idea).
- Speak, write, lecture and teach about various legal and non-legal subjects.

Probate judges may not:

- Hold any party political office such as state central political committee, ward chair, etc. (*see* 21-700(A)).
- Lobby the legislature as a judge except as to matters relating to the judiciary (judges **may** lobby *pro se* in matters involving themselves or their own personal interests).
- Engage in financial and business dealings that exploit the judge's judicial position.
- Accept gifts, bequests, favors, or loans from anyone except friends and relatives and a few other exceptions, *see* 21-500(D)(5).

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 concerning a pending or impending proceeding...,” Canon 21-300(B)(7), New Mexico Rules Annotated (NMRA).

- 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 involved in a case need to be informed about this duty.
- Judges also need 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.

In order 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 answering the person's questions.

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 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.

8.2.2 Staff Contact with Self-Represented Applicants

The New Mexico Supreme Court passed a rule, effective January 22, 2008, 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 in order 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 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.

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.

Note: See NMRA, Rule 21-300(B)(7)(a)-(e) for exceptions to the *ex parte* prohibition.

8.3 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. A person is not required to prove who they are or why they have an interest in a particular case in order to receive copies of any documents filed with the court.

Note: Sometimes judges may get a "funny feeling" about someone requesting information about a case--then they may need to monitor the case for anything that indicates a potential problem with the case. Train staff to note any unusual requests.

- 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 it's not in the file, it is not part of the case as far as public record is concerned.
- Judges should advise anyone calling the court that any concerns they have must be placed in writing in order to make them part of the court's record.
- Always keep in mind the prohibition against *ex parte* communications.

Practical Tip:

In the past, Personal Representatives have been asked to delete information that is not required, and that should not be made public. Sometimes people do not want their home phone numbers or addresses listed on the Applications--in that case, they may need to use a work phone number or a P.O. Box.

8.4 Unauthorized Practice of Law

There is a fine line between providing legal information and giving legal advice. Providing information is acceptable; giving legal advice is not. Be careful!

8.4.1 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 the difference between testate and intestate estates and assist *pro se* applicants in identifying the correct packet to purchase. They can cite basic laws regarding titles to property. 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. Contact the financial institution for further information on how to claim the bank account."

While it is appropriate to explain basic probate law requirements and the use of probate forms, judges cannot fill out the forms, prepare deeds, or prepare affidavits or other documents for anyone.

8.4.2 Paralegals

Probate judges who have paralegals helping them with court business should be aware that in 2004 the New Mexico Supreme Court approved a new rule about using paralegals. In response to input from the Bernalillo County Probate Court, the final rule allows court paralegals to explain forms but not to fill them out for a *pro se* applicant. 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.

See also Section 36-2-28 regarding the criminal offense of the unauthorized practice of law. Non-lawyers can prepare their own legal documents, but **cannot** prepare legal documents for anyone else.

8.4.3 Newspaper Article

The following article about the unauthorized practice of law appeared in the Albuquerque Journal in 2004. All of Judge Rudd's prior columns are available on the court web site at: www.bernco.gov/probate.

Ask the Probate Judge—Unauthorized Practice of Law

By Merri Rudd, appeared August 19, 2004, Albuquerque Journal, Business Outlook
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Q: A recent article in the Albuquerque Journal stated that the ONLY kind of revocable living trust accepted by the courts in New Mexico is one that is prepared/submitted by

an attorney. Is this true? Does the court accept or reject any revocable living trust prepared by a paralegal? G.A., Albuquerque

Q: I established a living trust that was executed by someone who is not a lawyer. Then I heard another lawyer state that living trusts should only be executed by a lawyer. I am concerned as to whether or not my revocable living trust is legal. Does a living trust have to be executed by a lawyer to be legal? All appropriate documents have been notarized, and my property deed has been recorded with the county clerk. R.N., Albuquerque

These two questions raise interesting issues. A prior column addressed whether a private individual with no law training could write wills for others and whether a will prepared by such an individual would be legal.

It is a criminal violation in New Mexico for a non-lawyer to prepare a will, trust, or other legal document without an attorney's help. When a non-lawyer prepares legal documents for others without being supervised by an attorney licensed in New Mexico, it is called the "unauthorized practice of law." Anyone found guilty of this crime can be fined up to \$500 or imprisoned up to six months, or both.

Individuals may prepare their own wills and living trusts, even though doing so is usually not wise. One must understand not only how to draft legal documents, but also community property, tax, estate planning, and other laws.

It is possible that an attorney is supervising the non-lawyers in the above questions. Judges might call the organizations that prepared the trusts and inquire. In the second question, it is good that the trust document is notarized. It is also proper to record the new deed with the county clerk.

A court should not be involved in a trust if all of the trustor's property was properly transferred into the trust. Usually a court does not have the opportunity to "accept or reject any revocable living trust," no matter who prepared it. Only if a dispute arises or some property was omitted from the trust should court intervention be necessary.

If a paralegal or other non-lawyer prepared a trust without the supervision of an attorney licensed in New Mexico, the trust might be valid if it were properly drafted and notarized. But any non-lawyer who prepares a trust for another person is still violating state law in doing so.

You both might want to hire a reputable attorney licensed in New Mexico to review your trust documents. If the documents are deficient, however, the attorney may recommend that you start over again from scratch.

If you have encountered a paralegal or other non-lawyer who is practicing law without a license and drafting legal documents without the supervision of an attorney, I urge you to

report that person to the Unauthorized Practice of Law Committee of the State Bar, P.O. Box 92860, Albuquerque, NM 87199-2860, 505-797-6068.

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8.5 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 21-300(B)(7)(b) allows judges to obtain the advice of a disinterested expert on the applicable law without giving notice to the parties involved, see Rule 21-901(C)(1)(c).
- Section 45-3-305 says judges can decline an application for any reason. The case can still proceed as a formal probate in the district court.
- Section 45-3-309 says a judge can 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 bully them into doing something that the judge knows is not within the scope of a probate judge's job or is contrary to the law.**

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 in order to pass clear title on 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.

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 the 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.

Practical Tip:

Probate judges should never assist anyone in filling out a Personal Representative’s Deed or any other deed or legal documents!

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 on 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 where 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 use Section 45-3-201(A)(2) to begin an original probate here if no other probate had been opened in the state of domicile. However, if a probate is already open in the state of domicile, then authenticated copies of documents as provided in Sections 45-3-301(B)(1), 303(D) and 308(C) would provide guidance.

9.3.1 Simultaneous 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.

However, if the applicant is the domiciliary personal representative (the personal representative appointed in the place the decedent was domiciled) 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.

9.4 Proof of Authority

If an **out-of-state** decedent owned real or personal property that needs New Mexico authority to transfer, a foreign personal representative or attorney can use a proof of authority, pursuant to Section 45-4-204. Requirements to use a proof of authority are:

- Personal representative appointed in another state.
- Need for transfer of 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.

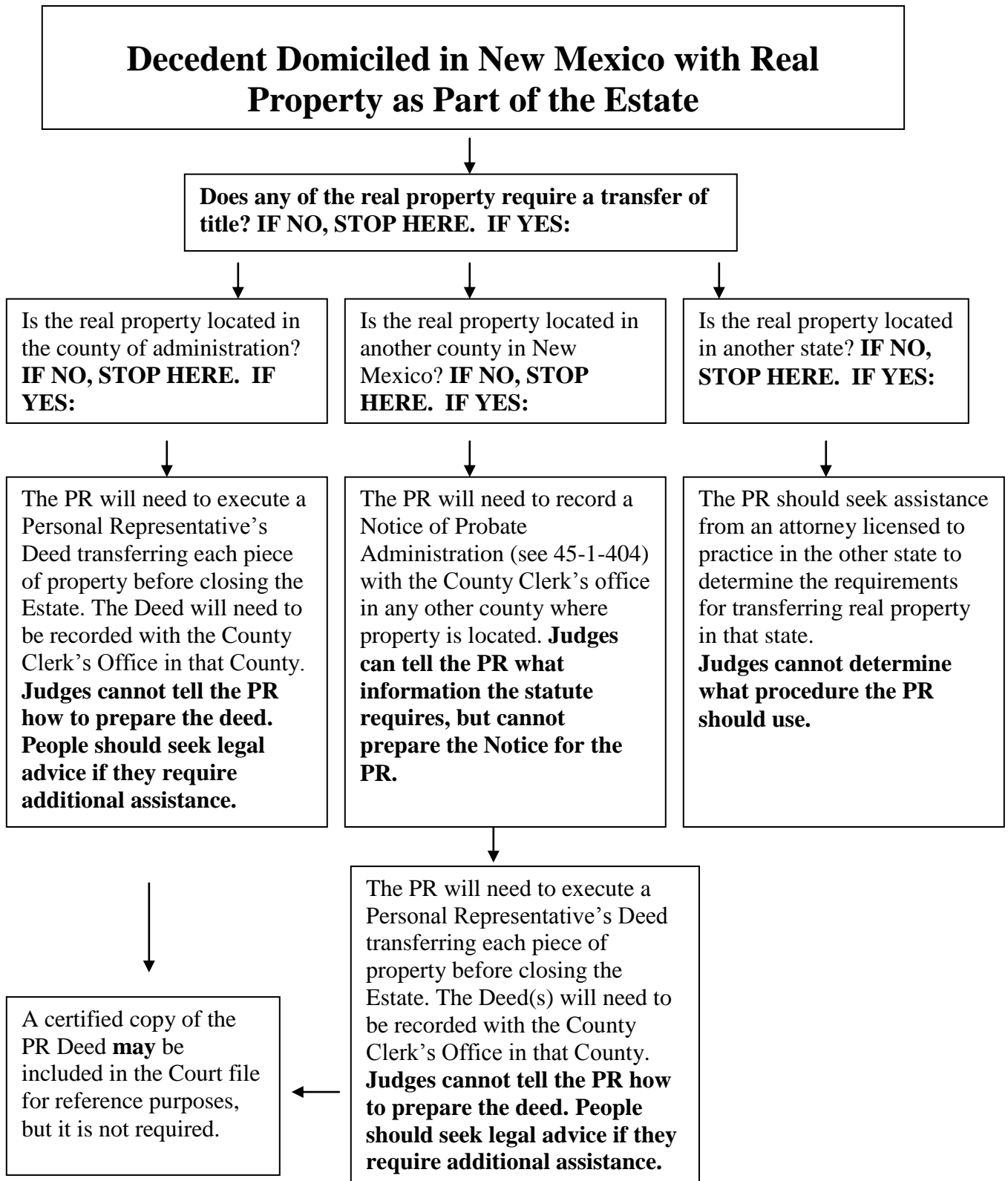
The probate judge does **NOT** issue letters in a Proof of Authority case! A Proof of Authority may not be sufficient for some title companies. If it is not sufficient authority for the transaction, then an ancillary proceeding can be used. Charts outlining the procedures to use for out-of-state decedents and the differences between Proof of Authority and ancillary proceedings are at the end of this section of the manual.

9.5 Manufactured (Mobile) Homes as Part of Estate

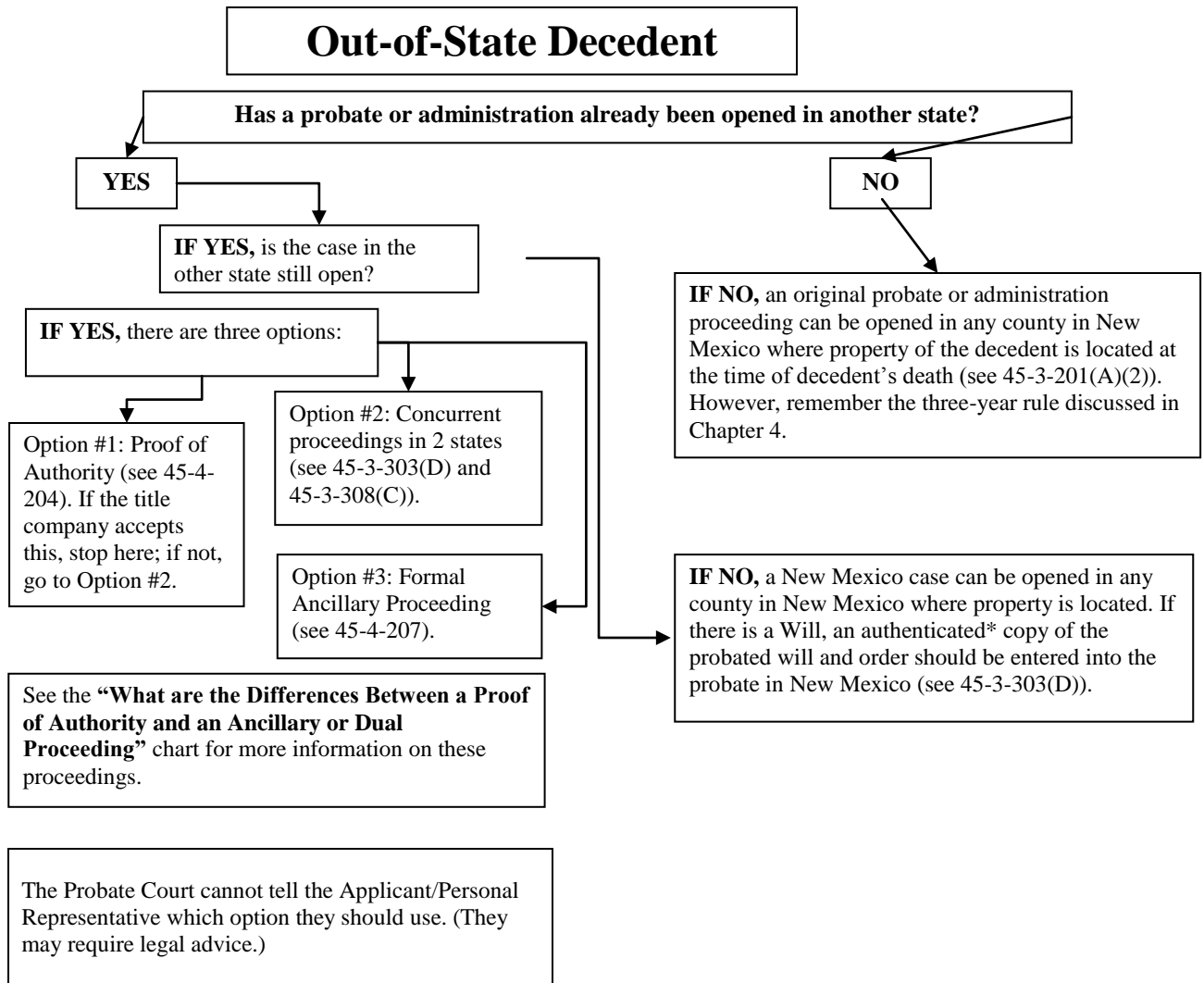
Some people think that manufactured (mobile) homes are real property, and in some cases they are. Since most manufactured (mobile) homes are moveable, they are considered personal property like automobiles and must be registered and licensed like motor vehicles. They originally have license plates like 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 web site, <http://www.mvd.newmexico.gov/assets/mvd10011.pdf> for more information. *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** is a triple certification used to prove the authenticity of a document so that it can be used as evidence. In probate courts the county clerk first certifies that the attachment is a true and correct copy of the document(s) 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 **Exemplification**. A sample form is in Chapter 10.

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.	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 (<i>see</i> 45-4-204).	Pleadings filed are the same as for a New Mexico resident, with some modifications to language on the <i>pro se</i> probate forms.
WHAT DOCUMENTATION is required?	Authenticated copies of any bond given and appointment documents are attached to Proof of Authority (<i>see</i> 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.
- 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 intestacy, 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.

10.3 Disclaimer Statutes

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 law, Sections 46-10-1 through 17. Disclaimers must be in writing and made within nine months of decedent's death. The person making the disclaimer cannot use or benefit from the disclaimed property. New Mexico's disclaimer law was amended in 2001 to allow a disclaimer to be:

- delivered to the personal representative of the decedent's estate; or
- if no personal representative is serving, it must be filed with a court having jurisdiction to appoint the personal representative. Section 46-10-12(c).

Under these new provisions, 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 Bernalillo County Probate Court requires 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 family allowance 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 personal property allowance 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 states otherwise. Minor, dependent, and adult children are all entitled to share the personal property allowance, if there is no surviving spouse.

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. Sometimes the judge may want to give a copy of the allowance statutes to applicants for their information.

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.

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.

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,

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.

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. 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. Any claimant disputing the denial of their claim must take action in the **district court**. Section 45-3-806.

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 up to the personal representative 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.

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. 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.

Practical Tips:

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. *See* Section 45-6-401(J)

Certain assets of 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.

10.8 Trusts

In 2003 the New Mexico legislature passed the Uniform Trust Code (UTC), which governs trust documents in New Mexico. 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 two items:

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 only becomes effective upon the death of the testator.

Probate judges should not be giving legal advice about whether a trust is better than a will. Unless judges are also attorneys licensed in New Mexico, they may not 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.

The cremation law appears in two sections of New Mexico's laws, Sections 24-12A-1 through 3 and Section 61-32-19. Although this section in the main statute says "Repealed effective July 1, 2006," the supplement extends the repeal date to July 1, 2012.

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.

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 (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, 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 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. Keep a copy of the oath paperwork for your records.

Probate judges or probate clerks should not notarize or administer oaths for probate cases filed in their court, as this can be seen as 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. *See* Sections 14-12A-1 et seq. and 14-14-3.

New, stricter laws governing notaries took effect in New Mexico on July 1, 2003. A \$10,000 surety bond is now required of all notaries.

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).

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.

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.
- 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. Application forms are available on line at <http://www.sos.state.nm.us/notaryinfo.htm>. For more information or to obtain a pamphlet about new notary requirements, call the Secretary of State 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

Sometimes an attorney or personal representative searches diligently for an heir or devisee and is unable to locate them. This question has come up several times at the Bernalillo County Probate Court.

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 wrong.

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 tangible and intangible property, such as bank accounts, the contents of safe deposit boxes, stocks, insurance policies, and annuities. UUPA does not allow the state to accept real property, guns, vehicles, animals, boats and other objects.

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.

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.

New Mexico's Tax and Revenue Department, which oversees UUPA, does not accept a small estate affidavit (discussed below) to claim property on behalf of a decedent. Heirs or devisees of a decedent entitled to claim property under UUPA usually need to open a probate case. 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.

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. Entrusting the missing person's share to a neutral agency ensures that the share will be available if the person is ever located.

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 \$25 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; your 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 web site at www.ssa.gov.

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.

IRS Policy Statement P-1-187 provides details about information to include in the cover letter to the IRS and the letter to the missing person, as well as sample letters. Or visit the IRS web site, www.irs.gov.

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 intestacy 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 power of attorney laws are located in Sections 45-5-601 through 45-5-617. See also Uniform Health Care Decisions Act, Sections 24-7A-1 through 18.

10.14 Authenticated v. Certified Copies

As mentioned in the glossary, **authentication** is a triple **certification**. Authenticated copies are not the same as certified copies! Only the county clerk and court, not attorneys or members of the public, can attest that documents are authenticated copies.

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 are different than authenticated copies and are appropriate in cases where the law does not require authenticated copies. 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 clerks of the district court and of the probate court shall each keep a record for each decedent, ward, protected person or trust involved in any document which may be filed with their respective court under the Probate Code [this chapter], including petitions and applications, demands for notices or bonds and any orders by the respective courts, and any 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 must 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 must 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 must show the date of appointment.

The certification stamp 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__.
<u>(Signature or name stamp of County Clerk)</u> _____ County Clerk
By: <u>(original signature of Deputy Clerk)</u> Deputy Clerk

10.15 Small Estate Affidavits

Estates consisting of personal property valued at \$30,000 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 (probatable) estate, less liens and encumbrances, does not exceed \$30,000.00.
- 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.

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.

The Motor Vehicles Division has its own version of this form, MVD Form 10011, “Certificate of Transfer without Probate.” A sample MVD affidavit is at:

<http://www.mvd.newmexico.gov/assets/mvd10011.pdf>

(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 of _____ (name of decedent), deceased.
- 2. The value of the entire estate of the decedent, wherever located, less liens and encumbrances, does not exceed \$30,000.
- 3. Thirty days have elapsed since the death of the decedent. A copy of the death certificate is attached hereto.
- 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 (1995 Repl.), 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 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

In the past 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." 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, where no probate proceeding is required. The law says that when one spouse dies, if there is no will or if the deceased spouse's will leaves the home to the surviving spouse, then the home transfers without a probate. **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 will of the decedent, if any, a copy of the deed to the subject property, and an original death certificate. The affidavit cannot be completed prior to six months after the death, must include statements as to the payment of debts and tax, and has restrictions on the value of the property.

To use this affidavit:

- the home must be community property;
- the value of the home for property tax purposes cannot exceed \$100,000; and
- the home involved must be the principal place of residence of the decedent or surviving 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 must be listed as well (New Mexico Statutes Annotated, Section 45-3-1205 outlines all requirements). A copy of the deed to the home, as well as a certified copy of the deceased spouse's death certificate, should be attached to the affidavit.

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 death certificate 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 law states that "the value of the home for property taxation purposes cannot exceed \$100,000." Some attorneys and title companies interpret this to mean you can only use the affidavit to transfer houses whose market value is \$100,000 or less. Others say it can be used for houses valued at up to \$300,000. Here's why: examine a yearly "Notice of Value" from the county assessor. In many counties, one should see "Full Total Value" and "Net Taxable Value," which is one-third of the "Full Total Value" minus exemptions. The second interpretation allows one to use the affidavit if the home's Net Taxable Value is \$100,000 or less, since that is the figure used to calculate property taxes.

Other counties value real property for property tax purposes at fair market value, rather than 1/3 of taxable value. Still other counties interpret the phrase "the value of the home for property taxation purposes cannot exceed \$100,000" to limit the use of the affidavit to houses whose fair market value is \$100,000 or less. The law governing these affidavits may be amended in the future to be more clear.

Currently, various title companies and their attorneys allow this affidavit to be used to transfer homes valued at up to \$300,000 if their "Net Taxable Value" does not exceed \$100,000.

(See the next page for a sample form).

10.16.1 Sample Affidavit Form

AFFIDAVIT OF TRANSFER OF HOMESTEAD TO SURVIVING SPOUSE

PURSUANT TO SECTION 45-3-1205, NMSA 1978

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 in the certified copy of the death certificate attached hereto.
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 any 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 is assessed for property tax purposes for not more than \$100,000.

All of which affiant affirms to be 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)

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.

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.

11.3 Limits on Fees for Performing Weddings

The following guidelines apply to wedding fees:

- Probate judges may **not** charge a fee for performing weddings, but may accept a voluntary gratuity or gift if it is offered, Section 40-1-2(C), 1931-32 Op. Att’y Gen. 31. This applies to weddings performed outside of the building and during non-regular work hours, such as weekends.
- **HOWEVER**, 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.

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 in prison*). Judges may decline to perform a proxy marriage if they feel uncomfortable with the concept.
- New Mexico does not have 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, without going through the probate process. Go to www.abogadapress.com 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, a copy of the deed to the subject property, and an original death certificate 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, *see* Sections 45-3-303(D), 45-4-207. *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(2).

"Application" is the written request to the probate court for an informal probate or appointment. For more information, *see* Section 45-1-201(2), Chapter 4 of this Manual and Probate Forms 4B-101 and 4B-102.

"Authentication" is a triple **certification**. In probate courts, 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."** *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(3)) or another governing instrument (*See* Section 45-6-201C.). The probate code and the forms use the word **"Devisee"** when referring to a will, which means the same thing (*See* Section 45-1-201(10)).

"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 (*See* Section 45-1-201(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. *Also see* Sections 45-1-201(A)(6), 45-3-801, 45-3-802 and 45-3-803. *Also see* Section 45-3-805 for priority for payment of 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 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 (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 (45-3-801(B), 45-3-803(A)(2)).

"Decedent" is the person who has died and whose will is being probated or whose estate is being administered.

"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 45-1-107A; *also see* Chapter 4 of this Manual.)

"Deed" is a document that conveys title to real property from one owner to another. *See* Chapter 9. *See also* Real Property as Part of Probate Cases brochure.

"Descendant" is the child, grandchild, great-grandchild, etc. of a decedent. For more information, *see* Section 45-1-201(8); *see also* **"Issue"** and **"Heirs,"** Chapter 4 of this Manual and the Who are the Heirs? brochure.

"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 for 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.

"Devise," when used as a noun, is a gift of real property (land) 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(9).

"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(10).

"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.

"Distributee" is any person who receives assets from the estate of the decedent, other than as a creditor or purchaser. For more information, *see* Section 45-1-201(11).

"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 registering to vote, using the address as a permanent address, etc. It is the place the person intends to return to, even when 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 in this Manual.

"Duties of a Personal Representative" are those things 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 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(12). **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.**

“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 300; also in 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. *See* 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 value of the decedent's assets at the time of death, without any deductions.

"Heirs" are those persons who are entitled to inherit the estate of the decedent under the "laws of intestate succession." 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. Many hospitals are using this act to deny the heirs of an estate access to a decedent’s medical records unless they open a probate.

"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 probate. For more information, *see* Affidavit of Surviving Spouse and Section 45-3-1205.

“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. *See* 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 may also include 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. *See* Sections 45-3-301 through 45-3-311 and Chapter 4 of this Manual.

“Inspection of Public Records Act” states that every person has a right to inspect public records of this state; see Section 14-2-1, et. seq. Also see Section 34-7, et seq.

“Interested Person” is an heir, devisee or any other person having a right to, or a claim against, a deceased person's estate. Creditors and the state, in certain circumstances, are interested persons. *See* Section 45-1-201(23). After the filing of the initial Application, heirs and devisees are 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 descendants, of all generations, of a deceased person (*See* 45-1-201).

“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 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).

“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.)

“**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 attesting to the signature and affixing the notary’s signature and seal to the document. *See* Sections 14-14-1 through 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). *Also see* Chapter 10 of this Manual.

“Open Records Act” is the **Inspection of Public Records Act**; see Section 14-2-1, et. seq. Also see Section 34-7-17 through 22, 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 and entering a will into probate and/or appointing a personal representative. The Order usually also stipulates that letters be issued "upon qualification and acceptance." **It is not the Order that gives the personal representative the authority to act, but the issuance of the Letters.** 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; *also 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 Representative" is the person appointed by the court to administer the estate of the decedent by giving notice of his/her appointment, paying claims of the estate and then distributing the estate according to the will or to the heirs, 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 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’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 intestacy or to a person (or entity) that has purchased the property from the estate. The deed needs to 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.

“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” is a beneficiary designation for bank accounts, U.S. Savings Bonds, and other accounts that means “payable on death.” The beneficiary/POD designee should be able to obtain 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).

"Power of Attorney" is a signed document that authorizes another person on someone's behalf. A power of attorney terminates upon the death of the person 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 45-5-601 to 45-5-617. *See* Section 45-5-602 for statutory 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 need to be careful about making sure they are only providing information and not legal advice.

“Pro Se” is the Latin phrase for acting without an attorney.

"Probate" technically is the court procedure by which a will is proved to be valid or invalid. Common usage of this term now means 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 18 states. The New Mexico Uniform Probate Code is Section 45 (Pamphlet 67) of the New Mexico Statutes Annotated. The current version is the 1995 Replacement Pamphlet with a 2005 Cumulative Supplement. Judges should always have the most current edition of the UPC, which is available from the New Mexico Compilation Commission, PO Box 15549, Santa Fe, NM 87592, (505) 827-4821.

"Probate Estate" is that part of a deceased person's estate that is governed by the provisions of the 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.

"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 to 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* 45-2-106, 45-2-709(B).

"Revoked or Revocation" when used with these forms refers to a will or other document that the decedent has canceled. If a will is revoked, it has no effect. *See* Section 45-2-507 and Chapter 2 of this Manual for more information on revoking wills.

"Safe Deposit Box" is a secure storage compartment at a bank 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); 58-10-109 (Saving & Loan Institutions); 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.

“**Small Estate Affidavit**” is the affidavit used to collect personal property of the decedent when a probate is not necessary and the total value of the estate is worth less than \$30,000.00. Also called **Affidavit of Successor in Interest**, defined in detail above

“**Special Administrator**” is someone who has been appointed by the court 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* 45-3-614 through 45-3-616 and Chapter 3 of this Manual 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).

“**Testate**” means having a valid will. *See* 45-2-502 for what constitutes a valid will; also see Chapter 2.

“**Testator**” is someone making, or who has made, a will, or someone who dies leaving a valid will. “**Testatrix**” is a female testator, although this term is no longer used in the Uniform Probate Code. “Testator” now applies to both males and females. *See* 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, in order to have effect, **must** be recorded with the County Clerk’s office during the grantor’s lifetime. *See* 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 probate usually is not required, as the trustee holds the assets of the estate (and not the decedent). *See* 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 need to be careful about making sure they are only providing 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” 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. *Also see* 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.

"Will" is a document that provides for the distribution of the assets of a person's estate upon death. 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 in order for the will to be considered valid. A will is sometimes referred to as **"Last Will and Testament."** For more information, *see* Sections 45-1-201(53) and 45-2-502. *See also* Chapter 2.

"Witnesses" are, for purposes of the Probate Code, persons attesting to having watched a testator sign 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. *See* Chapter 10.

"Wedding" is a ceremony to solemnize the contract of matrimony. *See* Section 40-1-1 et. seq. *Also see* Chapter 11 for license requirements.

CHAPTER 13

Code of Judicial Conduct

This chapter provides:

- Code of Judicial Conduct, with commentary.

Important notes:

- The Code is issued by the New Mexico Supreme Court and is binding on the New Mexico judiciary.
- Not all sections of the Code apply to all judges. Refer to Section 21-901(C) to determine which requirements of the Code do not apply to probate judges.

Preamble

21-001	Definitions.
21-100	A judge shall uphold the integrity and independence of the judiciary.
21-200	A judge shall avoid impropriety and the appearance of impropriety in all the judge's activities.
21-300	A judge shall perform the duties of office impartially and diligently.
21-400	Disqualification.
21-500	A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.
21-600	Reporting quasi-judicial and extra-judicial activities and compensation.
21-700	Elections and political activity.
21-800	A judge shall refrain from campaign fund-raising activity which has the appearance of impropriety.
21-900	Violations.
21-901	Applicability.

Preamble

An independent and honorable judiciary is indispensable to justice in our society. The provisions of this Code should be construed and applied to further that objective.

21-001. Definitions.

As used in this Code:

A. "candidate" means a person seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as the person makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support. The

term "candidate" has the same meaning when applied to a judge seeking election or appointment to nonjudicial office;

B. "election" means a municipal, primary or general election and includes partisan elections, nonpartisan elections and retention elections;

C. "fiduciary" includes such relationships as executor, personal representative, attorney in fact, trustee and guardian;

D. "impartiality" or "impartial" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

E. "knowingly," "knowledge," "known" or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances;

F. "law" means court rules, statutes, the United States Constitution, the Constitution of the State of New Mexico and decisional law of this jurisdiction;

G. "member of the candidate's family" or "member of the judge's family" means a spouse, child, grandchild, parent, grandparent or other relative or person with whom the candidate maintains a close familial relationship;

H. "member of the judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household;

I. "nonpublic information" means information that, by law or court order, is not available to the public; and

J. "require," when used in rules prescribing that a judge "require" certain conduct of others, means that a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

[Adopted, effective February 16, 1995; as amended, effective August 31, 2004.]

The 2004 amendment, effective August 31, 2004, added a new Paragraph D defining "impartiality" or "impartial" and relettered former Paragraphs D to I as present Paragraphs E to J.

21-100. A judge shall uphold the integrity and independence of the judiciary.

A judge shall participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.

[As amended, effective February 16, 1995.]

COMMITTEE COMMENTARY

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness and soundness of character. An independent judiciary is one free of inappropriate outside influences. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

COMPILER'S ANNOTATIONS

The 1995 amendment, effective February 16, 1995, rewrote the rule and rewrote the commentary.

The 2004 amendment, effective August 31, 2004, added two new sentences to the commentary as follows: "A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness and soundness of character. An independent judiciary is one free of inappropriate outside influences."

Failure to recuse when appearance of impropriety occurs. — Where district judge had a personal relationship with the defendant's attorney, who was defendant's boyfriend and who subsequently became the defendant's husband, and where district judge continued to preside over criminal case even though he acknowledged that his continued involvement in the case would foster the appearance of impropriety, the actions of district judge constituted willful misconduct in office. In re McBee, 2006-NMSC-024, 139 N.M. 529, 134 P.3d 769.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 1 et seq.

48A C.J.S. Judges § 35 et seq.

21-200. A judge shall avoid impropriety and the appearance of impropriety in all the judge's activities.

A. **Respect for the law.** A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. **Impartiality.** A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others; nor should a judge convey or permit others subject to the judge's direction and control to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. **Membership in organizations.** A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. [As amended, effective February 16, 1995.]

COMMITTEE COMMENTARY

Paragraph A

The commentary to Rule 21-100 NMRA also applies to Paragraph A.

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Subparagraphs (10) and (11) of Paragraph B of Rules 21-300 NMRA that are indispensable to the maintenance of the integrity, impartiality and independence of the judiciary.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial

responsibilities with integrity, impartiality and competence is impaired.

See *also* Commentary to Paragraph C of this rule.

Paragraph B

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. (As to the acceptance of awards, see Paragraph D(5)(a) of Rule 21-500 and Committee Commentary.)

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation.

Judges may participate in the process of judicial selection as provided by law and by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for judgeship. (See *also* Rule 21-700 regarding use of a judge's name in political activities.)

A judge must not testify voluntarily as a character witness because to do so might lend the prestige of the judicial office in support of the party for whom the judge testifies, and such testimony may be misunderstood to be an official testimonial. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

Paragraph C

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Paragraph C of this rule refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership. See *New York State Club Ass'n Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

It would be a violation of this rule for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under this rule and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Paragraph A of this rule.

When a judge learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Paragraph C or Paragraph A of this rule, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

COMPILER'S ANNOTATIONS

The 1995 amendment, effective February 16, 1995, added Paragraph C, made gender neutral changes throughout the rule, and rewrote the commentary.

The 2004 amendment, effective August 31, 2004, added a new sentence to the second paragraph of Paragraph A of the commentary as follows: "Examples are the restrictions on judicial speech imposed by Subparagraphs (10) and (11) of Paragraph B of Rules 21-300 NMRA that are indispensable to the maintenance of the integrity, impartiality and independence of the judiciary".

Stringent code of conduct. — The conduct prescribed for judges and justices is more stringent than conduct generally imposed on other public officials. *In re Romero*, 100 N.M. 180, 668 P.2d 296 (1983) (decided prior to 1995 amendment).

Suspension resulting from willful violation. — Judge who willfully violated Code of Judicial Conduct in that he accepted favor from a person appearing before his court, thus giving rise to an appearance of impropriety, was suspended for 30 days without pay. *In re Terry*, 101 N.M. 360, 683 P.2d 42 (1984) (decided prior to 1995 amendment).

Improper comments. — Judge who was critical of the legal system during voir dire, implying that the system is governed by legislative whim rather than by well-settled principles, and who told the jury during trial of the consequences of their verdict, in terms of the mandated sentences for first- and second-degree murder, committed reversible error by depriving defendant of a fair trial. *State v. Henderson*, 1998-NMSC-018, 125 N.M. 434, 963 P.2d 511.

Circumspect behavior off the bench. — Judge who identified himself as a judge during issuance of citations to his son and his son's friends for violation of municipal ordinance, who asked officer issuing the citations if she knew who he was, and who involved himself in the municipal court proceedings on the citations acted with impropriety and his conduct constituted willful misconduct in office. *In re Ramirez*, 2006-NMSC-021, 139 N.M. 529, 135 P.3d 230.

Delegation of duty. — A judge was suspended for having delegated the duty to perform marriages to a municipal court clerk. *In re Perea*, 103 N.M. 617, 711 P.2d 894 (Ct. App. 1985) (decided prior to 1995 amendment).

Judge's relatives having ties to victim. — Recusal of a judge at a murder trial was not required where the judge's brother-in-law was the attorney representing the victim's family in a wrongful death action against defendant and the judge's son was employed as a law clerk by the district attorney. *State v. Fero*, 105 N.M. 339, 732 P.2d 866 (1987), *aff'd*, 107 N.M. 369, 758 P.2d 783 (1988) (decided prior to 1995 amendment).

Request for findings of fact and conclusions of law. — Because the court had decided in the state's favor, it was reasonable for the trial court to want to see requested findings of fact and conclusions of law from the plaintiff. Its request for those findings and conclusions did not show a bias or prejudice that would necessitate recusal, despite the defendants assertion of an apparent personal interest of the court in ensuring that the state submit its requested findings and conclusions. *State ex rel. Taxation & Revenue Dep't Motor Vehicle Div. v. Van Ruiten*, 107 N.M. 536, 760 P.2d 1302 (Ct. App.), *cert. denied*, 107 N.M. 413, 759 P.2d 200 (1988) (decided prior to 1995 amendment).

Failure to recuse when appearance of impropriety occurs. — Where district judge had a personal relationship with the defendant's attorney, who was defendant's boyfriend and who subsequently became the defendant's husband, and where district judge continued to preside over criminal case even though he acknowledged that his continued involvement in the case would foster the appearance of impropriety, the actions of district judge constituted willful misconduct in office. In re McBee, 2006-NMSC-024, 139 N.M. 529, 134 P.3d 769.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 86, 88.

Judge as witness in cause not on trial before him, 86 A.L.R.3d 633.

Consorting with, or maintaining social relations with, criminal figure as ground for disciplinary action against judge, 15 A.L.R.5th 923.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case, 85 A.L.R.5th 471.

Disqualification of judge for having decided different case against litigant - state cases, 85 A.L.R.5th 547.

48A C.J.S. Judges §§ 36, 37, 59, 107 to 129.

21-300. A judge shall perform the duties of office impartially and diligently.

A. **Judicial duties in general.** The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. **Adjudicative responsibilities.**

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall maintain order and decorum in judicial proceedings.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, marital status, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, marital status, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This subparagraph does not preclude legitimate advocacy or consideration by the court when race, sex, religion, national origin, disability, age, marital status, sexual orientation or socioeconomic status, or other similar factors, are issues in or relevant to the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. 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 concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication if it might reasonably be perceived that the party contacting the judge may have gained a tactical advantage.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. Ordinarily the judge will meet jointly with the parties.

(e) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

(9) All cases decided by an opinion of an appellate court shall be by a collegial opinion. Before an opinion is placed in final form, the participating justices or judges shall attempt to reconcile any differences between them. Each justice or judge on each panel is charged with the duty of carefully reading and analyzing the pertinent submitted material on each case in which the justice or judge participates.

(10) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This subparagraph does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This subparagraph does not apply to proceedings in which the judge is a litigant in a personal capacity.

(11) A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

(12) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(13) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. Administrative responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall inform and require the judge's staff, court officials and others subject to the judge's direction and control to observe the standards of confidentiality, fidelity and diligence that apply to the judge and to refrain from manifesting bias and prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

D. Disciplinary responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge who knows that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the New Mexico Judicial Standards Commission.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge who knows that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the New Mexico Disciplinary Board.

(3) The requirements of Subparagraphs (1) and (2) of this paragraph do not apply to any communication concerning alcohol or substance abuse by a judge or attorney that is:

(a) made for the purpose of reporting substance abuse or recommending, seeking or furthering the diagnosis, counseling or treatment of a judge or an attorney for alcohol or substance abuse; and

(b) made to, by or among members or representatives of the Lawyer's Assistance Committee of the State Bar, Alcoholics Anonymous, Narcotics Anonymous or other support group recognized by the Judicial Standards Commission or the Disciplinary Board. Recognition of any additional support group by the Judicial Standards Commission or Disciplinary Board shall be published in the Bar Bulletin.

This exception does not apply to information that is required by law to be reported, including information that must be reported under Paragraph E of this rule, or to disclosures or threats of future criminal acts or violations of these rules.

(4) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Subparagraphs (1) and (2) of Paragraph D of this rule are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

E. Judicial misconduct involving unlawful drugs; reporting requirement.

Notwithstanding the provisions of Paragraph D, any incumbent judge who illegally sells, purchases, possesses, or uses drugs or any substance considered unlawful under the provisions of the Controlled Substances Act, shall be subject to discipline under the Code of Judicial Conduct.

Any judge who has specific, objective, and articulable facts, or reasonable inferences that can be drawn from those facts, that a judge has engaged in such misconduct shall report those facts to the New Mexico Judicial Standards Commission. Reports of such misconduct shall include the following information:

- (1) name of the person filing the report;
- (2) address and telephone number where the person may be contacted;
- (3) a detailed description of the alleged misconduct;
- (4) dates of the alleged misconduct; and
- (5) any supporting evidence or material that may be available to the reporting person.

The Judicial Standards Commission shall review and evaluate reports of such misconduct to determine if the report warrants further review or investigation.

F. Definition. As used in this rule, "court personnel" does not include the lawyers in a proceeding before a judge.

[As amended, effective March 1, 1991; February 16, 1995; August 31, 2004; as amended by Supreme Court Order No. 09-8300-002, effective March 23, 2009.]

COMMITTEE COMMENTARY

Paragraph A

The commentary to Rule 21-100 NMRA also applies to Paragraph A of this rule.

Paragraph B (4)

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

Commentary B (5)

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

Paragraph B (7)

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Subparagraph (7) of Paragraph B, it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

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*.

Certain *ex parte* communication is approved by Subparagraph (7) of Paragraph B to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if all the criteria stated in Subparagraph (7) are clearly met. A judge must disclose to all parties all *ex parte* communications described in Subparagraphs (a) and (b) of Subparagraph (7) of this paragraph regarding a proceeding pending or impending before the judge if it might reasonably be perceived that the party contacting the judge may have gained a tactical advantage. On rare occasions the judge may, with the consent of the parties, meet separately with the parties.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Subparagraph (7) of Paragraph B of this rule is not violated through law clerks or other personnel on the judge's staff. See Paragraph E of this rule for the definition of "court personnel".

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

Paragraph B (8)

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts. See Rule 11-408 NMRA of the Rules of Evidence relating to communications relating to compromise.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

The practices of a judge in the enjoyment of hours of personal holiday or recreation should leave no public perception that the business of the court is not a full-time demand or that the avoidance of delays in the administration of justice is not dependent upon active management of the judiciary.

Paragraphs B (10) and (11)

Paragraphs B (10) and (11) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality and independence of the judiciary. A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. Subparagraphs (10) and (11) of Paragraph B do not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly.

Paragraph B (12)

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

Paragraph C

Appointees of the judge include officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

Paragraph D

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

Paragraph E

The definition of "court personnel" was taken from the Model Code of Judicial Conduct "terminology" section. It is used in Subparagraph (7)(c) and Subparagraph (9) of Paragraph B of this rule.

2008 Committee Commentary. — Notwithstanding the provisions of Paragraph D, Paragraph E sets forth the requirements for mandatory reporting of judicial misconduct involving unlawful drugs. See *In re Garza*, 2007-NMSC-028, 141 N.M. 831, 161 P.3d 876. In addition to the mandatory reporting requirements set forth in Paragraph E, the Supreme Court encourages any judge, employee of the judiciary, or lawyer who has a good faith basis to believe a judge is engaged in such misconduct, but does not have specific and articulable facts regarding such conduct, to report such belief to the Lawyer Assistance Committee hotline. The suggested reporting is to encourage members of the judiciary to seek appropriate help for alcohol and/or substance abuse problems.

[As amended, effective March 1, 1991; February 16, 1995; August 31, 2004; as amended by Supreme Court Order No. 09-8300-002, effective March 23, 2009.]

COMPILER'S ANNOTATIONS

Cross references. — For broadcasting, televising, photographing and recording of court proceedings, see Rule 23-107 NMRA.

The 1995 amendment, effective February 16, 1995, rewrote the rule and rewrote the commentary.

The 2004 amendment, effective August 31, 2004, added a new Subparagraph (11) of Paragraph B prohibiting a judge with respect to cases, controversies or issues from making pledges, promises or commitments "that are inconsistent with the impartial performance of the adjudicative duties of the office", redesignated Subparagraphs (11) and (12) as Subparagraphs (12) and (13); amended the commentary to change the heading "Paragraph B (9)" to "Paragraphs B (10) and (11)"; added the first three sentences after the rewritten heading relating to restrictions on judicial speech; and revised internal references in the commentary to be consistent with the 2004 amendment.

The 2009 amendment, as approved by Supreme Court Order 09-8300-002, effective March 23, 2009, in Subparagraph (1) of Paragraph D, replaced "having knowledge" with "who knows" and replaced "appropriate authority" with "New Mexico Judicial Standards Commission"; in Subparagraph (2) of Paragraph D, replaced "having knowledge" with "who knows" and replaced "appropriate authority" with "New Mexico Disciplinary Board"; in Subparagraph (3) of Paragraph D, deleted "(a) intended to be confidential"; renumbered "(b)" as "(a)" and "(c)" as "(b)"; in renumbered "(b)", replaced "a lawyers support group" with "the Lawyers Assistance Committee of the State Bar" and added "including information that must be reported under Paragraph E of this rule,"; added a new Paragraph E; and renumbered former Paragraph E as Paragraph F.

Delegation of duty. — A judge was suspended for having delegated the duty to perform marriages to a municipal court clerk. *In re Perea*, 103 N.M. 617, 711 P.2d 894 (Ct. App. 1985) (decided prior to 1995 amendment).

Order and decorum. — Judge failed to maintain order and decorum in the courtroom when he raised his voice to attorney appearing before him, prevented attorney from making full objections for the record, and admonished attorney in front of her client and his conduct constituted misconduct in office. *In re Ramirez*, 2006-NMSC-021, 139 N.M. 529, 135 P.3d 230.

Breach of agreement with chief judge. — Where district judge agreed with chief judge of district court that district judge would recuse himself in a case in which his continued involvement would create the appearance of impropriety and where district judge subsequently breached the agreement and reinserted himself in the case, the actions of district judge constituted willful misconduct in office. *In re McBee*, 2006-NMSC-024, 139 N.M. 529, 134 P.3d 769.

Ex parte communications. — Where district judge recused himself in a criminal case, but subsequently engaged in ex parte communications with defense counsel concerning his plans to reassert control over the case, the actions of district judge constituted willful misconduct in office. *In re McBee*, 2006-NMSC-024, 139 N.M. 529, 134 P.3d 769.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Abuse or misuse of contempt power as ground for removal or discipline of judge, 76 A.L.R.4th 982.

Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness, 82 A.L.R.4th 567.

Removal or discipline of state judge for neglect of, or failure to perform, judicial duties, 87 A.L.R.4th 727.

Disciplinary action against judge on ground of abusive or intemperate language or conduct toward attorneys, court personnel, or parties to or witnesses in actions, and the like, 89 A.L.R.4th 278.

Gestures, facial expressions, or other nonverbal communication of trial judge in criminal case as ground for relief, 45 A.L.R.5th 531.

Disqualification of judge based on property-ownership interest in litigation which consists of more than mere stock-state cases, 56 A.L.R.5th 783.

21-400. Disqualification.

A. **Recusal.** A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(1) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the

matter, or the judge or such lawyer has been a witness concerning it;

(3) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child, wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter of the controversy or in a party to the proceeding or has any other more than *de minimis* interest that could be substantially affected by the proceeding;

(4) the judge acted in an official capacity in any inferior court;

(5) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director or trustee of a party;

(b) is acting as a lawyer in the proceeding;

(c) is known by the judge to have a more than *de minimis* interest that could be substantially affected by the proceeding; or

(d) is to the judge's knowledge likely to be a material witness in the proceeding;

(6) the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to:

(a) an issue in the proceeding; or

(b) the controversy in the proceeding.

B. Duty to be informed. A judge shall use reasonable efforts to keep informed about the judge's personal and fiduciary economic interests, and make reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household. In keeping informed about the judge's personal economic and fiduciary interests, the judge may rely on representations of professional investment or financial advisors.

C. Remittal of disqualification. A judge disqualified by the terms of Paragraph A of this rule may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

D. Definitions. As used in this rule:

(1) "*de minimis*" means an insignificant interest that could not raise reasonable question as to a judge's impartiality;

(2) "economic interest" means ownership of a more than *de minimis* legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(a) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(b) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(c) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(d) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities; and

(3) "third degree of relationship" means the following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

[Approved, January 1, 1984; as amended, effective February 16, 1995; August 31, 2004.]

Committee commentary.—

Paragraph A. Recusal.

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Paragraph A of this rule apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge. A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

The fact that an employee of the court is a party to the proceeding does not of itself disqualify the judge. The judge shall consider the specifics of the case in determining whether the judge's impartiality might reasonably be questioned and if a recusal is required.

Paragraph A (1) and (2)

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of Subparagraph (2) of Paragraph A; a judge formerly employed by a governmental agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Paragraph A (3)

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Subparagraph (1) of Paragraph A, or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by

the outcome of the proceeding" under Paragraph A(5)(c) of this rule may require the judge's disqualification.

Paragraph A (6)

Subparagraph (6) of Paragraph A prohibits a judge from pre-judging an issue. This Subparagraph is not intended to limit any comment allowed under Rule 21-500 NMRA.

Paragraph C. Remittal of disqualification.

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

The issue of whether a judge is required to recuse for an appearance of impropriety after being threatened by a defendant is "whether an objective, disinterested observer, fully informed of the underlying facts, would entertain significant doubt that justice would be done absent recusal." *State v. Riordan*, 2009-NMSC-022, ¶ 11, 146 N.M. 281, 209 P.3d 773 (internal quotation marks and citations omitted). Threats alone do not require recusal, and deference should be given to the trial court's decision when there is a significant possibility that the defendant is attempting to manipulate the justice system. [Amended by Supreme Court Order No. 09-8300-023, effective September 4, 2009.]

COMPILER'S ANNOTATIONS

Compiler's notes. — The commentary relating to A(6) is not a part of the ABA commentary.

The 1995 amendment, effective February 16, 1995, rewrote the prior rule to comprise Paragraph A, added Subparagraph A(3), added Paragraphs B, C, and D, and rewrote the commentary.

The 2004 amendment, effective August 31, 2004, added a new Subparagraph (6) of Paragraph A providing for the recusal of a judge in a judicial proceeding if the judge, while a judge or a candidate for judicial office, made a public statement that commits, or appears to commit, the judge with respect to an issue or controversy in the judicial proceeding; and added Paragraph A (6) of the committee commentary.

The 2009 amendment, approved by Supreme Court Order No. 09-8300-023, effective September 4, 2009, added the last paragraph of the committee commentary.

Threats against a presiding judge. — Where three criminal cases pending against the defendant were assigned to the same judge; during the pendency of the three cases, the defendant was charged with conspiring to commit an assault with a deadly weapon on the judge; the judge filed a recusal in the conspiracy case, but not in the other three pending cases; and there was no showing of bias by the judge against the defendant, the judge did not abuse the judge's discretion in denying the defendant's motion requesting the recusal of the judge. *State v. Riordan*, 2009-NMSC-022, 146 N.M. 281, 209 P.3d 773.

Judge acting as mediator and as hearing officer to impose sanctions. — Where a district judge appointed another district judge as a mediator to conduct a settlement conference; the mediator judge was subsequently appointed to hear motions for sanctions against one party for alleged bad faith participation in the settlement conference; the mediator judge heard the motions, made findings of fact, concluded that the party had conducted itself in bad faith at the conference, and entered an order requiring the party to pay a sanction; and the appointing district judge independently reviewed the mediator judge's decision and came to its own independent conclusions regarding sanctions; the appointing judge did not abuse its discretion in appointing the mediator judge to hear the motions for sanctions. *Carlsbad Hotel Associates, L.L.C. v. Patterson-UTI Drilling Co.*, 2009-NMCA-005, 145 N.M. 385, 199 P.3d 288, cert. granted, 2009-NMCERT-001.

Motion to recuse after waiver. — Where the district judge disclosed the basis for his disqualification and the respondent waived disqualification by agreeing to abide by the judge's decisions on all issues of the case, the judge was not required to recuse himself upon the motion of the petitioner after the waiver. In the Matter of Adoption Petn. of Rebecca M., 2008-NMCA-038, 143 NM 554, 178 P.3d 839.

Stringent code of conduct. — The conduct prescribed for judges and justices is more stringent than conduct generally imposed on other public officials. In re Romero, 100 N.M. 180, 668 P.2d 296 (1983) (decided prior to 1995 amendment).

Duty to exercise judicial function. — Except in those cases where a judge's impartiality might be reasonably questioned, he must exercise his judicial function. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

Recusal rests within discretion of trial judge. Demers v. Gerety, 92 N.M. 749, 595 P.2d 387 (Ct. App.), aff'd in part, rev'd on other grounds, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment); Klindere v. Worley Mills, Inc., 96 N.M. 743, 634 P.2d 1295 (Ct. App. 1981);(decided prior to 1995 amendment).

Judge has discretionary power to disqualify himself sua sponte whenever the existence of any semblance of judicial bias or impropriety in a proceeding in his court comes to his attention. Demers v. Gerety, 92 N.M. 749, 595 P.2d 387 (Ct. App.), aff'd in part, rev'd on other grounds, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

Statement of reasons for recusal not required. — When a recusal is challenged, and the challenge is denied, a district judge does not have a duty to state in the order of denial that he has valid reasons for recusing himself. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

Compelling constitutional, statutory or ethical reason for recusal required. — Although the reasons for a judge to disqualify himself may be personal and he need not state them, nonetheless a judge has a duty to perform his judicial role, and he has no right to disqualify himself unless there is a compelling constitutional, statutory or ethical cause for so doing. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

Grounds relied on for disqualification must be adequate, because a judge has no right to disqualify himself in the absence of a valid reason. Demers v. Gerety, 92 N.M. 749, 595 P.2d 387 (Ct. App.), aff'd in part, rev'd on other grounds, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

Suspicion of bias or prejudice is not enough to disqualify a judge. Roybal v. Morris, 100 N.M. 305, 669 P.2d 1100 (Ct. App. 1983) (decided prior to 1995 amendment).

Casual transaction cannot be basis of disqualification. — A casual transaction between two people is not a negative confrontation, so as to amount to an appearance of bias requiring voluntary disqualification. Lujan v. New Mexico State Police Bd., 100 N.M. 149, 667 P.2d 456 (1983) (decided prior to 1995 amendment).

Establishing record of impropriety. — Improper for trial judge to refuse defense counsel an opportunity to establish on the record defense counsel's objections to comments he claimed the trial judge had made during a recess. State v. Martin, 101 N.M. 595, 686 P.2d 937 (1984) (decided prior to 1995 amendment).

Impartiality throughout case required. — When judge believes he will be unable to remain impartial he should remove himself from the case in order to avoid any hint of impropriety. Gerety v. Demers, 92 N.M. 396, 589 P.2d 180 (1978) (decided prior to 1995 amendment).

Bias or prejudice as grounds for disqualification. — Bias or prejudice towards an attorney on each matter raised in the trial court is insufficient to disqualify a judge. This rule, however, is not absolute. If the bias and prejudice toward an attorney is of such a degree as to adversely affect the interest of the client, bias and prejudice toward an attorney is sufficient. Martinez v. Carmona, 95 N.M. 545, 624 P.2d 54 (Ct.

App. 1980) (decided prior to 1995 amendment).

When a district judge believes that his impartiality might reasonably be questioned with reference to bias and prejudice concerning a party, he must not exercise his judicial function. *Martinez v. Carmona*, 95 N.M. 545, 624 P.2d 54 (Ct. App. 1980) (decided prior to 1995 amendment) *Klindera v. Worley Mills, Inc.*, 96 N.M. 743, 634 P.2d 1295 (Ct. App. 1981);(decided prior to 1995 amendment).

Extrajudicial source. — Refusal of the judge to recuse himself in a malicious abuse of process case was proper pursuant to this rule where the analogy the court drew between a party and a well-known literary character (*Jay Gatsby*) did not establish any meaningful extrajudicial source. *Dawley v. La Puerta Architectural Antiques, Inc.*, 2003-NMCA-029, 133 N.M. 389, 62 P.3d 1271.

Recusal not required for prior judicial encounters. — The defendant's arguments that the trial judge was biased, based on the judge's previous contempt charges and sanctions or dislike toward the defendant, were without merit, since bias requiring recusal must arise from a personal, extra-judicial source, not a judicial source. *Purpura v. Purpura*, 115 N.M. 80, 847 P.2d 314 (Ct. App. 1993) (decided prior to 1995 amendment).

Failure to recuse when appearance of impropriety occurs. — Where district judge had a personal relationship with the defendant's attorney, who was defendant's boyfriend and who subsequently became the defendant's husband, and where district judge continued to preside over criminal case even though he acknowledged that his continued involvement in the case would foster the appearance of impropriety, the actions of district judge constituted willful misconduct in office. *In re McBee*, 2006-NMSC-024, 139 N.M. 529, 134 P.3d 769.

Review of decision not to recuse. — A decision contrary to recusal is reviewable on appeal only if it amounts to an abuse of sound judicial discretion. *Martinez v. Carmona*, 95 N.M. 545, 624 P.2d 54 (Ct. App. 1980) (decided prior to 1995 amendment).

When a movant has failed to meet its burden of establishing that the judge has a personal or extrajudicial bias or prejudice against it, the judge's refusal to disqualify himself is proper. *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981) (decided prior to 1995 amendment).

The constitutional right to disqualify a judge may be waived. *State v. Lucero*, 104 N.M. 587, 725 P.2d 266 (Ct. App. 1986) (decided prior to 1995 amendment).

Comment reflecting feelings about violent crimes after conviction obtained. — Comment reflecting judge's feelings about violent crimes once a conviction was obtained did not suggest that the judge had a personal bias or prejudice against defendant during trial. *State v. Swafford*, 109 N.M. 132, 782 P.2d 385 (Ct. App. 1989) (decided prior to 1995 amendment).

A claim of judicial bias cannot be based upon the imposition of the maximum legal sentence. *State v. Swafford*, 109 N.M. 132, 782 P.2d 385 (Ct. App. 1989) (decided prior to 1995 amendment).

Judge's refusal to accept a tendered plea agreement did not demonstrate judicial bias or prejudice, where, when the plea and disposition agreement was tendered, the judge reserved ruling on it until he could consider a presentence report, information on treatment programs, and written statements from the victim of the crime and her brother regarding their feelings and views on the proposed disposition. *State v. Swafford*, 109 N.M. 132, 782 P.2d 385 (Ct. App. 1989) (decided prior to 1995 amendment).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 95 et seq.

Relationship of judge to one who is party in an official or representative capacity as disqualification, 10 A.L.R.2d 1307.

Relationship to attorney in case as disqualifying judge, 50 A.L.R.2d 143.

Remarks or acts of trial judge criticizing, rebuking or punishing defense counsel in criminal case, as

requiring reversal, 62 A.L.R.2d 166.

Prior representation or activity as attorney or counsel as disqualifying judge, 72 A.L.R.2d 443, 16 A.L.R.4th 550.

Prejudicial effect of trial judge's remark during civil jury trial disparaging the litigants, the witnesses or the subject matter of the litigation, 83 A.L.R.2d 1128, 35 A.L.R.5th 1.

Prejudicial effect of remarks of trial judge criticizing counsel in civil case, 94 A.L.R.2d 826.

Disqualification of judge for bias against counsel for litigant, 23 A.L.R.3d 1416.

Disqualification of judge by relative's ownership of stock in corporation which is party to action or proceeding, 25 A.L.R.3d 1331.

Prejudicial effect of trial judge's remarks, during criminal trial, disparaging accused, 34 A.L.R.3d 1313.

Disqualification of judge or one acting in judicial capacity to preside in a case in which he has a pecuniary interest in the fine, penalty or forfeiture imposed upon the defendant, 72 A.L.R.3d 375.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge, 75 A.L.R.3d 1021.

Validity, propriety, and effect of allowing or prohibiting media's broadcasting, recording, or photographing court proceedings, 14 A.L.R.4th 121.

Waiver or loss of right to disqualify judge by participation in proceedings - modern state civil cases, 24 A.L.R.4th 870.

Disqualification of judge because of assault or threat against him by party or person associated with party, 25 A.L.R.4th 923.

Disqualification of judge because of political association or relation to attorney in case, 65 A.L.R.4th 73.

Judge's previous legal association with attorney connected to current case as warranting disqualification, 85 A.L.R.4th 700.

Disqualification of judge as affecting validity of decision in which other nondisqualified judges participated, 29 A.L.R.5th 722.

Disqualification of judge for bias against counsel for litigant, 54 A.L.R.5th 575.

Disqualification of judge based on property-ownership interest in litigation which consists of more than mere stock-state cases, 56 A.L.R.5th 783.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case, 85 A.L.R.5th 471.

Disqualification of judge for having decided different case against litigant - state cases, 85 A.L.R.5th 547.

Conduct or bias of law clerk or other judicial support personnel as warranting recusal of federal judge or magistrate, 65 A.L.R. Fed. 775.

48A C.J.S. Judges §§ 107 to 129.

21-500. A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.

A. **Extra-judicial activities in general.** A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office;
- (3) interfere with the proper performance of judicial duties; or
- (4) violate the judge's oath and obligation to uphold the laws and constitutions of the United States and the State of New Mexico.

B. Avocational activities. A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

C. Governmental, civic or charitable activities.

(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the judiciary or matters relating to the judiciary or which affect the interests of the judiciary, the legal system or the administration of justice or except when acting *pro se* in a matter involving the judge or the judge's interests;

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities;

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal, or civic organization not conducted for profit, subject to the following limitations and other requirements of this Code:

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization:

- (i) will be engaged in proceedings that would ordinarily come before the judge; or
- (ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Subparagraph (3)(b)(i) of this paragraph, if the membership solicitation is essentially a fund-raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

D. Financial activities.

(1) A judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to exploit the judge's judicial position; or

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

(3) A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:

(a) a business closely held by the judge or members of the judge's family; or

(b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(4) A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept a gift, bequest, favor or loan from anyone except for:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, including, but not limited to, a wedding anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative;

(f) a loan from a lending or similar institution in its regular course of business on the same terms generally available to persons who are not judges; or

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants.

E. Fiduciary activities.

(1) A judge shall not serve as the executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family or the family of a close friend, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as an arbitrator or mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

G. Practice of law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act *pro se* and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

H. 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.

I. No full-time municipal, magistrate, metropolitan, district or appellate judge may hold any other judicial position, elected or appointed.

[As amended, effective January 1, 1987; March 1, 1988 and October 1, 1989; February 16, 1995.]

COMMITTEE COMMENTARY

Paragraph A. Extra-judicial activities in general

Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.

Paragraph B. Avocational activities

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

In Paragraph B and other paragraphs of this rule, the phrase "subject to the requirements of this Code" is used, notably, in connection with a judge's governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various provisions of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

Paragraph C. Governmental, civic or charitable activities

Paragraph C(1)

See Paragraph B of Rule 21-200 regarding the obligation to avoid improper influence.

Paragraph C(2)

Paragraph C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system or administration of justice as authorized by Paragraph C(3). The appropriateness of accepting extra judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra judicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.

Paragraph C(2) does not govern a judge's service in a nongovernmental position. See Paragraph C(3) of this rule permitting service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit. For example, service on the board of a public educational institution, unless it were a law school, would be prohibited under Paragraph C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Paragraph C(3).

Paragraph C(3)

Paragraph C(3) of this rule does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Paragraph C(2).

See Commentary to Paragraph B of this rule regarding use of the phrase "subject to the following limitations and the other requirements of this Code". As an example of the meaning of the phrase, a judge permitted by Paragraph C(3) of this rule to serve on the board of a fraternal institution may be prohibited from such service by Paragraph A of Rule 21-200 if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Rule 21-400 in addition to Paragraph C of this rule. For example, a judge is prohibited by Paragraph G from serving as a legal advisor to a civic or charitable organization.

Paragraph C(3)(a)

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the court for adjudication.

Paragraph C(3)(b)

A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice or a nonprofit educational, religious, charitable, fraternal or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing or by telephone except in the following cases: (1) a judge may solicit for funds or memberships other judges over whom the judge does not exercise supervisory or appellate authority; (2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves; and (3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Paragraph C(3)(b) provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

If requested to be a speaker or guest of honor at an organization or fund-raising event, the judge should seriously consider whether the acceptance of such a role would constitute the use of the prestige of judicial office for fund-raising purposes. Mere attendance at such an event is permissible if otherwise consistent with this Code.

Paragraph D. Financial activities
Paragraph D(1)

When a judge acquires information in a judicial capacity, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Rule 21-200 B; see also Rule 21-300 B(12).

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's court. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. With respect to affiliation of relatives of judge with law firms appearing before the judge, see Commentary to Paragraph A of Rule 21-400 relating to disqualification.

Participation by a judge in financial and business dealings is subject to the general prohibitions in Paragraph A of this rule against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Rule 21-200 against activities involving impropriety or the appearance of impropriety and the prohibition in Paragraph B of Rule 21-200 against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Rule 21-100. See Commentary for Paragraph B of this rule regarding use of the phrase "subject to the requirements of this Code."

Paragraph D(2)

This subparagraph provides that, subject to the requirements of this Code, a judge may hold and manage investments owned solely by the judge, investments owned solely by a member or members of the judge's family, and investments owned jointly by the judge and members of the judge's family.

Paragraph D(3)

Subject to the requirements of this Code, a judge may participate in a business that is closely held either by the judge alone, by members of the judge's family, or by the judge and members of the judge's family.

Although participation by a judge in a closely-held family business might otherwise be permitted by Paragraph D(3) of this rule, a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge's court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely-held family business if the judge's participation would involve misuse of the prestige of judicial office.

Paragraph D(5)

Paragraph D(5) does not apply to contributions to a judge's campaign for judicial office, a matter governed by Rule 21-800. Because a gift, bequest, favor or loan to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

Paragraph D(5)(d)

A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required. See, however, Paragraph D(5)(e).

Paragraph D(5)(h)

Paragraph D(5)(h) prohibits judges from accepting gifts, favors, bequests or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

Paragraph E. Fiduciary activities

The restrictions imposed by this rule may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Subparagraph (4) of Paragraph D.

Paragraph F. Service as an arbitrator or mediator

Paragraph F does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties.

Paragraph G. Practice of law

This prohibition refers to the practice of law in a representative capacity and not in a *pro se* capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Paragraph B of Rule 21-200.

The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

COMPILER'S ANNOTATIONS

The 1995 amendment, effective February 16, 1995, rewrote the rule and rewrote the commentary.

Financial activity posing conflict of interest. — A municipal judge was in violation of this canon because he owned and directed a "driving while intoxicated school" while serving on the bench and sentencing people to attend said school; this conflict in interest reflected adversely on his impartiality as a member of the judiciary. *In re Rainaldi*, 104 N.M. 762, 727 P.2d 70 (1986) (decided prior to 1995 amendment).

Pro se appearance as party defendant not violative of Paragraph F (now G). — State court judge's pro se appearance as a party defendant in law suit pending before federal district court does not constitute practice of law in violation of Paragraph F (now see Paragraph G). *United States v. Martinez*, 101 N.M. 423, 684 P.2d 509 (1984) (decided prior to 1995 amendment).

Acceptance of gratuity for marriage ceremony. — Except for municipal judges, a judge may not accept a gratuity in connection with the performance of a marriage ceremony without violating the New Mexico Constitution. 1991 Op. Att'y Gen. No. 91-09 (decided prior to 1995 amendment).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 44 et seq.

Other public offices or employments within prohibitions as regards judicial officers of constitutional or statutory provisions against holding more than one office, 89 A.L.R. 1113.

What amounts to practice of law within contemplation of constitutional or statutory provision which makes such practice a condition of eligibility to a judicial office or forbids it by one holding judicial position, 106 A.L.R. 508.

Propriety and permissibility of judge engaging in practice of law, 89 A.L.R.2d 886.

Validity and application of state statute prohibiting judge from practicing law, 17 A.L.R.4th 829.

Disqualification of judge based on property-ownership interest in litigation which consists of more than mere stock-state cases, 56 A.L.R.5th 783.

48A C.J.S. Judges §§ 35 to 38.

21-600. Reporting quasi-judicial and extra-judicial activities and compensation.

A. **Compensation and reimbursement.** A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if neither the source nor amount of such payments gives the appearance of influencing the judge's official duties, or otherwise gives the appearance of impropriety.

B. **Extra-judicial compensation.** Extra-judicial compensation is defined as being the consideration received for services rendered by a judge to a person, firm, corporation or association other than the salary, benefits and perquisites of office provided to the judge for the performance of official judicial duties. Extra-judicial compensation does not include income from interest, dividends, rents, royalties, working interests, proceeds of or profits from the sale or exchange of capital assets as defined by the Internal Revenue Code and regulations, or collection of fees or retirement benefits earned or reimbursement of expenses incurred prior to entering judicial service. Compensation or income of a spouse attributed to the judge by operation of community property or other law is not extra-judicial compensation of the judge. Extra-judicial compensation should not exceed a reasonable amount for the activities performed, and should not exceed what a person who is not a judge would receive for the same activity.

C. **Expense reimbursement.** Expense reimbursement should be limited to the actual cost of travel, food and lodging and other expenses reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse. Any payment in excess of actual cost is extra-judicial compensation subject to the requirements of this rule.

D. **Public reports.** In addition to all other reports required by law, a judge should report the date, place and nature of any activity for which the judge received extra-judicial compensation as defined in this rule, including the name of the payor and the amount, or character and value, of extra-judicial compensation so received. The judge's report shall be filed as a public record in the office of the clerk of the Supreme Court of New Mexico on or before April 15 of each year covering the preceding calendar year.

[As amended, effective January 1, 1987; February 16, 1995.]

COMMITTEE COMMENTARY

Paragraph A. Compensation and reimbursement

The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the amount of the extra-judicial compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts of interest are created by the arrangements. A judge must not appear to trade on judicial office for personal advantage. A judge shall not spend significant time away from court duties in order to meet speaking or writing commitments. Neither the source of payment nor the amount paid as extra-judicial compensation must raise any question of undue influence or the judge's

ability or willingness to be impartial. Engaging in business for profit with the State of New Mexico or any of its departments, officials, or political subdivisions, either in person or through an entity in which the judge owns an interest, should be carefully scrutinized to avoid creating a conflict of interest or suggesting that the judge is exploiting judicial office for personal advantage.

Paragraph B. Extra-judicial compensation

No judge may ask for any remuneration for performing a marriage ceremony, but may receive an unsolicited gratuity for performing a marriage outside normal business hours.

COMPILER'S ANNOTATIONS

The 1995 amendment, effective February 16, 1995, rewrote the rule and added the commentary.

Internal Revenue Code. — For the Internal Revenue Code, referred to in Paragraph B, see 26 U.S.C. § 1 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 27.

48A C.J.S. Judges § 35.

21-700. Elections and political activity.

A. Incumbent judges.

(1) A judge may engage in political activity on behalf of the legal system, the administration of justice, measures to improve the law and as expressly authorized by law or by this Code.

(2) A judge may, unless and except as prohibited by law:

(a) purchase tickets for and attend political gatherings;

(b) identify the political party of the judge, except as prohibited by Subparagraph (6) of Paragraph B of this rule; and

(c) contribute to a political organization.

(3) A judge shall not:

(a) act as a leader or hold an office in a political organization;

(b) publicly endorse or publicly oppose a candidate for public office through the news media or in campaign literature;

(c) make speeches on behalf of a political organization; or

(d) solicit funds for a political organization or candidate.

B. Candidates for election to judicial office. Candidates for election to judicial office in partisan, non-partisan and retention elections, including judges, lawyers and non-lawyers, are permitted to participate in the electoral process, subject to the requirements that all candidates:

(1) shall maintain the dignity appropriate to judicial office, act in a manner consistent with the impartiality, integrity and independence of the judiciary and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate;

(2) shall prohibit public officials and employees subject to the candidate's direction or control from doing for the judge what the candidate is prohibited from doing under these rules;

(3) shall not allow any other person to do for the candidate what the candidate is prohibited from doing under these rules, except activities permitted to a campaign committee;

(4) shall not:

(a) with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office; or

(b) misrepresent the candidate's or the candidate's opponent's identity, qualifications, present position or other material fact;

(5) may speak at public meetings, subject to these rules;

(6) may use advertising that does not contain any misleading contents, provided that the advertising is within the bounds of proper judicial decorum and does not, in nonpartisan elections, contain any reference to the candidate's affiliation with a political party; and

(7) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Paragraph B(4) of this rule.

C. Elections for non-judicial offices. No judge of any court in the State of New Mexico may while in office be nominated or elected to a public non-judicial office. A judge must, when filing a statement of candidacy for a non-judicial office, resign the judge's office immediately.

D. Candidates seeking appointment to judicial office.

(1) A candidate for appointment to judicial office shall not solicit or accept funds, personally or through a committee or otherwise, to support the candidacy.

(2) A candidate for appointment to judicial office shall not engage in political activity to secure the appointment except that such candidate may:

(a) communicate with the appointing authority, including any nominating commission designated to screen candidates;

(b) seek support or endorsement for the appointment from organizations and from individuals to the extent requested, required or permitted by the appointing authority and the nominating commission; and

(c) provide to the appointing authority and the nominating commission information as to the candidate's qualifications for office.

E. Judges seeking appointment to public, non-judicial office.

(1) A judge seeking appointment to a public, non-judicial office shall not:

(a) solicit or accept funds, personally or through a committee, or otherwise, to support the candidacy;

(b) engage in any political activity to secure the appointment except:

(i) communicating with the appointing authority;

(ii) seeking the support or endorsement for the appointment from organizations and from individuals to the extent requested, required or permitted by the appointing authority; and

(iii) providing to the appointing authority information concerning the candidate's qualifications for the office.

(2) A judge seeking appointment to a public non-judicial office, during the time the appointment is sought, shall be disqualified from presiding or participating as a judge in any legal proceeding involving or materially affecting the interests of:

(a) the appointing authority; or

(b) an organization or individual that has been contacted by the candidate to make, or is known by the candidate to be making, a recommendation to the appointing authority concerning the appointment.

F. **Definition.** As used in this rule "political organization" means a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

[As amended, effective June 1, 1990; July 1, 1990; February 16, 1995; August 31, 2004.]

COMMITTEE COMMENTARY

With respect to a judge's activity on behalf of measures to improve the law, the legal system and the administration of justice, see Subparagraphs (1) through (3) of Paragraph C of Rule 21-500 NMRA. The Code does not prohibit a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government.

A judge or candidate for judicial office retains the right to participate in the political process as a voter.

Where false information concerning a judicial candidate is made public, a judge or another judicial candidate having knowledge of the facts is not prohibited from making the facts public.

A candidate for elective judicial office is not prohibited from retaining during candidacy a public office such as county prosecutor, which is not an office in a "political organization".

A judge or judicial candidate is not prohibited from privately expressing the judge's or judicial candidate's views on judicial candidates or other candidates for public office.

A candidate for judicial office does not publicly endorse another candidate for public office by having that candidate's name on the same ticket, or by participating in joint fund-raising with other judicial candidates, or by running for election as part of a slate of judicial candidates.

Although a judicial candidate must encourage members of the judicial candidate's family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

The Code prohibits a candidate for judicial office from making statements that commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of the candidate's personal views. The Code does not prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. Paragraph B(4) of this rule applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment.

This rule does not prohibit a candidate from initiating an evaluation by a judicial selection commission or bar association, or, subject to the requirements of the Code of Judicial Conduct, from responding to a request for information from any organization.

COMPILER'S ANNOTATIONS

Compiler's notes. — The ABA model rule provides that a candidate may not "knowingly" misrepresent the candidate's identity, qualifications, present position or other material fact.

The 1995 amendment, effective February 16, 1995, rewrote the rule and added the commentary.

The 2004 amendment, effective August 31, 2004, made gender neutral revisions; added to Subparagraph (1) of Paragraph B to require judicial candidates to "act in a manner consistent with the impartiality, integrity and independence of the judiciary; amended Subparagraph (4)(a) of Paragraph B to prohibit judicial candidates from making pledges or commitments with respect to cases, controversies or issues that are likely to come before the court that are inconsistent with the impartial performance of the adjudicative duties; deleted former Subparagraphs (4)(b) and (4)(c) of Paragraph B; redesignated former Subparagraph (4)(d) of Paragraph B as present Subparagraph (4)(b) and amended Subparagraph (4)(b) to prohibit a candidate from misrepresenting the candidate's opponent's position or other material fact.

The endorsement clause is a constitutional limitation on a judge's right to endorse political candidates. In the Matter of William A. Vincent, Jr., 2007-NMSC-056, 143 N.M. 56, 172 P.3d 605.

Judge cannot simultaneously run for separate judicial positions. — Paragraph B indicates that a judge may be nominated or run for another judicial office without resigning. It does not, however, state that a judge may simultaneously run for separate judicial positions. 1990 Op. Att'y Gen. No. 90-04 (decided prior to 1995 amendment).

Judicial candidate advertising. — Minnesota judicial advertising rule held unconstitutional under the strict scrutiny test. Republican Party of MN v. White, 536 U.S. 765 (2002).

Law reviews. — For article, "Judges and Politics: Accountability and Independence in an Election Year," see 12 N.M.L. Rev. 873 (1982).

For note, "Are There Any Limits on Judicial Candidates' Political Speech After Republican Party of Minnesota v. White," see 33 N.M.L. Rev. 449 (2003).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges § 47.

48A C.J.S. Judges § 37.

21-800. A judge shall refrain from campaign fund-raising activity which has the appearance of impropriety.

A. **Contributions creating appearance of impropriety.** Candidates for judicial office in both partisan and retention elections shall refrain from campaign fund-raising activity which has the appearance of impropriety, and shall not accept any contribution that creates an appearance of impropriety.

B. **Solicitation for other campaigns and candidates.** Subject to the restrictions of this rule, candidates in both partisan and retention elections for judicial office may solicit contributions for their own campaigns, but shall not solicit funds for any other political campaign, or for any candidate for any other office. Judicial candidates may run for election as part of a slate of judicial candidates and may participate in joint fund-raising events with other judicial candidates.

C. **Campaign committees.** Candidates in both partisan and retention elections shall establish committees of one or more responsible persons to conduct campaigns for the candidate using media advertisements, brochures, mailings, candidate forums and other means not prohibited by law or these rules. Campaign committees may solicit and accept reasonable

campaign contributions, and obtain public statements of support in behalf of the candidate, subject to the restrictions of these rules. All campaign contributions shall be paid or turned over to the campaign committee, and shall be managed and disbursed by the committee. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

D. Unopposed candidates in partisan elections. Candidates in partisan elections for judicial office who have a campaign fund, but who are unopposed or become unopposed in the campaign, shall return all unused and uncommitted campaign funds pro rata to the contributors of the funds, or donate the funds to a charitable organization, or to the State of New Mexico, as the candidate may choose, with disbursement of such funds to occur within thirty (30) days after the absence of opposition becomes known.

E. Unused campaign funds. A candidate for judicial office in either a partisan or retention election who has unused campaign funds remaining after election, and after all expenses of the campaign and election have been paid, shall refund the remaining funds pro rata to the campaign contributors, or donate the funds to a charitable organization, or to the State of New Mexico, as the candidate may choose, within thirty (30) days after the date the election results are certified.

F. Contributions by attorneys and litigants. 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 shall not knowingly solicit a contribution from a litigant whose case is then pending before the candidate. Campaign committees shall not disclose to the judge or candidate the identity or source of any funds raised by the committee. If a case is pending before any candidate for the judicial office being contested, restrictions of this subparagraph apply to all candidates for that office.

[As amended, effective February 16, 1995.]

COMMITTEE COMMENTARY

This rule restricts contributions for campaigns for judicial office to sources and amounts that do not create an appearance of impropriety. Candidates for judicial office may solicit contributions for their own campaigns, within the restrictions of this rule, but not for the campaigns for other candidates or offices. Candidates for election to judicial office are required to create campaign committees to solicit and accept contributions, to solicit public support, and to receive, manage and disburse all campaign contributions. Each candidate must instruct the campaign committee to solicit or accept only those contributions that are reasonable under the circumstances, and that meet the requirement of this rule.

Attorneys and litigants have the right as citizens to participate in the electoral process of public officers, including judges, and have the right to support and make contributions to candidates for judicial office. Therefore, campaign contributions by attorneys and litigants are permitted, within the restrictions of this rule. However, campaign contributions from litigants with cases pending before any candidate for the judicial office being contested may not be knowingly solicited or accepted by any candidate for that office, or that candidate's campaign committee.

Campaign committees established under this rule should attempt to manage campaign finances responsibly, avoiding deficits that may necessitate post-election fund-raising.

COMPILER'S ANNOTATIONS

The 1995 amendment, effective February 16, 1995, rewrote the rule and added the commentary.

21-900. Violations.

A. **Violations by incumbents.** Violations of any of the rules of the Code of Judicial Conduct by incumbent judges shall be investigated, proceeded upon and disposed of by the Judicial Standards Commission in accordance with its authority and rules of procedure, and by the Supreme Court of New Mexico acting under its powers of contempt and superintending control. Judges shall comply with all rules, requirements and procedures of the Judicial Standards Commission, shall cooperate with the Judicial Standards Commission in the performance of its functions and shall comply with all laws applicable to judicial office.

B. **Violations by candidates for judicial office.** All candidates for judicial office shall comply with Rules 21-700, 21-800, 21-900 and 21-901 NMRA of the Code of Judicial Conduct. Violations of those rules by persons who are members of the bar shall be deemed to constitute violations of the Rules of Professional Conduct. Violations of those rules by candidates who are not lawyers are within the superintending control of the Supreme Court, and may be grounds for petitioning the Supreme Court for relief by way of mandamus, injunction or other equitable relief to require compliance and rectify non-compliance.

C. **Challenges of violations in election campaigns.** A candidate may bring an action to challenge a violation by the candidate's opponent of Paragraph B of Rule 21-700 NMRA or Rule 21-800 NMRA occurring in election campaigns for judicial office.

(1) **Filing and venue.** In election campaigns for the Supreme Court and Court of Appeals, by filing a complaint in the district court for Santa Fe County. In election campaigns for district, metropolitan, magistrate, municipal and probate courts, by filing a complaint in the district court of the county in which the complainant or the defendant resides, but only within the judicial district where the election is to occur. The complainant shall serve all parties within three (3) days after filing the action. If available, any statement, advertisement or publication alleged to constitute a violation shall be filed with the complaint.

(2) **Standing; parties.** Violations by a candidate or by a candidate's campaign committee can be challenged by an opposing candidate. The alleged violator shall be joined as a defendant and shall be served forthwith in person with the complaint, summons and notice of hearing when issued. A candidate who has not been joined as a party may intervene in the proceeding by filing a notice of intervention and a response to the complaint within the time required by this rule.

(3) **Hearing.** The complaint shall be heard by the district court without a jury within ten (10) days after the action is filed, unless the time is extended for good cause. Peremptory challenges to the district judge shall be filed by the complainant within three (3) days after the action is filed and by a defendant within three (3) days after service of process on that defendant. The district court shall enter its decision, findings of fact and conclusions of law, within not more than three (3) days after the hearing is completed. The decision of the district court shall constitute a final judgment immediately upon entry.

(4) **Remedies.** The district court is authorized to issue any order provided by the Rules of Civil Procedure for the District Courts and any remedial decrees for cessation of violations, retractions, corrective publications or other relief as may be reasonably required to

rectify the effects of the violation. The district court may also refer any violation to the Judicial Standards Commission or the Disciplinary Board of the Supreme Court for additional action.

(5) **Discovery.** Any documentary or demonstrative evidence to be offered at the hearing shall be exchanged by the opposing parties as ordered by the district court, and in any case not less than twenty-four (24) hours prior to the commencement of the hearing. Discovery shall not delay the hearing on the merits, but wrongful refusal, obstruction or delay in discovery may be sanctioned in the discretion of the district court. The parties may by subpoena require the appearance of witnesses and the production of evidence at the hearing. The district court may allow oral testimony to be admitted telephonically.

(6) **Appeals.** Appeals shall be taken directly to the Supreme Court of New Mexico pursuant to the provisions of Rule 12-603 NMRA of the Rules of Appellate Procedure.

(7) **Other rules applicable.** The Rules of Civil Procedure for the District Courts, Rules of Appellate Procedure and Rules of Evidence shall apply unless inconsistent with this rule.

(8) **Other proceedings.** The jurisdiction of the Judicial Standards Commission, the Supreme Court and the Disciplinary Board to hear violations of the Code of Judicial Conduct is not affected by this paragraph.

[As amended, effective February 16, 1995; September 21, 2004.]

COMPILER'S ANNOTATIONS

Cross references. — For supreme court's power of superintending control over inferior courts, see N.M. Const., art. VI, § 3.

For judicial standards commission, see N.M. Const., art. VI, § 32, and 34-10-1 to 34-10-4 NMSA 1978.

The 1995 amendment, effective February 16, 1995, rewrote the rule.

The 2004 amendment, effective September 21, 2004, added Paragraph C.

Campaign promises. — Where a candidate for judicial office promised landlords that he would help them in court with their landlord-tenant case and advised the landlords on how to excuse the other judges, the actions of the candidate constituted willful misconduct. In the Matter of Rodella, 2008-NMSC-050, 144 N.M. 617, 190 P.3d 338.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 48A C.J.S. Judges § 48.

21-901. Applicability.

A. **Scope.** Except as provided in this rule, all judges and all candidates for judicial office shall comply with the provisions of this Code, including, but not limited to, all judges and justices and all judicial candidates of the Supreme Court, Court of Appeals, district court, magistrate court, metropolitan court, probate court and municipal court. Any person who serves as a full-time or part-time judge is a "judge" within the meaning of this Code.

B. **Full-time magistrate and municipal judges.** A full-time magistrate or municipal court judge is not required to:

(1) comply with the provisions of Paragraph B (7)(b) of Rule 21-300 which requires notice to the parties of advice obtained by the judge from a disinterested expert on the law; or

(2) comply with the provisions of Paragraphs E of Rule 21-500.

C. Probate and part-time magistrate and municipal judges. A probate judge or part-time magistrate or municipal judge:

(1) is not required to:

(a) except while serving as a judge, comply with Paragraph B(10) of Rule 21-300;

(b) comply with the provisions of Paragraph C(2) of Rule 21-500 relating to appointment to other governmental positions;

(c) comply with the provisions of Paragraph B (7)(b) of Rule 21-300 which requires notice to the parties of advice obtained by the judge from a disinterested expert on the law;

(d) comply with the provisions of Paragraph D of Rule 21-500, relating to financial activities, except:

(i) the requirement of Rule 21-500(D)(1)(a) that the judge not engage in financial and business dealings that may reasonably be perceived to exploit the judge's judicial position; and

(ii) the requirement of Rule 21-500(D)(5) that the judge not accept gifts, bequests, favors or loans except as permitted by the Code of Judicial Conduct;

(e) comply with Paragraphs E through G of Rule 21-500;

(f) comply with Paragraphs A through D of Rule 21-600; or

(g) comply with the provisions of Paragraphs C and F of Rule 21-800;

(2) 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.

D. Campaign Reporting Act. The provisions of the Campaign Reporting Act [1-19-25 to 1-19-36 NMSA 1978] shall apply to all judges who run in a primary and general election, including a judicial retention election.

E. Time for Compliance. A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Subparagraphs (2) and (3) of Paragraph D and Paragraph E of Rule 21-500 and shall comply with these paragraphs as soon as reasonably possible within one year after the effective date of this Code.

[As adopted, effective February 16, 1995.]

COMMITTEE COMMENTARY

The two categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. For the purposes of this section, as long as a retired judge is subject to recall the judge is considered to "perform judicial functions." The determination of which category and, accordingly, which specific Code provisions apply to an individual judicial officer, depend upon the facts of the particular judicial service.

Time for compliance

If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Paragraph E of Rule 21-500, continue to serve as fiduciary but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge

may, notwithstanding the prohibitions in Paragraph D (3) of Rule 21-500, continue in that activity for a reasonable period but in no event longer than one year.

CHAPTER 14

Selected New Mexico Statutes

This chapter provides:

- Statutes concerning probate courts.
- Statutes from the Uniform Probate Code.
- Statutes concerning safe deposit boxes.

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.

34-7-1. Probate judge; authorized.

There shall be a probate judge in each county of this state. The position of probate judge shall be deemed a part-time position.

History: Kearny Code, Courts and Judicial Powers, § 19; C.L. 1865, ch. 21, § 1; C.L. 1884, § 407; C.L. 1897, § 745; Code 1915, § 1423; C.S. 1929, § 34-401; 1941 Comp., § 16-401; 1953 Comp., § 16-4-1; Laws 1987, ch. 224, § 1.

34-7-2. [Probate judge and sheriff elected at each general election.]

At each general election held in this state there shall be elected in each county a probate judge and a sheriff.

History: Laws 1851-1852, p. 198; C.L. 1865, ch. 63, § 4; Code 1915, § 1245; C.S. 1929, § 33-4401; 1941 Comp., § 16-402; 1953 Comp., § 16-4-2.

34-7-3. [Seal of probate court.]

The probate courts shall procure and keep a seal with such emblems and devices as the courts shall think proper.

History: Kearny Code, Records and Seals, § 1; C.L. 1865, ch. 93, § 1; C.L. 1884, § 658; C.L. 1897, § 1033; Code 1915, § 1424; C.S. 1929, § 34-402; 1941 Comp., § 16-404; 1953 Comp., § 16-4-4.

34-7-4. [Place of holding court and keeping clerk's office.]

The probate judges of this state are strictly required to hold their courts in the county seats of their counties, and the probate clerks shall also have their offices in the said county seat of the county at all times.

History: Laws 1869-1870, ch. 51, § 1; C.L. 1884, § 415; C.L. 1897, § 749; Code 1915, § 1426; C.S. 1929, § 34-404; 1941 Comp., § 16-405; 1953 Comp., § 16-4-5.

34-7-5. [Failure to hold court or keep clerk's office at county seat; penalty.]

For every neglect on the part of any probate judge, or clerk of any probate court of the state, in the discharge of their duties as prescribed in the previous section [34-7-4 NMSA 1978], the one so failing, upon conviction thereof in the district court, shall be fined in a sum not exceeding five thousand dollars [(\$5,000)].

History: Laws 1869-1870, ch. 51, § 2; 1882, ch. 82, § 1; C.L. 1884, § 16; C.L. 1897, § 750; Code 1915, § 1427; C.S. 1929, § 34-405; 1941 Comp., § 16-406; 1953 Comp., § 16-4-6.

34-7-6. [County must furnish office and supplies for judge.]

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.

History: Laws 1887, ch. 66, § 3; C.L. 1897, § 754; Code 1915, § 1437; C.S. 1929, § 34-418; 1941 Comp., § 16-407; 1953 Comp., § 16-4-7.

34-7-7. [Custody of archives, documents and books.]

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.

History: Law 1865-1866, ch. 41, § 2; C.L. 1884, § 411; C.L. 1897, § 747; Code 1915, § 1425; C.S. 1929, § 34-403; 1941 Comp., § 16-408; 1953 Comp., § 16-4-8.

34-7-8. Probate courts; hours of business; notice.

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 which may properly come before the courts under the laws of the state and upon notice thereof given as required under the laws of the state.

History: Laws 1935, ch. 63, § 1; 1941 Comp., § 16-409; 1953 Comp., § 16-4-9; Laws 1987, ch. 224, § 2.

34-7-9. [Probate judge interested or disqualified; transfer to district court.]

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 papers and records or certified copies of all original papers and records in the probate court relating to said proceeding.

History: Laws 1889, ch. 132, § 1; C.L. 1897, § 751; Code 1915, § 1433; C.S. 1929, § 34-414; Laws 1933, ch. 102, § 1; 1941 Comp., § 16-412; 1953 Comp., § 16-4-12.

34-7-10. [Proceedings in district court after transfer.]

All proceedings thus transferred shall be docketed as other causes in the district court, which court shall thereupon exercise the same authority and take the same steps and proceedings as would have otherwise have [sic] been taken in the probate court.

History: Laws 1933, ch. 102, § 2; 1941 Comp., § 16-413; 1953 Comp., § 16-4-13.

34-7-11. [Probate judge absent or unable to attend to duties; powers of district judge.]

Whenever the probate judge shall be absent from the county wherein he was elected, or shall be incapacitated or unable to attend to his duties from any cause whatsoever, any district judge, of said county, or any other district judge designated to hold court in said county for him, may do any and all things that could otherwise be done by said probate judge, without the necessity of having the matters or proceedings transferred from the docket of the probate court to the docket of the district court. The fact of such absence or incapacity shall be recited in every order of the district judge entered in accordance with this act [section].

History: Laws 1933, ch. 101, § 1; 1941 Comp., § 16-414; Laws 1943, ch. 65, § 1; 1953 Comp., § 16-4-14.

34-7-12. Repealed.

Repeals. — Laws 1978, ch. 159, § 15, effective March 6, 1978, repealed 16-4-15, 1953 Comp. (34-7-12 NMSA 1978), relating to vacancy in the office of probate judge.

34-7-13. [Judges may issue process and make rules.]

That the judges of probate courts shall have full power and authority to issue whatever process may be necessary for the efficient discharge of their duties, and to make and publish rules and orders regulating the business and practice of their several courts, not inconsistent with the laws of this state.

History: Laws 1887, ch. 66, § 1; C.L. 1897, § 752; Code 1915, § 1435; C.S. 1929, § 34-416;

1941 Comp., § 16-416; 1953 Comp., § 16-4-16.

34-7-14. Fees of probate court clerks.

Clerks of the probate courts are entitled to receive the following docket fees in all matters:

A. for docketing each cause, to be paid by the party docketing the cause, thirty dollars (\$30.00), which shall include all costs of the clerks in any cause in the court; and

B. a fee of fifteen cents (\$.15) per folio in addition to the docket fee may be charged for any excess of twenty folios in cases where judgments or decrees or orders exceed twenty folios.

History: Laws 1923, ch. 29, § 1; C.S. 1929, § 34-406; Laws 1937, ch. 111, § 1; 1941 Comp., § 16-422; 1953 Comp., § 16-4-22; Laws 1961, ch. 16, § 1; 1975, ch. 257, § 8-102; 1993, ch. 132, § 1.

34-7-15. [Additional fees of clerk.]

In addition to the fees provided for in Section 1 [34-7-14 NMSA 1978] hereof, clerks of probate courts may charge the following fees:

for making an itemized bill of costs in any case, when demanded, fifty cents [(\$.50)];

for making and certifying to transcript of judgment, one dollar [(\$1.00)];

for taking an acknowledgment and affixing seal, fifty cents [(\$.50)], if but one person acknowledges, and twenty-five cents [(\$.25)] for each additional person;

for making copies of records or papers, ten cents [(\$.10)] per folio of one hundred words, for carbon copies three cents [(\$.03)] per folio;

for certificate and seal authenticating any paper as a true and correct copy, fifty cents [(\$.50)];

for making transcripts on appeal or certiorari to any court, and for certifying the same, such fees as are now provided by law; provided, however, that only fees for certification shall be charged where the transcript is prepared by the litigant himself.

History: Laws 1923, ch. 29, § 2; C.S. 1929, § 34-407; 1941 Comp., § 16-423; 1953 Comp., § 16-4-23.

34-7-16. [Fees exclusive.]

No other or different fees than those above provided shall be made or received by clerks of probate courts, and any services required of them in any matter other than those for which fees are herein provided shall be without compensation.

History: Laws 1923, ch. 29, § 4; C.S. 1929, § 34-409; 1941 Comp., § 16-424; 1953 Comp., § 16-4-24.

34-7-17. [Record of receipts and disbursements.]

The probate clerks of the different counties of this state are hereby required to keep a separate book for the sole purpose of keeping an exact account, which shall show in a clear and distinct manner all the money received, specifying the object for which it was received; and that the same book shall also contain a distinct and clear list of all warrants issued against the county treasury, and for what purpose.

History: Laws 1860-1861, p. 80; C.L. 1865, ch. 39, § 20; C.L. 1884, § 417; C.L. 1897, § 755;

Code 1915, § 1447; C.S. 1929, § 34-432; 1941 Comp., § 16-425; 1953 Comp., § 16-4-25.

34-7-18. [Current accounts; public inspection.]

There shall also be kept in said book a full copy of the accounts current for the year, open to the inspection of any citizen who may wish to examine the same as often as he may desire so to do.

History: Laws 1860-1861, p. 80; C.L. 1865, ch. 39, § 21; C.L. 1884, § 418; C.L. 1897, § 756; Code 1915, § 1448; C.S. 1929, § 34-433; 1941 Comp., § 16-426; 1953 Comp., § 16-4-26.

34-7-19. [Penalty for violation of Sections 34-7-17 and 34-7-18 NMSA 1978.]

All clerks who shall fail in the discharge of the duties required in the two foregoing sections [34-7-17, 34-7-18 NMSA 1978] shall be considered guilty of a misdemeanor, and on conviction before the district court shall be fined at the discretion of the court, in any sum not less than twenty-five dollars [(\$25.00)], nor more than one hundred dollars [(\$100)].

History: Laws 1860-1861, p. 80; C.L. 1865, ch. 39, § 24; C.L. 1884, § 419; C.L. 1897, § 757; Code 1915, § 1449; C.S. 1929, § 34-434; 1941 Comp., § 16-427; 1953 Comp., § 16-4-27.

34-7-20. Record of decedent's [decedents'] estates.

The county clerk shall keep a record or docket additional to the other records required by law, showing as follows:

- 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 the same can be ascertained; and
- C. a note of every sale of real estate made under the order of the court, with a reference to the volume and page of the court record where a complete record thereof may be found.

History: Laws 1889, ch. 90, § 42; C.L. 1897, § 2011; Code 1915, § 2309; C.S. 1929, § 47-902; 1941 Comp., § 16-428; 1953 Comp., § 16-4-28; Laws 1975, ch. 257, § 8-103.

34-7-21. Record of bonds and wills.

The clerk shall also record at length in books kept for that purpose, all bonds given by personal representatives, conservators and guardians, and all wills admitted to probate.

History: Laws 1889, ch. 90, § 43; C.L. 1897, § 2012; Code 1915, § 2310; C.S. 1929, § 47-903; 1941 Comp., § 16-429; 1953 Comp., § 16-4-29; Laws 1975, ch. 257, § 8-104.

34-7-22. [Deputy clerks; appointment; powers.]

The clerks of the probate courts of this state, with the consent of the probate judges, shall have power to appoint a deputy clerk of the probate court; each clerk shall appoint one, and such deputies when duly appointed and qualified shall have full power and shall be authorized to perform all the duties of the clerk of the said probate court.

History: Laws 1866-1867, ch. 24, § 1; C.L. 1884, § 421; C.L. 1897, § 759; Code 1915, § 1443; C.S. 1929, § 34-427; 1941 Comp., § 16-430; 1953 Comp., § 16-4-30.

34-7-23. [Oath of deputy clerks.]

The said deputy clerk shall take the same oath of office as is or may be provided by law as to his duties, which oath of office and his appointment shall be recorded in the records of the probate court.

History: Laws 1866-1867, ch. 24, § 2; C.L. 1884, § 422; C.L. 1897, § 760; Code 1915, § 1444; C.S. 1929, § 34-429; 1941 Comp., § 16-431; 1953 Comp., § 16-4-31.

34-7-24. [Authority of deputies; responsibility; signing papers.]

The clerks of the probate court shall be responsible, respectively, for the acts of their deputies, and for such purpose, all and every official act of the deputy shall be considered as an official act of the clerk who appointed him, and each deputy clerk shall sign all the papers issued by himself with the name of the clerk, in this manner: A. B., clerk of the probate court, by C. D., deputy clerk.

History: Laws 1866-1867, ch. 24, § 3; C.L. 1884, § 423; C.L. 1897, § 761; Code 1915, § 1445; C.S. 1929, § 34-430; 1941 Comp., § 16-432; 1953 Comp., § 16-4-32.

34-7-25. [Compensation of deputies to be paid by clerk.]

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.

History: Laws 1866-1867, ch. 24, § 4; C.L. 1884, § 424; C.L. 1897, § 762; Code 1915, § 1446; C.S. 1929, § 34-431; 1941 Comp., § 16-433; 1953 Comp., § 16-4-33.

14.2 Statutes from the Uniform Probate Code

45-1-302. Subject matter jurisdiction of district and probate courts.

A. The district court has exclusive original jurisdiction over all subject matter relating to:

(1) formal proceedings with respect to the estates of decedents, including determinations of testacy, appointment of personal representatives, constructions of wills, administration and expenditure of funds of estates, determination of heirs and successors of decedents and distribution and closing of estates;

(2) estates of missing and protected persons;

(3) protection of incapacitated persons and minors; and

(4) trusts.

B. The district court in formal proceedings shall have jurisdiction to determine title to and value of real or personal property as between the estate and any interested person, including strangers to the estate claiming adversely thereto. 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 which come before it.

C. The probate court and the district court have original jurisdiction over informal proceedings for probate of a will or appointment of a personal representative.

History: 1953 Comp., § 32A-1-302, enacted by Laws 1975, ch. 257, § 1-302; 1978, ch. 159, § 2.

45-1-302.1. Concurrent jurisdiction.

The district courts have concurrent jurisdiction with the probate courts in each county within their respective judicial district as to all matters concerning informal probate.

History: 1953 Comp., § 32A-1-302.1, enacted by Laws 1977, ch. 121, § 2.

45-1-307. Probate court; powers.

If for any reason the probate judge is unable to act, the acts and orders which the Probate Code [this chapter] specifies as performable by the probate court may be performed either by a judge of the district court or by a person designated by the district court by a written order filed and recorded in the office of the clerk of the district court.

History: 1953 Comp., § 32A-1-307, enacted by Laws 1975, ch. 257, § 1-307.

45-1-404. Real property outside county of administration; notice required; contents; effect.

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 and title of the personal representative; and
- (6) a complete description of the real property situate in such county.

B. The recorded notice shall constitute full and complete notice of all proceedings had, and to be had, in the administration proceedings, and it shall not be necessary to file or record in the county where the real property is located any other instruments or records relating to the administration of the estate.

History: 1953 Comp., § 32A-1-404, enacted by Laws 1975, ch. 257, § 1-404.

45-2-101. Intestate estate.

A. Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in the Uniform Probate Code [this chapter], except as modified by the decedent's will.

B. A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his intestate share.

History: 1978 Comp., § 45-2-101, enacted by Laws 1993, ch. 174, § 5.

45-2-102. Share of the spouse.

The intestate share of the surviving spouse is determined as follows:

- A. as to separate property:
 - (1) if there is no surviving issue of the decedent, the entire intestate estate; or
 - (2) if there is surviving issue of the decedent, one-fourth of the intestate estate; and
- B. as to community property, the one-half of the community property as to which the decedent could have exercised the power of testamentary disposition passes to the surviving spouse.

History: 1953 Comp., § 32A-2-102, enacted by Laws 1975, ch. 257, § 2-102.

45-2-103. Share of heirs other than surviving spouse.

Any part of the intestate estate not passing to the decedent's surviving spouse pursuant to Section 45-2-102 NMSA 1978, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

- A. to the decedent's descendants by representation;
- B. if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;
- C. if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation; and
- D. if there is no surviving descendant, parent or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation, and the other half passes to the decedent's maternal relatives in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half.

History: 1978 Comp., § 45-2-103, enacted by Laws 1993, ch. 174, § 6.

45-2-104. Requirement that heir survive decedent by one hundred twenty hours.

An individual who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent for purposes of family allowance, personal property allowance and intestate succession, and the decedent's heirs are determined accordingly. If it is not established by clear and convincing evidence that an individual who would otherwise be an heir survived the decedent by one hundred twenty hours, it is deemed that the individual failed to survive for the required period. This section is not to be applied if its application would result in a taking of intestate estate by the state pursuant to Section 45-2-105 NMSA 1978.

History: 1978 Comp., § 45-2-104, enacted by Laws 1993, ch. 174, § 7.

45-2-105. No taker.

If there is no taker under the provisions of Chapter 45, Article 2 NMSA 1978, the intestate estate passes to the state.

History: 1953 Comp., § 32A-2-105, enacted by Laws 1975, ch. 257, § 2-105; 1993, ch. 174, § 8.

45-2-106. Representation.

A. As used in this section:

(1) "deceased descendant", "deceased parent" or "deceased grandparent" means a descendant, parent or grandparent who either predeceased the decedent or is deemed to have predeceased the decedent pursuant to Section 45-2-104 NMSA 1978; and

(2) "surviving descendant" means a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent pursuant to Section 45-2-104 NMSA 1978.

B. If, pursuant to Section 45-2-103 NMSA 1978, a decedent's intestate estate or a part thereof passes "by representation" to the decedent's descendants, the estate or part thereof is divided into as many equal shares as there are:

(1) surviving descendants in the generation nearest to the decedent that contains one or more surviving descendants; and

(2) deceased descendants in the same generation who left surviving descendants, if any.

Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

C. If, pursuant to Section 45-2-103 NMSA 1978, a decedent's intestate estate or a part thereof passes "by representation" to the descendants of the decedent's deceased parents or either of them or to the descendants of the decedent's deceased paternal or maternal grandparents or either of them, the estate or part thereof is divided into as many equal shares as there are:

(1) surviving descendants in the generation nearest the deceased parents or either of them or the deceased grandparents or either of them that contains one or more surviving descendants; and

(2) deceased descendants in the same generation who left surviving descendants, if any.

Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

History: 1978 Comp., § 45-2-106, enacted by Laws 1993, ch. 174, § 9.

45-2-301. Entitlement of spouse; premarital will.

A. If a testator's surviving spouse married the testator after the testator executed his will, the surviving spouse is entitled to receive, as an intestate share, no less than the value of the share of the estate he would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse nor is devised to a descendant of such a child or passes pursuant to Section 45-2-603 or 45-2-604

NMSA 1978 to such a child or to a descendant of such a child, unless:

(1) it appears from the will or other evidence that the will was made in contemplation of the testator's marriage to the surviving spouse;

(2) the will expresses the intention that it is to be effective notwithstanding any subsequent marriage; or

(3) the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

B. In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse and who is not a child of the surviving spouse or a devise or substitute gift pursuant to Section 45-2-603 or 45-2-604 NMSA 1978 to a descendant of such a child, abate as provided in Section 45-3-902 NMSA 1978.

History: 1978 Comp., § 45-2-301, enacted by Laws 1993, ch. 174, § 17; 1995, ch. 210, § 5.

45-2-302. Omitted children.

A. Except as provided in Subsection B of this section, if a testator fails to provide in his will for any of his children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate as follows:

(1) if the testator had no child living when he executed the will, an omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all of the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will; or

(2) if the testator had one or more children living when he executed the will and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:

(a) the portion of the testator's estate in which the omitted after-born or after-adopted child is entitled to share is limited to devises made to the testator's then-living children under the will;

(b) the omitted after-born or after-adopted child is entitled to receive the share of the testator's estate, as limited in Subparagraph (a) of Paragraph (2) of Subsection A of this section, that the child would have received had the testator included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child;

(c) to the extent feasible, the interest granted an omitted after-born or after-adopted child under this section must be of the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children under the will; and

(d) in satisfying a share provided by Paragraph (2) of Subsection A of this section, devises to the testator's children who were living when the will was executed abate ratably. In abating the devices of the then-living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator.

- B. Subsection A of this section does not apply if:
- (1) it appears from the will that the omission was intentional; or
 - (2) the testator provided for the omitted after-born or after-adopted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.
- C. If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child.
- D. In satisfying a share provided by Paragraph (1) of Subsection A of this section, devises made by the will abate pursuant to Section 45-3-902 NMSA 1978.

History: 1978 Comp., § 45-2-302, enacted by Laws 1993, ch. 174, § 18; 1995, ch. 210, § 6.

45-2-401. Applicable law.

Chapter 45, Article 2, Part 4 NMSA 1978 applies to the estate of a decedent who dies domiciled in this state. Rights to family allowance and personal property allowance for a decedent who dies not domiciled in this state are governed by the laws of the decedent's domicile at death.

History: 1953 Comp., § 32A-2-401, enacted by Laws 1975, ch. 257, § 2-401; repealed and reenacted by Laws 1993, ch. 174, § 19.

45-2-402. Family allowance.

A decedent's surviving spouse is entitled to a family allowance of thirty thousand dollars (\$30,000). If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a family allowance amounting to thirty thousand dollars (\$30,000) divided by the number of minor and dependent children of the decedent. The family allowance is exempt from and has priority over all claims against the estate. Family allowance is in addition to any share passing to the surviving spouse or minor or dependent children by intestate succession or by the decedent's will, unless otherwise provided by the decedent in the will or other governing instrument.

History: 1978 Comp., § 45-2-402, enacted by Laws 1993, ch. 174, § 20; 1995, ch. 210, § 7.

45-2-403. Personal property allowance.

In addition to the family allowance, the decedent's surviving spouse is entitled from the estate to a value, not exceeding fifteen thousand dollars (\$15,000) in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, the decedent's children who are devisees under the will, who are entitled to a share of the estate pursuant to Section 45-2-302 NMSA 1978 or, if there is no will, who are intestate heirs are entitled jointly to the same value. If encumbered chattels are selected and the value in excess of security interests plus that of other exempt property is less than fifteen thousand dollars (\$15,000) or if there is not fifteen thousand dollars (\$15,000) worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the fifteen thousand dollar (\$15,000) value. Rights to specific property for the family allowance and assets needed to make up a deficiency in the property have priority over all claims against the estate, but the right to any assets to make up a deficiency of

exempt property abates as necessary to permit earlier payment of the family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by intestate succession or by the decedent's will, unless otherwise provided by the decedent in the will or other governing instrument.

History: 1978 Comp., § 45-2-403, enacted by Laws 1993, ch. 174, § 21; 1995, ch. 210, § 8; 1997, ch. 95, § 1; 1999, ch. 79, § 1.

45-2-501. Who may make will.

An individual eighteen or more years of age who is of sound mind may make a will.

History: 1978 Comp., § 45-2-501, enacted by Laws 1993, ch. 174, § 25.

45-2-502. Execution; witnessed wills.

Except as provided in Sections 45-2-506 and 45-2-513 NMSA 1978, a will must be:

- A. in writing;
- B. signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and
- C. signed by at least two individuals, each of whom signed in the presence of the testator and of each other after each witnessed the signing of the will as described in Subsection B of this section.

History: 1978 Comp., § 45-2-502, enacted by Laws 1993, ch. 174, § 26; 1995, ch. 210, § 11.

45-2-503. Reserved.

Compiler's notes. — Laws 1975, ch. 257, § 2-503, contained this section number, but no accompanying text.

45-2-504. Self-proved will.

A. A will may be simultaneously executed, attested and made self-proved by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:

"I, _____, the testator, sign my name to this instrument this _____ day of _____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind and under no constraint or undue influence.

Testator

We, _____, _____, the witnesses, sign our names to this instrument, and being first duly sworn, do hereby declare to the undersigned authority that the testator signs and executes this instrument as his will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence of the testator, and in the presence of each other hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind and under no constraint or undue influence.

Witness

Witness

The State of _____

County of _____

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____.

(Seal)

Signed _____

(Official capacity of officer)".

B. An attested will may be made self-proved at any time after its execution by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgment occurs and evidenced by the officer's certificate, under official seal, attached or annexed to the will in substantially the following form:

"The State of _____

County of _____

We, _____, _____ and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that he signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence of the testator, and in the presence of each other signed the will as witness, and that to the best of our knowledge the testator was at that time eighteen years of age or older, of sound mind and under no constraint or undue influence.

Testator

Witness

Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ of _____.

(Seal)

Signed _____

(Official capacity of officer)".

C. A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will if necessary to prove the will's due execution.

History: 1978 Comp., § 45-2-504, enacted by Laws 1993, ch. 174, § 27; 1995, ch. 210, § 12.

45-2-505. Who may witness.

A. An individual generally competent to be a witness may act as a witness to a will.

B. The signing of a will by an interested witness does not invalidate the will or any provision of it.

History: 1978 Comp., § 45-2-505, enacted by Laws 1993, ch. 174, § 28.

45-2-506. Choice of law as to execution.

A written will is valid if executed in compliance with Section 45-2-502 NMSA 1978 or if its execution complies with the law at the time of execution of the place where the will is executed or of the law of the place where at the time of execution or at the time of death the testator is domiciled or is a national.

History: 1978 Comp., § 45-2-506, enacted by Laws 1993, ch. 174, § 29.

45-2-507. Revocation by writing or by act.

A. A will or any part thereof is revoked:

(1) by executing a subsequent will that revokes the previous will or part expressly or by inconsistency; or

(2) by performing a revocatory act on the will if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this paragraph, "revocatory act on the will" includes burning, tearing, canceling, obliterating or destroying the will or any part of it. A burning, tearing or canceling is a "revocatory act on the will", whether or not the burn, tear or cancellation touched any of the words on the will.

B. If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will.

C. The testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked; only the subsequent will is operative on the testator's death.

D. The testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will only to the extent the subsequent will is inconsistent with the previous will; each will is fully operative on the testator's death to the extent they are not inconsistent.

History: 1978 Comp., § 45-2-507, enacted by Laws 1993, ch. 174, § 30.

45-2-513. Separate writing identifying devise of certain types of tangible personal property.

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.

History: 1978 Comp., § 45-2-513, enacted by Laws 1993, ch. 174, § 36.

45-2-515. Deposit of will with court in testator's lifetime.

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.

History: 1978 Comp., § 45-2-515, enacted by Laws 1993, ch. 174, § 38.

45-2-516. Duty of custodian of will; liability.

A. Any person having custody of a will shall, as soon as he is informed of the death of the testator, deliver the will to a person able to secure its probate or, if none is known, to an appropriate court.

B. If any person having the custody of a will fails to produce the will as provided for in Subsection A of this section, after receiving a reasonable notice to do so, he is liable to any person aggrieved for the damages that may be sustained by the failure.

C. Any person who refuses or fails to deliver a will after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of court.

History: 1978 Comp., § 45-2-516, enacted by Laws 1993, ch. 174, § 39.

45-2-803. Effect of homicide on intestate succession, wills, trusts, joint assets, life insurance and beneficiary designations.

A. As used in this section:

(1) "disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument; and

(2) "revocable", with respect to a disposition, appointment, provision or nomination, means one under which the decedent, at the time of or immediately before death, was alone empowered, by law or under the governing instrument, to cancel the designation, in favor of the killer, whether or not the decedent was then empowered to designate himself in place of his killer and the decedent then had capacity to exercise the power.

B. An individual who feloniously and intentionally kills the decedent forfeits all benefits pursuant to the provisions of Chapter 45, Article 2 NMSA 1978 with respect to the decedent's estate, including an intestate share, an omitted spouse's or child's share, a family allowance and a personal property allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his intestate share.

C. The felonious and intentional killing of the decedent:

(1) revokes any revocable:

(a) disposition or appointment of property made by the decedent to the killer in a governing instrument;

(b) provision in a governing instrument executed by the decedent conferring a general or nongeneral power of appointment on the killer; and

(c) nomination of the killer in a governing instrument executed by the decedent,

nominating or appointing the killer to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee or agent; and

(2) 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 tenancies in common.

D. A severance pursuant to the provisions of Paragraph (2) of Subsection C of this section does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the killer unless a writing declaring the severance has been noted, registered, filed or recorded in records appropriate to the kind and location of the property that are relied upon in the ordinary course of transactions involving such property as evidence of ownership.

E. Provisions of a governing instrument executed by the decedent are given effect as if the killer disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent.

F. An acquisition of property or interest by a killer not covered by this section must be treated in accordance with the principle that a killer cannot profit from his wrong.

G. After all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. In the absence of a conviction, the court upon the petition of an interested person must determine whether under the preponderance of evidence standard the individual would be found criminally accountable for the felonious and intentional killing of the decedent. If the court determines that under that standard the individual would be found criminally accountable for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent's killer for purposes of this section.

H. A payor or other third-party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument executed by the decedent affected by an intentional and felonious killing or for having taken any other action in good faith reliance on the validity of the governing instrument executed by the decedent upon request and satisfactory proof of the decedent's death before the payor or other third-party received written notice of a claimed forfeiture or revocation under this section. A payor or other third-party is liable for a payment made or other action taken after the payor or other third-party received written notice of a claimed forfeiture or revocation under this section.

Written notice of a claimed forfeiture or revocation pursuant to the provisions of this section must be mailed to the payor's or other third-party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third-party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed forfeiture or revocation pursuant to the provisions of this section, a payor or other third-party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination pursuant to the provisions of this section, shall order disbursement in accordance with the determination. Payments, transfers or deposits

made to or with the court discharge the payor or other third-party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

I. A person who purchases property for value and without notice or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation is neither obligated pursuant to the provisions of this section to return the payment, item of property or benefit nor is liable pursuant to the provisions of this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property or any other benefit to which the person is not entitled pursuant to the provisions of this section is obligated to return the payment, item of property or benefit or is personally liable for the amount of the payment or the value of the item of property or benefit to the person who is entitled to it pursuant to the provisions of this section.

J. If this section or any part of this section is pre-empted by federal law with respect to a payment, an item of property or any other benefit covered by this section, a person who, not for value, receives the payment, item of property or any other benefit to which the person is not entitled pursuant to the provisions of this section is obligated to return the payment, item of property or benefit or is personally liable for the amount of the payment or the value of the item of property or benefit to the person who would have been entitled to it were this section or part of this section not pre-empted.

History: 1978 Comp., § 45-2-803, enacted by Laws 1993, ch. 174, § 62; 1995, ch. 210, § 23.

45-2-804. Revocation of probate and nonprobate transfers by divorce; no revocation by other changes of circumstances.

A. As used in this section:

(1) "disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument;

(2) "divorce or annulment" means any divorce or annulment or any dissolution or declaration of invalidity of a marriage that would exclude the spouse as a surviving spouse within the meaning of Section 45-2-802 NMSA 1978. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section;

(3) "divorced individual" includes an individual whose marriage has been annulled;

(4) "governing instrument" means a governing instrument executed by the divorced individual before the divorce or annulment of his marriage to his former spouse;

(5) "relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption or affinity; and

(6) "revocable", with respect to a disposition, appointment, provision or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was alone empowered by law or under the governing instrument to cancel the designation in favor of his former spouse or former spouse's relative whether or not the divorced individual was then empowered to designate himself in place of his former spouse or in place of his former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

B. Except as provided by the express terms of a governing instrument, a 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, the divorce or annulment of a marriage:

(1) revokes any revocable:

(a) disposition or appointment of property made by a divorced individual to his former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse;

(b) provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse; and

(c) nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent or guardian; and

(2) 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 tenancies in common.

C. A severance pursuant to the provisions of Paragraph (2) of Subsection B of this section does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed or recorded in records appropriate to the kind and location of the property that are relied upon in the ordinary course of transactions involving such property as evidence of ownership.

D. Provisions of a governing instrument are given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

E. Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

F. No change of circumstances other than as described in this section and in Section 45-2-803 NMSA 1978 effects a revocation.

G. A payor or other third-party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment or remarriage or for having taken any other action in good faith reliance on the validity of the governing instrument before the payor or other third-party received written notice of the divorce, annulment or remarriage. A payor or other third-party is liable for a payment made or other action taken after the payor or other third-party received written notice of a claimed forfeiture or revocation pursuant to the provisions of this section.

Written notice of the divorce, annulment or remarriage pursuant to the provisions of this section must be mailed to the payor's or other third-party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third-party in the same manner as a summons in a civil action. Upon receipt of the written notice of the divorce, annulment or remarriage, a payor or other third-party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings

relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination pursuant to the provisions of this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers or deposits made to or with the court discharge the payor or other third-party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

H. A person who purchases property from a former spouse, relative of a former spouse or any other person for value and without notice or who receives from a former spouse, relative of a former spouse or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation is neither obligated pursuant to the provisions of this section to return the payment, item of property or benefit nor is liable pursuant to the provisions of this section for the amount of the payment or the value of the item of property or benefit. But a former spouse, relative of a former spouse or other person who, not for value, received a payment, item of property or any other benefit to which that person is not entitled pursuant to the provisions of this section is obligated to return the payment, item of property or benefit or is personally liable for the amount of the payment or the value of the item of property or benefit to the person who is entitled to it pursuant to the provisions of this section.

I. If this section or any part of this section is pre-empted by federal law with respect to a payment, an item of property or any other benefit covered by this section, a former spouse, relative of the former spouse or any other person who, not for value, received a payment, item of property or any other benefit to which that person is not entitled pursuant to the provisions of this section is obligated to return that payment, item of property or benefit or is personally liable for the amount of the payment or the value of the item of property or benefit to the person who would have been entitled to it were this section or part of this section not pre-empted.

History: 1978 Comp., § 45-2-804, enacted by Laws 1993, ch. 174, § 63; 1995, ch. 210, § 24.

45-3-108. Probate, testacy and appointment proceedings; ultimate time limit.

A. No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile or appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, except:

(1) if a previous proceeding was dismissed because of doubt about the fact of the decedent's death, then appropriate probate, appointment or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding;

(2) appropriate probate, appointment or testacy proceedings may be maintained in relation to the estate of an absent, disappeared or missing person for whose estate a conservator has been appointed at any time within three years after the conservator becomes able to establish the death of the protected person;

(3) a proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful may be commenced within the later of twelve months from the informal probate or three years from the decedent's death;

(4) an informal appointment or a formal testacy or appointment proceeding may be commenced thereafter if no proceedings concerning the succession or estate administration has occurred within the three-year period after the decedent's death, but the personal representative has no right to possess estate assets as provided in Section 45-3-709 NMSA 1978 beyond that necessary to confirm title thereto in the successors to the estate and claims other than expenses of administration may not be presented against the estate; and

(5) a formal testacy proceeding may be commenced at any time after three years from the decedent's death for the purpose of establishing an instrument to direct or control the ownership of property passing or distributable after the decedent's death from one other than the decedent when the property is to be appointed by the terms of the decedent's will or is to pass or be distributed as a part of the decedent's estate or its transfer is otherwise to be controlled by the terms of the decedent's will.

B. The limitations set out in Subsection A of this section do not apply to proceedings to construe probated wills or determine heirs of an intestate. In cases pursuant to the provisions of Paragraph (1) or (2) of Subsection A of this section, the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitation provisions of the Uniform Probate Code [this chapter] that relate to the date of death.

History: 1953 Comp., § 32A-3-108, enacted by Laws 1975, ch. 257, § 3-108; 1993, ch. 174, § 68; 1995, ch. 210, § 33.

45-3-201. Venue for first and subsequent estate proceedings; location of property.

A. Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:

- (1) in the county where the decedent had his domicile at the time of his death; or
- (2) if the decedent was not domiciled in New Mexico, in any county where property of the decedent was located at the time of his death.

B. Venue for all subsequent proceedings is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in Section 1-303 [45-1-303 NMSA 1978] or Subsection C of this section.

C. If the first proceeding was informal, on petition of an interested person and after notice to the proponent in the first proceeding, the district court in the place where the initial proceeding occurred, upon finding that venue is improper, may transfer the proceeding and the file to a court where venue is proper.

D. For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving non-domiciliaries, a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a non-domiciliary, is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.

History: 1953 Comp., § 32A-3-201, enacted by Laws 1975, ch. 257, § 3-201.

45-3-203. Priority among persons seeking appointment as personal representative.

A. Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

- (1) the person with priority as determined by a probated will, including a person nominated by a power conferred in a will;
- (2) the surviving spouse of the decedent who is a devisee of the decedent;
- (3) other devisees of the decedent;
- (4) the surviving spouse of the decedent;
- (5) other heirs of the decedent; and
- (6) on application or petition of an interested person other than a spouse, devisee or heir, any qualified person.

B. An objection to an appointment may be made only in formal proceedings. In case of objection, the priorities stated in Subsection A of this section apply except that:

- (1) if the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the court, on petition of creditors, may appoint any qualified person; and
- (2) in case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value of the estate or, in default of this accord, any suitable person.

C. A person entitled to letters under Paragraphs (2) through (5) of Subsection A of this section or a person who has not reached the age of majority and who might be entitled to letters but for the person's age may nominate a qualified person to act as personal representative and thereby confer the person's relative priority for appointment on the person's nominee. Any person who has reached the age of majority may renounce the right to nominate or to an appointment by appropriate writing filed with the court. When two or more persons share a priority, those of them who do not renounce shall concur in nominating another to act for them or in applying for appointment.

D. Conservators of the estates of protected persons or, if there is no conservator, any guardian except a guardian ad litem of a minor or incapacitated person may exercise the same right to nominate, to object to another's appointment or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person would have if qualified for appointment.

E. 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.

F. No person is qualified to serve as a personal representative who is:

- (1) under the age of majority;

- (2) a person whom the court finds unsuitable in formal proceedings; or
- (3) a creditor of the decedent unless the appointment is to be made after forty-five days have elapsed from the death of the decedent.

G. A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representatives in New Mexico and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

H. This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator.

History: 1953 Comp., § 32A-3-203, enacted by Laws 1975, ch. 257, § 3-203; 2009, ch. 159, § 25.

45-3-204. Demand for notice of order or filing concerning decedent's estate.

Any interested person desiring notice of any order or filing pertaining to a decedent's estate may at any time after the death of the decedent file a demand for notice with the clerk of the court in which the proceedings for the decedent's estate are being conducted or in the district court of the county where they would be pending if commenced. A person commencing a proceeding for a decedent's estate in probate court shall inquire of the clerk of the district court for that county whether any demand for notice has been filed prior to commencing a proceeding in the probate court. The demand for notice shall state the name of the decedent, the nature of the demandant's interest in the estate and the demandant's address or that of his attorney. The clerk shall mail a copy of the demand to the personal representative if one has been appointed. After filing of a demand, no order or filing to which the demand relates shall be made or accepted without notice as prescribed in Section 45-1-401 NMSA 1978 to the demandant or his attorney. The validity of an order which is issued, or filing which is accepted, without compliance with this requirement shall not be affected by the error, but the applicant or petitioner receiving the order or the person making the filing may be liable for any damage caused by the absence of notice. The requirement of notice arising from a demand under this provision may be waived in writing by the demandant and shall cease upon the termination of his interest in the estate.

History: 1953 Comp., § 32A-3-204, enacted by Laws 1975, ch. 257, § 3-204; 1983, ch. 194, § 4.

45-3-301. Informal probate or appointment proceedings; application; contents.

Applications for informal probate or informal appointment must be directed to the probate or district court and verified by the applicant to be accurate and complete to the best of his knowledge and belief as to the information found in Subsections A through F of this section.

A. Every application for informal probate of a will or for informal appointment of a personal representative, other than a special or successor representative, shall contain the following:

- (1) a statement of the interest of the applicant;
- (2) the name and date of death of the decedent; his age and the county and state of his domicile at the time of death; and the names and addresses of the spouse, children, heirs and devisees and the ages of any who are minors so far as known or ascertainable with reasonable

diligence by the applicant;

(3) if the decedent was not domiciled in New Mexico at the time of his death, a statement showing venue;

(4) a statement identifying and indicating the address of any personal representative of the decedent appointed in New Mexico or elsewhere whose appointment has not been terminated;

(5) a statement indicating whether the applicant has received a demand for notice, or is aware of any demand for notice, of any probate or appointment proceeding concerning the decedent that may have been filed in New Mexico or elsewhere; and

(6) a statement that the time limit for informal probate or appointment as provided in Sections 45-3-101 through 45-3-1204 NMSA 1978 has not expired either because three years or less have passed since the decedent's death, or, if more than three years from death have passed, that circumstances as described by Section 45-3-108 NMSA 1978 authorizing tardy probate or appointment have occurred.

B. An application for informal probate of a will shall state the following in addition to the statements required by Subsection A of this section:

(1) that the original of the decedent's last will is in the possession of the court, or accompanies the application, or that an authenticated copy of his will probated in another jurisdiction accompanies the application;

(2) that the applicant, to the best of his knowledge, believes the will to have been validly executed; and

(3) that after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will, and that the applicant believes that the instrument which is the subject of the application is the decedent's last will.

C. An application for informal appointment of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name, address and priority for appointment of the person whose appointment is sought.

D. An application for informal appointment of a personal representative in intestacy shall state in addition to the statements required by Subsection A of this section:

(1) that after the exercise of a reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in New Mexico under Section 45-1-301 NMSA 1978; and

(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 under Section 45-3-203 NMSA 1978.

E. An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant.

F. An application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in Subsection C of Section 45-3-610 NMSA 1978 or whose appointment has been terminated by death or removal, shall:

- (1) adopt the statements in the application or petition which led to the appointment of the person being succeeded except as specifically changed or corrected;
- (2) state the name and address of the person who seeks appointment as successor; and
- (3) describe the priority of the applicant.

G. By verifying an application for informal probate, or informal appointment, the applicant submits personally to the jurisdiction of the court in any proceeding for relief from fraud relating to the application, or for perjury, that may be instituted against him.

History: 1953 Comp., § 32A-3-301, enacted by Laws 1975, ch. 257, § 3-301; 1976 (S.S.), ch. 37, § 6; 1978, ch. 159, § 4.

45-3-302. Informal probate; duty of court; effect of informal probate.

Upon receipt of an application requesting informal probate of a will, the probate or the district court, upon making the findings required by Section 45-3-303 NMSA 1978, shall issue a written statement of informal probate if at least one hundred twenty hours have elapsed since the decedent's death. Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding. No defect in the application or procedure relating thereto which leads to informal probate of a will renders the probate void.

History: 1953 Comp., § 32A-3-302, enacted by Laws 1975, ch. 257, § 3-302; 1976 (S.S.), ch. 37, § 7; 1978, ch. 159, § 5.

45-3-303. Informal probate; proof and findings required.

A. In an informal proceeding for original probate of a will, the probate or the district court shall determine whether:

- (1) the application is complete;
- (2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;
- (3) the applicant appears from the application to be an interested person as defined in Paragraph (2) [(23)] of Subsection A of Section 45-1-201 NMSA 1978;
- (4) on the basis of the statements in the application, venue is proper;
- (5) an original, duly executed and apparently unrevoked will is in the possession of the probate or the district court;
- (6) any notice required by Section 45-3-204 NMSA 1978 has been given; and
- (7) it appears from the application that the time limit for original probate has not expired.

B. The application shall be denied if it indicates that a personal representative has been appointed in another county of New Mexico or, except as provided in Subsection D of this section, if it appears that this or another will of the decedent has been the subject of a previous informal probate order.

C. A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under Section 45-2-502 or 45-2-506 NMSA 1978 have been met shall be probated without further proof. In other cases, the probate or the district court may presume execution if the will appears to have been properly executed, or it may accept 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.

D. Informal probate of a will which 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 deposit of an authenticated copy of the will and of the order or statement probating it from the office or court where it was first probated.

E. A will from a place which does not provide for probate of a will after death and which is not eligible for probate under Subsection A of this section, may be probated in New Mexico upon receipt by the probate or the district court of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place.

History: 1953 Comp., § 32A-3-303, enacted by Laws 1975, ch. 257, § 3-303; 1978, ch. 159, § 6.

45-3-304. Reserved.

Compiler's notes. — Laws 1975, ch. 257, § 3-304, contained this section number, but no accompanying text.

45-3-305. Informal probate; court not satisfied.

The probate or the district court may decline application for informal probate of a will for any reason. A declination of informal probate is not an adjudication and does not preclude formal probate proceedings.

History: 1953 Comp., § 32A-3-305, enacted by Laws 1975, ch. 257, § 3-305; 1978, ch. 159, § 7.

45-3-306. Informal probate; notice requirements.

A. The applicant shall give notice as described by Section 45-1-401 NMSA 1978 of his application for informal probate to any person demanding it pursuant to Section 45-3-204 NMSA 1978 and to any personal representative of the decedent whose appointment has not been terminated. No other notice of informal probate is required.

B. If an informal probate is granted, within 30 days thereafter the applicant shall give written information of the probate to the heirs and devisees. The information shall include the name and address of the applicant, the name and location of the court granting the informal probate, and the date of the probate. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the applicant. No duty to give information is incurred under this section if a personal representative is appointed who is required to give written information pursuant to the provisions of Section 45-3-705 NMSA 1978. An applicant's failure to give information as required by this section is a breach of the applicant's duty to the heirs and devisees but does not affect the validity of the probate.

History: 1953 Comp., § 32A-3-306, enacted by Laws 1975, ch. 257, § 3-306; 1995, ch. 210, § 34.

45-3-307. Informal appointment proceedings; delay in order; duty of court; effect of appointment.

A. Upon receipt of an application for informal appointment of a personal representative (other than a special administrator as provided in Section 45-3-614 NMSA 1978), if at least one hundred twenty hours have elapsed since the decedent's death, the probate or the district court, after making the findings required by Section 45-3-308 NMSA 1978, shall appoint the applicant subject to qualification and acceptance. However, if the decedent was a nonresident, the probate or the district court shall delay the order of appointment until thirty days have elapsed since death unless the personal representative appointed at the decedent's domicile is the applicant, or unless the decedent's will directs that his estate be subject to the laws of New Mexico.

B. The status of personal representative and the powers and duties pertaining to the office are fully established by informal appointment. An appointment, and the office of personal representative created thereby, is subject to termination as provided in Sections 45-3-608 through 45-3-612 NMSA 1978, but is not subject to retroactive vacation.

History: 1953 Comp., § 32A-3-307, enacted by Laws 1975, ch. 257, § 3-307; 1976 (S.S.), ch. 37, § 8; 1978, ch. 159, § 8.

45-3-308. Informal appointment proceedings; proof and findings required.

A. In informal appointment proceedings, the probate or the district court must determine whether:

- (1) the application for informal appointment of a personal representative is complete;
- (2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;
- (3) the applicant appears from the application to be an interested person as defined in Paragraph (20) [(23)] of Subsection A of Section 45-1-201 NMSA 1978;
- (4) on the basis of the statements in the application, venue is proper;
- (5) any will to which the requested appointment relates has been formally or informally probated; but this requirement does not apply to the appointment of a special administrator;
- (6) any notice required by Section 45-3-204 NMSA 1978 has been given; and
- (7) from the statements in the application, from the contents of the probated will, if any, and from any nominations and renunciations pursuant to Section 45-3-203 NMSA 1978 that have been filed before or at the time of the application, the person whose appointment is sought has priority entitling him to the appointment.

B. Unless Section 45-3-612 NMSA 1978 controls, the application must be denied if it indicates that a personal representative who has not filed a written statement of resignation as provided in Subsection C of Section 45-3-610 NMSA 1978 has been appointed in New Mexico, that (unless the applicant is the domiciliary personal representative or his nominee) the decedent was not domiciled in New Mexico and that a personal representative whose appointment has not been terminated has been appointed by a court in the state of domicile, or that other requirements of this section have not been met.

C. If the applicant is the domiciliary personal representative and the decedent was not domiciled in New Mexico, informal appointment proceedings may be allowed.

History: 1953 Comp., § 32A-3-308, enacted by Laws 1975, ch. 257, § 3-308; 1978, ch. 159, § 9.

45-3-309. Informal appointment proceedings; court not satisfied.

The probate or the district court may decline an application for appointment of a personal representative for any reason. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings.

History: 1953 Comp., § 32A-3-309, enacted by Laws 1975, ch. 257, § 3-309; 1978, ch. 159, § 10.

45-3-310. Informal appointment proceedings; notice requirements.

The applicant must give notice as described by Section 1-401 [45-1-401 NMSA 1978] of his intention to seek an appointment informally to any person demanding it pursuant to Section 3-204 [45-3-204 NMSA 1978]. No other notice of an informal appointment proceeding is required, except that the personal representative shall give notice pursuant to the provisions of Section 3-705 [45-3-705 NMSA 1978].

History: 1953 Comp., § 32A-3-310, enacted by Laws 1975, ch. 257, § 3-310.

45-3-311. Informal appointment unavailable in certain cases.

If an application for informal appointment indicates the existence of a possible unrevoked testamentary instrument which may relate to property subject to the laws of New Mexico, and which is not filed for probate in the probate or the district court, the probate or the district court shall decline the application; however, such declination of informal probate is not an adjudication and does not preclude appointment in formal proceedings.

History: 1953 Comp., § 32A-3-311, enacted by Laws 1975, ch. 257, § 3-311; 1978, ch. 159, § 11.

45-3-613. Successor personal representative.

A. Sections 3-301 through 3-311 [45-3-301 to 45-3-311 NMSA 1978] and 3-401 through 3-414 [45-3-401 to 45-3-414 NMSA 1978] govern proceedings for appointment of a personal representative to succeed one whose appointment has been terminated.

B. After appointment and qualification, a successor personal representative shall be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process or claim which was given or served upon the former personal representative need be given or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative.

C. Except as otherwise ordered by the district court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated.

History: 1953 Comp., § 32A-3-613, enacted by Laws 1975, ch. 257, § 3-613.

45-3-614. Special administrator; appointment.

A special administrator may be appointed:

A. informally by the probate court on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative or if a prior appointment has been terminated by death or disability as provided in Section 3-609 [45-3-609 NMSA 1978]; or

B. in a formal proceeding by order of the district court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the district court that an emergency exists, appointment may be ordered without notice.

History: 1953 Comp., § 32A-3-614, enacted by Laws 1975, ch. 257, § 3-614.

45-3-615. Special administrator; who may be appointed.

A. If a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate, the person named personal representative in the will shall be appointed if available, and qualified.

B. In all other cases, any proper person may be appointed special administrator.

History: 1953 Comp., § 32A-3-615, enacted by Laws 1975, ch. 257, § 3-615.

45-3-616. Special administrator; appointed informally; powers and duties.

A special administrator appointed by the probate court in informal proceedings pursuant to Subsection A of Section 3-614 [45-3-614 NMSA 1978] has the duty to collect and manage the assets of the estate, to preserve them, to account for and to deliver such assets to the general personal representative upon his qualification. The special administrator appointed in informal proceedings has the power of a personal representative under the Probate Code [Chapter 45 NMSA 1978] necessary to perform his duties.

History: 1953 Comp., § 32A-3-616, enacted by Laws 1975, ch. 257, § 3-616.

45-3-617. Special administrator; formal proceedings; powers and duties.

A special administrator appointed by order of the district court in any formal proceeding has the power of a general personal representative except as limited in the appointment and duties as prescribed in the order. The appointment may be for a specified time, or to perform particular acts or on other terms as the district court may direct.

History: 1953 Comp., § 32A-3-617, enacted by Laws 1975, ch. 257, § 3-617.

45-3-618. Termination of appointment; special administrator.

The appointment of a special administrator pursuant to Section 3-614 [45-3-614 NMSA 1978] terminates in accordance with the provisions of the order of appointment or on the appointment of a general personal representative. In other cases, the appointment of a special administrator is subject to termination by resignation, or upon removal for cause, as provided in Sections 3-608 through 3-611 [45-3-608 to 45-3-611 NMSA 1978].

History: 1953 Comp., § 32A-3-618, enacted by Laws 1975, ch. 257, § 3-618.

45-3-705. Duty of personal representative; notice to heirs and devisees.

A. Not later than ten days after his appointment, every personal representative, except any special administrator, shall give notice of his appointment to the heirs and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application or petition for appointment of a personal representative.

B. The notice shall be delivered or mailed to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require notice to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The notice shall:

- (1) include the name and address of the personal representative;
- (2) indicate that it is being sent to persons who have or may have some interest in the estate being administered;
- (3) indicate whether bond has been filed; and
- (4) describe the court where papers relating to the estate are on file.

C. The notice shall state that the estate is being administered by the personal representative pursuant to the provisions of the Uniform Probate Code [this chapter] without supervision by the court but that recipients are entitled to information regarding the administration from the personal representative and can petition the court in any matter relating to the estate, including distribution of assets and expenses of administration.

D. The personal representative shall file a statement with the appointing court giving the names and addresses of those persons notified pursuant to Subsection A of this section.

E. The personal representative's failure to give notice pursuant to this section is a breach of his duty to the persons concerned but does not affect the validity of his appointment, his powers or other duties. A personal representative may inform other persons of his appointment by delivery or mail.

History: 1953 Comp., § 32A-3-705, enacted by Laws 1975, ch. 257, § 3-705; 1993, ch. 174, § 69.

45-3-706. Duty of personal representative; inventory and appraisalment.

A. Within three months after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare an inventory of property owned by the decedent at the time of his death, listing it with reasonable detail and indicating as to each listed item its estimated value as of the date of the decedent's death and the type and amount of any encumbrance that may exist with reference to any item.

B. The personal representative shall send a copy of the inventory to interested persons who request it. He may also file the original of the inventory with the appropriate court.

History: 1953 Comp., § 32A-3-706, enacted by Laws 1975, ch. 257, § 3-706; 1976 (S.S.), ch. 37, § 9; 1977, ch. 121, § 7; 1983, ch. 194, § 5.

45-3-713. Sale, encumbrance or transaction involving conflict of interest; voidable; exceptions.

A. Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any interested person except one who has consented after fair disclosure, unless:

- (1) the will or a contract entered into by the decedent expressly authorized the transaction; or
- (2) the transaction is approved by the district court after notice to interested persons.

B. An interested person must petition the district court to void the sale, encumbrance or transaction within the time limits set out by Section 3-1005 [45-3-1005 NMSA 1978].

History: 1953 Comp., § 32A-3-713, enacted by Laws 1975, ch. 257, § 3-713.

45-3-715. Transactions authorized for personal representatives; exceptions.

A. Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in Section 45-3-902 NMSA 1978, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) retain assets owned by the decedent pending distribution or liquidation, including those in which the representative is personally interested or which are otherwise improper for trust investment;

(2) receive assets from fiduciaries or other sources;

(3) perform, compromise or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(a) execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(b) deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent as designated in the escrow agreement;

(4) satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances;

(5) if funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including money received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements or other prudent investments which would be reasonable for use by trustees generally;

(6) acquire or dispose of an asset, including land in New Mexico or another state, for cash or on credit, at public or private sale, and manage, develop, improve, partition or change the

character of an estate asset;

(7) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, or raze existing or erect new party walls or buildings;

(8) subdivide, develop or dedicate land to public use, make or obtain the vacation of plats and adjust boundaries, adjust differences in valuation on exchange or partition by giving or receiving considerations or dedicate easements to public use without consideration;

(9) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the period of administration;

(10) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(11) abandon property when, in the opinion of the personal representative, it is valueless or is so encumbered or is in condition that it is of no benefit to the estate;

(12) vote stocks or other securities in person or by general or limited proxy;

(13) pay calls, assessments and other sums chargeable or accruing against or on account of securities unless barred by the provisions relating to claims;

(14) hold a security in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative is liable for any act of the nominee in connection with the security so held;

(15) insure the assets of the estate against damage, loss and liability and himself against liability as to third persons;

(16) borrow money with or without security to be repaid from the estate assets or otherwise and advance money when necessary for the protection or preservation of the estate;

(17) effect a fair and reasonable compromise with any debtor or obligor or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner of the assets in satisfaction of the indebtedness secured by lien;

(18) pay taxes, assessments, compensation of the personal representative and other expenses incident to the administration of the estate;

(19) sell or exercise stock subscription or conversion rights or consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprise;

(20) allocate items of income or expense to either estate income or principal as permitted or provided by law;

(21) employ persons, including attorneys, accountants, investment advisors, appraisers or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and, instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;

(22) prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties;

(23) sell, transfer, exchange or otherwise dispose of the estate or any interest in the estate for cash or on credit or for part cash and part credit at public or private sale. Security shall be taken for unpaid balances unless waived by order of the district court upon petition and good cause shown;

(24) continue any unincorporated business or venture in which the decedent was engaged at the time of his death:

(a) in the same business form for a period of not more than four months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business, including good will;

(b) in the same business form for any additional period of time that may be approved by order of the district court in a formal proceeding to which the persons interested in the estate are parties; or

(c) throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

(25) incorporate any business or venture in which the decedent was engaged at the time of his death;

(26) provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate; and

(27) satisfy and settle claims and distribute the estate as provided in the Uniform Probate Code [this chapter].

B. The powers granted in Subsection A of this section are given subject to those limitations contained in other sections of the Uniform Probate Code.

History: 1953 Comp., § 32A-3-715, enacted by Laws 1975, ch. 257, § 3-715; 1995, ch. 210, § 37.

45-3-716. Powers and duties of successor personal representative.

A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but he shall not exercise any power expressly made personally to any personal representative named in the will.

History: 1953 Comp., § 32A-3-716, enacted by Laws 1975, ch. 257, § 3-716.

45-3-717. Co-representatives; when joint action required.

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].

History: 1953 Comp., § 32A-3-717, enacted by Laws 1975, ch. 257, § 3-717.

45-3-719. Compensation for personal representatives.

A personal representative is entitled to reasonable compensation for his services. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, he may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of the fee may be filed with the court.

History: 1978 Comp., § 45-3-719, enacted by Laws 1995, ch. 210, § 38.

45-3-720. Expenses in estate litigation.

If any personal representative or person nominated as a personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred.

History: 1978 Comp., § 45-3-720, enacted by Laws 1995, ch. 210, § 39.

45-3-721. Proceedings for review of employment and compensation.

After notice to all interested persons or on petition of an interested person or an appropriate motion if administration is supervised, the court may review the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed or the reasonableness of the compensation determined by the personal representative for his own services. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

History: 1978 Comp., § 45-3-721, enacted by Laws 1995, ch. 210, § 40.

45-3-801. Notice to creditors.

A. A personal representative shall give written notice by mail or other delivery to any known creditor and to any creditor who is reasonably ascertainable by the personal representative within three months after the personal representative's appointment. A personal representative shall notify a creditor to present his claim within two months of the published notice, if given as provided in Subsection B of this section, or within two months after the mailing or other delivery of the notice, whichever is later, or be forever barred.

B. A personal representative, within a reasonable time after his appointment, may also publish a notice to creditors once a week for two successive weeks in a newspaper of general circulation in the county announcing the appointment and the personal representative's address and the name of the decedent and notifying creditors of the estate to present their claims within two months after the date of the first publication of the notice or be forever barred.

C. A personal representative who has proceeded in accordance with Subsection A of this section is not liable to a creditor whose claim was not identified or to a successor of the decedent for giving or failing to give notice pursuant to the provisions of this section.

History: 1953 Comp., § 32A-3-801, enacted by Laws 1975, ch. 257, § 3-801; 1993, ch. 174, § 71.

45-3-802. Statutes of limitations.

A. Unless an estate is insolvent, the personal representative, with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate. If the defense is not waived, no claim that was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid.

B. The running of a statute of limitations measured from an event other than death or the giving of notice to creditors is suspended for four months after the decedent's death but resumes thereafter as to claims not barred by other sections.

C. For purposes of a statute of limitations, the presentation of a claim pursuant to Section 45-3-804 NMSA 1978 is equivalent to commencement of a proceeding on the claim.

History: 1953 Comp., § 32A-3-802, enacted by Laws 1975, ch. 257, § 3-802; 1993, ch. 174, § 72; 1995, ch. 210, § 41.

45-3-803. Limitations on presentation of claims.

A. All claims against a decedent's estate that arose before the death of the decedent, including claims of the state and any subdivision of the state, whether due or to become due, absolute or contingent, liquidated or unliquidated or founded on contract, tort or other legal basis, if not barred earlier by another statute of limitations or non-claim statute, are barred against the estate, the personal representative and the heirs and devisees of the decedent unless presented within the earlier of the following:

(1) one year after the decedent's death; or

(2) the time provided by Subsection A of Section 45-3-801 NMSA 1978 for creditors who are given actual notice and the time provided in Subsection B of Section 45-3-801 NMSA 1978 for all creditors barred by publication.

B. A claim described in Subsection A of this section that is barred by the non-claim statute of the decedent's domicile before the giving of notice to creditors in this state is barred in this state.

C. All claims against a decedent's estate that arise at or after the death of the decedent, including claims of the state and any subdivision of the state, whether due or to become due, absolute or contingent, liquidated or unliquidated or founded on contract, tort or other legal basis, are barred against the estate, the personal representative and the heirs and devisees of the decedent unless presented as follows:

(1) a claim based on a contract with the personal representative within four months after performance by the personal representative is due; or

(2) any other claim within the later of four months after it arises or the time specified in Paragraph (1) of this subsection.

D. Nothing in this section affects or prevents:

(1) any proceeding to enforce any mortgage, pledge or other lien upon property of the estate;

(2) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance; or

(3) collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate.

History: 1953 Comp., § 32A-3-803, enacted by Laws 1975, ch. 257, § 3-803; 1993, ch. 174, § 73.

45-3-804. Manner of presentation of claims.

Claims against a decedent's estate may be presented as follows:

A. the claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed, or he may file a written statement of the claim with the appropriate court. The claim is presented on the first to occur of receipt of the written statement of claim by the personal representative or the filing of the claim with the appropriate court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty and the due date of a claim not yet due does not invalidate the presentation made;

B. the claimant, without the necessity of filing a claim, may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction, to obtain payment of his claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his death; and

C. if a claim is presented under Subsection A of this section, no proceeding thereon may be commenced more than sixty days after the personal representative has mailed a notice of disallowance. However, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the sixty-day period, or, to avoid injustice, the district court on petition may order an extension of the sixty-day period, but in no event shall the extension run beyond the applicable statute of limitations.

History: 1953 Comp., § 32A-3-804, enacted by Laws 1975, ch. 257, § 3-804; 1983, ch. 194, § 6.

45-3-805. Classification of claims.

A. If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(1) costs and expenses of administration, including compensation of personal representatives and of persons employed by the personal representatives;

(2) reasonable funeral expenses;

- (3) debts and taxes with preference under federal law;
- (4) reasonable medical and hospital expenses of the last illness of the decedent, including compensation of persons attending the decedent;
- (5) debts and taxes with preference under other laws of New Mexico; and
- (6) all other claims.

B. No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.

History: 1953 Comp., § 32A-3-805, enacted by Laws 1975, ch. 257, § 3-805; 1976 (S.S.), ch. 37, § 12; 1995, ch. 210, § 42.

45-3-806. Allowance of claims.

A. As to claims presented in the manner described in Section 45-3-804 NMSA 1978 within the time limit prescribed in Section 45-3-803 NMSA 1978, the personal representative may mail a notice to any claimant stating that the claim has been disallowed. If after allowing or disallowing a claim the personal representative changes his decision concerning the claim, he shall notify the claimant. The personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and the claim has been barred. Every claim that is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the district court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance or partial allowance. Failure of the personal representative to mail notice to a claimant of action on his claim for sixty days after the time for original presentation of the claim has expired has the effect of a notice of allowance.

B. After allowing or disallowing a claim the personal representative may change the allowance or disallowance as hereafter provided. The personal representative may prior to payment change the allowance to a disallowance in whole or in part but not after allowance by a court order or judgment or an order directing payment of the claim. He shall notify the claimant of the change to disallowance, and the disallowed claim is then subject to bar as provided in Subsection A of this section. The personal representative may change a disallowance to an allowance, in whole or in part, until it is barred pursuant to Subsection A of this section; after it is barred, it may be allowed and paid only if the estate is solvent and all successors whose interests would be affected consent.

C. Upon the petition of the personal representative or of a claimant in a proceeding for the purpose, the district court may allow in whole or in part any claim presented to the personal representative or filed with the clerk of the district court in due time and not barred by Subsection A of this section. Notice in this proceeding shall be given to the claimant, the personal representative and those other persons interested in the estate, as the court may direct by order entered at the time the proceeding is commenced.

D. A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

E. Unless otherwise provided in any judgment in another court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing sixty days after the time for original presentation of the claim has expired unless based on a contract

making a provision for interest, in which case they bear interest in accordance with that provision.

History: 1953 Comp., § 32A-3-806, enacted by Laws 1975, ch. 257, § 3-806; 1993, ch. 174, § 74.

45-3-912. Private agreements among successors to decedent binding on personal representative.

Subject to the rights of creditors and taxing authorities, competent successors may 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 intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing in this section relieves trustees of any duties owed to beneficiaries of trusts.

History: 1953 Comp., § 32A-3-912, enacted by Laws 1975, ch. 257, § 3-912.

45-3-914. Disposition of unclaimed assets.

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 [7-8A-1 NMSA 1978].

History: 1953 Comp., § 32A-3-914, enacted by Laws 1975, ch. 257, § 3-914; 1993, ch. 174, § 78.

45-3-1003. Closing estates; by sworn statement of personal representative.

A. Unless prohibited by order of the district court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court, no earlier than three months after the date of original appointment of a general personal representative for the estate, a verified statement stating that the personal representative or a previous personal representative has:

- (1) determined that the time limited for presentation of creditors' claims has expired;
- (2) fully administered the estate of the decedent by making payment, settlement or other disposition of all claims that were presented, expenses of administration and estate, inheritance and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement shall state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees or it shall state in detail other arrangements that have been made to accommodate outstanding liabilities; and
- (3) sent a copy of the statement to all distributees of the estate and to all creditors or other claimants of whom the personal representative is aware whose claims are neither paid nor barred and has furnished a full account in writing of the personal representative's administration

to the distributees whose interests are affected thereby, including guardians ad litem appointed pursuant to Section 45-1-403 NMSA 1978, conservators and guardians.

B. If no proceedings involving the personal representative are pending in the district court one year after the closing statement is filed, the appointment of the personal representative terminates.

History: 1953 Comp., § 32A-3-1003, enacted by Laws 1975, ch. 257, § 3-1003; 1983, ch. 194, § 7; 1993, ch. 174, § 81.

45-3-1007. Certificate discharging liens securing fiduciary performance.

After his appointment has terminated, the personal representative, his sureties, or any successor of either such person, upon the filing of a verified application showing, so far as is known by the applicant, that no action concerning the estate is pending in any court, is entitled to receive a certificate from the court that the personal representative appears to have fully administered the estate in question. The certificate evidences discharge of any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety, but does not preclude action against the personal representative or the surety.

History: 1953 Comp., § 32A-3-1007, enacted by Laws 1975, ch. 257, § 3-1007.

45-3-1008. Subsequent administration.

If other property of the estate is discovered after an estate has been settled and the personal representative discharged, or after one year after a closing statement has been filed, the district court, upon petition of any interested person and upon notice as it directs, may appoint the same or a successor personal representative to administer the subsequently discovered estate. If a new appointment is made, unless the district court orders otherwise, the provisions of the Probate Code [this chapter] apply as appropriate. However, no claim previously barred may be asserted in the subsequent administration.

History: 1953 Comp., § 32A-3-1008, enacted by Laws 1975, ch. 257, § 3-1008.

45-3-1201. Collection of personal property by affidavit.

A. Thirty days after the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the successor of the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

(1) the value of the entire estate, wherever located, less liens and encumbrances, does not exceed thirty thousand dollars (\$30,000);

(2) thirty days have elapsed since the death of the decedent;

(3) no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction; and

(4) the claiming successor is entitled to payment or delivery of the property.

B. A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in Subsection A of this section.

C. The affidavit made pursuant to this section may not be used to perfect title to real estate.
History: 1953 Comp., § 32A-3-1201, enacted by Laws 1975, ch. 257, § 3-1201; 1983, ch. 194, § 8; 1995, ch. 210, § 48.

45-3-1202. Effect of affidavit.

The person paying, delivering, transferring or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer or issuance compelled upon proof of their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.

History: 1953 Comp., § 32A-3-1202, enacted by Laws 1975, ch. 257, § 3-1202.

45-3-1203. Small estates; summary administrative procedure.

If it appears from the inventory and appraisal that the value of the entire estate, less liens and encumbrances, does not exceed the family allowance, personal property allowance, costs and expenses of administration, reasonable and necessary medical and hospital expenses of the last illness of the decedent and reasonable funeral expenses, the personal representative, without giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in Section 3-1204 [45-3-1204 NMSA 1978].

History: 1953 Comp., § 32A-3-1203, enacted by Laws 1975, ch. 257, § 3-1203.

45-3-1204. Small estates; closing by sworn statement of personal representative.

A. Unless prohibited by order of the district court and except for estates being administered by supervised personal representatives, a personal representative may close an estate administered under the summary procedures of Section 45-3-1203 NMSA 1978 by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(1) to the best knowledge of the personal representative, the value of the entire estate, less liens and encumbrances, did not exceed the family allowance, personal property allowance, costs and expenses of administration, reasonable necessary medical and hospital expenses of the last illness of the decedent and reasonable funeral expenses;

(2) the personal representative has fully administered the estate by disbursing and distributing it to the persons entitled thereto; and

(3) 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 and has furnished a full account in writing of his administration to the distributees whose interests are affected.

B. If no actions or proceedings involving the personal representative are pending in court one year after the closing statement is filed, the appointment of the personal representative terminates.

C. A closing statement filed under this section has the same effect as one filed under Section 45-3-1003 NMSA 1978.

History: 1953 Comp., § 32A-3-1204, enacted by Laws 1975, ch. 257, § 3-1204; 1983, ch. 194, § 9.

45-3-1205. Small estates; transfer of title to homestead to surviving spouse by affidavit.

A. Where a husband and wife own a homestead as community property and when either the husband or wife dies intestate or dies testate and by their will devise their interest in the homestead to the surviving spouse, the homestead passes to the survivor and no probate or administration is necessary.

B. Six months after the death of a decedent, the surviving spouse may record with the county clerk in the county in which the homestead is located an affidavit describing the real property and stating that:

(1) six months have elapsed since the death of the decedent as shown in a certified copy of the death certificate attached to the affidavit;

(2) the affiant and the decedent were at the time of the death of the decedent married and owned the homestead as community property;

(3) a copy of the deed with a legal description of the homestead is attached to the affidavit;

(4) but for the homestead, the decedent's estate need not be subject to any judicial probate proceeding either 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 as provided in Section 45-2-102 NMSA 1978 or by devise under a valid last will of the decedent, the original of which 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; and

(10) the affiant affirms that all statements in the affidavit are true and correct and further acknowledges that any false statement may subject the person to penalties relating to perjury and subornation of perjury.

C. As used in this section, "homestead" means 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 which 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 value of this property for property taxation purposes does not exceed one hundred thousand dollars (\$100,000).

History: 1978 Comp., § 45-3-1205, enacted by Laws 1985, ch. 12, § 1; 1985, ch. 132, § 1.

45-3-1206. Effect of affidavit.

A purchaser of real property from or lender to the surviving spouse designated as such in the affidavit recorded under Section 45-3-1205 NMSA 1978 is entitled to the same protection as a person purchasing from or lending to a distributee who has received a deed of distribution from a personal representative as provided in Section 45-3-910 NMSA 1978.

History: 1978 Comp., § 45-3-1206, enacted by Laws 1985, ch. 12, § 2; 1985, ch. 132, § 2.

45-4-204. Proof of authority; bond.

If no local administration or application or petition therefor is pending in New Mexico, a domiciliary foreign personal representative may file with the court of a county in which property belonging to the decedent is located authenticated copies of his appointment and of any official bond he has given and a statement of the domiciliary foreign personal representative's address.

History: 1953 Comp., § 32A-4-204, enacted by Laws 1975, ch. 257, § 4-204; 1983, ch. 194, § 11.

45-4-205. Powers.

A domiciliary foreign personal representative who has complied with Section 4-204 [45-4-204 NMSA 1978] may exercise as to assets in New Mexico all powers of a local personal representative and may maintain actions and proceedings in New Mexico subject to any conditions imposed upon nonresident parties generally.

History: 1953 Comp., § 32A-4-205, enacted by Laws 1975, ch. 257, § 4-205.

14.3 Statutes Concerning Safe Deposit Boxes

58-1-11. Access by fiduciaries.

A. Where access to a safe deposit box is requested by one or more persons acting as fiduciaries, the lessor may, except as otherwise expressly provided in the lease or the writings pursuant to which such fiduciaries are acting, allow access thereto and removal of the contents of the safe deposit box upon obtaining proper receipt from:

- (1) any one or more of the persons acting as executors or administrators;
- (2) any one or more of the persons otherwise acting as fiduciaries when authorized in writing signed by all other persons so acting; or
- (3) any agent authorized in writing signed by all of the persons acting as fiduciaries.

B. No lessor shall be liable for damages for allowing or refusing access or removal of the contents of the safety deposit box under the provisions of Subsection A of this section.

History: 1953 Comp., § 48-22-11, enacted by Laws 1963, ch. 305, § 11.

58-1-14. Search procedure on death.

A. A lessor shall permit the person named in a court order for the purpose, or if no order has been served upon the lessor, the spouse, a parent, an adult descendant or a person named as an executor 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 lessor; and the lessor, if so requested by such person, may deliver upon execution of receipt therefor:

- (1) any writing purporting to be a will of the decedent;
- (2) any writing purporting to be a deed to a burial plot or to give burial instructions to the person making the request for a search; and
- (3) any document purporting to be an insurance policy on the life of the decedent to the beneficiary named therein.

B. No other contents shall be removed, pursuant to this section except at the lessor's liability, until a special administrator, an administrator or executor qualifies and makes claim to the contents.

History: 1953 Comp., § 48-22-14, enacted by Laws 1963, ch. 305, § 14.

58-11A-4. Search procedure upon death of lessee.

A. A lessor shall permit the person named in a court order, or if no order has been served upon the lessor, 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 lessor. The lessor, if so requested by that person, may deliver 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].

History: Laws 1991, ch. 51, § 24.

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	<p>New Mexico Statutes Annotated</p> <p>Free website: http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0 or New Mexico Compilation Commission 4355 Center Place Santa Fe, NM 87507-9706 Phone: 505-827-4821</p>
Probate Forms	<p>New Mexico Supreme Court</p> <p>General Website: http://nmsupremecourt.nmcourts.gov</p> <p>Click on “Rules, Forms and Opinions” then “Forms” then “Probate Court.”</p> <p>Click on “Legal Forms” then “Probate Court Forms” to reach: http://nmsupremecourt.nmcourts.gov/legal-forms/vprobate_code.php</p>
Bernalillo County Probate Court	<p>Website: http://www.berncourt.gov/probate_judge/</p> <p>The court website include information to help <i>pro se</i> applicants use the court, newspaper columns about probate topics, a link to the <i>pro se</i> forms, and other useful resources.</p>

New Mexico Probate Judges Manual	<p>New Mexico Judicial Education Center MSC11 6060 1 University of New Mexico Albuquerque, NM 87131-0001</p> <p>Pam Lambert, Director Phone: 505-277-1052 Fax: 505-277-7064 Email: plams@unm.edu Website: http://jec.unm.edu/</p>
New Mexico Association of Counties	<p>Website: http://www.nmcounties.org/</p> <p>613 Old Santa Fe Trail Santa Fe NM 87505 505-983-2101 or 877-983-2101 (tollfree)</p>
National College of Probate Judges	<p>Website: http://ncpj.org/</p>

15.2 Additional State and Federal Government Resources

New Mexico Agencies	Contact Information
Motor Vehicle Division, Taxation and Revenue Department	<p>Phone: 1-888-683-4636 Website: www.state.nm.us/tax/mvd</p>
Taxation and Revenue Department	<p>Phone: 505-841-6200 (Albuquerque) Phone: 505-827-0700 (Santa Fe) Website: www.state.nm.us/tax</p>
Vital Records and Health Statistics Office (for death certificates) of N.M. Department of Health	<p>Phone: 505-841-4183, 505-841-4185 (Albuquerque) Phone: 505-827-0121 (Santa Fe), 866-534-0051 (tollfree) Website: www.health.state.nm.us (click on “Death Certificates”) or http://vitalrecordsnm.org/death.shtml</p>
Unclaimed Property Division	<p>Phone: (505) 476-1774 Email: uproperty@state.nm.us Website: http://ec3.state.nm.us/ucp/ or directly to missingmoney.com</p>

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