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You have many options when deciding to create an estate plan from private attorneys to online document services. If the documents are not prepared correctly, the cost to fix the errors after the fact are far more than the old adage of doing it right the first time.

FAQ

What is Probate in New Mexico?

Probate is a court proceeding to pass a deceased person's (decedent's) property to the heirs.

The court appoints a personal representative who has the legal authority to act on behalf of the estate in passing the decedent's property.

What is an heir in New Mexico?

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

What property is subject to probate in New Mexico?

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

Any property that is not held in a trust and does not have a payable on death designation will be subject to probate.

What is intestate in New Mexico?

Intestate means dying without a valid will.

What is testate in New Mexico?

Testate means dying with a valid will.

What are 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.

Do I need an attorney to file Probate?

In New Mexico, you do not need an attorney to file probate. You can find the probate court forms at this link <https://nmcourts.gov/forms.aspx>. The attorneys at Roybal-Mack & Cordova can assist you with limited service by reviewing the forms for a nominal fee or can complete the entire probate process for you from start to finish.

What estates get filed in probate court?

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.

Where can I find the probate court rules?

Free public access to all of New Mexico's statutes and rules is available online at:
<http://www.nmonesource.com/nmpublic/gateway.dll/?f=templates&fn=default.htm>

What type of cases are covered by the Uniform Probate Court?

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).

Where can you file probate proceedings?

You can file probate proceedings in either the probate court or the district court. In New Mexico, the courts have concurrent jurisdiction.

A list of probate courts can be found here. [\(LINK FOR PROBATE COURT\)](#)

Which probate court do you file in?

Answer these questions to determine the correct court.

- Where does the person consider his or her permanent place of abode?
- Where is the person registered to vote?
- Where is the person's permanent address?
- Where is the person's vehicle registered?
- Where was their driver's license issued?

When is probate required?

When the decedent owned property solely in his or her own name and the property needs to be transferred. The probate estate includes decedent's property, both real and personal, that is titled in decedent's sole name or as tenants in common (defined below). It does not generally include property held in joint tenancy (also defined below), insurance policies (unless the estate, rather than an individual, is named as a beneficiary), payable on death accounts, transfer on death accounts, trusts, etc.

Intestate Succession in New Mexico

Intestate means dying without a valid will.

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. If an intestate decedent had no spouse, then the decedent's heirs as set out in Section 45-2-103 would receive the decedent's property.

If an intestate decedent owned separate property at death and had only a spouse, but no children, then the surviving spouse receives all of the separate property in the intestate estate. 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. 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. It is important to consult with an attorney to help understand these code.

The law determines who will inherit in any given situation. Attorneys have ways to find lost heirs and individuals that may inherit.

- If decedent is married, decedent's spouse is an heir.
- The decedent's biological and adopted children.
- The decedent's grandchildren of a deceased child.
- If the decedent has no surviving spouse or children, decedent's parents are the heirs, if both survive, or the surviving parent if only one survives.
- If the decedent has no surviving spouse, children, or parents, then decedent's brothers and sisters.

Last Will & Testament in New Mexico

In New Mexico, if you do not like the intestate plan created by the State for you, then you must create a Will. A Will is a written document, signed by the testator and witnessed in a formal setting. A Will that follows the various formalities passes your assets to your intended beneficiaries. It allows you to disinherit your heirs if desired.

A Will can be created by any person over the age of 18 who is of sound mind. Wills in New Mexico follow formalities based on the number of witnesses, portions that are notarized.

A Last Will & Testament prepared by Roybal-Mack & Cordova PC will follow the necessary formalities for the Will to be valid.

There are various types of Wills. There is a holographic Will, which will not be accepted in New Mexico if created in this State. There are Joint Wills, Mutual Wills, Wills with Testamentary Trusts and Pour-Over Wills. Consult with an attorney to determine the right document to meet your needs.

There is a difference between a Living Will and a Last Will & Testament. People often confuse the two documents. A Living Will is the same as a Healthcare Directive, which instructs your decision maker and healthcare providers on your desired medical interventions. A Living Will does not pass your property to your heirs.

Revoking a Last Will & Testament

In New Mexico, you can revoke a Last Will & Testament. However, it is important to replace your revoked Will or you may be subject to the laws of intestate (dying without a Will) succession. There are specific steps that you must follow in revoking a Will. It is best to consult with a probate attorney prior to revoking the Will.

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

Some people wish to revoke only a portion of their wills by making a codicil (amendment) to the will. 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 our attorneys notarize wills and codicils that they prepare.

New Mexico law allows a separate writing to revoke a Will. A testator can revoke a Will by creating a writing revoking a Will. There are specific formalities that must be adhered to if a separate document is creating. It is best to consult with a Probate Attorney to meet these formalities.

What is a Personal Representative in New Mexico?

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.

Upon filing the probate proceeding, the Court will appoint a Personal Representative. It is the probate judge's responsibility to appoint the personal representative that has the highest priority to serve. If an individual wants to serve as personal representative and they are not the highest priority as outlined in the probate code, then they should consult an attorney for the best success in filing probate.

Who has priority to serve?

1. The Personal representative named in the will;
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;
6. Any individual 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, 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. 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.

If someone without highest priority asks the court to appoint them as personal representative and has not obtained written consents from those with higher priority, a formal proceeding is required in District Court. As formal proceedings are more complicated, it is best to advise an attorney.

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.

Duties of Personal Representative in New Mexico

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

Probate Special Administrators in New Mexico

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.

Summary Administration in New Mexico

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

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

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

Estates in New Mexico with Real Property

Estates that own real property (such as land, houses, farms, ranches, mobile homes that have been made into real property, leases, oil, gas, and other minerals, water rights and timber rights) may require additional court procedures to pass clear title to the heirs or devisees.

The general rule is that change of title to real property, including all assignments or other instruments of transfer of royalties in the production of oil, gas or other minerals on any lands in this state, must be recorded in the clerk's office of the county of the state where each piece of real property is located.

This includes real property titled as joint tenants with right of survivorship. Upon the death of one joint tenant, the property passes to surviving joint tenant(s) without a probate or court proceeding. Joint tenancy title may appear as —joint tenants,—joint tenants with right of survivorship. Any of these is a permissible joint tenancy designation on a deed to real property. In cases involving a joint tenancy deed to real property, the decedent joint tenant's death should be evidenced by an affidavit of death recorded in the county clerk's office in the county where the property is located. The title companies that record the affidavit of death will often review the original death certificate and will file an affidavit showing the name of the decedent, the location of death, the name of the spouse, if any, and the name of the informant of the death. This recording gives notice of the death to others searching the history of the real property that one joint tenant is deceased.

Unless restricted by the terms of a decedent's will (or the terms of a supervised administration), the personal representative may use, sell, or restrict the use of a property's natural resources, such as timber or minerals lying beneath the surface. However, natural resources, such as surface and underground water, oil, and gas, move about without regard to property lines. Use and removal of the rights to the natural resources is subject to state and federal regulations. The personal representative dealing with or passing title to such property should consult an attorney regarding these matters.

The personal representative appointed by a district court or probate court has legal authority to sell real property or to transfer title to it via a —Personal Representative's Deed" from the estate to the new owner(s). This deed must be signed by the personal representative in the presence of a notary public, who then notarizes the deed. The notarization must be in the form of an —acknowledgment.¶ The deed should be delivered to the new owner who should record it. The authority for the personal representative to execute this deed is found in Section 45-3-907.

It is the responsibility of the new owner(s) of the real property to inform the county assessor's and treasurer's offices about the change in ownership of the property.

Section 45-4-207 discusses ancillary proceedings in a formal proceeding. Under this section, the district court could issue Letters to a foreign personal representative who needed power to act in New Mexico. Probate judges do not have jurisdiction over formal ancillary proceedings. Ancillary proceedings are rarely necessary because proofs of authority, discussed below, are usually sufficient.

10.1 Disclaimer Statutes

Disclaimer means the refusal to accept an interest in or power over property. Section 45-2-1102C. Disclaimers are used when someone who is supposed to receive decedent's property does not want it (for tax or other reasons). Disclaimers must comply with federal Internal Revenue Code requirements and New Mexico's Uniform Disclaimer of Property Interests Act, Sections 45-2-1101 through 45-2-1116.

A disclaimer must be in a writing or other record, declare the disclaimer, describe the interest or power disclaimed, be signed by the person making the disclaimer, and be delivered or filed in the manner provided in Section 12 [45-2-1112 NMSA 1978] of the Uniform Disclaimer of Property Interests Act. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. Section 45-2-1105C. The person making the disclaimer cannot use or benefit from the disclaimed property.

The delivery or filing provisions of New Mexico's disclaimer law are listed in Section 45-2-1112. Disclaimers are not something a probate judge should be involved in, other than referring people to New Mexico's disclaimer statutes. People who are making a qualified disclaimer for tax purposes must also comply with the requirements of the Internal Revenue Code, which may contain time limits for making a disclaimer. This topic is outside the scope of the manual.

It is possible that someone could open a case in probate or district court for the sole purpose of filing a disclaimer. The docket fee would still be paid and the case would be docketed as if it were a regular probate case. No further filings relating to the disclaimer appear to be required. The probate court can require an original death certificate as part of the disclaimer paperwork.

10.2 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 or other governing instrument states otherwise. Minor, dependent, and adult children are all entitled to share the personal property allowance, if there is no surviving spouse. They do not each receive \$15,000, but instead split \$15,000 among however many recipients there are.

The family and personal property allowances apply whether or not a will exists. The allowances may also apply in the case of a legal separation, although deciding this issue is outside the scope of the probate judge's powers. In the case where a couple is informally separated, but no legal action has occurred, the allowances would apply.

10.3 Omitted Spouse and Children

Sections 45-2-301 and 45-2-302 discuss the entitlements of decedents' spouses and children who may have been omitted from decedent's will. If a testator's surviving spouse married the testator after the testator executed his will, the surviving spouse is entitled to receive an intestate share unless that share is devised to a child of the testator born before the marriage. This provision gives greater rights to children from another marriage than to new spouses. However, spouses and minor children are still entitled to the family allowance, and spouses and children are entitled to the personal property allowance.

The law also contains provisions about omitting children born after a will is made. The law is silent about omitting children born before the will is made. If someone intends to omit a child born before the will was made, that omission does not have to be in writing. However, having a written omission in a will or trust can prevent lawsuits later on.

Children born or adopted after a will is made may be entitled to a portion of a testator's estate unless the will is clear about the testator's intention to omit the child. Probate judges may encounter wills that contain a statement, —I specifically intend to omit Child A as a beneficiary under this will. Child A is still entitled to notice of the probate proceeding,

The New Mexico case, *Bell v. Estate of Bell*, 2008-NMCA-045, 143 N.M. 716 (Ct.App. 2008), discusses this issue at length. The New Mexico Supreme Court originally granted certiorari on the case, but later quashed certiorari. This means the Court of Appeals version of the case is the current interpretation of New Mexico's law governing omitted spouses.

Practical Tip:

If a dispute arises over omitted spouses' or children's shares, only the district court has jurisdiction to resolve the dispute.

10.4 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.

10.5 Creditors' Claims and Demands for Notice

Probate courts cannot accept a demand for notice unless a probate proceeding has already been opened with our court. If a probate has not been opened, the demand must be filed in the district court. Section 45-3-204.

The demand for notice must contain:

- The name of the decedent.
- The nature of the demandant's interest in the estate.
- The address of the demandant or his/her attorney.

Once the court receives a demand for notice, the court is required to mail a copy of the demand to the personal representative of the estate.

Once the demand for notice is filed, —no order or filing to which the demand relates shall be made or accepted without notice to the demandant or his/her attorney. Absence of such notice does not invalidate any order granted in such a hearing or any filing, but the person granted the order or making such a filing may be held liable for any damages to the demandant.

While the statute does not appear to require the court to provide these copies to the demandant, it is good practice for the court to do so.

Who Pays for Copies? Probate courts have a duty to be consistent in their policy regarding fees for copies (courts can't charge one person for copies, but not another), so courts should ask all people requesting the records to pay for them. Section 34-7-15 authorizes specific fees for clerks of probate courts. However, there are some prohibitions against charging other governmental entities for copies. In general see the Inspection of Public Records Act, Section 14-20-1, et. seq., which is discussed in more detail in Chapter 6.

What are Courts Required to Give to the Public? Since court files are public records, courts are required to provide anyone copies of anything they want from the files. If the demand relates to specific filings, they may not care about everything filed. Often, someone demanding copies of records wants things like the inventory. Since inventories often are not filed with the probate court, the court can tell the person requesting this information to contact the personal representative or his/her attorney.

Creditors' Claims Generally. Although it is not the judge's job to supervise personal representatives in properly performing their duties, it is important to study and understand the statutes governing creditors' claims. *See generally* Sections 45-3-801 through 45-3-816. Creditor's claims can be debts incurred before or after the decedent's death. Credit cards, utility bills, medical bills, funeral expenses, taxes, and more qualify as debts. Creditors are the persons or institutions to whom decedent's debts are owed. Creditors file claims against the decedent's estate. For claims arising before a decedent's death, creditors have a one-year time period to make claims. Section 45-3-803A(1).

Section 45-3-801 requires personal representatives, within three months of their appointment, to give written notice to known and reasonably ascertainable creditors. The creditor has two months to present a claim, either to the personal representative or to the court. Section 45-3-804(A). The personal representative has sixty days to act on the claim, allowing or disallowing it. Section 45-3-806(A). If the personal representative does not respond to a claim against the estate within sixty days, the claim is deemed allowed.

Probate courts cannot hold evidentiary hearings for creditor's disputes. If a personal representative disallows a creditor's claim, the creditor can file a petition for allowance in the district court within sixty days after the mailing of the notice of disallowance. Section 45-3-806. Some district judges will just resolve the creditor's dispute, and a copy of any court order of resolution should be placed in the probate court case file. The probate court would then keep jurisdiction over the rest of the case. Other district courts may order the probate court to transfer the case to the district court. The district court would then have jurisdiction over both the creditor's claim and the rest of the case.

Claims must be paid by the personal representative in a certain order. *See* Section 45-3-805. Section 45-3-803(A)(1) generally mandates that all creditors' claims are barred against the estate unless presented within one year following the decedent's death. Thus, if a probate is not opened until one year after decedent dies, creditors would be out of luck. Personal representatives need to be aware that the court does not make these determinations. It is the personal representative's duty to check to see if there are any claims against the estate, evaluate the validity of all claims against the estate, and to respond in a timely manner. Failure to do so is a breach of the personal representative's fiduciary duty. *See* Section 45-3-703A.

Practical Tip:

New Mexico law allows creditors to receive payment not just from estate assets, but also from certain assets that passed outside of probate, such as transfer on death deeds and trusts. *See* Sections 45-6-401(J) and Section 46A-5-505A(3).

Certain assets of a decedent are exempt from creditors' claims. For example, Section 42-10-5 exempts most life insurance proceeds from creditors' claims. *See also* Sections 42-10-1 through 42-10-13.

10.7.1 Estate Recovery Law in New Mexico

Federal law requires every state to enact an estate recovery law that allows each state to recover certain benefits paid on behalf of an individual for services rendered after the recipient reaches age 55. New Mexico's Human Services Department (HSD) may be a creditor of a decedent's estate if the state paid certain benefits on behalf of the decedent prior to death. If a person has spent down all of his or her resources, the state could not recover anything. New Mexico's estate recovery laws are contained in Sections 27-2A-1 through 27-2A-9.

Estate recovery rules apply to recipients who were fifty-five (55) years of age or older when medical assistance payments were made on their behalf for nursing facilities services, home and community based services, and/or related hospital and prescription drug services. Recovery from a recipient's estate will be made only after the death of the recipient's surviving spouse, if any, and only at a time that the recipient does not have surviving child(ren) who are less than twenty-one years of age or blind or disabled.

Under the estate recovery law, after the recipient of benefits dies, the state could recover monies paid on behalf of the individual who received benefits by filing a claim in probate, selling the home, or liquidating other assets. Certain undue hardship exceptions also exist. New Mexico's law allows recovery from probate estate assets. Real property that passed subject to a Transfer on Death Deed and other property held in joint tenancy or with —payable on death or —transfer on death beneficiaries may also be subject to estate recovery laws in an involuntary probate.

HSD may be a creditor, entitled to be given notice of the probate by the personal representative and an opportunity to file a claim against the decedent's estate. HSD might ask to be appointed personal representative. It is unlikely that HSD would have the highest priority to be appointed personal representative, so a formal proceeding in the district court would probably need to be filed. *See* Section 45-3-203E.

The probate court's involvement in cases with estate recovery issues is very limited. Filing a claim from HSD in the court file is the most likely involvement the court or staff will have. The probate judge cannot appoint HSD as personal representative if it does not have highest priority or unless all those with higher priority consent in writing. If issues arise that are outside of the probate judge's jurisdiction, the judge should transfer the case to the district court for a formal proceeding.

10.8 Trusts

The New Mexico legislature passed the Uniform Trust Code (UTC), which governs trust documents in New Mexico. Sections 46A-1-101 through 46A-11-1105. Only the district court has jurisdiction over disputed trust matters. Probate judges can accept probate cases involving pourover wills, discussed in Chapter 2, when there is no dispute. Valid pourover wills should be admitted to probate using the same procedure as for other wills.

The UTC contains many provisions about creating and managing a trust, as well as provisions regarding trustees' duties and liabilities. The UTC refers to the person making the trust as the "settlor."

Trusts are legal documents that set out provisions for the management of property and for the distribution of property upon someone's death. A person (who may also be called a trustor or grantor) creates a trust, transfers assets into the trust, and then may choose to manage the trust.

The manager of the trust is called the trustee. If the settlor serves as the initial trustee and later becomes incapacitated, a successor trustee manages the trust. Upon the settlor's death, assets remaining in the trust pass to beneficiaries named in the trust document. Beneficiaries can be spouses, children, grandchildren, pets, charities, or other entities or people.

A revocable living trust (sometimes called an inter vivos trust) is created during one's lifetime. Trust income and principal can be used for the settlor's benefit during the settlor's lifetime, then passed to designated beneficiaries after the settlor dies.

The settlor creates a written revocable living trust by signing a trust document (usually signed once as settlor and once as trustee) in the presence of a notary public, who then notarizes the trust document.

Once a trust is created, the settlor or the settlor's attorney must transfer assets into the trust. Legal title to transferred assets is held in the name of the trustee of the trust, so no probate is necessary when the settlor dies. The trustee (who could be the settlor, a bank or trust company, a friend, or a relative) manages the trust assets for the benefit of a beneficiary or beneficiaries (who could be the settlor during the settlor's lifetime, then the children of the settlor, etc.).

The living trust is established and becomes effective during the lifetime of the settlor. Revocable living trusts may be amended at any time and can be terminated at any time by the settlor, as long as the settlor is mentally competent.

The trust remains in effect when the settlor dies, and the settlor's assets are then distributed according to the terms of the trust. If more than one settlor has created a joint trust, the surviving settlor could change the trust unless the express provisions of the trust state otherwise. After both settlors died, the trust could not be changed unless all beneficiaries consented.

Only the district courts have jurisdiction to resolve disputes involving trusts or problems with the administration of trusts. Probate judges' involvement with trusts is limited to:

1. Admitting a pourover will into probate. Usually this occurs because the settlor neglected to transfer an asset into the name of the trustee of the trust.
2. Admitting a will that contains a testamentary trust, which becomes effective upon the death of the testator.

Probate judges should not give legal advice about whether or not a trust is better than or preferable to a will. Unless judges are also attorneys licensed in New Mexico, they cannot prepare trusts or other legal documents for family members, friends, neighbors or others.

10.9 Cremation Law

Since 1993 New Mexico has had a law that allows an individual to authorize his or her own cremation in a will or a separate written statement either signed by the individual and notarized or signed by the individual and two witnesses. Funeral homes, crematories and others are immune from liability for relying on the statement. If a person has put his or her wishes in the proper written form, funeral homes and others cannot require next of kin to sign permission for the cremation. Although the law clearly states that the permission of next of kin is not required if a valid cremation statement exists, some funeral establishments still will not honor cremation statements. This is a clear violation of the law.

If a person does not leave written instructions, but still wishes to be cremated, the law allows a decedent's next of kin to give permission. If a decedent is married, his or her spouse is the next of kin. If a decedent has no spouse, a majority of the decedent's surviving adult children must sign the authorization form. If a decedent has no spouse or children, a majority of the decedent's surviving siblings must sign. If a decedent has no next of kin, a close friend who is familiar with the decedent's wishes may sign permission for the cremation.

If a decedent left no written instructions regarding the disposition of the decedent's remains, died while serving in any branch of the United States armed forces, the United States reserve forces or the national guard and completed a United States department of defense record of emergency data form or its successor form, the person authorized by the decedent to determine the means of disposition on a United States department of defense record of emergency data form shall determine the means of disposition, not to be limited to cremation. Section 24-12A-2B.

The cremation law appears in two sections of New Mexico's laws, Sections 24-12A-1 through 3 and Section 61-32-19, which is part of the Funeral Services Act. Although Section 61-32-19 main statute says —Repealed effective July 1, 2012, the 2012 Cumulative Supplement extends the repeal date to July 1, 2018.

Practical Tip:

Although New Mexico law allows a person to leave cremation or burial instructions in a will, the reality is that often the will is not found or reviewed until after the funeral, cremation, or burial. Having a separate written statement of one's wishes should help ensure that one's wishes are followed. A person could have instructions in both a will and a separate statement; in that instance, make sure the instructions are identical to avoid future problems!

10.10 Wrongful Death Claims

On occasion a probate judge will receive a probate case asking for the appointment of a personal representative for the sole purpose of bringing a wrongful death action on behalf of a decedent. Judges should be aware that the term —personal representative as used in the Wrongful Death Act is different than a —personal representative appointed under the Uniform Probate Code. Further, the law provides that wrongful death proceeds are not part of the probate estate.

Section 41-2-3 of the Wrongful Death Act provides:

Every action mentioned in Section 41-2-1 NMSA 1978 shall be brought by and in the name of the personal representative of the deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they deem fair and just, taking into consideration the pecuniary injury resulting from the death to the surviving party entitled to the judgment, or any interest in the judgment, recovered in such action and also having regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased; provided the decedent has left a spouse, child, father, mother, brother, sister or child or children of the deceased child, as defined in the New Mexico Probate Code [Chapter 45 NMSA 1978], but shall be distributed as follows:

- A. if there is a surviving spouse and no child, then to the spouse;
- B. if there is a surviving spouse and a child or grandchild, then one-half to the surviving spouse and the remaining one-half to the children and grandchildren, the grandchildren taking by right of representation;
- C. if there is no husband or wife, but a child or grandchild, then to such child and grandchild by right of representation;
- D. if the deceased is a minor, childless and unmarried, then to the father and mother who shall have an equal interest in the judgment, or if either of them is dead, then to the survivor;
- E. if there is no father, mother, husband, wife, child or grandchild, then to a surviving brother or sister if there are any; and
- F. if there is no kindred as named in Subsections A through E of this section, then the proceeds of the judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons.

The case *In the Matter of the Estate of Sumler* 133 N.M. 319 (Ct. App.2002) has caused further confusion on this issue. *Sumler* states, —In view of our holding that appointment as the personal representative of Kirsten's estate [appointed in a probate proceeding] is neither necessary nor sufficient authority for Appellants to serve as Section 41-2-3 personal representatives in prosecuting an action for her wrongful death, we conclude that this appeal is moot to the extent it seeks review of the district court's order appointing Father as personal representative of Kirsten's estate.¶

Some attorneys ignore the *Sumler* case and continue to seek appointment of a personal representative in the probate court. Others ask the district court to appoint a personal

representative as part of the wrongful death action. Wrongful death cases are filed in the district court as *civil* cases, not *probate* cases. In that instance, a party can ask for a personal representative to be appointed for the purpose of bringing a wrongful death action.

The bottom line is that there is no provision in the Uniform Probate Code for a limited appointment of a personal representative. Personal representatives appointed under the Uniform Probate Code in either the probate or district court must meet all of their duties to give notice, prepare inventories, notify creditors, etc. even if their sole desire is to conduct discovery of medical records for a possible wrongful death action. If an attorney insists that a probate judge can appoint a personal representative with limited powers to handle only a wrongful death claim, ask that attorney to provide the section of the Uniform Probate Code that permits this. There isn't one!

10.11 Notarial Acts and Oaths

Initial probate applications, acceptances to serve as personal representative, and the verified closing statements must be signed in the presence of a notary public. Wills may also be notarized, although this is not required.

Probate judges may also administer oaths. *See also* Section 14-13-3, which allows clerks of the probate courts to administer oaths. Probate judges are occasionally asked to administer an oath to a personal representative who has opened a probate in another state but lives in New Mexico. The judge may receive a letter and packet from a court outside of New Mexico. The letter may include a —Commission or other authorization to the probate judge to administer an oath to a personal representative or administrator who was appointed in the other state's court. The other state's law may require the personal representative to personally appear to take the oath of office. But instead of requiring the personal representative to travel, for example, to Pennsylvania, the Pennsylvania court empowers a New Mexico judge to administer the oath locally. The judge, or clerk of the court, if allowed, would make an appointment with the personal representative to appear at the probate court to take the oath.

The other court will usually provide the probate judge with instructions on returning the paperwork to that court. The court, not the personal representative, must return the completed oath, including court seal, to the out-of-state court. Follow the instructions in the cover letter carefully. Before administering the oath, check the person's photo identification. The judge should keep a copy of the oath paperwork for his or her records.

Probate judges or probate clerks should not notarize or administer oaths for probate cases filed in their court, because this would be considered a conflict of interest. Although the Uniform Law on Notarial Acts allows a judge, clerk or deputy clerk of any court of this state to perform notarial acts, caution and restraint should be exercised when using the court seal. For additional guidance about notarial acts within New Mexico, *see* Sections 14-12A-1 through 14-12A-26 and Section 14-14-3. The definitions contained in Section 14-12A-2 are particularly helpful. For judges with limited access to the multiple volumes of New Mexico Statutes Annotated (NMSA), remember that all New Mexico statutes and rules are available online for free at:

<http://www.nmonesource.com/nmpublic/gateway.dll/?f=templates&fn=default.htm> Click in upper left corner —+ Statutes, Rules, Const. to drop down a menu.

The most important job of a notary public is to verify that the person signing the document is who they claim to be and personally signed the document in the notary's presence. The person signs the document, the notary signs the notarial certificate, and then the notary either seals an impression on the document or stamps it with a rubber stamp approved by the Secretary of State. From a practical standpoint, an inked rubber stamp photocopies much more easily than a seal impression, (but is much harder to identify as an original document). Some office supply stores have round ink stamps that notaries (or the court) can apply over a seal to make seal show up in a photocopy.

A person who is not personally known to the notary public must provide satisfactory evidence of identity, such as a driver's license or other photo ID. It is also the notary's responsibility to decide whether a person is signing willingly and seems competent to sign.

To make sure that notaries properly perform their duties, New Mexico's law requires a \$10,000 surety bond for all notaries. Section 14-12A-9. A person may not become a notary until an oath of office and the bond have been provided and the secretary of state approves the oath and bond. Notaries should never notarize a document that was not signed in their presence. Under the law, those who violate this requirement can be convicted and fined up to \$1,000, or imprisoned for up to six months, or both.

In New Mexico notaries may perform the following notarial acts:

- Acknowledgments.
- Oaths and affirmations.
- Jurats (defined in Section 14-12A-2(F)).
- Copy certifications.
- Other acts allowed by law.

New Mexico notaries may not perform marriages.

Notaries public shall:

- Be New Mexico residents.
- Be eighteen or older.
- Read and write English.
- Have no felony convictions.
- Not have had a notary public commission revoked during the past five years.

The law governing notaries contains detailed provisions about their duties and obligations. Although the law does not require it, keeping a journal of all notarial acts, along with the date, title of the document, and names of the people whose signatures were notarized is wise.

The law also sets fees that notaries can charge. A notary can charge a maximum fee of \$5.00 for each acknowledgment, oath, or jurat. If a notary charges more than \$5.00 per seal or stamp, the notary is probably unaware of the laws that regulate fees. Some notaries charge no fee, especially if they work at businesses that provide free notary services to customers.

The Secretary of State oversees notary appointments, which expire after four years. The application fee is \$20. Information about notaries is available on the Secretary of State's Office website at http://www.sos.state.nm.us/Business_Services/Notary_Division.aspx. For more information or to obtain a pamphlet about notary requirements, call the Secretary of State's office at 505-827-3600 (Santa Fe) or toll-free at 1-800-477-3632.

The laws governing notaries can be found at Sections 14-12A-1 through 26. Laws about acknowledgments and oaths are found at Sections 14-13-1 through 25. The Uniform Law on Notarial Acts is found at Sections 14-14-1 through 11.

10.12 Missing Heirs and Unclaimed Property

Sometimes an attorney or personal representative searches diligently for an heir or devisee and is unable to locate them. For example, suppose a decedent has five children, one of whom cannot be found. Many people think that the other four children end up sharing the missing child's share of the estate. They are incorrect.

Section 45-3-914 of New Mexico's Uniform Probate Code states, —If an heir, devisee or claimant cannot be found, the personal representative shall distribute the share of the missing person to his conservator, if any. Otherwise, the personal representative shall sell the share of the missing person and distribute the proceeds to the state treasurer as prescribed by the Uniform Unclaimed Property Act [UUPA].¶

If a court has not declared a missing person dead or appointed a conservator for him or her, then UUPA applies. UUPA only covers intangible property, such as bank accounts, stocks, insurance policies, and annuities, and intangible property that may be contained within a safe deposit box. UUPA does not allow the state to accept real property, guns not found in safe deposit boxes, vehicles, animals, boats and other objects. The contents of safe deposit boxes are sorted to dispose of valueless objects, and the more valuable objects may later be auctioned and converted to cash.

New Mexico's taxation and revenue department is charged with receiving and managing unclaimed property. Property is presumed abandoned if it is unclaimed for a certain amount of time. These time periods vary from one to fifteen years depending on the type of property. For example, the time period for:

- Utility deposits, one year
- Certain IRAs, three years.
- CDs and stocks, five years, in general.
- Traveler's checks, fifteen years after issuance.
- Money orders, seven years after issuance.

- Contents of safe deposit box, five years after expiration of rental period of box.

The holder of abandoned property must prepare reports and publish notices about the abandoned property. After the specified time periods have elapsed, the holder of the property must pay, deliver or arrange the payment or delivery of unclaimed property to the taxation and revenue department.

Upon payment or delivery of property, the state assumes custody and responsibility for the safekeeping of the property. Taxation and revenue must deposit the funds as set out in the law, reserving a certain amount for claims and keeping records of the property received.

If a person finds out that the state is holding their property, the person can file a claim with the taxation and revenue department. Once the department verifies the claimant's identity and right to the property, the department will allow the claim and must pay it within 30 days.

UUPA does not specifically address inheritances, but does address amounts distributable from trusts or custodial funds. Since the probate code directs missing heirs' shares to be governed by UUPA, that is the route to take unless a conservator has been appointed for the missing person.

People may wonder why the probate code directs a missing recipient's share to be held by a conservator or the state instead of being distributed to the decedent's other heirs. One reason may be that if the law allowed other heirs to split a missing person's share, the heirs might withhold information about a person's whereabouts to gain a larger share of the estate. Another is that the state is the only entity that has the ability to preserve the property for the heir indefinitely without cost to the estate or the heir. Entrusting the missing person's share to a neutral agency ensures that the share will be available if the person is ever located.

A court proceeding is usually not necessary to claim unclaimed property. New Mexico's Tax and Revenue Department, Unclaimed Property Division, which oversees UUPA, may release unclaimed property to a claimant who uses the division's own administrative claims procedure. Or the division may accept a small estate affidavit (discussed below) to claim property on behalf of a decedent if the claimant provides substantive entitlement to funds under applicable heirship laws and a copy of the owner's death certificate if the circumstance is such that a diligent personal representative has discovered some unclaimed property when searching for other assets of the estate. In this circumstance, the small estate affidavit may be accepted on a case-by-case basis. The Department usually requires that its own administrative claims procedure be used if the claim is the only substantial asset of the estate, or if it appears that a probate has been opened to —end run the Department's claim procedures.

The Unclaimed Property Division generally accepts what a claimant would provide to the probate court to claim the money or other property under UUPA. The division looks for a documented chain of title. If there is a will, a copy of the will should be provided. If there is no will, the division follows the intestacy laws in effect in the appropriate jurisdiction at the time of death as much as possible. The claimant should provide an affidavit that he or she knows of no later wills or codicils. The claimant must also show why he or she has priority to claim the unclaimed property of the decedent. If the distribution is made on a generational basis, i.e., a will

leaves to John Doe I and then John Doe I dies after the decedent, but before getting a distribution, the claimant should expect to describe who would take. For example, a claimant could state, —John Doe I was not married, was a widower, and left no will. He had left five children, Rebecca, Michael, Tommy, Gilbert and Grace and to my knowledge, no others. I am Rebecca.¶

The claimant must prove his or her identity, including official birth certificates if possible. The longer it has been since the property is unclaimed, the more difficult it may be to prove a right to claim the property. New Mexico’s Unclaimed Property Division may adjust what documents of proof it requires and the supporting affidavit to account for the circumstances of each case.

As described above, the division will generally honor a probate proceeding if it appears that the unclaimed property is ancillary to the ongoing probate. For example, sometimes a personal representative, as part of a probate, will check with New Mexico’s Unclaimed Property Division and find some. If that appears to be the case, the division will generally go along with processing the claim through the probate proceeding. If the single or most substantial asset is unclaimed property, the division will require the personal representative to go through the division’s own administrative process to make sure the correct people receive the unclaimed property and to help prevent fraud. The Department will require complete compliance with its administrative claims procedure if the probate appears to be opened as a means to avoid the Department’s required process.

Accordingly, the division does not honor claims made by personal representatives in their capacity years after the fact. The reason for this is that an heir-finder is often behind the claim and attempting to charge a finder’s fee against the other heirs who did not sign the heir-finder contract. The division may be willing to deal with a single family representative, who undertakes to distribute claim forms to other claimants and to process the claim on behalf of other relatives.

For more information on UUPA or to search for names of people for whom the state is holding unclaimed property, visit <http://ec3.state.nm.us/ucp/> or missingmoney.com. New Mexico’s Tax and Revenue Department’s Unclaimed Property Division can be reached by telephone at (505) 827-0762 or stephanie.dennis@state.nm.us.

Practical Tip:

Probate judges may encounter possible heirs to unclaimed property held by the state of New Mexico. —Heir finders¶ who charge a fee may have informed the heir about potential unclaimed property. It is permissible for the judge to give the heir contact information to the state’s Unclaimed Property Division so that the heir can contact the division directly and not pay a fee for services that are free.

10.12.1 Federal Letter Forwarding Services

Although it is not a probate judge’s job to help locate a missing heir, it is good for judges to know about the process. If someone has a person’s social security number, the Internal Revenue

Service and Social Security Administration can forward notice of an inheritance to the recipient at the last address on record.

The Social Security Administration (SSA) or Internal Revenue Service (IRS) will not give someone's address without his or her permission. But both agencies have a —letter forwarding service that can be used to attempt to contact a missing person. I used the IRS's service long ago to successfully locate two missing heirs.

These agencies will help in limited circumstances that do not interfere with their regular business. The requestor must give a good reason to forward the letter, such as a death or serious illness in the missing person's immediate family, or a large amount of money that is due the missing person.

SSA does not charge to forward letters with a humanitarian purpose. SSA charges a non-refundable \$35 fee to cover costs when the letter is informing the missing person about money or property due him or her.

SSA reviews each letter that they forward to ensure that it will not embarrass the missing person if read by a third party. Letters sent for forwarding should be in a plain, unstamped, unsealed envelope that only shows the missing person's name.

SSA needs the missing person's social security number or identifying information to help find the SSA number. Identifying information would include the person's date and place of birth, the father's name, and the mother's full birth name.

Requests to SSA must be in writing. Include the missing person's name and identifying information; the reason for wanting to contact the missing person; the last time the person was seen; and information about other attempts to contact the person.

Mail requests to Social Security Administration Letter Forwarding, P.O. Box 33022, Baltimore, MD 21290-3022. For questions about SSA's letter forwarding service, call the toll-free number, 1-800-772-1213 or visit the website at <http://www.socialsecurity.gov/foia/html/ltrfwding.htm>.

The IRS will help employers, state agencies, commercial locator services, individuals, attorneys, estate administrators, or others who directly control assets to try to locate a missing person, while safeguarding the privacy rights of the taxpayer who is sought.

The IRS's Letter-Forwarding Program helps individuals who have the social security numbers of the person they wish to contact, but whose address or whereabouts currently are unknown to the inquirer.

For humanitarian purposes, which include financial entitlement, the IRS will search its database for a recent address and forward the inquirer's letter to the missing person. Like the SSA, the IRS needs a good reason to cooperate, such as a matter of life and death and entitlements to assets. The IRS will not help locate a party to pending litigation, for service of process, or for genealogical searches.

IRS employees may screen letters submitted for forwarding to make sure they meet one of its purposes. The IRS may also charge a fee for its letter forwarding service, but does not charge for all searches.

For confidentiality reasons, the SSA or IRS will not inform the inquirer about the results of any searches. Letters intended for individuals for whom the IRS has no current records and letters forwarded by IRS and then returned as undeliverable are destroyed without informing the inquirer of the action taken.

Requests for letter forwarding assistance from the IRS should be directed to the Disclosure Scanning Unit in Chamblee, GA, at the following address:

Internal Revenue Service
Disclosure Scanning Operation —
Stop 93A
Chamblee GA 30341

The Disclosure Scanning Unit will handle these requests as its workload permits. There is no charge for this service, except for high volume requests. Revenue Procedure 2012-35 contains details and is available online at http://www.irs.gov/irb/2012-37_IRB/ar06.html.

10.13 Powers of Attorney

A financial power of attorney allows the maker, called the principal, to appoint an agent (also called an "attorney in fact") to make business decisions on the principal's behalf. Principals must be mentally competent to create a power of attorney. Financial powers of attorney should be signed in the presence of a notary public, who then notarizes the document. Health care powers of attorney authorize an agent to make personal and health care decisions on behalf of a principal.

New Mexico law does not require the agent to be a New Mexico resident. Appointing a trustworthy agent is vital, however.

A power of attorney may become effective immediately or it can "spring" into action only if the principal becomes incapacitated. To remain in effect if the principal becomes incapacitated, a power of attorney must contain specific language of "durability."

New Mexico has a "do it yourself" power of attorney form, but many attorneys use their own form. New Mexico law generally recognizes powers of attorney made in other states. Some financial institutions will not honor a power of attorney; some prefer that the person use the institution's in-house power of attorney form. Showing the power of attorney to a bank, stockbroker, insurance company, or other company before the agent must use the power of attorney could prevent problems later.

Usually powers of attorney do not need to be recorded. If, however, the agent uses the power of attorney to handle real estate transactions, the power of attorney must be recorded in the office of the county clerk where the real estate is located.

The Internal Revenue Service (IRS) prefers its own power of attorney Form 2848 for taxes. IRS Forms are available free by calling 1-800-829-3676. The Social Security Administration requires a representative payee to be appointed to handle benefit payments.

All powers of attorney end at the principal's death and should not be used to liquidate bank accounts or other assets of decedent after death. The decedent's will or trust or laws of intestate succession would control the disposition of decedent's property after death, not a power of attorney.

Probate judges usually will encounter powers of attorney only in the context of consents. If an heir or other person who has priority to serve as personal representative of an estate is unable to serve due to incapacity, the agent can sign a consent on behalf of the incapacitated person. Including a copy of the power of attorney in the probate court file will show that the agent had authority to sign on behalf of the heir or devisee.

New Mexico's Uniform Power of Attorney Act is located in Sections 45-5B-101 through 45-5B-403. A statutory form for a financial power of attorney is included in Section 45-5B-301. New Mexico's Uniform Health Care Decisions Act is located in Sections 24-7A-1 through 18. A statutory form for an —Optional Advance Health-Care Directive‡ is included in Section 24-7A-4.

10.14 Authenticated v. Certified Copies

Authentication in New Mexico means certified or exemplified, Section 45-1-201(A)(3). Copies certified by a court to be true and correct are considered —authenticated‡ under New Mexico's current law. In some states, however, authenticated copies are not the same as certified copies. For example, a court from another state may require an authenticated copy of a will from a case filed in the probate court. In that other state, authentication may require a triple certification. Only the county clerk and court, not attorneys or members of the public, can attest that documents are authenticated copies.

Practical Tip:

Although New Mexico probate courts can accept certified copies as authenticated copies (certification and authentication now appear to be the same thing for purposes of the Uniform Probate Code), out-of-state courts may require authenticated copies of documents from the probate court file. If an out-of-state court requests authenticated copies, the probate judge may need to call the out-of-state court to ask what formality is required. Because another state may require something more than certified copies, sample authentication forms are included below.

For authenticated copies issued by the probate court, the county clerk first certifies that the copies attached are true and correct copies of the documents on file with the court. The probate judge then certifies that the county clerk has the authority to act in his/her capacity. The county clerk then certifies that the probate judge has the authority to act in his/her capacity. Some states call this an Exemplification or Exemplified Copy. A sample authentication form follows.

SAMPLE AUTHENTICATION FORM

STATE OF NEW MEXICO)

)ss.

COUNTY OF _____)

I, _____, County Clerk and Ex-Officio Clerk of the Probate Court of the State of New Mexico, within and for the County of _____, do hereby certify the following to be a true, correct and complete copy of (insert name and # of Estate and list of pleadings attached (or state that it is a complete copy of the file starting with 1st document filed on xx date and ending with last document, filed on xx date _____)

as the same remains on file and of record in my said office.

IN WITNESS WHEREOF, I have set my hand and affixed the seal of said Court this _____ day of _____, 20____.

Signature of _____ County Clerk

(Affix seal here)

UNITED STATES OF AMERICA

STATE OF NEW MEXICO

COUNTY OF _____

I, _____, Judge of the Probate Court of the State of New Mexico, within and for the County of _____, do hereby certify that

(Affix seal here)

Signature of _____ County Clerk

Certified copies may also be requested from the probate court. A party might request a certified copy of a will, application, order or any other document in the court file. Each individual document requires a separate certification, while one authentication could apply to the entire contents of a court file. The statutory authority for the court's issuance of certified copies is Section 45-1-305(A), Records and Certified Copies, which reads:

A. The clerk of the district court and the clerk of the probate court shall each keep a record for each decedent, protected person or trust involved in any document that may be filed with the clerk's respective court under the Uniform Probate Code including petitions and applications, demands for notices or bonds and orders by the respective court, and responses relating thereto, and shall establish and maintain a system for indexing, filing or recording which is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law, the clerk shall issue certified copies of any probated wills, letters issued to personal representatives or any other record or paper filed or recorded. Certificates relating to probated wills shall indicate whether the decedent was domiciled in New Mexico and whether the probate was formal or informal. Such certificates shall also indicate the names and addresses of any known heirs. Certificates relating to letters shall show the date of appointment.

The certification stamp for Letters looks something like this:

I, _____, County Clerk of _____ County, New Mexico, hereby certify that the foregoing is a true, correct and full copy of the instrument herewith set out and remaining in full force and effect, as appears of record in my office.
Dated this _____ day of _____, 20__ .
(Signature or name stamp of County Clerk) _____ County Clerk
By: (original signature of Deputy Clerk) _____ Deputy Clerk

10.15 Small Estate Affidavits

Estates consisting of personal property valued at \$50,000 or less may be able to use a —Collection of Personal Property Affidavit, set out in Sections 45-3-1201 and 45-3-1202. Some financial institutions will not accept the affidavit; then, it may be easier for the person to open a probate.

The affidavit cannot be used to transfer title to real property. The requirements for the affidavit (under Section 45-3-1201) are that:

- The value of the entire (probate) estate, less liens and encumbrances, does not exceed \$50,000.00.
- It has been more than 30 days since the person has died.
- No probate is filed or pending in any jurisdiction.
- The person submitting the affidavit is the person entitled to transfer of the asset.

All successors entitled to the property must sign the affidavit in the presence of a notary public. The person or entity that transfers the property based on the affidavit is released from liability as if they had dealt with a duly appointed personal representative of the estate; *see* Sections 45-3-1201 and 1202. Judges can give a copy of these laws to people to give to the financial institution holding the decedent's personal property, but should not participate in persuading the institution to honor the affidavit. If an institution refuses to accept the affidavit, the person entitled to be the decedent's personal representative can file a case with the probate or district court asking to be appointed or file another proceeding to claim the property, *see* Section 45-3-1202.

This affidavit cannot be used if a probate case has been opened in any court. If a case is already open, the personal representative would use the Letters Testamentary or Letters of Administration to claim and pass the decedent's personal property to the rightful successors.

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

<http://www.mvd.newmexico.gov/SiteCollectionDocuments/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(s) of _____ (name of decedent), deceased.
2. The value of the entire estate of the decedent, wherever located, less liens and encumbrances, does not exceed \$50,000.
3. Thirty days have elapsed since the death of the decedent.
4. No application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction.
5. Pursuant to NMSA Section 45-3-1201 (2012 Cum. Supp.), the affiant(s), as successor(s) of the decedent, is/are entitled to the payment of any sums of money due and owing to the decedent, to the delivery of all tangible personal property belonging to the decedent and in the possession of another, and to the delivery of all instruments evidencing a debt, obligation, stock or chose in action belonging to the decedent.

DATED: _____, 20__.

AFFIANT*

*Each affiant should sign on a separate line and and also sign a separate acknowledgement below.

_____, Affiant, being first duly sworn, states on oath that all of the representations in this affidavit are true as far as affiant knows or is informed, and that such affidavit is true, accurate and complete to the best of affiant's knowledge and belief.

AFFIANT*

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 20__
by _____, Affiant.

NOTARY PUBLIC

My Commission Expires:

10.16 Transfer of Homestead Affidavits

Sometimes a home acquired during the marriage as community property was titled only in decedent's name (rather than both spouses' names) or listed both spouses' names, but only as —husband and wife, and not as —joint tenants. Normally if this were the case, the surviving spouse would open a court probate proceeding to transfer the home into his or her name. But when only a community home needs to be probated, New Mexico has a special law that allows the surviving spouse to complete an "affidavit of transfer of title to homestead."

When a husband and wife own a homestead as community property and when either the husband or wife dies intestate or dies testate and by the husband's or wife's will devises the husband's or wife's interest in the homestead to the surviving spouse, the homestead passes to the survivor and no probate or administration is necessary. Section 45-3-1205. Instead the law allows the transfer of title to the homestead to the surviving spouse by an affidavit. The affidavit must be signed by the surviving spouse in the presence of a notary public.

Section 45-3-1205 provides this shortcut transfer of title to the community homestead to the surviving spouse when no probate proceeding is required for any other property or assets. This means that all of decedent's other assets must have passed outside of probate through joint tenancy, payable on death (POD) accounts, transfer on death (TOD) accounts, or named beneficiaries on accounts. Only title to the community homestead needs to pass to the surviving spouse.

If no court proceeding is required for other assets, the transfer of homestead affidavit may be used. If there is no will or if the deceased spouse's will leaves the home to the surviving spouse, the home transfers by using the affidavit instead of a court proceeding. This affidavit cannot be used to transfer title to real property other than the marital home. The affidavit must be recorded in the county clerk's office where the property is located and must be accompanied by the original will of the decedent, if any, and a copy of the deed to the homestead. A surviving spouse must wait at least six months after the death of the spouse to use this affidavit, which must also include statements about the payment of debts and tax.

To use this affidavit:

- the home must be community property;
- the value of the home for property tax purposes cannot exceed \$500,000; and
- the home involved must be the principal place of residence of the decedent or surviving spouse.
- at least six months must have elapsed since the death of the decedent spouse.

The affidavit must contain particular language, such as:

- the surviving spouse and deceased spouse were married at the time of death and owned the home as community property;
- except for the home, no probate of the decedent's estate is necessary;

- no one has applied to be personal representative or started a probate proceeding in any court;
- all funeral expenses and other debts have been paid; and
- no federal or state taxes are due.

Additional language, outlined in Section 45-3-1205, must be included as well.

If these requirements are met, clear legal title to the home passes to the surviving spouse without a probate. To complete the transfer of title, the surviving spouse records the affidavit, deed, and original will, if any, in the office of the county clerk in the county where the home is located. If a person is unsure about how to prepare and record this affidavit, they should hire an attorney for assistance.

This affidavit helps only husbands and wives who do not have a joint tenancy deed to their community home. If the marital home were the separate property of one spouse, this affidavit could not be used.

Also, the current version of the law defines "homestead" as the principal place of residence of the decedent or surviving spouse or the last principal place of residence if neither the decedent nor the surviving spouse is residing in that residence because of illness or incapacitation and that consists of one or more dwellings together with appurtenant structures, the land underlying both the dwellings and the appurtenant structures and a quantity of land reasonably necessary for parking and other uses that facilitates the use of the dwellings and appurtenant structures, and provided the full value of this property as assessed for property taxation purposes does not exceed five hundred thousand dollars (\$500,000).

(See the next page for a sample affidavit form).

10.16.1 Sample Affidavit Form

AFFIDAVIT OF TRANSFER OF HOMESTEAD TO SURVIVING SPOUSE PURSUANT TO NMSA SECTION 45-3-1205 (2012 Cum. Supp.)

The undersigned, _____, (name of surviving spouse, hereinafter "affiant") being first duly sworn, deposes and says that:

1. Six months have elapsed since the death of _____ (name of deceased spouse, hereinafter "decedent") as shown on the death certificate.
2. At the time of death of the decedent, affiant and decedent were married and owned their homestead described as:

(insert legal description of home here)

as community property.

3. A copy of the deed with the legal description of the homestead is attached hereto.
4. But for the homestead, the decedent's estate is not subject to any judicial probate proceedings in district court or probate court.
5. No application or petition for appointment of a personal representative or for admittance of a will to probate is pending or has been granted in any jurisdiction.
6. Funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid.
7. The affiant is the surviving spouse of the decedent and is entitled to title to the homestead by intestate succession or by devise (if devised under a valid last will of decedent, the original will is attached to the affidavit).
8. No other person has a right to the interest of the decedent in the described property.
9. No federal or state tax is due on the decedent's estate.
10. The property was the homestead of decedent and affiant as defined in Section 45-3-1205, NMSA 1978, and the full value of the property as assessed for property taxation purposes does not exceed five hundred thousand dollars (\$500,000).

The affiant affirms that all statements in the affidavit are true and correct and further acknowledges that any false statement herein may subject affiant to penalties relating to perjury or subornation of perjury.

Dated: _____

Affiant (Print Name Here, Sign on Line Above)

CHAPTER 11

Weddings Performed by Probate Judges

This chapter covers:

- Who may perform weddings.
- Marriage license requirement.
- Limits on fees for performing weddings.
- Wedding ceremony.
- Certain restrictions or prohibitions on marriages.

11.1 Who May Perform Weddings

The following people may perform weddings:

- Any ordained clergy.
- Authorized representatives of a federally recognized Indian tribe.
- New Mexico judges, justices, and magistrates, including probate judges. *See Section 40-1-2.*

Practical Tip:

Probate judges may perform weddings within their county only.

11.2 Marriage License Required

The following conditions apply for marriage licenses:

- The bride and groom must present the probate judge with a properly sealed marriage license issued by the county clerk prior to the ceremony. Section 40-1-14.
- The marriage license need not be from the county where the wedding takes place; it can be from any county. Section 40-1-10.

- Once the license is issued it remains valid until the marriage is performed.
- The county clerk charges a \$25.00 fee for each marriage license issued. Section 40-1-11(E).
- Currently, there are no health requirements or blood tests required to obtain a marriage license in New Mexico.

Practical Tip:

In 2009 the New Mexico county clerks' affiliate issued a policy resolution re: marriage licenses. County clerks' offices will currently issue marriage licenses only if both parties are personally present to obtain the license. Exceptions, with additional requirements, may apply for military personnel and very ill applicants. Although incarcerated individuals have a right to marry, obtaining a license may be more difficult under this policy. Contact the county clerk for details or with questions.

The Marriage License is on one side of the document, and it authorizes the judge to perform the marriage ceremony. The county clerk (or the marriage clerk in the county clerk's office) fills out the names of the bride and groom and their city/state of residence on the Marriage License. It is the county clerk's responsibility to verify the identity and age of the applicants. The county clerk then fills out the —WITNESS my hand and seal part at the bottom of the Marriage License. The bride and groom must present this Marriage License to the judge prior to the ceremony. Marriage licenses do not expire.

On the reverse side of the license is the Marriage Certificate. Except for the recording language, it is the judge's job to fill out all information on the Certificate including the day, month and year of the ceremony, city/state where the marriage ceremony occurred, the official's title, names and city/state of the bride and groom (this is the same information from the Marriage License on the reverse side). After the ceremony the bride, groom, two witnesses and judge sign the certificate. The —Recorded this _ day of ... section is filled out by the county clerk's office, which then records the marriage certificate into the public record. The county clerk can issue certified copies of the marriage certificate in case the newlyweds need to provide proof of a name change or wedding to social security, employers, insurance companies, and others.

Practical Tip:

There is no requirement that the bride take the last name of the groom. It is a personal choice to be made by the couple. The judge should inform the bride that she needs to sign the marriage certificate with the name she wants to be known by. If she wants to change her last name to that of the groom, she should sign her new name on the marriage certificate.

11.3 New Limits on Fees for Performing Weddings

The following rules apply to wedding fees:

When performing a wedding on county property during a judge's regular work hours, state and county rules prohibit the judge from taking additional compensation for weddings other than the judge's usual salary.

Under the current Code of Judicial Conduct, a judge cannot even accept a box of candy or gift card for performing a wedding ceremony. No matter where or when the wedding is performed, judges may not accept —any remuneration, including a gratuity¹ for performing a marriage ceremony. Rule 21-312, commentary [3].

For weddings performed outside of the building and during non-regular work hours, such as weekends, effective January 1, 2012, probate judges may not charge a fee for performing weddings. The Code of Judicial Conduct, Rule 21-312, states:

21-312. Compensation for extrajudicial activities.

A. A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. [This section does NOT apply to weddings; see commentary [3] below.]

B. Conflicting compensated activities. A judge shall not hold any other paid position, judicial or otherwise, that conflicts with the hours and duties the judge is required to perform for every judicial position. A judge shall devote the number of hours that is required by any judicial position held. In no event shall other paid employment or compensable activity hours be performed simultaneously.

Committee commentary. -

[1] A judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing, and other extrajudicial activities, provided the compensation is reasonable and commensurate with the task performed. The judge should be mindful, however, that judicial duties must take precedence over other activities. See Rule 21-201 NMRA.

[2] Compensation derived from extrajudicial activities may be subject to public reporting. See Rule 21-315 NMRA.

[3] No judge may receive any remuneration, including a gratuity, for performing a marriage ceremony. For reasonable travel expenses, see Rule 21-314 NMRA.

Rule 21-314, Reimbursement of expenses and waivers of fees and charges, states:

A. Unless otherwise prohibited by Rules 21-301 and 21-313A NMRA or other law, a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.

B. Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner, or guest.

C. A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, domestic partner, or guest shall publicly report such acceptance as required by Rule 21-315 NMRA.

Practical Tip:

Judges should carefully read the current Code of Judicial Conduct, including the committee commentary after each rule, to make sure their conduct does not violate any of the rules. Chapter 13 contains the complete text of the Code of Judicial Conduct. It is the judge's responsibility to know and follow the Code to avoid disciplinary action by the Judicial Standards Commission.

11.4 Ceremony

The following guidelines apply to the wedding ceremony:

- Two competent witnesses, in addition to the probate judge, are required. *See generally*, Sections 40-1-1 through 40-1-20.
- There is no established language for a marriage ceremony, but the ceremony should include the agreement to marry. Marriages can be performed in English or in Spanish (or other language); some judges note on the Marriage Certificate if a wedding was performed in Spanish (or other language) for the benefit of the couple.
- It is the duty of the probate judge to certify the marriages to the county clerk within ninety (90) days from the date of the marriage. Certifying the marriage means filling out the Marriage Certificate discussed above and presenting it to the county clerk. By law the county clerk must record the license in the county clerk's records in the county that issued the license. Section 40-1-15. Often the couple does this themselves, but be sure and tell them that recording the certificate is required and that they should have the license recorded before they leave the building. If the wedding is performed offsite, the judge can take the license to the clerk for recording and then call the couple after the county clerk has recorded it.)
- Medical tests are not currently required for issuance of marriage licenses.
- Proxy marriages are allowed in New Mexico (i.e. one party is overseas or incarcerated). Judges may decline to perform a proxy marriage (for example, one party is personally present and one party is —present by telephone or computer video) if the judge feels uncomfortable with the arrangement.
- New Mexico does not allow common law marriages, but if a couple has a valid common law marriage from another state, New Mexico should honor that marriage.

Practical Tips:

Make sure the parties have a valid marriage license before performing the marriage.

Have the witnesses be at least eighteen (18) to ensure reliability. Although New Mexico's marriage laws do not require witnesses to marriages to be 18, it is probably a good idea. Witnesses do not have to be U.S. citizens, just anyone competent to observe the ceremony and sign the marriage license. If it is important to the couple, more than two witnesses can sign the license in the white spaces around where the —officialll witnesses sign or at the top of the marriage certificate.

11.5 Certain Marriages Restricted or Prohibited

The following restrictions on marriage apply:

- Minors between the ages of sixteen and eighteen can marry with the consent of one parent or guardian. The consent should be acknowledged by a notary or judge.
- Minors under the age of sixteen can marry only if authorized by a district judge. A probate judge cannot authorize the marriage of a person under age sixteen. Section 40-1-6. If the judge is in doubt about the age of the couple, he or she can ask for proof of age.
- Marriages between certain relatives are absolutely void. *See* Section 40-1-7 for list of specific relatives.

Practical Tips:

Make sure that all blanks on the marriage license are properly filled in before the couple leaves. Although it is not required, keeping a log of the couples' name, the date of the ceremony, and the marriage license number may be a good idea.

Persons authorized to perform marriage ceremonies who violate the provisions governing marriage can be tried and convicted of a misdemeanor and fined or sent to jail. Section 40-1-19.

CHAPTER 12

Glossary

This chapter provides:

- Glossary of terms used in probate court.

“Acceptance/Acceptance of Appointment” is the notarized statement where the applicant agrees to undertake the duties of personal representative of the estate, and abide by the laws of New Mexico. *See* Probate Form 4B-105. Judges must have a notarized Acceptance from the applicant before they can issue the Letters.

"Administration of an Estate" is the process of managing and settling the estate of a deceased person. This usually involves:

- a) giving notice of the administration of the estate;
- b) collecting the assets of an estate;
- c) paying the valid debts of an estate and expenses of administration;
- d) paying any taxes owed; and
- e) distributing the remainder of the estate to those who are entitled to it.

“Affidavit of Successor in Interest” or "Small Estate Affidavit" is a sworn, notarized statement, created pursuant to Section 45-3-1201, which is used to collect assets of a small estate (\$50,000 or less), without going through the probate process. Go to www.abogadapress.com and click on the link for —legal forms for a sample affidavit.

"Affidavit of Surviving Spouse" is a sworn, notarized statement created pursuant to Section 45-3-1205, and is used to transfer title of a marital home that is community property, but is held as sole property or as tenants in common, to a surviving spouse without the need for a probate. This affidavit is recorded in the county clerk's office where the property is located, and must be accompanied by the will of the decedent, if any, and a copy of the deed to the subject property. Also known as a “Homestead Affidavit.”

“Ancillary Proceeding” is one of the methods used to transfer ownership of property located in New Mexico when the decedent was domiciled in another state and a probate or administration proceeding is already open in the state where the decedent was domiciled. This requires the filing of authenticated copies of certain documents from the original probate proceeding along with the paperwork normally required for an informal proceeding, *see* Section 45-4-207 (formal ancillary proceeding). *See also* "Proof of Authority" for another means of

transferring ownership. If a probate was opened in a formal proceeding in the original jurisdiction, a formal proceeding may also be required in New Mexico.

"Applicant" is the person who makes a written application to the probate court for an informal probate of a will and/or informal appointment of a personal representative, *see* Section 45-1-201(A)(2).

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

"Authenticated" means certified or exemplified. Section 45-1-201(A)(3). Copies certified by a court to be true and correct are considered —authenticated under New Mexico's current law. Other states may have different requirements for authenticated copies, such as a triple certification. Some states call authentication an "Exemplification" or "Exemplified Copy." *See* Chapter 10 for a sample authentication form.

"Beneficiary" is a person who is given a gift by a will (*See* Section 45-1-201(4)) or another governing instrument (*See* Section 45-6-201C.). The probate code and the forms use the word "Devisee" when referring to a will. *See* Section 45-1-201(A)(11)).

"Beneficiary Designation" is a designation on an insurance policy, bank account, transfer on death deed, etc. regarding who receives the property after death of the owner. This designation takes precedence over any terms set out in a will. Section 45-1-201(A)(4).

"Bond" is a financial security provided to the court by the personal representative and/or a bonding company to ensure that the personal representative of the estate faithfully does the job of personal representative. A bond is usually not required in an informal proceeding. However, a bond may be required if the will requires it, or if a person with an interest in the estate asks the court to require it and the court orders that a bond be posted. For more information, *see* Sections 45-3-603 to 45-3-606.

"Certification" is an attestation by the court clerk (or deputy clerk) that a copy of a document is a true and correct copy of the document on file with the Court. Certified Letters usually also state that the document remains in full force and effect. Many financial institutions require that a certification be "current" (i.e. within 30-90 days of the issue date depending on the financial institution). *See* Chapter 10 for a sample certification.

"Claim" is a claim against the estate of the decedent, including those for debts of the decedent that arise before or after the death of the decedent, including the last medical bills and the funeral costs. The time period during which a claim can be made against the estate can be shortened from the statutory time limit of one year from the death of the decedent to two (2) months after actual notice or the publication of a Notice to Creditors. Actual notice to known or reasonably ascertainable creditors is required. (*See* Step 3 of Probate Form 4B-012 NMRA for more information) *See also* Probate Form 4B-302 NMRA, Sections 45-1-201(A)(7), 45-3-801, 45-3-802 and 45-3-803. Section 45-3-805 addresses the priority for payment of creditors' claims.

"Claimant" is the person or entity (usually, but not always, a creditor) making a claim against the decedent's estate. *See also* Claim.

"Codicil" is an amendment to a will. The testator must be at least 18 (or an emancipated minor) and of sound mind to make a codicil. To be valid, a codicil must be executed (signed and witnessed) in the same manner as a will. *See generally* Section 45-2-502 and Chapter 2 of this manual.

"Creditor" is a person or entity to whom a debt is owed by the decedent. The decedent's estate is the "debtor." Normally, a creditor has one (1) year from the death of the decedent to file a claim against the estate, *see* Section 45-3-803(A)(1). Once a known creditor is given actual notice of the appointment of the personal representative (Probate Form 4B-301), the creditor has two (2) months to file a claim against the estate (Sections 45-3-801(A), 45-3-803(A)(2)). An unknown creditor has two months after the first publication of the Notice to Creditors, (Probate Form 4B-302 NMRA), to file a claim against the estate (Sections 45-3-801(B), 45-3-803(A)(2)).

"Death Certificate" is a document that provides corroborating evidence that the person whose estate is being filed is actually deceased. It also provides evidence of date of death, marital status, and decedent's domicile at death. Because probate records are public record and the death certificate contains protected information, such as social security numbers, it should not be placed in the court file. (*See* Section 45-1-107; also *see* Chapter 4 of this manual.)

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

"Deed" is a document that conveys title to real property from one owner to another. *See* Chapter 9.

"Demand for Notice" is a written document filed in the court where the probate has been filed, or in district court of the county where the proceedings would be pending if commenced. The document must state (1) the name of the decedent, (2) the nature of the filing person's interest in the decedent's estate, and (3) that person's address. A personal representative filing an action in probate court is required to ask the district court clerk of that county if any person has filed a demand for notice relating to the decedent's estate. If a demand for notice has been filed with the district court, the personal representative is required to send a copy of everything filed with the court, including every order the judge signs, to the person who has demanded notice. Any interested person can also file a "demand for notice" with the probate court after an estate has been filed with the court. After such demand has been filed, no order or filing to which the demand relates shall be made or accepted without notice as prescribed in Section 45-1-401. For more information, *see* Section 45-3-204.

"Descendant" is a decedent's child, grandchild, great-grandchild, etc., with the relationship of parent and child set out in the UPC. For more information, *see* Section 45-1-201(9); *see also* "Issue" and "Heirs," and Chapter 4 of this manual.

"Devise," when used as a noun, is a gift of real property (land, ranch, house, etc.) or personal property (other assets) given by a will. When used as a verb, "devise" means to give a gift of real or personal property. For more information, *see* Section 45-1-201(10).

"Devisee" means a person, charity, school, church, or other entity named in a will to receive assets of an estate. Also see "beneficiary." For more information, *see* Section 45-1-201(11).

"Disclaimer" is a written statement where an heir or devisee declines to accept an asset of the estate. This statement must be filed with the court in certain circumstances and provided to the personal representative of the estate. If real property is involved, the disclaimer may also need to be filed with the county clerk's office where the property is located. This is generally done for tax purposes. The Uniform Disclaimer of Property Interests Act, Sections 45-2-1101 through 45-2-1116, contains details.

"Distributee" is any person who receives assets from the estate of the decedent, other than a creditor or purchaser. For more information, *see* Section 45-1-201(A)(12).

"Docket" when used as a noun is the court's case files. When used as a verb, docketing is the process of entering the case and subsequent pleadings into the court's case log.

"Docket Fee" is the thirty dollar (\$30.00) fee for filing a case with the probate court. This fee is statutory (meaning it is set by state law and cannot be changed by individual probate judges), *see* Section 34-7-14(A). Payment of the docket fee is required before opening the case unless the court determines that the applicant has provided sufficient proof of Poverty and Indigency. *See* Probate Forms 4B-601 and 4B-602.

"Domicile" is a person's usual and permanent place of abode. Evidence of domicile includes voter registration location, using the address as a permanent address, etc. It is the place the person intends to return to, even if currently residing elsewhere. The death certificate usually indicates where the decedent was domiciled at the time of his/her death. Domicile is important when determining the venue of the case. *See* Section 45-3-201(A) and its annotations, as well as Chapter 1 of this manual.

"Duties of a Personal Representative" are the tasks that a personal representative is required to do under the probate code, as well as any other responsibilities he/she may have to the heirs or devisees of the estate as a "fiduciary." *See* Sections 45-3-705 through 45-3-721 and Sections 45-3-306 and 45-3-310.

"Estate" is the property of the decedent that is subject to the New Mexico Uniform Probate Code, Chapter 45 NMSA 1978. For the purposes of probate, an estate generally does not include things that pass automatically to a listed beneficiary, such as land held as joint tenants, life insurance proceeds, payable on death accounts or retirement benefits that have a beneficiary designation. For more information, *see* Section 45-1-201(15). This is not the same as the taxable or gross estate, which includes all assets owned by the decedent at the time of his or her death for purposes of calculating estate tax liability.

“*Ex Parte* Communication” is a prohibited communication between the court and one party without the consent of, or notice to, another party who would be adversely affected by the communication. In the interest of impartiality and giving every party the right to be heard, judges are prohibited from permitting or even considering such communications outside of the presences of all parties concerned. (*See* Code of Judicial Conduct Rule 21-209 governing *ex parte* communications and Chapter 8.)

“Executor” is another term for —personal representative.¶

“Family Allowance” is a \$30,000.00 allowance given to a decedent’s surviving spouse (or minor or dependent children if no spouse) that is exempt from and has priority over any claims against the estate. *See* Section 45-2-402 and Chapter 10 of this manual.

"Fiduciary" is a person or entity, who acts primarily for another's benefit in matters connected with that duty. A fiduciary is held to the highest degree of good faith in performing his or her duties. A personal representative is a fiduciary. *See* Section 45-1-201(14) for a list of who are considered to be fiduciaries.

“Filing Fee” is the Thirty Dollar (\$30.00) fee required for filing a case with the probate court. *See also* "Docket Fee," Section 34-7-14(A).

“Formal Probate” is a court proceeding to probate a will and/or appoint a personal representative of an estate. Formal probates are started by filing a Petition with notice to interested persons required to be given at least 14 days prior to the hearing before a judge for the appointment of the personal representative. Formal probates may only be filed in district court and may include determinations of heirship and the validity of wills. May also be called —Formal Testacy¶ or —Formal Appointment¶ proceedings. *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 fair market value of the decedent's assets at the time of death, without any deductions.

"Heirs" are those persons who are entitled to inherit the property of the decedent under the laws of intestate succession. Section 45-1-201(A)(23). This usually includes the surviving spouse, children, and, if any of them are deceased, their heirs. Heirs are always entitled to notice in probate proceedings, even if a will excludes them from inheriting, although they can decline notice by filing a written Waiver of Notice with the court. For information on priority among heirs, *see* Sections 45-2-102 to 45-2-108. *See also* Chapter 4.

“HIPAA” is the Health Insurance Portability and Accounting Act of 1996 and addresses the privacy of medical records. Many hospitals interpret this act to mean that that the privacy of medical records extends beyond a person’s death and use HIPAA as a way to deny the heirs of an estate access to a decedent’s medical records unless they open a probate to step into the shoes of the deceased person.

“Holographic Will” is a will entirely handwritten document, dated and signed by the testator, but not signed by the required witnesses. Although New Mexico does not recognize holographic wills made in New Mexico, the court may accept a holographic will if it was validly made in a state that allows them. *See* Chapter 2 for details.

"Homestead Affidavit" is an affidavit used to transfer title to a marital home, which is community property, to a surviving spouse without the need for a court proceeding. For more information, *see* Section 45-3-1205 and Chapter 10.

“Informal Appointment” is a court proceeding to appoint a personal representative when the decedent had no valid will. Informal appointment proceedings may be filed in probate court or district court and are started by filing an application. No notice to interested persons and no hearings are required prior to the appointment of the personal representative. *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 usually includes a request to informally appoint a personal representative of an estate. Informal probates may be filed in probate court or district court and are started by filing an application. No notice to interested persons and no hearings are required prior to the appointment of the personal representative. *See* Sections 45-3-301 through 45-3-311 and Chapter 4 of this manual.

“Inspection of Public Records Act,” also known as IPRA, states that every person has a right to inspect public records of this state. New Mexico’s law is set out in Sections 14-2-1 through 14-2-9. *See also* Section 34-7-20

"Interested Person" includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, a minor protected person or an incapacitated person. Creditors and the state, in certain circumstances, are interested persons. Section 45-1-201(26). After the filing of the initial application, heirs and devisees are —interested persons— entitled to notice regarding the probate proceedings. *See* Section 45-3-705.

"Intestate" means having died:

- (a) without a will;
- (b) without a valid will; or,
- (c) with an incomplete will.

"Issue" is all of a decedent’s descendants, of all generations, with the relationship of parent and child set out in the UPC, of a deceased person. Section 45-1-201(A)(27).

“Jurisdiction” is the authority for a court to act on a matter. Probate courts are courts of "limited jurisdiction," and only have the authority to act over informal probate/appointment proceedings. *See* 45-1-302(C) and Chapter 1.

“Letters” is the document issued by the court, which gives the personal representative the authority to act on behalf of the estate. Letters Testamentary are issued in a testate case;

Letters of Administration are issued in an intestate case. There are also Letters of Special Administration (for the appointment of a Special Administrator, Letters of Successor Personal Representative, etc.). (*See* probate forms 4B-106 and 4B-107.)

“Missing Heir” is an heir who cannot be located. If an heir cannot be found, the personal representative shall distribute the share of the missing person to his conservator, if any. Otherwise, the personal representative shall sell the share of the missing person and distribute the proceeds to the state treasurer as prescribed by the Unclaimed Property Act. (*See* Section 45-3-914 and Chapter 10.)

“Missing Person” means a person whose whereabouts are unknown to the person's custodian or immediate family member. Only the district court has jurisdiction over the estates of missing persons (*See* Section 45-1-302).

—NMSA stands for New Mexico Statutes Annotated, the “official” name of the laws of our state.

“Notarization” is the attestation by a notary public that a document was signed under oath and that the person whose signature appears on the document is that person. Notaries in New Mexico must be authorized by the Secretary of State to act in this capacity. To notarize is the act of the notary verifying the signer’s identity, attesting to the signature, and affixing the notary’s signature and seal to the document. *See* Sections 14-14-1 through 14-14-11 for further information on notarial acts. Certain documents filed in a probate case must be notarized before being accepted by the court for filing.

“Notice” or “giving notice” is a written “announcement” to persons entitled to know what has transpired or will transpire in a case. When personal representatives comply with notice requirements, they give interested persons information about what is happening in the case, and protect the estate (and themselves) from claims that proper procedures were not followed. Generally, notice should be sent to:

- (a) all the heirs or devisees of an estate;
- (b) persons who have or may have an interest in the estate of the decedent;
- (c) known creditors
- (d) anyone who asks for notice; and,
- (e) anyone who has filed a demand for notice.

“Omitted Children” is, for the purpose of the Uniform Probate Code, children who were born or adopted after the execution of the testator’s will. *See* Section 45-2-302 and Chapter 10 of this manual.

“Omitted Spouse” is for the purpose of the Uniform Probate Code, a spouse who married the testator after the testator executed his will, *see* Section 45-2-301. This can also apply to a spouse who is entitled to family and personal property allowances despite provisions in the will to the contrary (*See* annotations to updates for Section 45-2-402 and Chapter 10 of this manual).

“Open Records Act” is the Inspection of Public Records Act, Sections 14-2-1 through 14-2-9. Also *see* Section 34-7-17 through 34-7-21 for records that specifically pertain to probate courts.

“Order for Informal Probate of Will/Appointment of Personal Representative” is the document signed by the judge making findings that the requirements of the probate code have been met, entering a will, if any, into probate and/or appointing a personal representative. The order usually also stipulates that Letters be issued "upon qualification and acceptance." The issuance of the Letters gives the personal representative the authority to act, not the order. A probate judge may also need to sign orders concerning other matters that arise in the case. (*See* Section 45-303 and 45-3-308; *also see* probate forms 4B-103 and 4B-104.)

—*Per Capital* is one method of determining the distribution of the assets of an estate to the heirs. *See* —(by) Representation below and Section 45-2-709(B).

—*Per Stirpes* is one method of determining the distribution of the assets of an estate to the heirs. In *per stirpes* the descendants of a deceased heir or devisee split that person's share. *See* 45-2-709(C).

"Personal Property" is all property that is not land, real estate or real property. Some examples are bank accounts, stocks, bonds, insurance policies, pension plans, jewelry, furniture and motor vehicles.

“Personal Property Allowance” is a \$15,000.00 allowance given to a decedent's surviving spouse (or children if no spouse) that is exempt from and has priority over any claims against the estate. (*See* Section 45-2-403, supplement and Chapter 10 of this manual.)

"Personal Representative" is the person appointed by the court to administer the estate of the decedent. The personal representative must give notice of his/her appointment, pay claims of the estate, and then distribute the estate according to the will or to the laws of intestate succession, if there is no will. This person is sometimes called an "executor/executrix" or "administrator." A personal representative appointed in an informal proceeding generally has the authority to do almost anything the decedent could have done with his/her property during his/her lifetime, *see* Section 45-3-715.

“Personal Representative's Deed” is a deed from the personal representative transferring real property to the person(s) entitled to receive it under a will or the laws of intestate succession or to a person (or entity) that has purchased the property from the estate. The deed must be recorded with the county clerk's office in the county where the property is located. A certified copy of the deed may also be filed with the probate court. *See* Chapter 9 for additional information.

“Pleading” is a legal document filed with the court. Pleadings and papers filed in the court include a caption or heading that identifies the state, county, and name of the court; the names of the parties; and a title describing the type of paperwork being submitted.

“POD” means —payable on death and is a beneficiary designation for bank accounts, U.S. savings bonds, and other accounts. Upon proof of death, the beneficiary/POD designee should be able to receive these accounts without a probate proceeding, unless the beneficiary/POD designee is —my estate or the beneficiary has predeceased the owner. *See* Section 45-6-201(H) and Section 45-6-212.

"Power of Attorney" means a writing or other record that grants authority to an agent to act in the place of the principal during the principal's lifetime. A power of attorney terminates upon the death of the person (the principal) who granted the power of attorney. The fact that a person had power of attorney does not give that person priority for appointment as personal representative. *See* Sections 45-5B-101 to 45-5B-403. *See* Section 45-5B-301 for a statutory power of attorney form.

“Practicing Law without a License,” also known as the —Unauthorized Practice of Law is providing legal advice to someone or preparing legal documents or pleadings for them without being an attorney licensed in New Mexico. Court personnel must be careful to make sure they are providing only information and not legal advice.

“*Pro Se*” is the Latin phrase that means acting without an attorney or —on one's own.

"Probate" technically is the court procedure by which a will is proved to be valid or invalid. Common usage of this term, however, includes all matters relating to the administration of an estate, including estates with wills and intestate estates.

"Probate Code" is the body of law within the New Mexico statutes that governs the estates of deceased persons. The Probate Code also deals with the administration of trusts and the protection of minors and persons under disability, but probate courts do not have jurisdiction (authority) to act in these matters. The New Mexico Probate Code is based upon the Uniform Probate Code (UPC)—a national model system that is used, at least in part, in 16 states. The New Mexico Uniform Probate Code is Section 45 (Pamphlet 67) of the New Mexico Statutes Annotated. The current version is the 2008 Replacement Pamphlet with a 2012 Cumulative Supplement. Judges should always have the most current edition of the UPC, which is available from the New Mexico Compilation Commission, New Mexico Compilation Commission, PO Box 15549, Santa Fe NM 87592-5549, (505) 827-4821.

“Probate Estate” is that part of a deceased person's estate that is governed by the provisions of the Uniform Probate Code. It does not generally include property held in joint tenancy or assets with named beneficiaries, such as insurance policies, payable on death accounts, etc.

“Proof of Authority” is documentation filed with the court showing that a person has been appointed by a court in another state to act on behalf of the estate of a deceased person. Proof of authority does not involve the opening of a full probate (although the person filing the proof pays the usual filing fee) and does not involve the issuance of Letters. Filing the proof of authority with the probate court gives a personal representative appointed in another state the

authority to act in New Mexico, *see* Section 45-4-204. However, depending on the degree of authority needed, an Ancillary Proceeding may be required. *See* Chapter 9.

"Property" includes both real and personal property or any right or interest therein and means anything that may be the subject of ownership. Section 45-1-201(A)(40).

"Real Property" includes land, houses, farms, ranches, leases, oil, gas, mineral, water and timber rights.

"(by) Representation" is the method used by New Mexico's Uniform Probate Code for intestate distribution of the estates of deceased heirs. It involves pooling the shares of deceased heirs on each level of heirship and dividing it into equal shares for each survivor on that level. *See* Sections 45-2-106 and 45-2-709(B) and Section 4.5.1 of Chapter 4 for more detailed information and examples.

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

"Safe Deposit Box" is a secure storage compartment at a financial institution where people may store their original wills and other important documents during their lifetime. For regulations concerning accessing safe deposit boxes after a person's death, *see* Sections 58-1-14 (Banking Generally); Section 58-10-109 (Saving & Loan Institutions); Section 58-11A-4 (Leasing of Safe Deposit Facilities) and Chapter 2 of this manual.

"Seal" means a notary seal or stamp, seal of the court, etc., which proves the authenticity of a document.

"Sign" means with present intent to authenticate or adopt a record other than a will: (a) to execute or adopt a tangible symbol; or (b) to attach to or logically associate with the record an electronic symbol, sound or process. Section 45-1-201(A)(46).

"Small Estate Affidavit" is the affidavit used to collect personal property of the decedent when a court proceeding for the transfer of estate assets is not necessary and the total value of the estate is worth less than \$50,000.00. Also called Affidavit of Successor in Interest, defined in detail above

"Special Administrator" is a person who has been appointed by the court to act in a limited capacity when an appointment is needed immediately. A special administrator who is informally appointed does not have the full powers of a personal representative and cannot distribute estate assets. *See* Sections 45-3-614 through 45-3-618 and Chapter 3 for further information and sample forms.

"Statute of Limitation" is a law that sets a time limit for starting a case. Certain civil claims must be filed within three or four years, depending on the law that governs the claim. In

general, probate cases must be filed no more than three years after a decedent's death (*but see* Section 45-3-108 for certain exceptions to this three-year limit).

"Successors" means persons, other than creditors, who are entitled to property of a decedent under the decedent's will or the Uniform Probate Code. Section 45-1-201(A)(49).

"Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative. Section 45-1-201(A)(49).

"Testate" means having a valid will. *See* 45-2-502 and Chapter 2 for what constitutes a valid will.

"Testator" is someone making, or who has made, a will, or someone who dies leaving a valid will. Under New Mexico law, —testator includes an individual of either gender. Section 45-1-201(A)(54). Other states may call a female testator a "testatrix." *See* Section 45-2-501 for who may make a will.

"TODD: is a Transfer on Death Deed that grants ownership rights upon the death of grantor. TODDs, to have effect, must be recorded with the County Clerk's office during the grantor's lifetime. *See* Section 45-6-401 for statutory requirements and sample form.

"Trust" is an entity set up during a person's lifetime through a written trust agreement. Trust assets must be transferred into the name of the trustee of the trust. If a trust is properly funded, a court proceeding usually is not required upon the death of the trustor, as the trustee holds the assets of the estate (and not the decedent). *See also* Section 45-1-201(A)(55) and Chapter 10.

"Unauthorized Practice of Law" also known as —Practicing Law without a License is providing legal advice to someone or preparing legal documents or pleadings for them without being an attorney licensed in New Mexico. Court personnel must be careful to make sure they provide only information and not legal advice. *See* Chapter 8 for specific statutory cites and examples.

"Uniform Probate Code" for our purposes, is the New Mexico Statutes Annotated (NMSA) (laws) governing probates, also known as Chapter 45, Pamphlet 67. Judges should also be sure they have the most recent supplement to the Probate Code! *See* —Probate Code definition for specific information.

"Unrevoked," when used in these forms, refers to a will or other document that has not been invalidated or canceled.

"Venue" is the place where the case should be filed. Generally, a probate is either filed in the probate court or the district court in the county where the decedent died or, if the decedent did not live in New Mexico, in the probate court or the district court in the county where the decedent owned property. For more information, *see* Section 45-3-201 and Chapter 1.

“Verification” is a formal written declaration made in the presence of an authorized person, including a notary, where one swears to the truth of the statements made in the preceding document.

“Verified Statement of Personal Representative” is a sworn statement from the personal representative of the estate that they have completed all duties necessary to administer the estate of decedent and that they are ready to close the estate. For specific requirements *see* Section 45-3-1003 and Probate Form 4B-502.

—Wedding” is a ceremony to solemnize the contract of matrimony. *See* Section 40-1-1 through 40-1-3 and Chapter 11 for marriage license requirements.

"Will" is a document that provides for the distribution of the assets of a person's estate upon death. New Mexico's definition of —will includes a codicil, but does not include a holographic will. Section 45-1-201(A)(57). A will also typically designates a personal representative and can appoint a guardian for minor children. Certain formalities must be followed when executing the will to make sure the will is valid according to New Mexico law. A will is sometimes referred to as "Last Will and Testament." For more information, *see* Section 45-2-502 and Chapter 2.

“Witnesses” are, for purposes of the Uniform Probate Code, persons attesting to having been present when a testator signed his/her will. An individual generally competent to be a witness may act as a witness to a will. *See* Section 45-2-505 and Chapter 2. In New Mexico an interested person may witness a will. The notary may also serve as one of the witnesses to a will. There also must be two competent witnesses when judges perform a wedding ceremony.

"Wrongful Death Act" is the section of New Mexico's statutes that governs the procedures one must follow when filing a claim for wrongful death. In New Mexico, a personal representative is the only one with the authority to file a wrongful death claim on behalf of the estate of a deceased person. However, the distribution of any proceeds from the wrongful death claim is not governed by the probate code, but by the terms of the Wrongful Death Act. *See* Section 41-2-3 and Chapter 10.

Materials	Source
Uniform Probate Code	<p>New Mexico Statutes Annotated</p> <p>Website for free access to New Mexico laws and rules: http://www.nmonesource.com/nmpublic/gateway.dll/?f=templates&fn=default.htm or purchase a copy from: New Mexico Compilation Commission 4355 Center Place Santa Fe, NM 87507-9706 Phone: (505) 827-4821 Website: www.nmcompcomm.us</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>Direct link to probate forms is: http://nmsupremecourt.nmcourts.gov/legal-forms/vprobate_code.php</p>
Bernalillo County Probate Court (aka Court of Wills, Estates & Probate)	<p>Website: http://www.bernco.gov/probate-judges-office/</p> <p>The court website includes helpful information for <i>pro se</i> applicants who 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>Phone: (505) 277-1052 Fax: (505) 277-7064 Website: http://jec.unm.edu/ Probate Judges Manual online at: http://jec.unm.edu/manuals-resources</p>
New Mexico Association of Counties	<p>Website: http://www.nmcounties.org/ 613 Old Santa Fe Trail Santa Fe NM 87505 Phone: (505) 983-2101 or 877-983-2101 (toll free) Email: info@nmcounties.org</p>
National College of Probate Judges	<p>Website: http://ncpj.org/ Email: ncpj@ncsc.org</p>

15.1 Additional State and Federal Government Resources

New Mexico Agencies	Contact Information
Disciplinary Board of State Bar (complaints against attorneys)	<p>20 First Plaza Center NW # 710 Albuquerque, NM 87102 Phone: (505) 842-5781 Website: www.nmdisboard.org/</p>
Judicial Standards Commission	<p>P.O. Box 27248 Albuquerque, NM 87125-7248 Phone: (505) 222-9353 Website: http://www.nmjsc.org</p>
Motor Vehicle Division, Taxation and Revenue Department	<p>Phone: 1-888-683-4636 Website: http://www.mvd.newmexico.gov/Pages/Home.aspx</p>

Taxation and Revenue Department	Phone: (505) 841-6200 (Albuquerque) Phone: (505) 827-0700 (General Inquiries & Santa Fe) Website: http://www.tax.newmexico.gov/Pages/TRD-Homepage.aspx
Unauthorized Practice of Law Reports	State Bar of New Mexico, Office of the General Counsel P.O. Box 92860 Albuquerque, NM 87199-2860 Phone: (505) 797-6050
Unclaimed Property Division	Phone: (505) 827-0762 Email: uproperty@state.nm.us or stephanie.dennis@state.nm.us Website: http://www.tax.newmexico.gov/Online-Services/Pages/Unclaimed-Property-Search.aspx or directly to missingmoney.com
Vital Records and Health Statistics Office (for death certificates) of N.M. Department of Health	Phone: (505) 841-4183, (505) 841-4185 (Albuquerque) Phone: (505) 827-0121 (Santa Fe), (866) 534-0051 (toll free) Website: www.health.state.nm.us or http://vitalrecordsnm.org/ (click on —Death Certificates) or link directly at: http://vitalrecordsnm.org/death.shtml
Federal Agencies	Contact Information
Internal Revenue Service (IRS)	Phone: 1-800-829-1040 Website: www.irs.treas.gov
Medicare (U.S. Department of Health and Human Services)	Phone: 1-800-633-4227 Website: www.medicare.gov
Social Security Administration	Phone: 1-800-772-1213 Website: www.ssa.gov
U.S. Department of Veterans Affairs	Phone: 1-800-827-1000 Website: www.va.gov

