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FISCAL IMPACT REPORT

ORIGINAL DATE 02/04/16
 LAST UPDATED 02/04/16

SPONSOR Wirth HB _____

SHORT TITLE Uniform Powers of Appointment Act SB 155

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY16 | FY17 | FY18 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|------|------|----------------------|------------------------------|------------------|
| Total | | NFI | | | | |

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Attorney General’s Office (AGO)

SUMMARY

Synopsis of Bill

Senate Bill 155 enacts the Uniform Powers of Appointment Act (UPAA), mirroring the Uniform Law Commission’s (“ULC”) 2013 annual meeting approved text. It codifies the law of powers of appointment used by estate planners to give a third party the authority to direct the disposition of a donor’s property to specified eligible recipients. The UPAA was approved by the ULC in July of 2013 and by the American Bar Association (“ABA”) on February 10, 2014. It has been enacted by Colorado, Montana and North Carolina, and introduced in 2016 by Missouri and Virginia.

It also enacts new and amends other sections of the Uniform Probate Code (UPC) pertaining to notice, time for presentation of claims, penalty clauses and closing an estate.

The effective date of Sections 101 through 603 and Section 724 is January 1, 2017. The effective date of Sections 701 through 723 and Section 725 is July 1, 2016.

FISCAL IMPLICATIONS

According to the AOC, there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes.

SIGNIFICANT ISSUES

In Section 715, this bill repeals existing law regarding notice to creditors in the UPC provisions governing probate of wills and administration of estates, and enacts a new version that permits but does not require notice to a creditor by a) publication or b) written notice by mail or other delivery. HB 280 also expands the time for creditors to present their claims from two to four months following any publication (which must now run for three rather than two weeks). Current law requires written notice by mail or other delivery, while notice by publication is allowed but not required. The failure to require at least some form of notice to creditors may be unintended, but could severely impact the rights of creditors if left as is.

As to the UPAA, both the AGO and the AOC cite the ULC's explanation of the uniform act that it does not change the law but rather codifies the scant case law addressing powers of appointment, providing needed guidance for practitioners, for clients, and for courts. Currently, powers of appointment are commonly included in both wills and trusts, but there is very little statutory law governing their use. Instead, estate planners must rely on a patchwork of state court decisions, most of which are not binding outside the jurisdiction in which the case was decided. The bill adds clarity and direction for parties using the Probate Code. This should result in easier, more efficient probating of estates in probate and district courts.

The UPAA governs the creation, amendment, and revocation of powers of appointment. It also addresses the exercise of powers by the person holding the power (sometimes referred to as the powerholder) and the distribution of appointive property; provides rules for disclaimers and releases and for contracts between a power-holder and a permissible beneficiary; and sets out the rights of a powerholder's creditors to access appointive property under certain conditions.

It codifies most of the rules concerning powers of appointment already set out in the American Law Institute's recently completed *Restatement (Third) of Property*. Therefore, estate planning attorneys already familiar with the substance of many of the Uniform Act's provisions likely will welcome the legal certainty that a statute provides.

SB 155 enacts statutory sections and amends others, including:

- Section 403, within the UPAA, provides for release of a power of appointment in whole or in part by a record manifesting the powerholder's intent by clear and convincing evidence, if the terms of the instrument creating the power do not provide a method or the method provided in the terms of the instrument is not expressly made exclusive. The statutory section also provides for release by substantial compliance with a method provided in the terms of the instrument creating the power.
- Section 407, within the UPAA, limits the remedy for a powerholder's breach of a contract to appoint or not to appoint appointive property to damages payable out of the appointive property or, if appropriate, specific performance of the contract.
- Section 603, within the UPAA, provides that:
 - Except as otherwise provided in the UPAA, it applies to:
 - (1) a power of appointment created before, on or after January 1, 2017;
 - (2) a judicial proceeding concerning a power of appointment commenced on or after January 1, 2017; and
 - (3) a judicial proceeding concerning a power of appointment commenced before

January 1, 2017 unless the court finds that application of a particular provision of the UPAA interferes substantially with the effective conduct of the judicial proceeding or prejudices a right of a party, in which case the particular provision of the UPAA does not apply and the superseded law applies.

Additionally, a rule of construction or presumption provided in the UPAA applies to an instrument executed before January 1, 2017 unless there is a clear indication of a contrary intent in the terms of the instrument; and except as otherwise provided in Paragraphs 12 (1) through (4) of this subsection, an action taken before January 1, 2017 is not affected by the UPAA.

- Section 708 enacts a new section of the Uniform Probate Code (UPC) governing the appointment of a representative, permitting the court to appoint a representative to receive notice, give consent and otherwise represent, bind and act on behalf of a minor, incapacitated or unborn person, or a person whose identity or location is unknown, if the court determines that an interest is not represented under Chapter 45 NMSA 1978, or that otherwise available representation might be inadequate. The court may appoint a representative to represent several persons or interests. It also provides that a representative may act on behalf of the person represented with respect to any matter arising under the UPC, whether or not a judicial proceeding concerning the estate is pending.
- Section 712 amends Section 45-2-704, NMSA 1978, to allow for substantial compliance with a specific reference requirement imposed in a governing document by a donor under certain circumstances.
- Section 713 amends Section 45-2-904, NMSA 1978 to expand an exclusion to the statutory rule against perpetuities applicable to honorary trusts and trusts for pets that are subject to a time limit of 21 years to include any property interest held in trust without limiting the time that that interest may be held in trust.
- Section 718 repeals an existing section of the UPC, codified at Section 45-3-905, NMSA 1978, and enacts a new UPC section providing that a provision in a will purporting to penalize any interested person for contesting a will or instituting other proceedings relating to an estate is unenforceable if probable cause exists for instituting proceedings.
- Section 721 amends Section 45-3-110, NMSA 1978, to clarify that a “court-approved” compromise is binding even though it may affect a trust or an inalienable interest, rather than any compromise

PERFORMANCE IMPLICATIONS

AOC reports the courts participate in performance-based budgeting, and this bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

RELATIONSHIP

SB 155 conflicts with SB 91 and HB 280, which enact the Uniform Trust Decanting Act as well as the UPAA and also amend the statutory rule against perpetuities (Section 45-2-904 NMSA 1978) in a manner different than the amendment in this bill. This bill also duplicates SB 91 and HB 280 as to the enactment of the UPAA and the amendment of other existing statutes).

OTHER SUBSTANTIVE ISSUES

AGO provides this summary of the specific articles of the UPAA:

Article 1 (Sections 101 – 104) contains the short title (§101), definitions (§102) and scope (§§ 103 & 104) of the Act. Some of the critical definitions in the Act are: “donor” means a person that creates a power of appointment; “power of appointment” means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. “Power of appointment” does not include a power of attorney; and “powerholder” means a person in whom a donor creates a power of appointment.

Article 2 (Sections 201 – 206) details the creation, revocation and amendment of a power of appointment. Section 201 explains how a donor creates the power of appointment, and the donor may revoke or amend that power under Section 206. Section 202 directs that the power is not transferable to another person. Sections 203 – 205 explain the scope of the powerholder’s authority.

Article 3 (Sections 301 – 314) addresses how the powerholder exercises the power of appointment. Under Section 301, the power of appointment is valid only if the instrument exercising the power is legally valid, is consistent with the powerholder’s intent, and satisfies the donor’s requirements (all of which are described in more detail in Sections 302-304). Section 305 details what appointments are permissible, and Section 307 details which are impermissible. Sections 309 through §311 explain the disposition of “unappointed” or “ineffectively appointed” property. Section 14 allows the powerholder to revoke or amend the exercise under specific circumstances.

Article 4 (Sections 401 – 407) allows the powerholder to disclaim the power of attorney (Section 401), to release a power of appointment (Sections 402-404), or to contract to either exercise or not exercise a power of appointment (Sections 405-406). Section 407 is the remedy for a breach of such a contract.

Article 5 (Sections 501 – 504) sets forth the rights of the powerholder’s creditors in the appointive property. A creditor of the powerholder can reach the appointive property of a general power of appointment, in some circumstances, whether or not the general power of appointment was created by the powerholder. However, if the appointive property was of a “nongeneral” power of appointment, it is exempt from a creditor’s claim (unless the property was transferred in violation of the Uniform Voidable Transactions Act, Section 56-10-14, NMSA 1978).

Article 6 (Sections 601-603) contains miscellaneous provisions of the Act. Section 601 says that consideration shall be given to the need to promote uniformity of the act.

Article 7 (Sections 701 – 727) makes technical and conforming changes to the UPC and the Uniform Trust Code, and amends the UPC regarding notice, time for presentation of claims, penalty clauses and closing an estate.

MD/al