HOUSE BILL 181

53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017

INTRODUCED BY

Zachary J. Cook

FOR THE COURTS, CORRECTIONS AND JUSTICE COMMITTEE

AN ACT

RELATING TO PROPERTY; ENACTING THE UNIFORM PARTITION OF HEIRS PROPERTY ACT AND MAKING CONFORMING AMENDMENTS TO THE UNIFORM PROBATE CODE; AMENDING PROCEDURES FOR SELF-PROVING WILLS IN THE UNIFORM PROBATE CODE; MAKING A TECHNICAL AMENDMENT TO THE UNIFORM TRUST DECANTING ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--Sections 1 through 13 of this act may be cited as the "Uniform Partition of Heirs Property Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the Uniform Partition of Heirs Property Act:

A. "ascendant" means an individual who precedes another individual in lineage, in the direct line of ascent from the other individual;

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B. "collateral" means an individual who is related to another individual under the law of intestate succession of this state but who is not the other individual's ascendant or descendant;

C. "descendant" means an individual who follows another individual in lineage, in the direct line of descent from the other individual;

D. "determination of value" means a court order determining the fair market value of heirs property under Section 6 or 10 of the Uniform Partition of Heirs Property Act or adopting the valuation of the property agreed to by all cotenants;

E. "heirs property" means real property held in tenancy in common that satisfies all of the following requirements as of the filing of a partition action:

(1) there is no agreement in a record binding all the cotenants that governs the partition of the property;

(2) one or more of the cotenants acquired title from a relative, whether living or deceased; and

(3) any of the following applies:

(a) twenty percent or more of the interests are held by cotenants who are relatives;

(b) twenty percent or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or

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(c) twenty percent or more of the cotenants are relatives;

F. "partition by sale" means a court-ordered sale of the entire heirs property, whether by auction, sealed bids or open-market sale, conducted under Section 10 of the Uniform Partition of Heirs Property Act;

G. "partition in kind" means the division of heirs property into physically distinct and separately titled parcels;

H. "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; and

I. "relative" means an ascendant, descendant or collateral or an individual otherwise related to another individual by blood, marriage, adoption or law of this state other than the Uniform Partition of Heirs Property Act.

SECTION 3. [NEW MATERIAL] APPLICABILITY--RELATION TO OTHER LAW.--

A. The Uniform Partition of Heirs Property Act applies to partition actions filed on or after July 1, 2017.

B. In an action to partition real property under Chapter 42, Article 5 NMSA 1978, the court shall determine whether the property is heirs property. If the court determines that the property is heirs property, the property shall be partitioned under the Uniform Partition of Heirs

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Property Act unless all of the cotenants otherwise agree in a record.

C. The Uniform Partition of Heirs Property Act supplements Chapter 42, Article 5 NMSA 1978 and, if an action is governed by the Uniform Partition of Heirs Property Act, replaces provisions of Chapter 42, Article 5 NMSA 1978 that are inconsistent with the Uniform Partition of Heirs Property Act.

SECTION 4. [NEW MATERIAL] SERVICE--NOTICE BY POSTING.--

A. The Uniform Partition of Heirs Property Act does not limit or affect the method by which service of a complaint in a partition action may be made.

B. If the plaintiff in a partition action seeks an order of notice by publication and the court determines that the property may be heirs property, the plaintiff, not later than ten days after the court's determination, shall post and maintain while the action is pending a conspicuous sign on the property that is the subject of the action. The sign must state that the action has commenced and identify the name and address of the court and the common designation by which the property is known. The court may require the plaintiff to publish on the sign the name of the plaintiff and the known defendants.

SECTION 5. [NEW MATERIAL] COMMISSIONERS.--If the court appoints commissioners pursuant to Section 42-5-6 NMSA 1978, each commissioner, in addition to the requirements and

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disqualifications applicable to commissioners in Section 42-5-6 NMSA 1978, shall be disinterested and impartial and not a party to or a participant in the action.

SECTION 6. [NEW MATERIAL] DETERMINATION OF VALUE.--

A. Except as otherwise provided in Subsections B and C of this section, if the court determines that the property that is the subject of a partition action is heirs property, the court shall determine the fair market value of the property by ordering an appraisal pursuant to Subsection D of this section.

B. If all cotenants have agreed to the value of the property or to another method of valuation, the court shall adopt that value or the value produced by the agreed method of valuation.

C. If the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal, the court, after an evidentiary hearing, shall determine the fair market value of the property and send notice to the parties of the value.

D. If the court orders an appraisal, the court shall appoint a disinterested real estate appraiser licensed in this state to determine the fair market value of the property assuming sole ownership of the fee simple estate. On completion of the appraisal, the appraiser shall file a sworn or verified appraisal with the court.

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E. If an appraisal is conducted pursuant to Subsection D of this section, not later than ten days after the appraisal is filed, the court shall send notice to each party with a known address stating:

(1) the appraised fair market value of the property;

(2) that the appraisal is available at the clerk's office; and

(3) that a party may file with the court an objection to the appraisal not later than thirty days after the notice is sent, stating the grounds for the objection.

F. If an appraisal is filed with the court pursuant to Subsection D of this section, the court shall conduct a hearing to determine the fair market value of the property not sooner than thirty days after a copy of the notice of the appraisal is sent to each party under Subsection E of this section, whether or not an objection to the appraisal is filed under Paragraph (3) of Subsection E of this section. In addition to the court-ordered appraisal, the court may consider any other evidence of value offered by a party.

G. After a hearing under Subsection F of this section, but before considering the merits of the partition action, the court shall determine the fair market value of the property and send notice to the parties of the value.

SECTION 7. [NEW MATERIAL] COTENANT BUYOUT.--

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A. If any cotenant requests partition by sale, after the determination of value under Section 6 of the Uniform Partition of Heirs Property Act, the court shall send notice to the parties that any cotenant except a cotenant that requests partition by sale may buy all the interests of the cotenants that request partition by sale.

B. Not later than forty-five days after the notice is sent under Subsection A of this section, any cotenant except a cotenant that requests partition by sale may give notice to the court that it elects to buy all the interests of the cotenants that request partition by sale.

C. The purchase price for each of the interests of a cotenant that requests partition by sale is the value of the entire parcel determined under Section 6 of the Uniform Partition of Heirs Property Act multiplied by the cotenant's fractional ownership of the entire parcel.

D. After expiration of the period in Subsection B of this section, the following rules apply:

(1) if only one cotenant elects to buy all the interests of the cotenants that request partition by sale, the court shall notify all the parties of that fact;

(2) if more than one cotenant elects to buy all the interests of the cotenants that request partition by sale, the court shall allocate the right to buy those interests among the electing cotenants based on each electing cotenant's

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existing fractional ownership of the entire parcel divided by the total existing fractional ownership of all cotenants electing to buy and send notice to all the parties of that fact and of the price to be paid by each electing cotenant; and

(3) if no cotenant elects to buy all the interests of the cotenants that request partition by sale, the court shall send notice to all the parties of that fact and resolve the partition action under Subsections A and B of Section 8 of the Uniform Partition of Heirs Property Act.

E. If the court sends notice to the parties under Paragraph (1) or (2) of Subsection D of this section, the court shall set a date, not sooner than sixty days after the date the notice was sent, by which electing cotenants shall pay their apportioned price into the court. After this date, the following rules apply:

(1) if all electing cotenants timely pay their apportioned price into court, the court shall issue an order reallocating all the interests of the cotenants and disburse the amounts held by the court to the persons entitled to them;

(2) if no electing cotenant timely pays its apportioned price, the court shall resolve the partition action under Subsections A and B of Section 8 of the Uniform Partition of Heirs Property Act as if the interests of the cotenants that requested partition by sale were not purchased; and

(3) if one or more but not all of the electing

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cotenants fail to pay their apportioned price on time, the court, on motion, shall give notice to the electing cotenants that paid their apportioned price of the interest remaining and the price for all that interest.

F. Not later than twenty days after the court gives notice pursuant to Paragraph (3) of Subsection E of this section, any cotenant that paid may elect to purchase all of the remaining interest by paying the entire price into the court. After the twenty-day period, the following rules apply:

(1) if only one cotenant pays the entire price for the remaining interest, the court shall issue an order reallocating the remaining interest to that cotenant. The court shall issue promptly an order reallocating the interests of all of the cotenants and disburse the amounts held by it to the persons entitled to them;

(2) if no cotenant pays the entire price for the remaining interest, the court shall resolve the partition action under Subsections A and B of Section 8 of the Uniform Partition of Heirs Property Act as if the interests of the cotenants that requested partition by sale were not purchased; and

(3) if more than one cotenant pays the entire price for the remaining interest, the court shall reapportion the remaining interest among those paying cotenants, based on each paying cotenant's original fractional ownership of the

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entire parcel divided by the total original fractional ownership of all cotenants that paid the entire price for the remaining interest. The court shall issue promptly an order reallocating all of the cotenants' interests, disburse the amounts held by it to the persons entitled to them and promptly refund any excess payment held by the court.

G. Not later than forty-five days after the court sends notice to the parties pursuant to Subsection A of this section, any cotenant entitled to buy an interest under this section may request the court to authorize the sale as part of the pending action of the interests of cotenants named as defendants and served with the complaint but that did not appear in the action.

H. If the court receives a timely request under Subsection G of this section, the court, after hearing, may deny the request or authorize the requested additional sale on such terms as the court determines are fair and reasonable, subject to the following limitations:

(1) a sale authorized under this subsection may occur only after the purchase prices for all interests subject to sale under Subsections A through F of this section have been paid into court and those interests have been reallocated among the cotenants as provided in those subsections; and

(2) the purchase price for the interest of a

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nonappearing cotenant is based on the court's determination of value under Section 6 of the Uniform Partition of Heirs Property Act.

SECTION 8. [NEW MATERIAL] PARTITION ALTERNATIVES.--

A. If all the interests of all cotenants that requested partition by sale are not purchased by other cotenants pursuant to Section 7 of the Uniform Partition of Heirs Property Act or if, after conclusion of the buyout under that section, a cotenant remains that has requested partition in kind, the court shall order partition in kind unless the court, after consideration of the factors listed in Section 9 of the Uniform Partition of Heirs Property Act, finds that partition in kind will result in manifest prejudice to the cotenants as a group. In considering whether to order partition in kind, the court shall approve a request by two or more parties to have their individual interests aggregated.

B. If the court does not order partition in kind under Subsection A of this section, the court shall order partition by sale pursuant to Section 10 of the Uniform Partition of Heirs Property Act, or if no cotenant requested partition by sale, the court shall dismiss the action.

C. If the court orders partition in kind pursuant to Subsection A of this section, the court may require that one or more cotenants pay one or more other cotenants' amounts so that the payments, taken together with the value of the in-kind

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distributions to the cotenants, will make the partition in kind just and proportionate in value to the fractional interests held.

D. If the court orders partition in kind, the court shall allocate to the cotenants that are unknown, unlocatable or the subject of a default judgment, if their interests were not bought out pursuant to Section 7 of the Uniform Partition of Heirs Property Act, a part of the property representing the combined interests of these cotenants as determined by the court.

SECTION 9. [NEW MATERIAL] CONSIDERATIONS FOR PARTITION IN KIND.--

A. In determining under Subsection A of Section 8 of the Uniform Partition of Heirs Property Act whether partition in kind would result in manifest prejudice to the cotenants as a group, the court shall consider the following:

(1) whether the heirs property practicably can be divided among the cotenants;

(2) whether partition in kind would apportion the property in such a way that the aggregate fair market value of the parcels resulting from the division would be materially less than the value of the property if it were sold as a whole, taking into account the condition under which a court-ordered sale likely would occur;

(3) evidence of the collective duration of

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ownership or possession of the property by a cotenant and one or more predecessors in title or predecessors in possession to the cotenant who are or were relatives of the cotenant or each other;

(4) a cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant;

(5) the lawful use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property;

(6) the degree to which the cotenants have contributed their pro rata share of the property taxes, insurance and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance or upkeep of the property; and

(7) any other relevant factor.

B. The court shall not consider any one factor in Subsection A of this section to be dispositive without weighing the totality of all relevant factors and circumstances.

SECTION 10. [NEW MATERIAL] OPEN-MARKET SALE, SEALED BIDS OR AUCTION.--

A. If the court orders a sale of heirs property, the sale must be an open-market sale unless the court finds that a sale by sealed bids or an auction would be more

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economically advantageous and in the best interest of the cotenants as a group.

B. If the court orders an open-market sale and the parties, not later than ten days after the entry of the order, agree on a real estate broker licensed in this state to offer the property for sale, the court shall appoint the broker and establish a reasonable commission. If the parties do not agree on a broker, the court shall appoint a disinterested real estate broker licensed in this state to offer the property for sale and shall establish a reasonable commission. The broker shall offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court.

C. If the broker appointed under Subsection B of this section obtains within a reasonable time an offer to purchase the property for at least the determination of value:

(1) the broker shall comply with the reporting requirements in Section 11 of the Uniform Partition of Heirs Property Act; and

(2) the sale may be completed in accordance with state law other than the Uniform Partition of Heirs Property Act.

D. If the broker appointed under Subsection B of this section does not obtain within a reasonable time an offer to purchase the property for at least the determination of

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value, the court, after hearing, may:

(1) approve the highest outstanding offer, if any;

(2) redetermine the value of the property and order that the property continue to be offered for an additional time; or

(3) order that the property be sold by sealed bids or at an auction.

E. If the court orders a sale by sealed bids or an auction, the court shall set terms and conditions of the sale. If the court orders an auction, the auction must be conducted under Chapter 42, Article 5 NMSA 1978.

F. If a purchaser is entitled to a share of the proceeds of the sale, the purchaser is entitled to a credit against the price in an amount equal to the purchaser's share of the proceeds.

SECTION 11. [NEW MATERIAL] REPORT OF OPEN-MARKET SALE.--

A. Unless required to do so within a shorter time by Chapter 42, Article 5 NMSA 1978, a broker appointed under Subsection B of Section 10 of the Uniform Partition of Heirs Property Act to offer heirs property for open-market sale shall file a report with the court not later than seven days after receiving an offer to purchase the property for at least the value determined under Section 6 or 10 of the Uniform Partition of Heirs Property Act.

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B. The report required by Subsection A of this section shall contain the following information:

(1) a description of the property to be sold to each buyer;

(2) the name of each buyer;

(3) the proposed purchase price;

(4) the terms and conditions of the proposed sale, including the terms of any owner financing;

(5) the amounts to be paid to lienholders;

(6) a statement of contractual or other arrangements or conditions of the broker's commission; and

(7) other material facts relevant to the sale.

SECTION 12. [NEW MATERIAL] UNIFORMITY OF APPLICATION AND CONSTRUCTION.--In applying and construing the Uniform Partition of Heirs Property Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 13. [NEW MATERIAL] RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.--The Uniform Partition of Heirs Property Act modifies, limits and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15

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U.S.C. Section 7003(b).

SECTION 14. Section 45-2-103 NMSA 1978 (being Laws 1993, Chapter 174, Section 6, as amended) is amended to read:

"45-2-103. SHARE OF HEIRS OTHER THAN SURVIVING SPOUSE.--

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

(1) to the decedent's descendants by representation;

(2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent if only one survives;

(3) if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;

(4) if there is no surviving descendant, parent or descendant of a parent, but the decedent is survived [~~on both the paternal and maternal sides~~] by one or more grandparents or descendants of grandparents, on both grandparents' sides:

(a) half to the decedent's [~~paternal~~] grandparents on one side equally if both survive, or to the [~~surviving paternal grandparent~~] survivor of them if only one

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survives, or to the descendants of the decedent's [~~paternal~~] grandparents on this side or either of them if both are deceased, the descendants taking by representation; and

(b) half to the decedent's [~~maternal~~] grandparents on the other side equally if both survive, or to the [~~surviving maternal grandparent~~] survivor of them if only one survives, or to the descendants of the decedent's [~~maternal~~] grandparents or either of them if both are deceased, the descendants taking by representation; and

(5) if there is no surviving descendant parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents [~~on the paternal but not the maternal side, or on the maternal but not the paternal~~] on one side but not the other side, to the decedent's relatives on the side with one or more surviving members in the manner described in Paragraph (4) of this subsection.

B. If there is no taker under Subsection A of this section, but the decedent has:

(1) one deceased spouse who has one or more descendants who survive the decedent, the estate or part thereof passes to that spouse's descendants by representation; or

(2) more than one deceased spouse who has one or more descendants who survive the decedent, an equal share of

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the estate or part thereof passes to each set of descendants by representation.

C. For purposes of Subsection B of this section, the term "deceased spouse" means an individual to whom the decedent was married at the individual's death, and does not include a spouse who was divorced from, or treated pursuant to Section 45-2-802 or Section 45-2-804 NMSA 1978 as divorced from, the decedent at the time of the decedent's death."

SECTION 15. Section 45-2-504 NMSA 1978 (being Laws 1993, Chapter 174, Section 27, as amended) is amended to read:

"45-2-504. SELF-PROVED WILL.--

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

~~["I, _____, the testator, sign my name to this instrument this _____ day of _____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind and~~

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~~under no constraint or undue influence.~~]

"I, _____, the testator, swear or affirm under penalty of perjury on this _____ day of _____, that I request _____ and _____ to act as witnesses to my will; that I declare to them and the undersigned authority that this document is my will; that I sign this will in the presence of both witnesses; that they sign the will as witnesses in my presence and in the presence of each other; that the will was read by me (or read and explained to me) after being prepared and before I sign it; that it clearly and accurately expresses my wishes; that I sign it willingly (or willingly directed another to sign for me); that I make and sign the will as my free and voluntary act for the purposes expressed in the will; that I am eighteen years of age or older; that I am mentally capable of disposing of my estate by will; and that I am not acting under duress, menace, fraud or undue influence of any person.

_____

Testator

We, _____ and _____, the witnesses, [~~sign our names to this instrument, and being first duly sworn, do hereby declare to the undersigned authority that the testator signs and executes this instrument as his will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence of the testator, and in the presence of each other hereby signs this will as witness to the~~

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~~testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind and under no constraint or undue influence~~] do hereby swear or affirm under penalty of perjury on this _____ day of _____ to the undersigned authority that the testator, _____, declares that the attached document is his or her will; that the testator signs it willingly (or willingly directs another to sign for him or her); that the testator signs it in the presence of both of us and requests both of us to sign as witnesses; that each of us, in the presence of the testator and in the presence of each other, signs this will as witness to the testator's signing; that so far as we can determine, the testator is eighteen years of age or older; that the testator is not acting under duress, menace, fraud or undue influence of any person; and that the testator, in our opinion, is mentally capable of disposing of his or her estate by will.

_____

Witness

_____

Witness

[~~The~~] State of _____

County of _____

Subscribed and sworn to, or affirmed under penalty of perjury, and acknowledged before me by _____, the

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testator, and subscribed and sworn to, or affirmed under penalty of perjury, before me by _____ and _____, witnesses, this _____ day of _____.

(Seal)

(Signed) _____

_____

(Official capacity of officer)".

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

[~~"The State of _____~~

~~County of _____~~

~~We, _____, _____ and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that he signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses,~~

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~~in the presence of the testator, and in the presence of each other signed the will as witness, and that to the best of our knowledge the testator was at that time eighteen years of age or older, of sound mind and under no constraint or undue influence.~~

_____

~~Testator~~

_____

~~Witness~~

_____

~~Witness~~]

"I, _____, the testator, swear or affirm under penalty of perjury on this _____ day of _____ that I requested _____ and _____ to act as witnesses to my will; that I declared to them and the undersigned authority that this document is my will; that I signed this will in the presence of both witnesses; that they signed the will as witnesses in my presence and in the presence of each other; that the will was read by me (or read and explained to me) after being prepared and before I signed it; that it clearly and accurately expresses my wishes; that I signed it willingly (or willingly directed another to sign for me); that I made and signed the will as my free and voluntary act for the purposes expressed in the will; that I am eighteen years of age or older; that I am

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mentally capable of disposing of my estate by will; and that I am not acting under duress, menace, fraud or undue influence of any person.

_____

Testator

We, _____ and _____, the witnesses, do hereby swear or affirm under penalty of perjury on this _____ day of _____ that the testator, _____, declared the attached document to be his or her will; that the testator signed it willingly (or willingly directed another to sign for the testator); that the testator signed it in the presence of both of us and requested both of us to sign as witnesses; that each of us, in the presence of the testator and in the presence of each other, signed this will as witness to the testator's signing; that so far as we could determine, the testator is eighteen years of age or older; that the testator was not acting under duress, menace, fraud or undue influence of any person; and that the testator, in our opinion, was mentally capable of disposing of the testator's estate by will.

_____

Witness

_____

Witness

State of _____

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County of _____

Subscribed and sworn to, or affirmed under penalty of perjury, and acknowledged before me by _____, the testator, and subscribed and sworn to, or affirmed under penalty of perjury, before me by _____ and _____, witnesses, this _____ of _____.

(Seal)

(Signed) _____

_____

(Official capacity of officer)".

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

SECTION 16. Section 45-3-203 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-203, as amended) is amended to read:

"45-3-203. PRIORITY AMONG PERSONS SEEKING APPOINTMENT AS PERSONAL REPRESENTATIVE.--

A. Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

(1) the person with priority as determined by a probated will, including a person nominated by a power conferred in a will;

(2) the surviving spouse of the decedent who is a devisee of the decedent;

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(3) other devisees of the decedent;

(4) the surviving spouse of the decedent;

(5) other heirs of the decedent; and

(6) [~~on application or petition of an interested person other than a spouse, devisee or heir, any qualified person~~] forty-five days after the death of the decedent, any creditor.

B. An objection to an appointment may be made only in formal proceedings. In case of objection, the priorities stated in Subsection A of this section apply except that:

(1) if the estate appears to be more than adequate to meet allowances and costs of administration but inadequate to discharge anticipated unsecured claims, the court, on petition of creditors, may appoint any qualified person; and

(2) in case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value of the estate or, in default of this accord, any suitable person.

C. A person entitled to letters under Paragraphs (2) through (5) of Subsection A of this section or a person who

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has not reached the age of majority and who [~~might~~] would be entitled to letters but for the person's age may nominate a qualified person to act as personal representative by an appropriate writing filed with the court and thereby confer the person's relative priority for appointment on the person's nominee. Any person who has reached the age of majority may renounce the right to nominate or to an appointment by an appropriate writing filed with the court. When two or more persons entitled to letters under Paragraphs (2) through (5) of Subsection A of this section share a priority, all those who do not renounce [~~shall~~] must concur in nominating another to act for them or in applying for appointment by an appropriate writing filed with the court. The person so nominated shall have the same priority as those who nominated the person. A nomination or renunciation shall be signed by each person making it, the person's attorney or the person's representative authorized by Subsection D of this section.

D. Conservators of the estates of protected persons or, if there is no conservator, any guardian except a guardian ad litem of a minor or incapacitated person may exercise the same right to nominate, to object to another's appointment or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person would have if qualified for appointment.

E. Appointment of one who does not have [~~highest~~]

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priority, including [~~highest~~] priority resulting from renunciation or nomination determined pursuant to this section, may be made only in formal proceedings. Before appointing one without [~~highest~~] priority, the court shall determine that those having [~~highest~~] priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment and that administration is necessary.

F. No person is qualified to serve as a personal representative who is:

(1) under the age of majority; or

(2) a person whom the court finds unsuitable in formal proceedings [~~or~~

~~(3) a creditor of the decedent unless the appointment is to be made after forty-five days have elapsed from the death of the decedent~~].

G. A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representatives in New Mexico and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

H. This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator."

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SECTION 17. Section 45-3-703 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-703, as amended) is amended to read:

"45-3-703. GENERAL DUTIES--RELATION AND LIABILITY TO PERSONS INTERESTED IN ESTATE--STANDING TO SUE.--

A. 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. The personal representative shall use the authority conferred upon the personal representative by the Uniform Probate Code, the terms of the will, if any, and any order in proceedings to which the personal representative is party for the best interests of successors to the estate.

B. A personal representative may not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will authorizes a personal representative to administer and distribute the estate according to its terms.

C. An order of appointment of a personal representative, whether issued in informal or formal proceedings, authorizes a personal representative to distribute

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apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of:

(1) a pending testacy proceeding;

(2) a proceeding to vacate an order entered in an earlier testacy proceeding;

(3) a formal proceeding questioning the personal representative's appointment or fitness to continue; or

(4) a supervised administration proceeding.

D. This section does not affect the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants whose claims have been allowed, the surviving spouse, any minor and dependent children and any pretermitted child of the decedent.

E. Except as to proceedings that do not survive the death of the decedent, a personal representative of a decedent domiciled in New Mexico at the decedent's death has the same standing to sue and be sued in the courts of New Mexico and the courts of any other jurisdiction as the decedent had immediately prior to death.

F. The personal representative must not delay distribution of an estate pending the possible birth of a posthumously conceived child unless the personal representative:

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(1) has received written notice or has actual knowledge that there is an intention to use a decedent's genetic material to create a child; and

(2) the birth of the child pursuant to the provisions of Section 45-2-120 NMSA 1978 or other law could have an effect on the personal representative's distribution of the estate. As used in this subsection, "genetic material" means eggs, sperm or embryos."

SECTION 18. Section 45-3-705 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-705, as amended) is amended to read:

"45-3-705. DUTY OF PERSONAL REPRESENTATIVE--NOTICE TO HEIRS AND DEVISEES.--

A. Not later than [~~ten~~] thirty days after [~~his~~] appointment, every personal representative, except [~~any~~] a special administrator, shall give notice of [~~his~~] the appointment to the heirs and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application or petition for appointment of a personal representative.

B. The notice shall be delivered or [~~mailed~~] sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require notice to persons:

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(1) who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate; or

(2) who are born more than thirty days after the personal representative's appointment, including children born by posthumous conception.

C. The notice shall:

(1) include the name and address of the personal representative;

(2) indicate that it is being sent to persons who have or may have some interest in the estate being administered;

(3) indicate whether bond has been filed; and

(4) describe the court where papers relating to the estate are on file.

[~~C.~~] D. The notice shall state that the estate is being administered by the personal representative pursuant to the provisions of the Uniform Probate Code without supervision by the court but that recipients are entitled to information regarding the administration from the personal representative and can petition the court in any matter relating to the estate, including distribution of assets and expenses of administration.

[~~D.~~] E. The personal representative shall file a statement with the appointing court giving the names and addresses of those persons notified pursuant to Subsection A of

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this section.

[~~E.~~] F. The personal representative's failure to give notice pursuant to this section is a breach of [~~his~~] duty to the persons concerned but does not affect the validity of [~~his~~] the appointment, [~~his~~] the personal representative's powers or other duties. A personal representative may inform other persons of [~~his~~] the appointment by delivery or ordinary mail."

SECTION 19. Section 45-3-911 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-911) is amended to read:

"45-3-911. PARTITION FOR PURPOSE OF DISTRIBUTION.--

A. When two or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the heirs or devisees may petition the district court prior to the formal or informal closing of the estate to make partition.

B. After notice to the interested heirs or devisees, the district court shall partition the property pursuant to the provisions of the Uniform Partition of Heirs Property Act.

C. The district court may direct the personal representative to sell any property [~~which cannot be partitioned without prejudice to the interested heirs and devisees and which cannot conveniently be allotted to any one~~

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~~party~~] pursuant to the provisions of the Uniform Partition of Heirs Property Act."

SECTION 20. Section 46-12-119 NMSA 1978 (being Laws 2016, Chapter 72, Section 1-119) is amended to read:

"46-12-119. TAX-RELATED LIMITATIONS.--

A. As used in this section:

(1) "grantor trust" means a trust as to which a settlor of a first trust is considered the owner under 26 U.S.C. Sections 671 through 677, as amended, or 26 U.S.C. Section 679, as amended;

(2) "Internal Revenue Code" means the United States Internal Revenue Code of 1986, as amended;

(3) "nongrantor trust" means a trust that is not a grantor trust; and

(4) "qualified benefits property" means property subject to the minimum distribution requirements of 26 U.S.C. Section 401(a)(9), as amended, and any applicable regulations or subject to any similar requirements that refer to 26 U.S.C. Section 401(a)(9), as amended or the regulations.

B. An exercise of the decanting power is subject to the following limitations:

(1) if a first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for a marital deduction for purposes of the gift or estate tax

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under the Internal Revenue Code or a state gift, estate or inheritance tax, the second-trust instrument shall not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified;

(2) if the first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for a charitable deduction for purposes of the income, gift or estate tax under the Internal Revenue Code or a state income, gift, estate or inheritance tax, the second-trust instrument shall not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified;

(3) if the first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for the exclusion from the gift tax described in 26 U.S.C.

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Section 2503(b), as amended, the second-trust instrument shall not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. Section 2503(b), as amended. If the first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for the exclusion from the gift tax described in 26 U.S.C. Section 2503(b), as amended, by application of 26 U.S.C. Section 2503(c), as amended, the second-trust instrument shall not include or omit a term that, if included or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. Section 2503(c), as amended;

(4) if the property of the first trust includes shares of stock in an S corporation, as defined in 26 U.S.C. Section 1361, as amended, and the first trust is, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would be, a permitted shareholder under any provision of 26 U.S.C. Section 1361, as amended, an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under 26 U.S.C. Section 1361(c)(2), as amended. If the property of the first

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trust includes shares of stock in an S corporation and the first trust is, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would be, a qualified subchapter-S trust within the meaning of 26 U.S.C. Section 1361(d), as amended, the second-trust instrument shall not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust;

(5) if the first trust contains property that qualified, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would have qualified, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under 26 U.S.C. Section 2642(c), as amended, the second-trust instrument shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under 26 U.S.C. Section 2642(c), as amended;

(6) if the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument shall not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under 26 U.S.C. Section 401(a)(9), as amended, and any applicable regulations or any similar requirements that refer to 26 U.S.C.

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Section 401(a)(9), as amended, or the regulations. If an attempted exercise of the decanting power violates this paragraph, the trustee is deemed to have held the qualified benefits property and any reinvested distributions of the property as a separate share from the date of the exercise of the power, and Section [~~1-122 of the Uniform Trust Decanting Act~~] 46-12-122 NMSA 1978 applies to the separate share;

(7) if the first trust qualifies as a grantor trust because of the application of 26 U.S.C. Section 672(f)(2)(A), as amended, the second trust shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under 26 U.S.C. Section 672(f)(2)(A), as amended;

(8) as used in this paragraph, "tax benefit" means a federal or state tax deduction, exemption, exclusion or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject to Paragraph (9) of this subsection, a second-trust instrument shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if:

(a) the first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the benefit; and

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(b) the transfer of property held by the first trust or the first trust qualified, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would have qualified, for the tax benefit;

(9) subject to Paragraph (4) of this subsection:

(a) except as otherwise provided in Paragraph (7) of this subsection, the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and

(b) except as otherwise provided in Paragraph (10) of this subsection, the second trust may be a grantor trust, even if the first trust is a nongrantor trust; and

(10) an authorized fiduciary shall not exercise the decanting power if a settlor objects in a signed record delivered to the fiduciary within the notice period and:

(a) the first trust and a second trust are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the [~~second~~] first trust to cease to be a grantor trust and the second trust does not grant an equivalent power to the settlor or other person; or

(b) the first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in

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part, with respect to the settlor, unless: 1) the settlor has the power at all times to cause the second trust to cease to be a grantor trust; or 2) the first-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second-trust instrument contains the same provision."

SECTION 21. EFFECTIVE DATE.--

A. The effective date of the provisions of Sections 14 and 20 of this act is July 1, 2017.

B. The effective date of the provisions of Sections 1 through 13 and 15 through 19 of this act is January 1, 2018.

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