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52ND LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2016

INTRODUCED BY

DISCUSSION DRAFT

AN ACT

RELATING TO PROPERTY; ENACTING THE UNIFORM POWERS OF APPOINTMENT ACT; ENACTING THE UNIFORM TRUST DECANTING ACT; REVISING THE STATUTORY RULE AGAINST PERPETUITIES AS IT AFFECTS PROPERTY INTERESTS, INCLUDING REAL PROPERTY INTERESTS, HELD IN TRUST; MAKING TECHNICAL AND CONFORMING CHANGES TO THE UNIFORM PROBATE CODE AND THE UNIFORM TRUST CODE; AMENDING PROVISIONS OF THE UNIFORM PROBATE CODE PERTAINING TO NOTICE, TIME FOR PRESENTATION OF CLAIMS, PENALTY CLAUSES AND CLOSING AN ESTATE.

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

UNIFORM POWERS OF APPOINTMENT ACT

Article 1

GENERAL PROVISIONS

SECTION 1-101. [NEW MATERIAL] SHORT TITLE.--Sections 1-101 through 1-603 of this act may be cited as the "Uniform

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Powers of Appointment Act".

SECTION 1-102. [NEW MATERIAL] DEFINITIONS.--As used in the Uniform Powers of Appointment Act:

A. "appointee" means a person to which a powerholder makes an appointment of appointive property;

B. "appointive property" means the property or property interest subject to a power of appointment;

C. "blanket-exercise clause" means a clause in an instrument that exercises a power of appointment and is not a specific-exercise clause. "Blanket-exercise clause" includes a clause that:

(1) expressly uses the words "any power" in exercising any power of appointment the powerholder has;

(2) expressly uses the words "any property" in appointing any property over which the powerholder has a power of appointment; or

(3) disposes of all property subject to disposition by the powerholder;

D. "donor" means a person that creates a power of appointment;

E. "exclusionary power of appointment" means a power of appointment exercisable in favor of any one or more of the permissible appointees to the exclusion of the other permissible appointees;

F. "general power of appointment" means a power of

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appointment exercisable in favor of the powerholder, the powerholder's estate, a creditor of the powerholder or a creditor of the powerholder's estate;

G. "gift-in-default clause" means a clause identifying a taker in default of appointment;

H. "impermissible appointee" means a person that is not a permissible appointee;

I. "instrument" means a record;

J. "nongeneral power of appointment" means a power of appointment that is not a general power of appointment;

K. "permissible appointee" means a person in whose favor a powerholder may exercise a power of appointment;

L. "person" means an individual; an estate; a trust; a business or nonprofit entity; a public corporation; a government or governmental subdivision, agency or instrumentality; or another legal entity;

M. "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;

N. "powerholder" means a person in which a donor creates a power of appointment;

O. "presently exercisable power of appointment" means a power of appointment exercisable by the powerholder at

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the relevant time. "Presently exercisable power of appointment":

(1) includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard or the passage of a specified time only after:

(a) the occurrence of the specified event;

(b) the satisfaction of the ascertainable standard; or

(c) the passage of the specified time; and

(2) does not include a power exercisable only at the powerholder's death;

P. "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;

Q. "specific-exercise clause" means a clause in an instrument that specifically refers to and exercises a particular power of appointment;

R. "taker in default of appointment" means a person that takes all or part of the appointive property to the extent the powerholder does not effectively exercise the power of appointment; and

S. "terms of the instrument" means the

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manifestation of the intent of the maker of the instrument regarding the instrument's provisions as expressed in the instrument or as may be established by other evidence that would be admissible in a legal proceeding.

SECTION 1-103. [NEW MATERIAL] GOVERNING LAW.--Unless the terms of the instrument creating a power of appointment manifest a contrary intent:

A. the creation, revocation or amendment of the power is governed by the law of the donor's domicile at the relevant time; and

B. the exercise, release or disclaimer of the power, or the revocation or amendment of the exercise, release or disclaimer of the power, is governed by the law of the powerholder's domicile at the relevant time.

SECTION 1-104. [NEW MATERIAL] COMMON LAW AND PRINCIPLES OF EQUITY.--The common law and principles of equity supplement the Uniform Powers of Appointment Act, except to the extent modified by that act or New Mexico law other than that act.

Article 2

CREATION, REVOCATION AND AMENDMENT OF POWER OF APPOINTMENT

SECTION 1-201. [NEW MATERIAL] CREATION OF POWER OF APPOINTMENT.--

A. A power of appointment is created only if:

(1) the instrument creating the power:

(a) is valid under applicable law; and

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(b) except as otherwise provided in Subsection B of this section, transfers the appointive property; and

(2) the terms of the instrument creating the power manifest the donor's intent to create in a powerholder a power of appointment over the appointive property exercisable in favor of a permissible appointee.

B. Subparagraph (b) of Paragraph (1) of Subsection A of this section does not apply to the creation of a power of appointment by the exercise of a power of appointment.

C. A power of appointment shall not be created in a deceased individual.

D. Subject to the provisions of Section 45-2-901 NMSA 1978, a power of appointment may be created in an unborn or unascertained powerholder.

SECTION 1-202. [NEW MATERIAL] NONTRANSFERABILITY.--A powerholder shall not transfer a power of appointment. If a powerholder dies without exercising or releasing a power, the power lapses.

SECTION 1-203. [NEW MATERIAL] PRESUMPTION OF UNLIMITED AUTHORITY.--Subject to Section 1-205 of the Uniform Powers of Appointment Act, and unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is:

A. presently exercisable;

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B. exclusionary; and

C. except as otherwise provided in Section 1-204 of the Uniform Powers of Appointment Act, general.

SECTION 1-204. [NEW MATERIAL] EXCEPTION TO PRESUMPTION OF UNLIMITED AUTHORITY.--Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is nongeneral if:

A. the power is exercisable only at the powerholder's death; and

B. the permissible appointees of the power are a defined and limited class that does not include the powerholder's estate, the powerholder's creditors or the creditors of the powerholder's estate.

SECTION 1-205. [NEW MATERIAL] RULES OF CLASSIFICATION.--

A. As used in this section, "adverse party" means a person with a substantial beneficial interest in property that would be affected adversely by a powerholder's exercise or nonexercise of a power of appointment in favor of the powerholder, the powerholder's estate, a creditor of the powerholder or a creditor of the powerholder's estate.

B. If a powerholder may exercise a power of appointment only with the consent or joinder of an adverse party, the power is nongeneral.

C. If the permissible appointees of a power of appointment are not defined and limited, the power is

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exclusionary.

SECTION 1-206. [NEW MATERIAL] POWER TO REVOKE OR AMEND.--A donor may revoke or amend a power of appointment only to the extent that:

A. the instrument creating the power is revocable by the donor; or

B. the donor reserves a power of revocation or amendment in the instrument creating the power of appointment.

Article 3

EXERCISE OF POWER OF APPOINTMENT

SECTION 1-301. [NEW MATERIAL] REQUISITES FOR EXERCISE OF POWER OF APPOINTMENT.--A power of appointment is exercised only:

A. if the instrument exercising the power is valid under applicable law; and

B. if the terms of the instrument exercising the power:

(1) manifest the powerholder's intent to exercise the power; and

(2) subject to Section 1-304 of the Uniform Powers of Appointment Act, satisfy the requirements of exercise, if any, imposed by the donor; and

C. to the extent the appointment is a permissible exercise of the power.

SECTION 1-302. [NEW MATERIAL] INTENT TO EXERCISE--

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DETERMINING INTENT FROM RESIDUARY CLAUSE.--

A. As used in this section:

(1) "residuary clause" does not include a residuary clause containing a blanket-exercise clause or a specific-exercise clause; and

(2) "will" includes a codicil and a testamentary instrument that revises another will.

B. A residuary clause in a powerholder's will, or a comparable clause in the powerholder's revocable trust, manifests the powerholder's intent to exercise a power of appointment only if:

(1) the terms of the instrument containing the residuary clause do not manifest a contrary intent;

(2) the power is a general power exercisable in favor of the powerholder's estate;

(3) there is no gift-in-default clause or the gift-in-default clause is ineffective; and

(4) the powerholder did not release the power.

SECTION 1-303. [NEW MATERIAL] INTENT TO EXERCISE--AFTER-ACQUIRED POWER.--Unless the terms of the instrument exercising a power of appointment manifest a contrary intent:

A. except as otherwise provided in Subsection B of this section, a blanket-exercise clause extends to a power acquired by the powerholder after executing the instrument containing the clause; and

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B. if the powerholder is also the donor of the power, the clause does not extend to the power unless there is no gift-in-default clause or the gift-in-default clause is ineffective.

SECTION 1-304. [NEW MATERIAL] SUBSTANTIAL COMPLIANCE WITH DONOR-IMPOSED FORMAL REQUIREMENT.--A powerholder's substantial compliance with a formal requirement of appointment imposed by the donor, including a requirement that the instrument exercising the power of appointment make reference or specific reference to the power, is sufficient if:

A. the powerholder knows of and intends to exercise the power; and

B. the powerholder's manner of attempted exercise of the power does not impair a material purpose of the donor in imposing the requirement.

SECTION 1-305. [NEW MATERIAL] PERMISSIBLE APPOINTMENT.--

A. A powerholder of a general power of appointment that permits appointment to the powerholder or the powerholder's estate may make any appointment, including an appointment in trust or creating a new power of appointment, that the powerholder could make in disposing of the powerholder's own property.

B. A powerholder of a general power of appointment that permits appointment only to the creditors of the powerholder or of the powerholder's estate may appoint only to

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those creditors.

C. Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the powerholder of a nongeneral power may:

(1) make an appointment in any form, including an appointment in trust, in favor of a permissible appointee;

(2) create a general power in a permissible appointee; or

(3) create a nongeneral power in any person to appoint to one or more of the permissible appointees of the original nongeneral power.

SECTION 1-306. [NEW MATERIAL] APPOINTMENT TO DECEASED APPOINTEE OR PERMISSIBLE APPOINTEE'S DESCENDANT.--

A. Subject to Sections 45-2-603 and 45-2-707 NMSA 1978, an appointment to a deceased appointee is ineffective.

B. Unless the terms of the instrument creating a power of appointment manifest a contrary intent, a powerholder of a nongeneral power may exercise the power in favor of, or create a new power of appointment in, a descendant of a deceased permissible appointee whether or not the descendant is described by the donor as a permissible appointee.

SECTION 1-307. [NEW MATERIAL] IMPERMISSIBLE APPOINTMENT.--

A. Except as otherwise provided in Section 1-306 of the Uniform Powers of Appointment Act, an exercise of a power

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of appointment in favor of an impermissible appointee is ineffective.

B. An exercise of a power of appointment in favor of a permissible appointee is ineffective to the extent the appointment is a fraud on the power.

SECTION 1-308. [NEW MATERIAL] SELECTIVE ALLOCATION DOCTRINE.--If a powerholder exercises a power of appointment in a disposition that also disposes of property the powerholder owns, the owned property and the appointive property must be allocated in the permissible manner that best carries out the powerholder's intent.

SECTION 1-309. [NEW MATERIAL] CAPTURE DOCTRINE--DISPOSITION OF INEFFECTIVELY APPOINTED PROPERTY UNDER GENERAL POWER.--To the extent a powerholder of a general power of appointment, other than a power to withdraw property from, revoke or amend a trust, makes an ineffective appointment:

A. the gift-in-default clause controls the disposition of the ineffectively appointed property; or

B. if there is no gift-in-default clause or to the extent the clause is ineffective, the ineffectively appointed property:

(1) passes to:

(a) the powerholder if the powerholder is a permissible appointee and is living; or

(b) if the powerholder is an

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impermissible appointee or deceased, the powerholder's estate if the estate is a permissible appointee; or

(2) if there is no taker under Paragraph (1) of this subsection, passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

SECTION 1-310. [NEW MATERIAL] DISPOSITION OF UNAPPOINTED PROPERTY UNDER RELEASED OR UNEXERCISED GENERAL POWER.--To the extent a powerholder releases or fails to exercise a general power of appointment other than a power to withdraw property from, revoke or amend a trust:

A. the gift-in-default clause controls the disposition of the unappointed property; or

B. if there is no gift-in-default clause or to the extent the clause is ineffective:

(1) except as otherwise provided in Paragraph (2) of this subsection, the unappointed property passes to:

(a) the powerholder if the powerholder is a permissible appointee and is living; or

(b) if the powerholder is an impermissible appointee or deceased, the powerholder's estate if the estate is a permissible appointee; or

(2) to the extent the powerholder released the power, or if there is no taker under Paragraph (1) of this subsection, the unappointed property passes under a reversionary interest to the donor or the donor's transferee or

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successor in interest.

SECTION 1-311. [NEW MATERIAL] DISPOSITION OF UNAPPOINTED PROPERTY UNDER RELEASED OR UNEXERCISED NONGENERAL POWER.--To the extent a powerholder releases, ineffectively exercises or fails to exercise a nongeneral power of appointment:

A. the gift-in-default clause controls the disposition of the unappointed property; or

B. if there is no gift-in-default clause or to the extent that the clause is ineffective, the unappointed property:

(1) passes to the permissible appointees if:

(a) the permissible appointees are defined and limited; and

(b) the terms of the instrument creating the power do not manifest a contrary intent; or

(2) if there is no taker under Paragraph (1) of this subsection, passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

SECTION 1-312. [NEW MATERIAL] DISPOSITION OF UNAPPOINTED PROPERTY IF PARTIAL APPOINTMENT TO TAKER IN DEFAULT.--Unless the terms of the instrument creating or exercising a power of appointment manifest a contrary intent, if the powerholder makes a valid partial appointment to a taker in default of appointment, the taker in default of appointment may share fully in unappointed property.

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SECTION 1-313. [NEW MATERIAL] APPOINTMENT TO TAKER IN DEFAULT.--If a powerholder makes an appointment to a taker in default of appointment and the appointee would have taken the property under a gift-in-default clause had the property not been appointed, the power of appointment is deemed not to have been exercised and the appointee takes under the clause.

SECTION 1-314. [NEW MATERIAL] POWERHOLDER'S AUTHORITY TO REVOKE OR AMEND EXERCISE.--A powerholder may revoke or amend an exercise of a power of appointment only to the extent that:

A. the powerholder reserves a power of revocation or amendment in the instrument exercising the power of appointment and, if the power is nongeneral, the terms of the instrument creating the power of appointment do not prohibit the reservation; or

B. the terms of the instrument creating the power of appointment provide that the exercise is revocable or amendable.

Article 4

DISCLAIMER OR RELEASE; CONTRACT TO APPOINT OR NOT TO APPOINT

SECTION 1-401. [NEW MATERIAL] DISCLAIMER.--As provided by the Uniform Disclaimer of Property Interests Act:

A. a powerholder may disclaim all or part of a power of appointment; and

B. a permissible appointee, appointee or taker in default of appointment may disclaim all or part of an interest

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in appointive property.

SECTION 1-402. [NEW MATERIAL] AUTHORITY TO RELEASE.--A powerholder may release a power of appointment, in whole or in part, except to the extent that the terms of the instrument creating the power prevent the release.

SECTION 1-403. [NEW MATERIAL] METHOD OF RELEASE.--A powerholder of a releasable power of appointment may release the power in whole or in part:

A. by substantial compliance with a method provided in the terms of the instrument creating the power; or

B. 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, by a record manifesting the powerholder's intent by clear and convincing evidence.

SECTION 1-404. [NEW MATERIAL] REVOCATION OR AMENDMENT OF RELEASE.--A powerholder may revoke or amend a release of a power of appointment only to the extent that:

A. the instrument of release is revocable by the powerholder; or

B. the powerholder reserves a power of revocation or amendment in the instrument of release.

SECTION 1-405. [NEW MATERIAL] POWER TO CONTRACT--PRESENTLY EXERCISABLE POWER OF APPOINTMENT.--A powerholder of a presently exercisable power of appointment may contract:

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A. not to exercise the power; or

B. to exercise the power if the contract when made does not confer a benefit on an impermissible appointee.

SECTION 1-406. [NEW MATERIAL] POWER TO CONTRACT--POWER OF APPOINTMENT NOT PRESENTLY EXERCISABLE.--A powerholder of a power of appointment that is not presently exercisable may contract to exercise or not to exercise the power only if the powerholder:

A. is also the donor of the power; and

B. has reserved the power in a revocable trust.

SECTION 1-407. [NEW MATERIAL] REMEDY FOR BREACH OF CONTRACT TO APPOINT OR NOT TO APPOINT.--The remedy for a powerholder's breach of a contract to appoint or not to appoint appointive property is limited to damages payable out of the appointive property or, if appropriate, specific performance of the contract.

Article 5

RIGHTS OF POWERHOLDER'S CREDITORS IN APPOINTIVE PROPERTY

SECTION 1-501. [NEW MATERIAL] CREDITOR CLAIM--GENERAL POWER CREATED BY POWERHOLDER.--

A. As used in this section, "power of appointment created by the powerholder" includes a power of appointment created in a transfer by another person to the extent that the powerholder contributed value to the transfer.

B. Appointive property subject to a general power

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of appointment created by the powerholder is subject to a claim of a creditor of the powerholder or of the powerholder's estate to the extent provided in the Uniform Voidable Transactions Act.

C. Subject to Subsection B of this section, appointive property subject to a general power of appointment created by the powerholder is not subject to a claim of a creditor of the powerholder or the powerholder's estate to the extent the powerholder irrevocably appointed the property in favor of a person other than the powerholder or the powerholder's estate.

D. Subject to Subsections B and C of this section, and notwithstanding the presence of a spendthrift provision or whether the claim arose before or after the creation of the power of appointment, appointive property subject to a general power of appointment created by the powerholder is subject to a claim of a creditor of:

(1) the powerholder, to the same extent as if the powerholder owned the appointive property, if the power is presently exercisable; and

(2) the powerholder's estate, to the extent the estate is insufficient to satisfy the claim and subject to the right of a decedent to direct the source from which liabilities are paid, if the power is exercisable at the powerholder's death.

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SECTION 1-502. [NEW MATERIAL] CREDITOR CLAIM--GENERAL POWER NOT CREATED BY POWERHOLDER.--

A. Except as otherwise provided in Subsection B of this section, appointive property subject to a general power of appointment created by a person other than the powerholder is subject to a claim of a creditor of:

(1) the powerholder, to the extent that the powerholder's property is insufficient, if the power is presently exercisable; and

(2) the powerholder's estate, to the extent that the estate is insufficient, subject to the right of a decedent to direct the source from which liabilities are paid.

B. Subject to Subsection C of Section 1-504 of the Uniform Powers of Appointment Act, a power of appointment created by a person other than the powerholder that is subject to an ascertainable standard relating to an individual's health, education, support or maintenance within the meaning of 26 U.S.C. Section 2041(b)(1)(A), as amended, or 26 U.S.C. Section 2514(c)(1), as amended, is treated for purposes of this article as a nongeneral power.

SECTION 1-503. [NEW MATERIAL] POWER TO WITHDRAW.--

A. For purposes of this article and except as otherwise provided in Subsection B of this section, a power to withdraw property from a trust is treated, during the time the power may be exercised, as a presently exercisable general

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power of appointment to the extent of the property subject to the power to withdraw.

B. On the lapse, release or waiver of a power to withdraw property from a trust, the power is treated as a presently exercisable general power of appointment only to the extent that the value of the property affected by the lapse, release or waiver exceeds the greater of the amount specified in 26 U.S.C. Section 2041(b)(2), as amended, and 26 U.S.C. Section 2514(e), as amended, or the amount specified in 26 U.S.C. Section 2503(b), as amended.

SECTION 1-504. [NEW MATERIAL] CREDITOR CLAIM--NONGENERAL POWER.--

A. Except as otherwise provided in Subsections B and C of this section, appointive property subject to a nongeneral power of appointment is exempt from a claim of a creditor of the powerholder or the powerholder's estate.

B. Appointive property subject to a nongeneral power of appointment is subject to a claim of a creditor of the powerholder or the powerholder's estate to the extent that the powerholder owned the property and, reserving the nongeneral power, transferred the property in violation of the Uniform Voidable Transactions Act.

C. If the initial gift in default of appointment is to the powerholder or the powerholder's estate, a nongeneral power of appointment is treated for purposes of this article as

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a general power.

Article 6

MISCELLANEOUS PROVISIONS

SECTION 1-601. [NEW MATERIAL] UNIFORMITY OF APPLICATION AND CONSTRUCTION.--In applying and construing the Uniform Powers of Appointment Act, consideration shall be given to the need to promote uniformity of the act with respect to its subject matter among states that enact it.

SECTION 1-602. [NEW MATERIAL] RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.--The Uniform Powers of Appointment Act modifies, limits or supersedes the 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 U.S.C. Section 7003(b).

SECTION 1-603. [NEW MATERIAL] APPLICATION TO EXISTING RELATIONSHIPS.--

A. Except as otherwise provided in the Uniform Powers of Appointment Act, on and after January 1, 2017:

(1) the Uniform Powers of Appointment Act applies to a power of appointment created before, on or after January 1, 2017;

(2) the Uniform Powers of Appointment Act

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applies to a judicial proceeding concerning a power of appointment commenced on or after January 1, 2017;

(3) the Uniform Powers of Appointment Act applies to 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 Uniform Powers of Appointment Act would interfere substantially with the effective conduct of the judicial proceeding or prejudice a right of a party, in which case the particular provision of the Uniform Powers of Appointment Act does not apply and the superseded law applies;

(4) a rule of construction or presumption provided in the Uniform Powers of Appointment Act 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

(5) except as otherwise provided in Paragraphs (1) through (4) of this subsection, an action done before January 1, 2017 is not affected by the Uniform Powers of Appointment Act.

B. If a right is acquired, extinguished or barred on the expiration of a prescribed period that commenced under New Mexico law other than the Uniform Powers of Appointment Act before January 1, 2017, the law continues to apply to the right.

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UNIFORM TRUST DECANTING ACT

Article 1

GENERAL PROVISIONS

SECTION 2-101. [NEW MATERIAL] SHORT TITLE.--Sections 2-101 through 2-129 of this act may be cited as the "Uniform Trust Decanting Act".

SECTION 2-102. [NEW MATERIAL] DEFINITIONS.--As used in the Uniform Trust Decanting Act:

A. "appointive property" means the property or property interest subject to a power of appointment;

B. "ascertainable standard" means a standard relating to an individual's health, education, support or maintenance within the meaning of 26 U.S.C. Section 2041(b)(1)(A), as amended, or 26 U.S.C. Section 2514(c)(1), as amended, and any applicable regulations;

C. "authorized fiduciary" means:

(1) a trustee or other fiduciary, other than a settlor, that has discretion to distribute, or direct a trustee to distribute, part or all of the principal of the first trust to one or more current beneficiaries;

(2) a special fiduciary appointed under Section 2-109 of the Uniform Trust Decanting Act; or

(3) a special-needs fiduciary under Section 2-113 of the Uniform Trust Decanting Act;

D. "beneficiary" means a person that:

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(1) has a present or future, vested or contingent, beneficial interest in a trust;

(2) holds a power of appointment over trust property; or

(3) is an identified charitable organization that will or may receive distributions under the terms of the trust;

E. "charitable interest" means an interest in a trust that:

(1) is held by an identified charitable organization and makes the organization a qualified beneficiary;

(2) benefits only charitable organizations and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary; or

(3) is held solely for charitable purposes and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary;

F. "charitable organization" means:

(1) a person, other than an individual, organized and operated exclusively for charitable purposes; or

(2) a government or governmental subdivision, agency or instrumentality, to the extent it holds funds

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exclusively for a charitable purpose;

G. "charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, a municipal or other governmental purpose or another purpose the achievement of which is beneficial to the community;

H. "court" means the court in New Mexico having jurisdiction in matters relating to trusts;

I. "current beneficiary" means a beneficiary that, on the date the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal. "Current beneficiary":

(1) includes the holder of a presently exercisable general power of appointment; and

(2) does not include a person that is a beneficiary only because the person holds any other power of appointment;

J. "decanting power" or "the decanting power" means the power of an authorized fiduciary under the Uniform Trust Decanting Act to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust;

K. "expanded distributive discretion" means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard;

L. "first trust" means a trust over which an

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authorized fiduciary may exercise the decanting power;

M. "first-trust instrument" means the trust instrument for a first trust;

N. "general power of appointment" means a power of appointment exercisable in favor of a powerholder, the powerholder's estate, a creditor of the powerholder or a creditor of the powerholder's estate;

O. "jurisdiction", with respect to a geographic area, includes a state or country;

P. "person" means an individual; an estate; a business or nonprofit entity; a public corporation; a government or governmental subdivision, agency or instrumentality; or another legal entity;

Q. "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;

R. "powerholder" means a person in which a donor creates a power of appointment;

S. "presently exercisable power of appointment" means a power of appointment exercisable by the powerholder at the relevant time. "Presently exercisable power of appointment":

(1) includes a power of appointment

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exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard or the passage of a specified time only after:

(a) the occurrence of the specified event;

(b) the satisfaction of the ascertainable standard; or

(c) the passage of the specified time; and

(2) does not include a power exercisable only at the powerholder's death;

T. "qualified beneficiary" means a beneficiary that on the date the beneficiary's qualification is determined:

(1) is a distributee or permissible distributee of trust income or principal;

(2) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in Paragraph (1) of this subsection terminated on that date without causing the trust to terminate; or

(3) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date;

U. "reasonably definite standard" means a clearly measurable standard under which a holder of a power of

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distribution is legally accountable within the meaning of 26 U.S.C. Section 674(b)(5)(A), as amended, and any applicable regulations;

V. "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;

W. "second trust" means:

(1) a first trust after modification under the Uniform Trust Decanting Act; or

(2) a trust to which a distribution of property from a first trust is or may be made under the Uniform Trust Decanting Act;

X. "second-trust instrument" means the trust instrument for a second trust;

Y. "settlor", except as otherwise provided in Section 2-125 of the Uniform Trust Decanting Act, means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to the person's contribution except to the extent that another person has power to revoke or withdraw that portion;

Z. "sign" means, with present intent to authenticate or adopt a record:

(1) to execute or adopt a tangible symbol; or

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(2) to attach to or logically associate with the record an electronic symbol, sound or process;

AA. "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States;

BB. "terms of the trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument, as may be established by other evidence that would be admissible in a judicial proceeding or as may be established by court order or nonjudicial settlement agreement; and

CC. "trust instrument" means a record executed by the settlor to create a trust or by any person to create a second trust that contains some or all of the terms of the trust, including any amendments.

SECTION 2-103. [NEW MATERIAL] SCOPE.--

A. Except as otherwise provided in Subsections B and C of this section, the Uniform Trust Decanting Act applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.

B. The Uniform Trust Decanting Act does not apply to a trust held solely for charitable purposes.

C. Subject to Section 2-115 of the Uniform Trust

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Decanting Act, a trust instrument may restrict or prohibit exercise of the decanting power.

D. The Uniform Trust Decanting Act does not limit the power of a trustee, powerholder or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, New Mexico law other than the Uniform Trust Decanting Act, common law, a court order or a nonjudicial-settlement agreement.

E. The Uniform Trust Decanting Act does not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

SECTION 2-104. [NEW MATERIAL] FIDUCIARY DUTY.--

A. In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

B. The Uniform Trust Decanting Act does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of the Uniform Trust Decanting Act.

C. Except as otherwise provided in a first-trust instrument, for purposes of the Uniform Trust Decanting Act, Section 46A-8-801 NMSA 1978 and Subsection A of Section

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46A-8-802 NMSA 1978, the terms of the first trust are deemed to include the decanting power.

SECTION 2-105. [NEW MATERIAL] APPLICATION--GOVERNING LAW.--

A. The Uniform Trust Decanting Act applies to a trust that:

(1) has its principal place of administration in New Mexico, including a trust whose principal place of administration has been changed to New Mexico; or

(2) provides by its trust instrument that it is governed by New Mexico law or is governed by New Mexico law for the purpose of:

(a) administration, including administration of a trust whose governing law for purposes of administration has been changed to New Mexico law;

(b) construction of terms of the trust; or

(c) determining the meaning or effect of terms of the trust.

B. Except as otherwise provided in the Uniform Trust Decanting Act, on and after January 1, 2017:

(1) the Uniform Trust Decanting Act applies to a trust created before, on or after January 1, 2017;

(2) the Uniform Trust Decanting Act applies to a judicial proceeding concerning a trust commenced on or after

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January 1, 2017;

(3) the Uniform Trust Decanting Act applies to a judicial proceeding concerning a trust commenced before January 1, 2017 unless the court finds that application of a particular provision of the Uniform Trust Decanting Act would interfere substantially with the effective conduct of the judicial proceeding or prejudice a right of a party, in which case the particular provision of the Uniform Trust Decanting Act does not apply and the superseded law applies;

(4) a rule of construction or presumption provided in the Uniform Trust Decanting Act applies to a trust instrument executed before January 1, 2017 unless there is a clear indication of a contrary intent in the terms of the instrument; and

(5) except as otherwise provided in Paragraphs (1) through (4) of this subsection, an action done before January 1, 2017 is not affected by the Uniform Trust Decanting Act.

C. If a right is acquired, extinguished or barred on the expiration of a prescribed period that commenced under New Mexico law other than the Uniform Trust Decanting Act before January 1, 2017, the law continues to apply to the right.

SECTION 2-106. [NEW MATERIAL] REASONABLE RELIANCE.--A trustee or other person that reasonably relies on the validity

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of a distribution of part or all of the property of a trust to another trust, or a modification of a trust under the Uniform Trust Decanting Act, New Mexico law other than the Uniform Trust Decanting Act or the law of another jurisdiction, is not liable to any person for any action or failure to act as a result of the reliance.

SECTION 2-107. [NEW MATERIAL] NOTICE--EXERCISE OF DECANTING POWER.--

A. In this section, a notice period begins on the day notice is given under Subsection C of this section and ends fifty-nine days after the day notice is given.

B. Except as otherwise provided in the Uniform Trust Decanting Act, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

C. Except as otherwise provided in Subsection F of this section, an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than sixty days before the exercise to:

(1) each settlor of the first trust, if living or then in existence;

(2) each qualified beneficiary of the first trust;

(3) each holder of a presently exercisable power of appointment over any part or all of the first trust;

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(4) each person that currently has the right to remove or replace the authorized fiduciary;

(5) each other fiduciary of the first trust;

(6) each fiduciary of the second trust; and

(7) the attorney general, if Subsection B of Section 2-114 of the Uniform Trust Decanting Act applies.

D. An authorized fiduciary is not required to give notice under Subsection C of this section to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

E. A notice given under Subsection C of this section shall:

(1) specify the manner in which the authorized fiduciary intends to exercise the decanting power;

(2) specify the proposed effective date for exercise of the power;

(3) include a copy of the first-trust instrument; and

(4) include a copy of all second-trust instruments.

F. The decanting power may be exercised before expiration of the notice period specified in Subsection A of this section if all persons entitled to receive notice waive the period in a signed record.

G. The receipt of notice, waiver of the notice

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period or expiration of the notice period does not affect the right of a person to file an application under Section 2-109 of the Uniform Trust Decanting Act asserting that:

(1) an attempted exercise of the decanting power is ineffective because it did not comply with the Uniform Trust Decanting Act or was an abuse of discretion or breach of fiduciary duty; or

(2) Section 2-122 of the Uniform Trust Decanting Act applies to the exercise of the decanting power.

H. An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under Subsection C of this section if the authorized fiduciary acted with reasonable care to comply with that subsection.

SECTION 2-108. [NEW MATERIAL] REPRESENTATION.--

A. Notice to a person with authority to represent and bind another person under a first-trust instrument or the Uniform Trust Code has the same effect as notice given directly to the person represented.

B. Consent of or waiver by a person with authority to represent and bind another person under a first-trust instrument or the Uniform Trust Code is binding on the person represented unless the person represented objects to the representation before the consent or waiver otherwise would become effective.

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C. A person with authority to represent and bind another person under a first-trust instrument or the Uniform Trust Code may file an application under Section 2-109 of the Uniform Trust Decanting Act on behalf of the person represented.

D. A settlor shall not represent or bind a beneficiary under the Uniform Trust Decanting Act.

SECTION 2-109. [NEW MATERIAL] COURT INVOLVEMENT.--

A. On application of an authorized fiduciary, a person entitled to notice under Subsection C of Section 2-107 of the Uniform Trust Decanting Act, a beneficiary or, with respect to a charitable interest, the attorney general or other person that has standing to enforce the charitable interest, the court, may:

(1) provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under the Uniform Trust Decanting Act and consistent with the fiduciary duties of the authorized fiduciary;

(2) appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under the Uniform Trust Decanting Act and to exercise the decanting power;

(3) approve an exercise of the decanting power;

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(4) determine that a proposed or attempted exercise of the decanting power is ineffective because:

(a) after applying Section 2-122 of the Uniform Trust Decanting Act, the proposed or attempted exercise does not or did not comply with the Uniform Trust Decanting Act; or

(b) the proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty;

(5) determine the extent to which Section 2-122 of the Uniform Trust Decanting Act applies to a prior exercise of the decanting power;

(6) provide instructions to the trustee regarding the application of Section 2-122 of the Uniform Trust Decanting Act to a prior exercise of the decanting power; or

(7) order other relief to carry out the purposes of the Uniform Trust Decanting Act.

B. On application of an authorized fiduciary, the court may approve:

(1) an increase in the fiduciary's compensation under Section 2-116 of the Uniform Trust Decanting Act; or

(2) a modification under Section 2-118 of the Uniform Trust Decanting Act of a provision granting a person the right to remove or replace the fiduciary.

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SECTION 2-110. [NEW MATERIAL] FORMALITIES.--An exercise of the decanting power shall be made in a record signed by an authorized fiduciary. The signed record shall, directly or by reference to the notice required by Section 2-107 of the Uniform Trust Decanting Act, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

SECTION 2-111. [NEW MATERIAL] DECANTING POWER UNDER EXPANDED DISTRIBUTIVE DISCRETION.--

A. As used in this section:

(1) "noncontingent right" means a right that is not subject to the exercise of discretion or the occurrence of a specified event that is not certain to occur. "Noncontingent right" does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary's estate;

(2) "presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary;

(3) "successor beneficiary" means a beneficiary that is not a qualified beneficiary on the date the beneficiary's qualification is determined. "Successor beneficiary" does not include a person that is a beneficiary only because the person holds a nongeneral power of

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appointment; and

(4) "vested interest" means:

(a) a right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power;

(b) a current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount or a percentage of value of some or all of the trust property;

(c) a current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount or a percentage of value of some or all of the trust property;

(d) a presently exercisable general power of appointment; or

(e) a right to receive an ascertainable part of the trust property on the trust's termination that is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

B. Subject to Subsection C of this section and Section 2-114 of the Uniform Trust Decanting Act, an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

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C. Subject to Section 2-113 of the Uniform Trust Decanting Act, in an exercise of the decanting power under this section, a second trust shall not:

(1) include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in Subsection D of this section;

(2) include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary or successor beneficiary of the first trust, except as otherwise provided in Subsection D of this section; or

(3) reduce or eliminate a vested interest.

D. Subject to Paragraph (3) of Subsection C of this section and Section 2-114 of the Uniform Trust Decanting Act, in an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction and may:

(1) retain a power of appointment granted in the first trust;

(2) omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

(3) create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion

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to distribute principal to the beneficiary; and

(4) create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

E. A power of appointment described in Paragraphs (1) through (4) of Subsection D of this section may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust.

F. If an authorized fiduciary has expanded distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has expanded distributive discretion.

SECTION 2-112. [NEW MATERIAL] DECANTING POWER UNDER LIMITED DISTRIBUTIVE DISCRETION.--

A. As used in this section, "limited distributive discretion" means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

B. An authorized fiduciary that has limited distributive discretion over the principal of the first trust

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for benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

C. Under this section and subject to Section 2-114 of the Uniform Trust Decanting Act, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, shall grant each beneficiary of the first trust beneficial interests that are substantially similar to the beneficial interests of the beneficiary in the first trust.

D. A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:

(1) the distribution is applied for the benefit of the beneficiary;

(2) the beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated and the distribution is made as permitted under the Uniform Trust Code; or

(3) the distribution is made as permitted under the terms of the first-trust instrument and the second-trust instrument for the benefit of the beneficiary.

E. If an authorized fiduciary has limited distributive discretion over part but not all of the principal

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of a first trust, the fiduciary may exercise the decanting power provided by this section over that part of the principal over which the authorized fiduciary has limited distributive discretion.

SECTION 2-113. [NEW MATERIAL] TRUST FOR BENEFICIARY WITH DISABILITY.--

A. As used in this section:

(1) "beneficiary with a disability" means a beneficiary of a first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated incapacitated;

(2) "governmental benefits" means financial aid or services from a state, federal or other type of public agency;

(3) "special-needs fiduciary" means, with respect to a trust that has a beneficiary with a disability:

(a) a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries;

(b) if no trustee or fiduciary has discretion under Subparagraph (a) of this paragraph, a trustee or other fiduciary, other than a settlor, that has discretion

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to distribute part or all of the income of the first trust to one or more current beneficiaries; or

(c) if no trustee or fiduciary has discretion under Subparagraphs (a) and (b) of this paragraph, a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries; and

(4) "special-needs trust" means a trust that the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

B. A special-needs fiduciary may exercise the decanting power provided by Section 2-111 of the Uniform Trust Decanting Act over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:

(1) a second trust is a special-needs trust that benefits the beneficiary with a disability; and

(2) the special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

C. In an exercise of the decanting power provided by this section, the following rules apply:

(1) notwithstanding Paragraph (2) of

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Subsection C of Section 2-111 of the Uniform Trust Decanting Act, the interest in the second trust of a beneficiary with a disability may:

(a) be a pooled trust as defined by medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. Section 1396p(d)(4)(C), as amended; or

(b) contain payback provisions complying with reimbursement requirements of medicaid law under 42 U.S.C. Section 1396p(d)(4)(A), as amended;

(2) Paragraph (3) of Subsection C of Section 2-111 of the Uniform Trust Decanting Act does not apply to the interests of the beneficiary with a disability; and

(3) except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, shall grant each other beneficiary of the first trust beneficial interests in the second trusts that are substantially similar to the beneficiary's beneficial interests in the first trust.

SECTION 2-114. [NEW MATERIAL] PROTECTION OF CHARITABLE INTEREST.--

A. As used in this section:

(1) "determinable charitable interest" means a charitable interest that is a right to a mandatory distribution

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currently, periodically, on the occurrence of a specified event or after the passage of a specified time and that is unconditional or will be held solely for charitable purposes; and

(2) "unconditional" means not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the United States Internal Revenue Code of 1986, as amended, on the date of the distribution if the charitable organization meets the requirement on the date of determination.

B. If a first trust contains a determinable charitable interest, the attorney general has the rights of a qualified beneficiary and may represent and bind the charitable interest.

C. If a first trust contains a charitable interest, the second trust or trusts shall not:

(1) diminish the charitable interest;

(2) diminish the interest of an identified charitable organization that holds the charitable interest;

(3) alter any charitable purpose stated in the first-trust instrument; or

(4) alter any condition or restriction related to the charitable interest.

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D. If there are two or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of Subsection C of this section.

E. If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to Subsection C of this section shall be administered under New Mexico law unless:

(1) the attorney general, after receiving notice under Section 2-107 of the Uniform Trust Decanting Act, fails to object in a signed record delivered to the authorized fiduciary within the notice period;

(2) the attorney general consents in a signed record to the second trust or trusts being administered under the law of another jurisdiction; or

(3) the court approves the exercise of the decanting power.

F. The Uniform Trust Decanting Act does not limit the powers and duties of the attorney general under New Mexico law other than that act.

SECTION 2-115. [NEW MATERIAL] TRUST LIMITATION ON DECANTING.--

A. An authorized fiduciary shall not exercise the

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decanting power to the extent that the first-trust instrument expressly prohibits exercise of:

(1) the decanting power; or

(2) a power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust.

B. Exercise of the decanting power is subject to any restriction in the first-trust instrument that expressly applies to exercise of:

(1) the decanting power; or

(2) a power granted by state law to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

C. A general prohibition of the amendment or revocation of a first trust, a spendthrift clause or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.

D. Subject to Subsections A and B of this section, an authorized fiduciary may exercise the decanting power provided by the Uniform Trust Decanting Act even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.

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E. If a first-trust instrument contains an express prohibition described in Subsection A of this section or an express restriction described in Subsection B of this section, the provision shall be included in the second-trust instrument.

SECTION 2-116. [NEW MATERIAL] CHANGE IN COMPENSATION.--

A. If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary shall not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless:

(1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or

(2) the increase is approved by the court.

B. If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary shall not exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by the Uniform Trust Code unless:

(1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or

(2) the increase is approved by the court.

C. A change in an authorized fiduciary's compensation that is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of Subsections A and B of this section.

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SECTION 2-117. [NEW MATERIAL] RELIEF FROM LIABILITY AND INDEMNIFICATION.--

A. Except as otherwise provided in this section, a second-trust instrument shall not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument.

B. A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

C. A second-trust instrument shall not reduce fiduciary liability in the aggregate.

D. Subject to Subsection C of this section, a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by New Mexico law other than the Uniform Trust Decanting Act.

SECTION 2-118. [NEW MATERIAL] REMOVAL OR REPLACEMENT OF AUTHORIZED FIDUCIARY.--An authorized fiduciary shall not exercise the decanting power to modify a provision in a first-trust instrument granting another person power to remove

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or replace the fiduciary unless:

A. the person holding the power consents to the modification in a signed record and the modification applies only to the person;

B. the person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or

C. the court approves the modification and the modification grants a substantially similar power to another person.

SECTION 2-119. [NEW MATERIAL] 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

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to 26 U.S.C. Section 401(a)(9) 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 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

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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. 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,

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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 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

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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. 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 2-122 of the Uniform Trust Decanting Act 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

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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

(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

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are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the second 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 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 2-120. [NEW MATERIAL] DURATION OF SECOND TRUST.--

A. Subject to Subsection B of this section, a second trust may have a duration that is the same as or different from the duration of the first trust.

B. To the extent that property of a second trust is attributable to property of the first trust, the property of the second trust is subject to any maximum perpetuity, accumulation or suspension-of-the-power-of-alienation rules that apply to property of the first trust.

SECTION 2-121. [NEW MATERIAL] NEED TO DISTRIBUTE NOT REQUIRED.--An authorized fiduciary may exercise the decanting power regardless of whether under the first trust's

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discretionary distribution standard the fiduciary would have made, or could have been compelled to make, a discretionary distribution of principal at the time of the exercise.

SECTION 2-122. [NEW MATERIAL] SAVING PROVISION.--

A. If exercise of the decanting power would be effective under the Uniform Trust Decanting Act except that the second-trust instrument in part does not comply with the Uniform Trust Decanting Act, the exercise of the power is effective and the following rules apply with respect to the principal of the second trust attributable to the exercise of the power:

(1) a provision in the second-trust instrument that is not permitted under the Uniform Trust Decanting Act is void to the extent necessary to comply with the Uniform Trust Decanting Act; and

(2) a provision required by the Uniform Trust Decanting Act to be in the second-trust instrument that is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with the Uniform Trust Decanting Act.

B. If a trustee or other fiduciary of a second trust determines that Subsection A of this section applies to a prior exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary's duties.

SECTION 2-123. [NEW MATERIAL] TRUST FOR CARE OF ANIMAL.--

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A. As used in this section:

(1) "animal trust" means a trust or an interest in a trust created to provide for the care of one or more animals; and

(2) "protector" means a person appointed in an animal trust to enforce the trust on behalf of the animal or, if no such person is appointed in the trust, a person appointed by the court for that purpose.

B. The decanting power may be exercised over an animal trust that has a protector to the extent that the trust could be decanted under the Uniform Trust Decanting Act as if each animal that benefits from the trust were an individual if the protector consents in a signed record to the exercise of the power.

C. A protector for an animal has the rights under the Uniform Trust Decanting Act of a qualified beneficiary.

D. Notwithstanding any other provision of the Uniform Trust Decanting Act, if a first trust is an animal trust, in an exercise of the decanting power, the second trust shall provide that trust property may be applied only to its intended purpose for the period the first trust benefited the animal.

SECTION 2-124. [NEW MATERIAL] TERMS OF SECOND TRUST.--A reference in the Uniform Trust Code to a trust instrument or terms of the trust includes a second-trust instrument and the

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terms of the second trust.

SECTION 2-125. [NEW MATERIAL] SETTLOR.--

A. For purposes of New Mexico law other than the Uniform Trust Decanting Act and subject to Subsection B of this section, a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of the principal of the first trust subject to the exercise of the decanting power.

B. In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, a settlor of the second trust and the authorized fiduciary may be considered.

SECTION 2-126. [NEW MATERIAL] LATER-DISCOVERED PROPERTY.--

A. Except as otherwise provided in Subsection C of this section, if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust or trusts.

B. Except as otherwise provided in Subsection C of this section, if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered property belonging

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to the first trust or property paid to or acquired by the first trust after exercise of the power remains part of the trust estate of the first trust.

C. An authorized fiduciary may provide in an exercise of the decanting power, or by the terms of a second trust, for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power.

SECTION 2-127. [NEW MATERIAL] OBLIGATIONS.--A debt, liability or other obligation enforceable against property of a first trust is enforceable to the same extent against the property when held by the second trust after exercise of the decanting power.

SECTION 2-128. [NEW MATERIAL] UNIFORMITY OF APPLICATION AND CONSTRUCTION.--In applying and construing the Uniform Trust Decanting 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 2-129. [NEW MATERIAL] RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.--The Uniform Trust Decanting Act modifies, limits or supersedes the 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

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described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 3-101. Section 45-1-108 NMSA 1978 (being Laws 1975, Chapter 257, Section 1-108) is amended to read:

"45-1-108. ACTS BY HOLDER OF GENERAL POWER.--[~~A.~~] For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, or to perform other duties, and for purposes of consenting to modification or termination of a trust or deviation from its terms, the sole holder or all co-holders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests, as objects, takers in default or otherwise, are subject to the power.

[~~B. As used in Subsection A of this section, the term "general power" is one which enables the power holder to draw absolute ownership to himself. Moreover, the common law concept of general powers is intended rather than special concepts developed for tax purposes.~~]"

SECTION 3-102. Section 45-1-401 NMSA 1978 (being Laws 1975, Chapter 257, Section 1-401) is amended to read:

"45-1-401. NOTICE--METHOD AND TIME OF GIVING.--

A. If notice of a hearing on any petition is required and except for specific notice requirements as

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otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person [~~having an interest in the subject of the hearing~~] or, if the interested person is represented by an attorney, to the attorney. Notice shall be given:

(1) by mailing a copy thereof at least fourteen days before the time set for the hearing by certified, registered or ordinary first class mail addressed to the person being notified at the post office address given in [~~his~~] the demand for notice, if any, or at [~~his~~] the person's office or place of residence, if known; [~~or~~]

(2) by service of a copy thereof upon the person being notified in the manner provided by the rules of civil procedure for service of summons and complaint in civil actions; or

(3) if the address or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing a copy thereof [~~at least~~] once a week for [~~two~~] three consecutive weeks in a newspaper [~~published and having~~] of general circulation in the county in which the hearing is to be held, [~~or, if there be no newspaper published in such county, then in a newspaper of general circulation in such county~~] the last publication of which is to be at least ten days before the time set for the hearing.

B. The court for good cause shown may provide for a

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different method or time of giving notice for [~~any hearings~~] a hearing.

C. Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding."

SECTION 3-103. Section 45-1-403 NMSA 1978 (being Laws 1975, Chapter 257, Section 1-403, as amended) is amended to read:

"45-1-403. PLEADINGS--WHEN PARTIES BOUND BY OTHERS--NOTICE.--In formal proceedings involving trusts, or estates of decedents, minors, protected persons or incapacitated persons, and in judicially supervised settlements, [~~the following rules apply:~~

~~A.~~] interests to be affected shall be described in pleadings that give reasonable information to owners by name or class, by reference to the instrument creating the interests or in another appropriate manner.

[~~B. a person is bound by an order binding another in the following cases:~~

~~(1) an order binding the sole holder or all co-holders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, binds other persons to the extent their interests as objects, takers in default or otherwise are subject to the power;~~

~~(2) to the extent there is no conflict of~~

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~~interest between them or among persons represented:~~

~~(a) an order binding a conservator binds the person whose estate the conservator controls;~~

~~(b) an order binding a guardian binds the protected person if no conservator of the protected person's estate has been appointed;~~

~~(c) an order binding a trustee binds beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a former fiduciary and in proceedings involving creditors or other third parties;~~

~~(d) an order binding a personal representative binds persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate; and~~

~~(e) an order binding the sole holder or all co-holders of a general testamentary power of appointment binds other persons to the extent their interests as objects, takers in default or otherwise are subject to the power; and~~

~~(3) unless otherwise represented, a minor or an incapacitated, unborn or unascertained person is bound by an order to the extent the minor's or the incapacitated, unborn or unascertained person's interest is adequately represented by another party having a substantially identical interest in the proceeding;~~

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~~C. if no conservator or guardian has been appointed, a parent may represent a minor child;~~

~~D. notice is required as follows:~~

~~(1) the notice prescribed by Section 45-1-401 NMSA 1978 shall be given to every person having an interest in the subject of the hearing or to one who can bind an interested person as described in Paragraph (1) or (2) of Subsection B of this section. Notice may be given both to an interested person and to another who may bind that person; and~~

~~(2) notice is given to unborn or unascertained persons who are not represented under Paragraph (1) or (2) of Subsection B of this section by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons; and~~

~~E. at any point in a proceeding, the district court shall appoint a guardian ad litem to represent the interest of a minor; an incapacitated, unborn or unascertained person; or a person whose identity or address is unknown, if the district court determines that representation of the interest would otherwise be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The district court shall state its reasons for appointing a guardian ad litem as a part of the record of the proceeding.~~]"

SECTION 3-104. A new section of the Uniform Probate Code,

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Section 45-1-403.1 NMSA 1978, is enacted to read:

"45-1-403.1. [NEW MATERIAL] REPRESENTATION--BASIC EFFECT.--

A. Notice to a person who may represent and bind another person pursuant to the provisions of Chapter 45 NMSA 1978 has the same effect as if notice were given directly to the other person.

B. The consent of a person who may represent and bind another person pursuant to the provisions of Chapter 45 NMSA 1978 is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

C. Except as otherwise provided in Sections 46A-4-411 and 46A-6-602 NMSA 1978, a person who, pursuant to the provisions of Chapter 45 NMSA 1978, may represent a settlor who lacks capacity, may receive notice and give a binding consent on the settlor's behalf.

D. A settlor shall not represent or bind a beneficiary pursuant to the provisions of Chapter 45 NMSA 1978 with respect to the termination or modification of a trust under Subsection A of Section 46A-4-411 NMSA 1978."

SECTION 3-105. A new section of the Uniform Probate Code, Section 45-1-403.2 NMSA 1978, is enacted to read:

"45-1-403.2. [NEW MATERIAL] REPRESENTATION BY HOLDER OF GENERAL TESTAMENTARY POWER OF APPOINTMENT.--To the extent there

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is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default or otherwise, are subject to the power."

SECTION 3-106. A new section of the Uniform Probate Code, Section 45-1-403.3 NMSA 1978, is enacted to read:

"45-1-403.3. [NEW MATERIAL] REPRESENTATION BY FIDUCIARIES AND PARENTS.--To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

A. a conservator may represent and bind the estate that the conservator controls;

B. a guardian may represent and bind the protected person if a conservator of the protected person's estate has not been appointed;

C. an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

D. a trustee may represent and bind the beneficiaries of the trust;

E. a personal representative of a decedent's estate may represent and bind persons interested in the

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estate; and

F. a parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed."

SECTION 3-107. A new section of the Uniform Probate Code, Section 45-1-403.4 NMSA 1978, is enacted to read:

"45-1-403.4. [NEW MATERIAL] REPRESENTATION BY PERSON HAVING SUBSTANTIALLY IDENTICAL INTEREST.--Unless otherwise represented, a minor, incapacitated or unborn person, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent that there is no conflict of interest between the representative and the person represented."

SECTION 3-108. A new section of the Uniform Probate Code, Section 45-1-403.5 NMSA 1978, is enacted to read:

"45-1-403.5. [NEW MATERIAL] APPOINTMENT OF REPRESENTATIVE.--

A. If the court determines that an interest is not represented under Chapter 45 NMSA 1978, or that the otherwise available representation might be inadequate, the court may 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

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location is unknown. A representative may be appointed to represent several persons or interests.

B. A representative may act on behalf of the person represented with respect to any matter arising under the Uniform Probate Code, whether or not a judicial proceeding concerning the estate is pending.

C. In making decisions, a representative may consider the general benefit accruing to the living members of the person's family."

SECTION 3-109. Section 45-2-506 NMSA 1978 (being Laws 1993, Chapter 174, Section 29) is amended to read:

"45-2-506. CHOICE OF LAW AS TO EXECUTION.--A written will is valid if executed in compliance with Section 45-2-502 NMSA 1978 or if its execution complies with the law at the time of execution of the place where the will is executed or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national."

SECTION 3-110. Section 45-2-517 NMSA 1978 (being Laws 1995, Chapter 210, Section 13) is amended to read:

"45-2-517. PENALTY CLAUSE FOR CONTEST.--A provision in a governing instrument purporting to penalize an interested person for contesting [~~a~~] the governing instrument or instituting other proceedings relating to [~~a governing instrument or an~~] the estate is unenforceable if probable cause

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exists for instituting proceedings."

SECTION 3-111. Section 45-2-608 NMSA 1978 (being Laws 1993, Chapter 174, Section 47) is amended to read:

"45-2-608. EXERCISE OF POWER OF APPOINTMENT.--In the absence of a requirement that a power of appointment be exercised by a reference or by an express or specific reference to the power, a general residuary clause in a will or a will making general disposition of all of the testator's property expresses an intention to exercise a power of appointment held by the testator only if:

A. the power is a general power exercisable in favor of the powerholder's estate and the creating instrument does not contain [~~a~~] an effective gift if the power is not exercised; or

B. the testator's will manifests an intention to include the property subject to the power."

SECTION 3-112. Section 45-2-704 NMSA 1978 (being Laws 1993, Chapter 174, Section 52) is amended to read:

"45-2-704. POWER OF APPOINTMENT--[~~MEANING OF~~] COMPLIANCE WITH SPECIFIC REFERENCE REQUIREMENT.--[~~If a governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference or a specific reference to the power or its source, it is presumed that the donor's intention, in requiring that the donee exercise the power by making reference to the~~

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~~particular power or to the creating instrument, was to prevent an inadvertent exercise of the power.~~] A powerholder's substantial compliance with a formal requirement of appointment imposed in a governing instrument by the donor, including a requirement that the instrument exercising the power of appointment make reference or specific reference to the power, is sufficient if:

A. the powerholder knows of and intends to exercise the power; and

B. the powerholder's manner of attempted exercise does not impair a material purpose of the donor in imposing the requirement."

SECTION 3-113. Section 45-2-904 NMSA 1978 (being Laws 1992, Chapter 66, Section 4, as amended) is amended to read:

"45-2-904. EXCLUSIONS.--

A. Section 45-2-901 NMSA 1978 does not apply to:

[~~A.~~] (1) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of:

[~~(1)~~] (a) a premarital or postmarital agreement;

[~~(2)~~] (b) a separation or divorce settlement;

[~~(3)~~] (c) a spouse's election;

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[~~(4)~~] (d) a similar arrangement arising out of a prospective, existing or previous marital relationship between the parties;

[~~(5)~~] (e) a contract to make or not to revoke a will or trust;

[~~(6)~~] (f) a contract to exercise or not to exercise a power of appointment;

[~~(7)~~] (g) a transfer in satisfaction of a duty of support; or

[~~(8)~~] (h) a reciprocal transfer;

[~~B.~~] (2) a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease or mortgage property and the power of a fiduciary to determine principal and income;

[~~C.~~] (3) a power to appoint a fiduciary;

[~~D.~~] (4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

[~~E.~~] (5) a nonvested property interest held by a charity, government or governmental agency or subdivision if the nonvested property interest is preceded by an interest held by another charity, government or governmental agency or subdivision;

[~~F.~~] (6) a nonvested property interest in or a

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power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral or other current or deferred benefit plan for one or more employees, independent contractors or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse;

[~~G.~~] (7) a property interest, power of appointment or arrangement that was not subject to the common-law rule against perpetuities or that is excluded by another statute of New Mexico; or

[~~H.~~] (8) a property interest [~~or arrangement subject to a time limit under the provisions of Section 45-2-907 NMSA 1978~~] held in trust.

B. For real property held in trust, at the end of three hundred sixty-five years from the later of the date on which an interest in real property is added to or purchased by a trust or the date that the trust became irrevocable, if the interest in real property is still held in trust and if the trust instrument:

(1) provides for the distribution of the

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interest upon termination of the trust, the property shall be distributed as though termination occurred at that time;

(2) does not provide for the distribution of the interest upon termination of the trust, the property shall be distributed to the beneficiaries who are then entitled to receive income from the trust:

(a) in proportion to the amount of income each is entitled to receive; or

(b) if that proportion is not specified in the trust instrument, in equal shares; or

(3) does not provide for the distribution of the interest upon termination of the trust and there is no income beneficiary of the trust, the property shall be distributed, pursuant to the laws of New Mexico then in effect that govern the distribution of intestate real property, to the then-living persons who are then determined to be the settlor's or testator's distributees as though the settlor or testator had died at that time, intestate, a resident of New Mexico and owning the property so distributable. For the purposes of this paragraph, "settlor" means a person who creates or contributes property to a trust.

C. A trust shall not become void or subject to termination under this section or Section 45-2-901 NMSA 1978 if:

(1) a trust holds an interest in a

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corporation, a limited liability company, a partnership, a statutory trust, a business trust or another business entity;

(2) the entity is the owner of an interest in real property;

(3) the entity terminates; and

(4) the trust becomes the holder of an interest in real property.

D. Except as otherwise provided in the trust instrument, the trustee of a trust that becomes the holder of an interest in real property through the sequence outlined in Subsection C of this section may:

(1) distribute the interest in real property in accordance with this subsection; or

(2) convey the interest in real property to another business entity in exchange for an interest in that entity to be held by the trustee.

E. For the purposes of this section, "real property" does not include:

(1) intangible personal property; or

(2) an interest in a corporation, a limited liability company, a partnership, a statutory trust, a business trust or another business entity, regardless of whether the entity is the owner of an interest in real property."

SECTION 3-114. Section 45-3-712 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-712) is amended to read:

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"45-3-712. IMPROPER EXERCISE OF POWER--BREACH OF FIDUCIARY DUTY.--If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of [~~his~~] the personal representative's fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing with a personal representative shall be determined as provided in Sections [~~3-713 and 3-714~~] 45-3-713 and 45-3-714 NMSA 1978."

SECTION 3-115. Section 45-3-801 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-801, as amended) is repealed and a new Section 45-3-801 NMSA 1978 is enacted to read:

"45-3-801. [NEW MATERIAL] NOTICE TO CREDITORS.--

A. A personal representative upon appointment may publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation in the county in which the probate proceeding is pending, announcing the personal representative's appointment and address and notifying creditors of the estate to present their claims within four months after the date of the first publication of the notice or be forever barred.

B. A personal representative may give written notice by mail or other delivery to a creditor, announcing the personal representative's appointment and address and notifying the creditor to present the creditor's claim within four months

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after the published notice, if given as provided in Subsection A of this section, or within sixty days after the mailing or other delivery of the notice, whichever is later, or be forever barred.

C. The personal representative is not liable to anyone for giving or failing to give notice pursuant to this section."

SECTION 3-116. Section 45-3-803 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-803, as amended) is amended to read:

"45-3-803. LIMITATIONS ON PRESENTATION OF CLAIMS.--

A. All claims against a decedent's estate that arose before the death of the decedent, including claims of the state and any political subdivision of the state, whether due or to become due, absolute or contingent, liquidated or unliquidated or founded on contract, tort or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute, are barred against the estate, the personal representative and the heirs, devisees and nonprobate transferees of the decedent unless presented within the earlier of the following:

(1) one year after the decedent's death; or

(2) the time provided by Subsection [~~A~~] B of Section 45-3-801 NMSA 1978 for creditors who are given actual notice and the time provided in Subsection [~~B~~] A of Section

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45-3-801 NMSA 1978 for all creditors barred by publication.

B. A claim described in Subsection A of this section that is barred by the nonclaim statute of the decedent's domicile before the giving of notice to creditors in this state is barred in this state.

C. All claims against a decedent's estate that arise at or after the death of the decedent, including claims of the state and any political subdivision of the state, whether due or to become due, absolute or contingent, liquidated or unliquidated or founded on contract, tort or other legal basis, are barred against the estate, the personal representative and the heirs and devisees of the decedent unless presented as follows:

(1) a claim based on a contract with the personal representative within four months after performance by the personal representative is due; or

(2) any other claim within the later of four months after it arises or the time specified in Paragraph (1) of this subsection.

D. Nothing in this section affects or prevents:

(1) any proceeding to enforce any mortgage, pledge or other lien upon property of the estate;

(2) to the limits of the insurance protection only, a proceeding to establish liability of the decedent or the personal representative for which the decedent or personal

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representative is protected by liability insurance; or

(3) collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate."

SECTION 3-117. Section 45-3-902 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-902, as amended) is amended to read:

"45-3-902. DISTRIBUTION--ORDER IN WHICH ASSETS APPROPRIATED--ABATEMENT.--

A. Except as provided in Subsection C of this section, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

(1) property not disposed of by the will;

(2) residuary devises;

(3) general devises; and

(4) specific devises.

B. For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged and, upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the

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beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

C. If the will expresses an order of abatement or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in Subsection A of this section, the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

D. If an estate of a decedent consists partly of separate property and partly of community property, the debts and expenses of administration shall be apportioned and charged against the different kinds of property in accordance with the provisions of Subsection B of Section [~~45-2-805~~] 45-2-807 NMSA 1978.

E. If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in or contribution from other interests in the remaining assets."

SECTION 3-118. Section 45-3-905 NMSA 1978 is repealed and a new Section 45-3-905 NMSA 1978 is enacted to read:

"45-3-905. [NEW MATERIAL] PENALTY CLAUSE FOR CONTEST.--A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause

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exists for instituting proceedings."

SECTION 3-119. Section 45-3-912 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-912) is amended to read:

"45-3-912. PRIVATE AGREEMENTS AMONG SUCCESSORS TO DECEDENT BINDING ON PERSONAL REPRESENTATIVE.--Subject to the rights of creditors and taxing authorities, [~~competent~~] successors or their representatives may agree among themselves to alter the interests, shares or amounts to which they are entitled under the will of the decedent or under the laws of intestacy in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to [~~his~~] the personal representative's obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration and to carry out the responsibilities of [~~his~~] the personal representative's office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing in this section relieves trustees of any duties owed to beneficiaries of trusts."

SECTION 3-120. Section 45-3-1003 NMSA 1978 (being Laws

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1975, Chapter 257, Section 3-1003, as amended) is amended to read:

"45-3-1003. CLOSING ESTATES--BY SWORN STATEMENT OF PERSONAL REPRESENTATIVE.--

A. Unless prohibited by order of the district court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court, no earlier than [~~three~~] six months after the date of original appointment of a general personal representative for the estate, a verified statement stating that the personal representative or a previous personal representative has:

(1) determined that the time limited for presentation of creditors' claims has expired;

(2) fully administered the estate of the decedent by making payment, settlement or other disposition of all claims that were presented, expenses of administration and estate, inheritance and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement shall state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees or it shall state in detail other arrangements that have been made to accommodate outstanding liabilities; and

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(3) sent a copy of the statement to all distributees of the estate and to all creditors or other claimants of whom the personal representative is aware whose claims are neither paid nor barred and has furnished a full account in writing of the personal representative's administration to the distributees whose interests are affected thereby, including guardians ad litem appointed pursuant to Section 45-1-403 NMSA 1978, conservators and guardians.

B. If no proceedings involving the personal representative are pending in the district court one year after the closing statement is filed, the appointment of the personal representative terminates."

SECTION 3-121. Section 45-3-1101 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-1101, as amended) is amended to read:

"45-3-1101. EFFECT OF APPROVAL OF AGREEMENTS INVOLVING TRUSTS, INALIENABLE INTERESTS OR INTERESTS OF THIRD PERSONS.--

A. A compromise of any controversy is binding on all the parties thereto as to <u>any lawful matter involving the estate. Matters that may be resolved by the compromise include</u>:

(1) admission to probate of any instrument offered for formal probate as the will of a decedent;

(2) the construction, validity or effect of

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any governing instrument;

(3) the rights or interests in the estate of the decedent;

(4) the rights or interests of any successor; [~~or~~] and

(5) the administration of the estate, if approved in a formal proceeding in the district court for that purpose.

B. [~~An approved~~] A court-approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities [~~who~~] that are not parties to it."

SECTION 3-122. Section 45-3-1102 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-1102, as amended) is amended to read:

"45-3-1102. PROCEDURE FOR SECURING COURT APPROVAL OF COMPROMISE.--The procedure for securing court approval of a compromise is as follows:

A. the terms of the compromise shall be set forth in an agreement in writing [~~which~~] that shall be executed by all [~~competent~~] persons [~~and parents acting for any minor child~~] or their representatives having beneficial interests or having claims [~~which~~] that will or may be affected by the compromise;

B. any interested person, or the person's

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representative, including the personal representative, if any, or a trustee, may then submit the agreement to the district court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust and other fiduciaries and representatives; and

C. after notice to all interested persons or their representatives, including the personal representative of any estate and all affected trustees of trusts, the district court, if it finds that an actual contest or controversy exists and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries under its supervision to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other [~~competent~~] persons or their representatives in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate shall then be made in accordance with the terms of the agreement."

SECTION 3-123. Section 46A-1-113 NMSA 1978 (being Laws 2011, Chapter 124, Section 95) is amended to read:

"46A-1-113. INSURABLE INTEREST OF TRUSTEE.--

A. In this section, "settlor" means a person [~~including a person for which a fiduciary or agent is acting~~] that executes a trust instrument. "Settlor" includes a person

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for which a fiduciary or agent is acting.

B. A trustee of a trust has an insurable interest in the life of an individual insured under a life insurance policy that is owned by [~~the trust or~~] the trustee of the trust acting in a fiduciary capacity or that designates the trust itself as the owner if, on the date the policy is issued:

(1) the insured is:

(a) a settlor of the trust; or

(b) an individual in whom a settlor of the trust has, or would have had if living at the time the policy was issued, an insurable interest; and

(2) the life insurance proceeds are primarily for the benefit of one or more trust beneficiaries that have:

(a) an insurable interest in the life of the insured; or

(b) a substantial interest engendered by love and affection in the continuation of the life of the insured and, if not already included under Subparagraph (a) of this paragraph, who are: 1) related within the third degree or closer, as measured by the civil law system of determining degrees of relation, either by blood or law, to the insured; or 2) stepchildren of the insured."

SECTION 3-124. REPEAL.--Sections 45-2-608 and 45-2-704 NMSA 1978 (being Laws 1993, Chapter 174, Sections 47 and 52) are repealed.

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SECTION 3-125. REPEAL.--Section 45-2-907 NMSA 1978 (being Laws 1995, Chapter 210, Section 30) is repealed.

SECTION 3-126. TEMPORARY PROVISION--INSTRUCTION TO COMPILER.--The compiler shall compile Sections 1-101 through 1-603 of this act in Chapter 46 NMSA 1978.

SECTION 3-127. EFFECTIVE DATE.--

A. The effective date of the provisions of Sections 3-101 through 3-123 and 3-125 of this act is July 1, 2016.

B. The effective date of the provisions of Sections 1-101 through 1-603, 2-101 through 2-129 and 3-124 of this act is January 1, 2017.

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