

AN ACT

RELATING TO PROBATE; ENACTING THE UNIFORM ESTATE TAX  
APPORTIONMENT ACT; AMENDING, REPEALING AND ENACTING SECTIONS  
OF THE UNIFORM PROBATE CODE.

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

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

"45-3-102. NECESSITY OF ORDER OF PROBATE FOR WILL.--  
Except as provided in Sections 45-3-1201, 45-3-1205 and  
45-3-1301 NMSA 1978, to be effective to prove the transfer of  
any property or to nominate a personal representative, a will  
must be declared to be valid by an order of informal probate  
by the probate court or an adjudication of probate by the  
district court."

Section 2. Section 45-6-101 NMSA 1978 (being Laws 1992,  
Chapter 66, Section 17) is amended to read:

"45-6-101. NONPROBATE TRANSFERS ON DEATH.--A provision  
for a nonprobate transfer on death in an insurance policy,  
contract of employment, bond, mortgage, promissory note,  
certificated or uncertificated security, account agreement,  
custodial agreement, deposit agreement, compensation plan,  
pension plan, individual retirement plan, employee benefit  
plan, trust, conveyance, deed of gift, marital property  
agreement or other written instrument of a similar nature is

nontestamentary. This section includes a written provision that:

A. money or other benefits due to, controlled by or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later;

B. money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or

C. any property controlled by or owned by the decedent before death that is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later."

Section 3. A new section of the Uniform Probate Code, Section 45-6-102 NMSA 1978, is enacted to read:

"45-6-102. LIABILITY OF NONPROBATE TRANSFEREES FOR CREDITOR CLAIMS AND STATUTORY ALLOWANCES.--

A. In this section, "nonprobate transfer" means a valid transfer effective at death, other than a transfer of a survivorship interest in a joint tenancy of real estate, by a transferor whose last domicile was in this state to the extent

that the transferor immediately before death had power, acting alone, to prevent the transfer by revocation or withdrawal and instead to use the property for the benefit of the transferor or apply it to discharge claims against the transferor's probate estate.

B. Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against the decedent's probate estate and statutory allowances to the decedent's spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.

C. Nonprobate transferees are liable for the insufficiency described in Subsection B of this section in the following order of priority:

(1) a transferee designated in the decedent's will or any other governing instrument, as provided in the instrument;

(2) the trustee of a trust serving as the principal nonprobate instrument in the decedent's estate plan as shown by its designation as devisee of the decedent's residuary estate or by other facts or circumstances, to the extent of the value of the nonprobate transfer received or

controlled; and

(3) other nonprobate transferees, in proportion to the values received.

D. Unless otherwise provided by the trust instrument, interests of beneficiaries in all trusts incurring liabilities under this section abate as necessary to satisfy the liability, as if all of the trust instruments were a single will and the interests were devised under it.

E. A provision made in one instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument. If a provision in one instrument conflicts with a provision in another, the later one prevails.

F. Upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this state, whether or not the transferee is located in this state.

G. A proceeding under this section may not be commenced unless the personal representative of the decedent's estate has received a written demand for the proceeding from the surviving spouse or a child, to the extent that statutory allowances are affected, or a creditor. If the personal representative declines or fails to commence a proceeding after demand, a person making demand may commence the proceeding in the name of the decedent's estate, at the

expense of the person making the demand and not of the estate. A personal representative who declines in good faith to commence a requested proceeding incurs no personal liability for declining.

H. A proceeding under this section must be commenced within one year after the decedent's death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within sixty days after final allowance of the claim.

I. Unless a written notice asserting that a decedent's probate estate is nonexistent or insufficient to pay allowed claims and statutory allowances has been received from the decedent's personal representative, the following rules apply:

(1) payment or delivery of assets by a financial institution, registrar or other obligor to a nonprobate transferee in accordance with the terms of the governing instrument controlling the transfer releases the obligor from all claims for amounts paid or assets delivered; and

(2) a trustee receiving or controlling a nonprobate transfer is released from liability under this section with respect to any assets distributed to the trust's beneficiaries. Each beneficiary to the extent of the

distribution received becomes liable for the amount of the trustee's liability attributable to assets received by the beneficiary."

Section 4. Section 45-6-309 NMSA 1978 (being Laws 1992, Chapter 66, Section 45) is amended to read:

"45-6-309. NONTESTAMENTARY TRANSFER ON DEATH.--A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and Sections 45-6-301 through 45-6-311 NMSA 1978 and is not testamentary."

Section 5. A new section of the Uniform Probate Code, Part 9A, is enacted to read:

"SHORT TITLE.--Sections 5 through 17 of this act may be cited as the "Uniform Estate Tax Apportionment Act"."

Section 6. A new section of the Uniform Probate Code, Part 9A, is enacted to read:

"DEFINITIONS.--As used in the Uniform Estate Tax Apportionment Act:

A. "apportionable estate" means the value of the gross estate as finally determined for purposes of the estate tax to be apportioned reduced by:

(1) any claim or expense allowable as a deduction for purposes of the tax;

(2) the value of any interest in property

that, for purposes of the tax, qualifies for a marital or charitable deduction or otherwise is deductible or is exempt; and

(3) any amount added to the decedent's gross estate because of a gift tax on transfers made before death;

B. "estate tax" means a federal, state or foreign tax imposed because of the death of an individual and interest and penalties associated with the tax. The term does not include an inheritance tax, income tax or generation-skipping transfer tax other than a generation-skipping transfer tax incurred on a direct skip taking effect at death;

C. "gross estate" means, with respect to an estate tax, all interests in property subject to the tax;

D. "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, governmental subdivision, agency or instrumentality, or any other legal or commercial entity;

E. "ratable" means apportioned or allocated pro rata according to the relative values of interests to which the term is to be applied. "Ratably" has a corresponding meaning;

F. "time-limited interest" means an interest in property which terminates on a lapse of time or on the occurrence or nonoccurrence of an event or which is subject to

the exercise of discretion that could transfer a beneficial interest to another person. The term does not include a cotenancy unless the cotenancy itself is a time-limited interest; and

G. "value" means, with respect to an interest in property, fair market value as finally determined for purposes of the estate tax that is to be apportioned, reduced by any outstanding debt secured by the interest without reduction for taxes paid or required to be paid or for any special valuation adjustment."

Section 7. A new section of the Uniform Probate Code, Part 9A, is enacted to read:

"APPORTIONMENT BY WILL OR OTHER DISPOSITIVE INSTRUMENT.--

A. Except as otherwise provided in Subsection C of this section, the following rules apply:

(1) to the extent that a provision of a decedent's will expressly and unambiguously directs the apportionment of an estate tax, the tax must be apportioned accordingly;

(2) any portion of an estate tax not apportioned pursuant to Paragraph (1) of this subsection must be apportioned in accordance with any provision of a revocable trust of which the decedent was the settlor that expressly and unambiguously directs the apportionment of an estate tax. If



conflicting apportionment provisions appear in two or more revocable trust instruments, the provision in the most recently dated instrument prevails. For purposes of this paragraph:

(a) a trust is revocable if it was revocable immediately after the trust instrument was executed, even if the trust subsequently becomes irrevocable; and

(b) the date of an amendment to a revocable trust instrument is the date of the amended instrument only if the amendment contains an apportionment provision; and

(3) if any portion of an estate tax is not apportioned pursuant to Paragraph (1) or (2) of this subsection, and a provision in any other dispositive instrument expressly and unambiguously directs that any interest in the property disposed of by the instrument is or is not to be applied to the payment of the estate tax attributable to the interest disposed of by the instrument, the provision controls the apportionment of the tax to that interest.

B. Subject to Subsection C of this section, and unless the decedent expressly and unambiguously directs the contrary, the following rules apply:

(1) if an apportionment provision directs that a person receiving an interest in property under an

instrument is to be exonerated from the responsibility to pay an estate tax that would otherwise be apportioned to the interest:

(a) the tax attributable to the exonerated interest must be apportioned among the other persons receiving interests passing under the instrument; or

(b) if the values of the other interests are less than the tax attributable to the exonerated interest, the deficiency must be apportioned ratably among the other persons receiving interests in the apportionable estate that are not exonerated from apportionment of the tax;

(2) if an apportionment provision directs that an estate tax is to be apportioned to an interest in property a portion of which qualifies for a marital or charitable deduction, the estate tax must first be apportioned ratably among the holders of the portion that does not qualify for a marital or charitable deduction and then apportioned ratably among the holders of the deductible portion to the extent that the value of the nondeductible portion is insufficient;

(3) except as otherwise provided in Paragraph (4) of this subsection, if an apportionment provision directs that an estate tax be apportioned to property in which one or more time-limited interests exist, other than interests in specified property under Section 11 of

this act, the tax must be apportioned to the principal of that property, regardless of the deductibility of some of the interests in that property; and

(4) if an apportionment provision directs that an estate tax is to be apportioned to the holders of interests in property in which one or more time-limited interests exist and a charity has an interest that otherwise qualifies for an estate tax charitable deduction, the tax must first be apportioned, to the extent feasible, to interests in property that have not been distributed to the persons entitled to receive the interests.

C. A provision that apportions an estate tax is ineffective to the extent that it increases the tax apportioned to a person having an interest in the gross estate over which the decedent had no power to transfer immediately before the decedent executed the instrument in which the apportionment direction was made. For purposes of this subsection, a testamentary power of appointment is a power to transfer the property that is subject to the power."

Section 8. A new section of the Uniform Probate Code, Part 9A, is enacted to read:

"STATUTORY APPORTIONMENT OF ESTATE TAXES.--To the extent that apportionment of an estate tax is not controlled by an instrument described in Section 7 of this act and except as otherwise provided in Sections 10 and 11 of this act, the

following rules apply:

A. subject to Subsections B, C and D of this section, the estate tax is apportioned ratably to each person that has an interest in the apportionable estate;

B. a generation-skipping transfer tax incurred on a direct skip taking effect at death is charged to the person to which the interest in property is transferred;

C. if property is included in the decedent's gross estate because of Section 2044 of the federal Internal Revenue Code of 1986 or any similar estate tax provision, the difference between the total estate tax for which the decedent's estate is liable and the amount of estate tax for which the decedent's estate would have been liable if the property had not been included in the decedent's gross estate is apportioned ratably among the holders of interests in the property. The balance of the tax, if any, is apportioned ratably to each other person having an interest in the apportionable estate; and

D. except as otherwise provided in Paragraph (4) of Subsection B of Section 7 of this act and except as to property to which Section 11 of this act applies, an estate tax apportioned to persons holding interests in property subject to a time-limited interest must be apportioned, without further apportionment, to the principal of that property."

Section 9. A new section of the Uniform Probate Code, Part 9A, is enacted to read:

"CREDITS AND DEFERRALS.--Except as otherwise provided in Sections 10 and 11 of this act, the following rules apply to credits and deferrals of estate taxes:

A. a credit resulting from the payment of gift taxes or from estate taxes paid on property previously taxed inures ratably to the benefit of all persons to which the estate tax is apportioned;

B. a credit for state or foreign estate taxes inures ratably to the benefit of all persons to which the estate tax is apportioned, except that the amount of a credit for a state or foreign tax paid by a beneficiary of the property on which the state or foreign tax was imposed, directly or by a charge against the property, inures to the benefit of the beneficiary; and

C. if payment of a portion of an estate tax is deferred because of the inclusion in the gross estate of a particular interest in property, the benefit of the deferral inures ratably to the persons to which the estate tax attributable to the interest is apportioned. The burden of any interest charges incurred on a deferral of taxes and the benefit of any tax deduction associated with the accrual or payment of the interest charge is allocated ratably among the persons receiving an interest in the property."

Section 10. A new section of the Uniform Probate Code, Part 9A, is enacted to read:

"INSULATED PROPERTY--ADVANCEMENT OF TAX.--

A. In this section:

(1) "advanced fraction" means a fraction that has as its numerator the amount of the advanced tax and as its denominator the value of the interests in insulated property to which that tax is attributable;

(2) "advanced tax" means the aggregate amount of estate tax attributable to interests in insulated property that is required to be advanced by uninsulated holders under Subsection C of this section;

(3) "insulated property" means property subject to a time-limited interest that is included in the apportionable estate but is unavailable for payment of an estate tax because of impossibility or impracticability;

(4) "uninsulated holder" means a person who has an interest in uninsulated property; and

(5) "uninsulated property" means property included in the apportionable estate other than insulated property.

B. If an estate tax is to be advanced pursuant to Subsection C of this section by persons holding interests in uninsulated property subject to a time-limited interest other than property to which Section 11 of this act applies, the tax

must be advanced, without further apportionment, from the principal of the uninsulated property.

C. Subject to Subsections B and D of Section 13 of this act, an estate tax attributable to interests in insulated property must be advanced ratably by uninsulated holders. If the value of an interest in uninsulated property is less than the amount of estate taxes otherwise required to be advanced by the holder of that interest, the deficiency must be advanced ratably by the persons holding interests in properties that are excluded from the apportionable estate under Paragraph (2) of Subsection A of Section 6 of this act as if those interests were in uninsulated property.

D. A court having jurisdiction to determine the apportionment of an estate tax may require a beneficiary of an interest in insulated property to pay all or part of the estate tax otherwise apportioned to the interest if the court finds that it would be substantially more equitable for that beneficiary to bear the tax liability personally than for that part of the tax to be advanced by uninsulated holders.

E. When a distribution of insulated property is made, each uninsulated holder may recover from the distributee a ratable portion of the advanced fraction of the property distributed. To the extent that undistributed insulated property ceases to be insulated, each uninsulated holder may recover from the property a ratable portion of the advanced

fraction of the total undistributed property.

F. Upon a distribution of insulated property for which, pursuant to Subsection D of this section, the distributee becomes obligated to make a payment to uninsured holders, a court may award an uninsured holder a recordable lien on the distributee's property to secure the distributee's obligation to that uninsured holder."

Section 11. A new section of the Uniform Probate Code, Part 9A, is enacted to read:

"APPORTIONMENT AND RECAPTURE OF SPECIAL ELECTIVE BENEFITS.--

A. In this section:

(1) "special elective benefit" means a reduction in an estate tax obtained by an election for:

(a) a reduced valuation of specified property that is included in the gross estate;

(b) a deduction from the gross estate, other than a marital or charitable deduction, allowed for specified property; or

(c) an exclusion from the gross estate of specified property; and

(2) "specified property" means property for which an election has been made for a special elective benefit.

B. If an election is made for one or more special



elective benefits, an initial apportionment of a hypothetical estate tax must be computed as if no election for any of those benefits had been made. The aggregate reduction in estate tax resulting from all elections made must be allocated among holders of interests in the specified property in the proportion that the amount of deduction, reduced valuation or exclusion attributable to each holder's interest bears to the aggregate amount of deductions, reduced valuations and exclusions obtained by the decedent's estate from the elections. If the estate tax initially apportioned to the holder of an interest in specified property is reduced to zero, any excess amount of reduction reduces ratably the estate tax apportioned to other persons that receive interests in the apportionable estate.

C. An additional estate tax imposed to recapture all or part of a special elective benefit must be charged to the persons that are liable for the additional tax under the law providing for the recapture."

Section 12. A new section of the Uniform Probate Code, Part 9A, is enacted to read:

"SECURING PAYMENT OF ESTATE TAX FROM PROPERTY IN POSSESSION OF FIDUCIARY.--

A. A fiduciary may defer a distribution of property until the fiduciary is satisfied that adequate provision for payment of the estate tax has been made.

B. A fiduciary may withhold from a distributee an amount equal to the amount of estate tax apportioned to an interest of the distributee.

C. As a condition to a distribution, a fiduciary may require the distributee to provide a bond or other security for the portion of the estate tax apportioned to the distributee."

Section 13. A new section of the Uniform Probate Code, Part 9A, is enacted to read:

"COLLECTION OF ESTATE TAX BY FIDUCIARY.--

A. A fiduciary responsible for payment of an estate tax may collect from any person the tax apportioned to and the tax required to be advanced by the person.

B. Except as otherwise provided in Section 10 of this act, any estate tax due from a person that cannot be collected from the person may be collected by the fiduciary from other persons in the following order of priority:

(1) any person having an interest in the apportionable estate that is not exonerated from the tax;

(2) any other person having an interest in the apportionable estate; and

(3) any person having an interest in the gross estate.

C. A domiciliary fiduciary may recover from an ancillary personal representative the estate tax apportioned

to the property controlled by the ancillary personal representative.

D. The total tax collected from a person pursuant to the Uniform Estate Tax Apportionment Act may not exceed the value of the person's interest."

Section 14. A new section of the Uniform Probate Code, Part 9A, is enacted to read:

"RIGHT OF REIMBURSEMENT.--

A. A person required under Section 13 of this act to pay an estate tax greater than the amount due from the person under Section 7 or 8 of this act has a right to reimbursement from another person to the extent that the other person has not paid the tax required by Section 7 or 8 of this act and a right to reimbursement ratably from other persons to the extent that each has not contributed a portion of the amount collected under Subsection B of Section 13 of this act.

B. A fiduciary may enforce the right of reimbursement under Subsection A of this section on behalf of the person that is entitled to the reimbursement and shall take reasonable steps to do so if requested by the person."

Section 15. A new section of the Uniform Probate Code, Part 9A, is enacted to read:

"ACTION TO DETERMINE OR ENFORCE ACT.--A fiduciary, transferee or beneficiary of the gross estate may maintain an action for declaratory judgment to have a court determine and

enforce the Uniform Estate Tax Apportionment Act."

Section 16. A new section of the Uniform Probate Code, Part 9A, is enacted to read:

"UNIFORMITY OF APPLICATION AND CONSTRUCTION.--In applying and construing the Uniform Estate Tax Apportionment Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."

Section 17. A new section of the Uniform Probate Code is enacted to read:

"SEVERABILITY.--If any part or application of the Uniform Estate Tax Apportionment Act is held invalid, the remainder or its application to other situations or persons shall not be affected."

Section 18. REPEAL.--Sections 45-3-916 and 45-6-215 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-916 and Laws 1992, Chapter 66, Section 28, as amended) are repealed.

Section 19. APPLICABILITY.--

A. Sections 7 through 11 of this act do not apply to the estate of a decedent who dies on or within three years after the effective date of the Uniform Estate Tax Apportionment Act, nor to the estate of a decedent who dies more than three years after the effective date of the Uniform Estate Tax Apportionment Act if the decedent continuously lacked testamentary capacity from the expiration of the three-

year period until the date of death.

B. For the estate of a decedent who dies on or after the effective date of the Uniform Estate Tax Apportionment Act to which Sections 7 through 11 of this act do not apply, estate taxes must be apportioned pursuant to the law in effect immediately before the effective date of the Uniform Estate Tax Apportionment Act.

Section 20. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2005. \_\_\_\_\_