

**A STROLL THROUGH
THE UNIFORM PROBATE CODE**

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State Bar of New Mexico, Real Property, Trust and Estate Section Board of Directors. Budget Officer – 2011 -- 2012, Member - 2011 to present.

Southern New Mexico Estate Planning Council. President – 2011 to 2012. 1st Vice-President – 2010 – 2011. Member 2006 to present.

Rio Grande Professional Advisor of the Year. Community Foundation of Southern New Mexico. April 2009.

20th Annual Advanced Drafting: Estate Planning and Probate Course Planning Committee. State Bar of Texas. Member - 2009.

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I. INTRODUCTION

As a member of the Planning Committee for the Southern New Mexico Estate Planning Institute, the author has found himself in the enviable position of being able to suggest topics for the Institute. Perhaps because of his mind's inelasticity, the author has found the New Mexico Uniform Probate Code (the "UPC") to be somewhat cryptic and confusing. Presuming, falsely, that other practitioners would have the same reaction to the UPC, the author enthusiastically suggested an introductory overview of the UPC as one of the topics for the 2012 Institute. The Planning Committee's reaction to the suggestion took the author by surprise. The Committee could not understand how an attorney who put himself out as practicing in the area would find the UPC to be anything other than a model of clarity and enlightenment. With a bit of skepticism, the committee finally allowed the topic.

Regardless, the author still finds the UPC to be cryptic, even after writing this paper, and imagines that there are others who feel the same way. The UPC leaves so much unsaid and requires a great deal of reading between the lines.

The author's goal is to provide a quick resource to attorneys who regularly practice in the area and, perhaps, a significant resource for those who do not. Unfortunately, the UPC is a very broad statute and no single paper can really do the entire statute justice. The author therefore has chosen to focus this paper on the administration of decedents' estates, from start to finish. The paper does not address (i) estate planning, including the interpretation of poorly drafted wills and other governing documents; (ii) the protection of incapacitated persons under guardianships and conservatorships; and (iii) powers of attorney, all of which are major components of the UPC.

II. SUMMARY OF THE UPC

A. History of the UPC

New Mexico adopted the Uniform Probate Code (the "UPC") in 1975, to be effective on July 1, 1976. The Legislature has amended the UPC several times, most recently (and quite extensively) in 2011, effective January 1, 2012. Most of the 2011 amendments seem to be more stylistic than substantive. The parent-child relationship for purposes of descent received the most substantive changes.

The New Mexico Legislature did not dream up the UPC. Rather, it is the product of the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws). The Uniform Law Commission ("ULC") drafts model

codes in a very broad range of areas with the intention that most of the states will adopt the model codes so that the law will be uniform across the country. The ULC adopted the current version of the model UPC in 2004 with amendments in 2006 and 2008. New Mexico has been amending its version of the UPC and is current with the model UPC.

According to the ULC, some form of the model UPC has been adopted in 18 states and territories. Those jurisdictions are, in alphabetical order: Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, Utah and the Virgin Islands. Also according to the ULC, 4 states have adopted some portion of the 2008 amendments: Colorado, New Mexico, North Dakota and Utah. Of the jurisdictions that have adopted the UPC, only three are community property states: Arizona, Idaho and New Mexico. As can be seen, New Mexico's version of the UPC probably is one of the most current state versions of the Uniform Code. Still, the New Mexico Legislature has tweaked its version ever so slightly from the original.

The full text of the model UPC (as are other uniform codes) is available at the ULC's website, www.nccusl.org. The full text includes the ULC's official comments to each section of the UPC. Practitioners should find the comments to be very helpful in understanding the UPC.

B. Basic Structure

The UPC addresses more than the probate of a will, or even the administration of an estate. Its scope includes:

- Rules for determining intestate succession (Article 2, part 1);
- Exempt property in the context of an estate (Article 2, part 4);
- The formality required for a will to be valid (Article 2, part 5);
- Rules of construction, both for wills and governing instruments, including trusts (Article 2, parts 6 and 7);
- The rule against perpetuities (Article 2, part 9);
- Disclaimers (Article 2, part 11);
- Probates of wills and intestacy proceedings, combined with the appointment of personal representatives (Article 3, parts 1 through 6);
- Administration of the estate, including creditor claims (Article 3, parts 7 through 11);
- Small estates (Article 3, parts 12 and 13);
- Ancillary administrations (Article 4);

- Protection of minors and incapacitated persons (Article 5);
- Powers of attorney (Article 5B);
- Non-probate transfers through transfers on death or rights of survivorship (Article 6);
- Custodial trusts (a simplified statutory trust) (Article 7, part 5); and
- Standards of care and duties with respect to investments by a fiduciary, including trustees (Article 7, part 7).

Despite its breadth, the UPC does not address every issue. An attorney advising clients in the context of a decedent's estate also will need to refer to several other New Mexico statutes. Those statutes include, but are not limited to, the following:

- The NM inheritance tax (Chap. 7, art. 7)¹;
- The disposition of dead bodies and cremations (Chap. 24, arts. 12, 12A and 13);
- The law governing probate courts (Chap. 34, art. 7);
- Statutes of limitations (Chap. 37, art. 1);
- Abatement and revival of claims (Chap. 37, art. 2);
- Valid marriages (Chap. 40, art. 1);
- Marital property (Chap. 40, arts. 2, 3 and 3A);
- Wrongful death claims (Chap. 41, art. 2);
- Exemptions from creditor claims (Chap. 42, art. 10);
- Declaratory judgments (Chap. 44, art. 6);
- The Uniform Principal and Income Act (Chap. 46, art. 3A);
- Transfers to minors (Chap. 46, art. 7);
- The Uniform Trust Code (Chap. 46A);
- Real property conveyances (Chap. 47, art. 1); and
- Fraudulent transfers (Chap. 56, art. 10).

C. The UPC's Philosophy

A purpose of the UPC is "to promote a speedy and efficient system for the settlement of [a] decedent's estate". NMSA 45-1-102(B)(3). The comments to the model UPC state its philosophy behind probate and estate administration best and point out that the decedent's family should be allowed to settle the estate

¹ New Mexico's inheritance tax takes advantage of and only imposes a tax to the extent a decedent's estate has available a credit against the federal estate tax. Under current federal law, the relevant credit is non-existent and therefore, there is no NM inheritance tax. On January 1, 2013, however, and unless Congress changes the law, the relevant credit comes back into existence, thereby resurrecting the NM inheritance tax.

unless there is a specific need to involve state power. Only then should the state get involved, but only to resolve the limited issues brought to its attention. The comments state:

The provisions of [the UPC] describe the Flexible System of Administration of Decedents' Estates. Designed to be applicable to both intestate and testate estates and to provide persons interested in decedents' estates with as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances, this system is the heart of the [UPC].

Overall, the system accepts the premise that the Court's role in regard to probate and administration, and its relationship to [PRs] who derive their power from public appointment, is wholly passive until some interested person invokes its power to secure resolution of a matter. The state, through the Court, should provide remedies which are suitable and efficient to protect any and all rights regarding succession, but should refrain from intruding into family affairs unless relief is requested, and limit its relief to that sought.

The model UPC comments also provide what the ULC apparently considers to be the "essential characteristics" of the UPC, as follows:

(1) Post mortem probate of a will must occur to make a will effective and appointment of a personal representative by a public official after the decedent's death is required in order to create the duties and powers attending the office of [PR]. Neither are compelled, however, but are left to be obtained by persons having an interest in the consequence of probate or appointment. Estates descend at death to successors identified by any probated will, or to heirs if no will is probated, subject to rights which may be implemented through administration.

(2) Two methods of securing probate of wills which include a non adjudicative determination (informal probate) on the one hand, and a judicial determination after notice to all interested persons (formal probate) on the other, are provided.

(3) Two methods of securing appointment of a [PR] which include appointment without notice and without final adjudication of matters relevant to priority

for appointment (informal appointment), on the one hand, and appointment by judicial order after notice to interested persons (formal appointment) on the other, are provided.

(4) A five day waiting period from death preventing informal probate or informal appointment of any but a special administrator is required.

(5) Probate of a will by informal or formal proceedings or an adjudication of intestacy may occur without any attendant requirement of appointment of a [PR].

(6) One judicial, in rem, proceeding encompassing formal probate of any wills (or a determination after notice that the decedent left no will), appointment of a [PR] and complete settlement of an estate under continuing supervision of the Court (supervised administration) is provided for testators and persons interested in a decedent's estate, whether testate or intestate, who desire to use it.

(7) Unless supervised administration is sought and ordered, persons interested in estates (including [PRs], whether appointed informally or after notice) may use an "in and out" relationship to the Court so that any question or assumption relating to the estate, including the status of an estate as testate or intestate, matters relating to one or more claims, disputed titles, accounts of [PRs], and distribution, may be resolved or established by adjudication after notice without necessarily subjecting the estate to the necessity of judicial orders in regard to other or further questions or assumptions.

(8) The status of a decedent in regard to whether he left a valid will or died intestate must be resolved by adjudication after notice in proceedings commenced within three years after his death. If not so resolved, any will probated informally becomes final, and if there is no such probate, the status of the decedent as intestate is finally determined, by a statute of limitations which bars probate and appointment unless requested within three years after death.

(9) [PRs] appointed informally or after notice, and whether supervised or not, have statutory powers enabling them to collect, protect, sell, distribute and otherwise handle all steps in administration without further order of the Court, except that supervised [PRs] may be subjected to special restrictions

on power as endorsed on their letters.

(10) Purchasers from [PRs] and from distributees of [PRs] are protected so that adjudications regarding the testacy status of a decedent or any other question going to the propriety of a sale are not required in order to protect purchasers.

(11) Provisions protecting a [PR] who distributes without adjudication are included to make nonadjudicated settlements feasible.

(12) Statutes of limitation bar creditors of the decedent who fail to present claims within four months² after legal advertising of the administration and unsecured claims not previously barred by non claim statutes are barred after three years³ from the decedent's death.

III. INITIAL CONSIDERATIONS

A. Identification of the Client

In the context of decedents' estates (hereafter simply "estates"), attorneys sometimes make the mistake of taking the position that they represent the estate rather than the Personal Representative (hereafter "PR"). The problem with taking such a position is that the estate is not a legal entity. In fact, the only way to assert a claim against an estate is to present it to the PR. *See* NMSA 45-3-104 (the appointment of a PR is necessary to enforce any claims against an estate); 45-3-804 (specifying the manner in which one must present claims). The proper client for the attorney, therefore, is the person who will be applying to be appointed as PR in that person's capacity as PR.

Many times, the PR also is one of the beneficiaries of the estate. In such a situation, the attorney needs to be careful to avoid conflicts of interest. The PR has the same fiduciary duties to the estate's beneficiaries that a trustee has towards a trust's beneficiaries. NMSA 45-3-703(A). Consequently, the attorney representing the PR should be very careful when the PR, in his or her individual capacity, is taking an adverse position against one of the other estate beneficiaries, especially if the other beneficiaries are not represented by counsel.

One must also determine whether the person seeking to be appointed as PR has priority to be appointed. Generally speaking, under NMSA 45-3-203(A), the following persons have priority to serve:

² The time period is two months in New Mexico. *See* NMSA 45-3-803(A)(2).

³ The limitations period is one year from the date of decedent's death in New Mexico. *See* NMSA 45-3-803(A)(1).

- The person with priority as determined by a probated will;
- The decedent’s surviving spouse, who also is a devisee;
- Other devisees;
- The surviving spouse;
- Other heirs of the decedent; and
- Any other qualified person.

As can be seen, it may be that several people have the same priority to serve as PR. If the decedent died intestate, all of that person’s heirs (unless there is a surviving spouse) have equal priority. Unless all the heirs want to serve, it may be that the attorney will need to obtain consents from the other heirs for the proposed applicant to serve as PR. *Cf.* NMSA 45-3-203(C) (providing that a person with priority may nominate another person to serve).

The person applying to be PR also must not be disqualified to serve. A person is disqualified if he or she is a minor, is found to be “unsuitable” in a formal proceeding; or is a creditor (unless the decedent has already been dead for at least 45 days). NMSA 45-3-203(F).

Neither the statute nor the comments to the model UPC give any guidance as to what factors a court is to consider in determining whether an applicant is unsuitable. Section 45-3-611(B) provides the grounds for removal of a PR for cause. But because most of the grounds relate to the PR’s actions or inactions as PR, the section does not provide any real guidance.

The *Oldham* case suggests that a person’s conflicts of interest would make that person unsuitable to serve. *See Oldham v. Oldham*, 2011 NMSC 7, 149 N.M. 215, 247 P.3d 736. But that is probably too broad a reading of the case. Any beneficiary of less than the whole estate will have a conflict of interest.

Possible grounds for finding an applicant to be unsuitable include conviction of a felony and, for legal entities, lack of authorization to act as a fiduciary in NM. *Cf.* TEX. PROB. CODE 78 (which lists these reasons as rendering a person unsuitable to serve as executor in TX). Under NM law, any persons holding themselves out as being a professional fiduciary (if not a bank, licensed attorney or certified public accountant) also must hold a certificate issued under the Trust Company Act (NMSA Chap. 58, art. 9). NMSA 58-9-4. Such a person’s failure to qualify for and to obtain the certificate probably renders the person unsuitable to serve as PR. A person’s bankruptcy also might cause the person to be unsuitable. But what about old age or infirmity? What about a surviving spouse in a second marriage situation with animosity between the families? What about a person’s lack of formal education? Or general lack of economic success? The drafters of the model UPC

probably left the term “unsuitable” undefined on purpose. But the lack of guidance likely will be a source of much litigation in the future.

B. Necessity of Administration

One of the first tasks in any estate administration engagement is to determine whether a formal⁴ administration of the estate is necessary. Not all estates need to be administered in a formal manner through the courts. Modern law makes it very easy to arrange one’s affairs in such a way as to avoid probate. Typically speaking, the only assets for which one might need letters testamentary (in the context of a will) or letters of administration (in the context of an intestacy) is any type of real property (including mineral interests and water rights) and personal property in the custody or control of a third party, especially banks and other financial institutions. One does not require official sanction to transfer ownership of a couch or the silver ware (assuming everyone that might be interested is cooperative). Even then, many of those assets that might need official sanction to transfer can be held in a manner that allows title to be transferred by operation of law, especially between husband and wife. Most married couples, for example, hold real estate acquired during marriage as joint tenants. Banks and brokerage companies also like transfer on death or pay on death designations and joint tenancies with rights of survivorship. Another common method of avoiding administration is through the use of inter vivos or living trusts. Finally, small estates (those probate estates that are worth \$50,000 or less) may be collected by small estate affidavits. *See* NMSA 45-3-1201; also *see* NMSA 58-1-8 (providing that a financial institution may release accounts up to \$2,000 to the surviving spouse or next of kin under certain circumstances).

C. Locating the Will

To seek an administration in intestacy, either informal or formal, the applicant must state under oath that he or she exercised reasonable diligence to locate a will, but was unsuccessful. NMSA 45-3-301(D)(1) (informal proceeding), 45-3-402(C) (formal proceeding). Certainly, the applicant should carefully search the decedent’s papers for any will. The applicant also should check with third parties, such as CPAs and attorneys, who might have the decedent’s will.⁵ Third party custodians of a person’s will have a

⁴ The word “formal” here refers only to the process of seeking letters testamentary or letters of administration, and not to informal or formal proceedings under the UPC.

⁵ Many attorneys regularly retain the original wills they draft for clients. The author’s firm generally refuses to retain a client’s original documents of any type, and especially a

duty to deliver the will to “a person able to secure its probate” or to an appropriate court upon learning of the testator’s death. *Id.* 45-2-516(A). The applicant also should check the decedent’s safety deposit box, if any. The bank is required to provide access to the box to a person named in a court order, the lessor’s surviving spouse, parent, adult descendant or the person named as PR in a copy of a will, for the sole purpose of searching for and retrieving a will. *Id.* 58-1-14.

D. Proper Venue

The relevant application or petition initiating the administration of the estate should be filed in either the county where the decedent had his domicile at the time of death or, if the decedent’s domicile was outside of NM, any county where the decedent owned property at the time of death. NMSA 45-3-201(A). The word “domicile” as used in 45-3-201(A) is not defined in the UPC. Generally speaking, a person’s domicile is where the person has moved with the intent to live indefinitely. *See Id.* 40-4-5 (defining domicile for purposes of giving a NM court jurisdiction to consider a divorce action). Conceivably, one may move into a nursing home, for example, with the intent to stay only until the person recovers enough to return home. Or, a rancher might move to the city for several years for a decent paying job always with the intention of moving back to the ranch some day. In both instances, the decedent might not have been actually living in his or her domicile at the time of death.

E. Informal or Formal Proceeding

New Mexico law allows estates to be administered through either informal or formal proceedings. An informal proceeding is an administrative finding that the submitted application is complete as required by law. *See* NMSA 45-3-303(A) (stating the findings required for the informal probate of a will); 45-3-308(A) (stating the findings required for the informal appointment of a PR). No hearing is required to obtain an informal decision and an informal order may be obtained without prior notice to other interested parties.⁶ Formal proceedings, in contrast, require at least 14 days’ notice to several persons, including the decedent’s heirs and devisees. Nevertheless, if no formal proceeding is brought, the informal finding carries with it the force of law. *See* NMSA 45-3-302 (an informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding). Informal proceedings are

therefore a fairly efficient way of proceeding assuming that the proceeding is available and one does not anticipate issues that require court intervention to arise in the future.

Informal proceedings are not available in all circumstances, even if all interested persons (typically, the surviving family members) agree. An informal proceeding is available only as follows:

- To probate an original, apparently unrevoked will within 3 years of the decedent’s death. *See* NMSA 45-3-108(A)(4), (5) (prohibiting informal probates of wills after the time period); 45-3-301(B)(1) (requiring the original will to be submitted with the application). Note that one is not required to file a contemporaneous application for appointment of a PR.
- To appoint a person with priority to serve as PR, but only under a previously probated will or a will being probated contemporaneously with the application. *See* NMSA 45-3-308(A)(7) (requiring the applicant to have priority for appointment); 45-3-308(A)(5) and 45-3-311 (requiring that the decedent’s will to have been probated).
- To appoint a PR in intestacy. *See* NMSA 45-3-301(D) (allowing for a PR to seek appointment in intestacy). This proceeding does not, however, allow for an informal determination of heirs.
- To appoint a special administrator to protect estate property before the appointment of a PR. NMSA 45-3-614(A). Note that the special administrator’s powers are limited to those that are necessary to protect the property when appointed informally. *Id.* 45-3-616. In contrast, a formally appointed special administrator’s powers can be equal to that of a general PR. *Id.* 45-3-617.

Informal proceedings are not available in several common situations. Each of the following examples requires a formal proceeding.

- To determine heirs in an intestacy.
- To probate a copy of a lost will.
- To contest a will.
- To appoint a PR to the exclusion of another person with equal priority.
- To appoint a PR without priority.
- To contest the appointment of another PR, or to seek removal of the PR.

If an informal proceeding is available and one does not anticipate challenges, there is no legal basis for choosing a formal proceeding over an informal proceeding. On the other hand, if one anticipates

will, because of the attendant liabilities associated with losing original documents.

⁶ The informally appointed PR nevertheless has the duty to provide notice within 10 days of his or her appointment to the estate’s beneficiaries pursuant to NMSA 45-3-705(A).

challenges to the probate or to the appointment of the PR, litigation strategy may suggest that one bypasses the informal proceeding in favor of the formal proceeding at the matter's inception.⁷

One may bring a formal proceeding regardless of whether an informal proceeding has been initiated and regardless of the status of the informal proceeding. NMSA 45-3-401(B) (formal probate of a will), 45-3-414(B). The formal proceeding automatically stops the informal proceeding, if it has not concluded, and automatically requires an informally appointed PR to refrain from exercising any power except as necessary to preserve the estate. *Id.* 45-3-401(C), (D).

F. Choice of Court.

All formal proceedings, that is, any proceeding which seeks a court determination other than the informal probate of a will or informal appointment of a PR or special administrator, must be filed in the district court. NMSA 45-1-302(A)(1). For informal proceedings, however, one has a choice to file in district court or probate court. *Id.* 45-1-302(C), 45-1-302.1. The author has found that the probate judges are a very helpful group of governmental officials, especially for persons who seek to go through the probate process without an attorney. On the other hand, the author typically files all probate proceedings, informal and formal, in district court because just about any estate might require a ruling by the court that is outside the probate court's jurisdiction. Two arguments against filing in district court are that the probate court judges typically are very quick about their business and the filing fees in probate court are a bit cheaper: \$30.00 in probate court, \$132.00 for district court. Unfortunately, if one starts out in probate court and then needs a district court's blessing, both filing fees will be paid.

G. Bonds

Typically, the person seeking to be appointed as PR will not seek to have a bond imposed. Nevertheless, the attorney must determine if one might be required.

In the context of an informal proceeding, and pursuant to NMSA 45-3-603(A), no bond is required unless:

- The person is being appointed as a special administrator;
- The will specifically requires a bond; or
- An interested person has demanded a bond under NMSA 45-3-605.

In the context of a formal proceeding, the court may, *sua sponte*, order a bond, unless the will specifically relieves the PR of bond. NMSA 45-3-603(B). An interested person also may request a bond under NMSA 45-3-605, but the court has discretion whether to order the bond. Finally, a district court can relieve the PR of a bond requirement or lower the required amount, even if the bond is required by the will. *Id.* 45-3-603(B) (court may dispense with bond requirement if the court finds "it is not necessary"); 45-3-604(C) (court may eliminate or reduce the bond amount upon petition by an interested person).

Sections 45-3-604 through 45-3-606 provide the details of what might be required in connection with the bond.

H. Unsupervised or Supervised Administration

Most estate administrations are unsupervised; and the PR has the authority to act (within the scope of authority as provided by the UPC and the will, if any) without being forced to seek permission from the court. NMSA 45-3-704. The court may, however, order a supervised administration, which may significantly restrict the PR's authority to act without a court order. *Id.* 45-3-501.

The default administration is unsupervised. *See* NMSA 45-3-502(B) (stating circumstances under which a supervised administration may be ordered). In all cases, the court has the discretion whether to order a supervised administration, regardless of what the decedent's will might direct. *Id.* Note that only a district court has the authority to order a supervised administration in a formal proceeding. *Id.* 45-3-502(A). The court may order a supervised administration if:

- The decedent's will directs a supervised administration, unless the court finds that the circumstances calling for a supervised administration have changed since the will was executed and "there is no necessity for supervised administration". *Id.* 45-3-502(B)(1).
- The decedent's will directs an unsupervised administration, but only if the court finds a supervised administration is "necessary for

⁷ Formal decisions (outside the context of supervised administrations) are considered to be separate proceedings and an order disposing of all issues raised in a petition is a final and appealable order, regardless of whether the administration is ongoing. *In re Duran*, 2007 NMCA 68, 141 N.M. 793, 796-97, 161 P.3d 290. Hearings on formal proceedings may be had on 14 days' notice. NMSA 45-1-401(A). Contests to informally probated wills, however, may be filed within one year of the informal probate. *Id.* 45-3-108(A)(3). As can be seen, a sleepy contestant might be thwarted through the use of a formal proceeding.

protection of persons interested in the estate”. *Id.* 45-3-502(B)(2).

- The court finds that supervised administration “is necessary under the circumstances” in all other cases. *Id.* 45-3-502(B)(3). Those other cases are when the decedent’s will is silent as to whether the administration is to be supervised and intestate estates.

Interestingly, the UPC does not prohibit one from seeking an informal appointment as PR under a will that directs a supervised administration. Rather, the UPC places the burden of seeking an order of supervised administration upon the person who really wants the supervised administration. *See* NMSA 45-3-502(A). Nevertheless, if one chooses to seek an informal appointment in the context of such a will, the applicant should bring to the court’s attention that the will directs a supervised administration. Taking this approach could help avoid unnecessary attorneys’ fees and delays if all the devisees under the will agree that a supervised administration is not necessary. Consents to the unsupervised administration signed by all the interested parties, if available, should be submitted with the application for informal appointment. The court then has the option to decline the informal appointment under NMSA 45-3-309, which gives the court the discretion to deny an informal appointment for any reason.

I. Information to Obtain in Each Engagement

The attorney should obtain the following information at the beginning of each engagement:

- The original of the last will and of any codicils.
 - If the original cannot be located, an explanation of why the will cannot be located. *See* NMSA 45-3-402(B).
 - If the will is a pour-over will, a copy of the relevant trust documents.
 - If the will includes an express exercise of a power of appointment, a copy of the relevant documents creating the power of appointment.
- The decedent’s death certificate (probate courts tend to require the death certificate to proceed, while the district courts tend not to require them). *Cf.* NMSA 45-1-107(B) (death certificate is prima facie evidence of death).
- The names, addresses and ages (if minors) of each of the following:
 - The decedent’s surviving spouse, if any;
 - The decedent’s heirs (as determined under the intestacy statutes); and

- The decedent’s devisees (as determined by the will).
- The written consent of any other persons with higher or equal priority to serve as PR.
- A preliminary inventory of the decedent’s probate estate (for determining whether administration really is necessary) and gross estate (for determining whether an estate tax return might be required).
- An engagement letter identifying the client and defining the scope of representation.

IV. The Original Application or Petition and Related Orders

For the uninitiated, the NM Supreme Court has promulgated forms for use in the probate practice. The forms are found in the New Mexico Rules, Article 4B. The UPC provides detailed requirements of what must be included in the various applications and petitions that initiate estate administrations. The following details the contents that must be included in each type of pleading and order. The applications for the different pleadings tend to require much of the same information. Typically, applications for the appointment of a PR are made in the same application for probate or intestacy, but that is not required.

Note that each pleading filed under the UPC is deemed to include an oath or affirmation that the pleading’s “representations are true as far as the person executing or filing it knows or is informed, and penalties of perjury may follow deliberate falsification therein”. NMSA 45-1-310; *cf.* 45-1-106 (specifying remedies and penalties related to fraudulent representations made in connection with proceedings under the UPC), and 45-3-301(G) (by verifying an informal application, the applicant subjects himself or herself to proceedings for relief from fraud or perjury).

A. Informal Probate of a Will and Appointment of PR

The application for informal probate of a will and appointment of a PR must include the following information. *See* NMSA 45-3-301(A), (B), (C).

- The interest of the applicant. The point of the statement is to establish that the applicant is an “interested person” as defined under NMSA 45-1-201(A)(26). *Cf.* NMSA 45-3-303(A)(3) (which requires a finding that the applicant is an interested person).
- The decedent’s name.
- The decedent’s age and date of death.
- The state and county of the decedent’s domicile at death. If the decedent was not domiciled in New Mexico, the NM county in

which the decedent owned property and that venue is proper. *Cf.* NMSA 45-3-201(A)(2).

- So far as known or ascertainable with reasonable diligence, the names, addresses and ages (if minors) of the decedent's:

- Spouse;
- Children;
- Heirs (*Cf.* NMSA 45-2-103 (heirs other than spouse)); and
- Devisees.

- A statement that no PR has been appointed for the estate or identifying the name and address of any such PR whose appointment has not terminated.⁸

- A statement whether the applicant has received a demand for notice of any proceeding under the UPC. The PR should check with the district clerk for any such notice before filing. *Cf.* NMSA 45-3-204 (a demand for notice may be filed in the district court of the relevant county).

- A statement addressing the timeliness of the application under NMSA 45-3-108 (generally speaking, the time limit is three years from the date of death, though there are several exceptions).

- A description of the will and any codicils by date of execution.

- A statement that the original will and any codicils (or an authenticated copy of a will probated in another jurisdiction) accompany the application or already are in the court's possession.⁹

- If the will is self-proved (*see* NMSA 45-2-504 (providing the requirements for the self-proving affidavit)), nothing more is required with respect to the will. NMSA 45-3-303(C). In an informal probate, the court may even presume proper execution if the will "appears to have been properly executed". *Id.* Otherwise, the application should include an affidavit from a person, who may be a witness or some other

person, with knowledge about the circumstances of execution. *Id.*

- The name and address of the applicant seeking to be appointed as PR.

- The applicant's priority to serve as PR. *Cf.* NMSA 45-3-203(A) (listing the priority to serve as PR). If the applicant does not have priority, the application should include written nominations of the applicant to serve as PR under NMSA 45-3-203(C) executed by those with higher or equal priority.

- If the will appoints the applicant as PR, a statement whether the will requires a bond. A bond might be required in an informal probate if the will requires one. *Cf.* NMSA 45-3-603(A)(2). This statement is not explicitly required by the provision governing the application, but is implicated by the provisions regarding bonds. *See Id.* 45-3-603(A)(2).

- A statement that the applicant "to the best of his [or her] knowledge, believes the will to have been validly executed".

- A statement that "after the exercise of reasonable diligence" the applicant "is unaware of any instrument revoking the will, and that the applicant believes that the instrument which is the subject of the application is the decedent's last will".

- A verification executed by the applicant that the application is "accurate and complete to the best of his [or her] knowledge and belief".

The associated order of informal probate and informal appointment of a PR should contain the following findings and orders. *See* NMSA 45-3-303(A), 45-3-308(A):

- The application is complete.
- The applicant made an oath or affirmation that the statements contained in the application "are true to the best of his knowledge and belief".¹⁰

- Based on the application, the applicant appears to be an interested person. *Cf.* NMSA 45-1-201(A)(26) (providing the definition of an interested person).

- Based on the application, venue is proper.
- An original, duly executed and apparently unrevoked will is in the court's possession.

⁸ The application for informal appointment of PR must be denied if it indicates there is another PR in NM. NMSA 45-3-308(B).

⁹ On at least two occasions in the last year, the district clerk (of two different counties that will remain anonymous) has temporarily lost the original will that the author submitted with the application for informal probate. After much insistence on the part of the author's staff in response to allegations that the will did not accompany the application, the district clerk eventually found the will in both instances. Why the district clerks insist on separating the will from the application is beyond the author's understanding and the district clerks have been unable to provide the author with guidance as to how to avoid recurrence of a similar event in the future.

¹⁰ The difference in language between the required verification for the application under NMSA 45-3-301 and the finding for the informal order under NMSA 45-3-303(A)(2) is curious. Perhaps "true" means "accurate and complete" under the UPC.

- Any required notice has been given. Under NMSA 45-3-204, notice must be given to persons who have filed a demand for notice.
- Based on the application, it appears that the time limit for original probate has not expired.
- Based on the application, the contents of the probated will and any nominations made pursuant to NMSA 45-3-203, the applicant has priority to serve as PR.
- An order informally probating the will.
- An order informally appointing the applicant as PR, dependent upon the applicant's acceptance, and, if applicable, satisfaction of any bond requirement.

B. Informal Appointment of PR in Intestacy

The application for informal appointment of a PR in intestacy must include the following information. *See* NMSA 45-3-301(A), (D).

- The interest of the applicant. The point of the statement is to establish that the applicant is an "interested person" as defined under NMSA 45-1-201(A)(26). *Cf.* NMSA 45-3-303(A)(3) (which requires a finding that the applicant is an interested person).
- The decedent's name.
- The decedent's age and date of death.
- The state and county of the decedent's domicile at death. If the decedent was not domiciled in New Mexico, the NM county in which the decedent owned property and that venue is proper. *Cf.* NMSA 45-3-201(A)(2).
- So far as known or ascertainable with reasonable diligence, the names, addresses and ages (if minors) of the decedent's:
 - Spouse;
 - Children; and
 - Heirs (*Cf.* NMSA 45-2-103 (heirs other than spouse)).
- A statement that no PR has been appointed for the estate or identifying the name and address of any such PR whose appointment has not terminated.¹¹
- A statement whether the applicant has received a demand for notice of any proceeding under the UPC. The PR should check with the district clerk for any such notice before filing. *Cf.* NMSA 45-3-204 (a demand for notice may be filed in the district court of the relevant county).
- A statement addressing the timeliness of the application under NMSA 45-3-108 (generally

speaking, the time limit is three years from the date of death, though there are certain exceptions).

- A statement that "after the exercise of reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in New Mexico". *Cf.* NMSA 45-1-301 (while the term "situs" is left undefined, property located in NM or coming into the control of a fiduciary subject to NM law fall within the term's meaning).
- The name and address of the applicant seeking to be appointed as PR.
- The applicant's priority to serve as PR and the names and addresses of any other persons who have equal or higher priority to serve as PR. *Cf.* NMSA 45-3-203(A) (listing the priority to serve as PR). If the applicant does not have priority, the application should include written nominations of the applicant to serve as PR under NMSA 45-3-203(C) executed by those with higher or equal priority.
- A verification executed by the applicant that the application is "accurate and complete to the best of his [or her] knowledge and belief".

The associated order of informal appointment of a PR in intestacy should contain the following findings and orders. *See* NMSA 45-3-308(A).

- The application is complete.
- The applicant made an oath or affirmation that the statements contained in the application "are true to the best of his knowledge and belief".¹²
- Based on the application, the applicant appears to be an interested person. *Cf.* NMSA 45-1-201(A)(26) (providing the definition of an interested person).
- Based on the application, venue is proper.
- Any required notice has been given. Under NMSA 45-3-204, notice must be given to persons who have filed a demand for notice.
- Based on the application and any nominations made pursuant to NMSA 45-3-203, the applicant has priority to serve as PR.
- An order informally appointing the applicant as PR, dependent upon the applicant's acceptance.

C. Formal Probate of Will and Appointment of PR

The petition for formal probate of a will and appointment of a PR must include the following

¹¹ See footnote 6.
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¹² See footnote 8.
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information. *See* NMSA 45-3-402(A), (B), 45-3-414(A).

- A statement of the interest of the petitioner.
- The decedent's name.
- The decedent's age and date of death.
- The state and county of the decedent's domicile at death. If the decedent was not domiciled in New Mexico, the NM county in which the decedent owned property and that venue is proper. *Cf.* NMSA 45-3-201(A)(2).
- So far as known or ascertainable with reasonable diligence, the names, addresses and ages (if minors) of the decedent's:
 - Spouse;
 - Children;
 - Heirs (*Cf.* NMSA 45-2-103 (heirs other than spouse)); and
 - Devisees.
- A statement that no PR has been appointed for the estate or identifying the name and address of any such PR whose appointment has not terminated.
- A statement whether the petitioner has received a demand for notice of any proceeding under the UPC. The PR should check with the district clerk for any such notice before filing. *Cf.* NMSA 45-3-204 (a demand for notice may be filed in the district court of the relevant county).
- A statement addressing the timeliness of the petition under NMSA 45-3-108 (generally speaking, the time limit is three years from the date of death, though there are certain exceptions).
- A statement that the original will and any codicils (or an authenticated copy of a will probated in another jurisdiction), all described by date, accompany the petition or already are in the court's possession. If the original will is unavailable, a statement describing the will's contents and why the original is unavailable.
- If the will is self-proved (*see* NMSA 45-2-504 (providing the requirements for the self-proving affidavit)), nothing more is required with respect to the will. NMSA 45-3-405(C) (uncontested cases), 45-3-406(B) (contested cases). If the will is not self-proved, the affidavit of at least one of the witnesses should be submitted with the petition in an uncontested case. *Id.* 45-3-405(B). In a contested case, witness testimony will likely be required. *Id.* 45-3-406(A). If no witness is available, the will may be proved by other means. *Id.* 45-3-405(B) (uncontested case), 45-3-406(A) (contested case).
- The name and address of the petitioner seeking to be appointed as PR.

- The petitioner's priority to serve as PR. *Cf.* NMSA 45-3-203(A) (listing the priority to serve as PR). If the petitioner does not have priority, the petition should include written nominations of the applicant to serve as PR under NMSA 45-3-203(C) executed by those with higher or equal priority. If there is a question as to priority or qualification of the petitioner, the petition should include a description of the issue to be resolved.
- A statement that the petitioner "to the best of his [or her] knowledge, believes the will to have been validly executed".
- A statement that "after the exercise of reasonable diligence" the petitioner "is unaware of any instrument revoking the will, and that the petitioner believes that the instrument which is the subject of the petition is the decedent's last will".
- If appropriate and in an uncontested case, a request that the court enter an order based upon the strength of the pleadings and without a hearing. *See* NMSA 45-3-405(A).
- A request for a hearing.
- A verification executed by the petitioner that the application is "accurate and complete to the best of his [or her] knowledge and belief".¹³
- A request for a judicial order after notice and hearing that:
 - The will in question was the decedent's last will; and
 - Appointing the petitioner as PR.

The associated order of formal probate and formal appointment of a PR should contain the following findings and orders. *See* NMSA 45-3-409(A), 45-3-414(B).

- If appropriate, that the proceeding is unopposed and a hearing is unnecessary. *Cf.* NMSA 45-3-405(A) (which allows for a decision on the strength of the pleadings). If not, a statement that a hearing was held, after notice.
- The testator is dead.
- Venue is proper.
- The proceeding was brought within the time limitations prescribed by NMSA 45-3-108.
- The domicile of the decedent at death.

¹³ A careful reading of NMSA 45-3-402 suggests that the petitioner for a formal decision is not required to make the verification that is required for informal applications under 45-3-301. On the other hand, a verification is nevertheless deemed to be included for every pleading filed under the UPC that the representations "are true as far as the person executing or filing it knows or is informed". NMSA 45-1-310. It probably is better practice to include the formal verification.

- That the decedent died testate.
- That the will and any codicils, which are in the court's possession, are valid and unrevoked.
- The petitioner is entitled and qualified to be appointed as PR.
- Whether a bond is required, and, if so, the basis for determining the bond amount.
- Whether the administration is to be supervised or unsupervised, and, if supervised, a statement as to the scope of the PR's duties and powers.
- An order formally probating the will.
- An order formally appointing the applicant as PR, dependent upon the applicant's acceptance, and, if applicable, satisfaction of any bond requirement.

D. Formal Adjudication of Intestacy, Determination of Heirs and Appointment of PR

The petition for formal adjudication of intestacy, determination of heirs and appointment of a PR must include the following information. *See* NMSA 45-3-402(C), 45-3-414(A).

- A statement of the interest of the petitioner.
- The decedent's name.
- The decedent's age and date of death.
- The state and county of the decedent's domicile at death. If the decedent was not domiciled in New Mexico, the NM county in which the decedent owned property and that venue is proper. *Cf.* NMSA 45-3-201(A)(2).
- So far as known or ascertainable with reasonable diligence, the names, addresses and ages (if minors) of the decedent's:
 - Spouse;
 - Children; and
 - Heirs (*Cf.* NMSA 45-2-103 (heirs other than spouse)).
- A statement that no PR has been appointed for the estate or identifying the name and address of any such PR whose appointment has not terminated.
- A statement whether the petitioner has received a demand for notice of any proceeding under the UPC. The PR should check with the district clerk for any such notice before filing. *Cf.* NMSA 45-3-204 (a demand for notice may be filed in the district court of the relevant county).
- A statement addressing the timeliness of the petition under NMSA 45-3-108 (generally speaking, the time limit is three years from the date of death, though there are certain exceptions).
- A statement that "after the exercise of reasonable diligence, the applicant is unaware of

any unrevoked testamentary instrument relating to property having a situs in New Mexico". *Cf.* NMSA 45-1-301 (while the term "situs" is left undefined, property located in NM or coming into the control of a fiduciary subject to NM law fall within the term's meaning).

- The name and address of the applicant seeking to be appointed as PR.
- The applicant's priority to serve as PR and the names and addresses of any other persons who have equal or higher priority to serve as PR. *Cf.* NMSA 45-3-203(A) (listing the priority to serve as PR). If the applicant does not have priority, the application should include written nominations of the applicant to serve as PR under NMSA 45-3-203(C) executed by those with higher or equal priority. If there is a question as to priority or qualification of the petitioner, the petition should include a description of the issue to be resolved.
- A statement as to whether a supervised administration is sought.
- If appropriate and in an uncontested case, a request that the court enter an order based upon the strength of the pleadings and without a hearing. *See* NMSA 45-3-405(A).
- A request for a hearing.
- A verification executed by the petitioner that the application is "accurate and complete to the best of his [or her] knowledge and belief".¹⁴
- A request for a judicial order after notice and hearing that:
 - The decedent died with no will;
 - Declares the identity of the decedent's heirs and their respective shares of the estate;
 - Appointing the petitioner as PR; and
 - Stating whether a supervised administration is ordered.

The associated order of formal adjudication of intestacy, determination of heirs and appointment of a PR should contain the following findings and orders. *See* NMSA 45-3-402(C), 45-3-409(A), 45-3-414(B).

- If appropriate, that the proceeding is unopposed and a hearing is unnecessary. *Cf.* NMSA 45-3-405(A) (which allows for a decision on the strength of the pleadings). If not, a statement that a hearing was held, after notice.
 - The testator is dead.
 - Venue is proper.
 - The proceeding was brought within the time limitations prescribed by NMSA 45-3-108.

¹⁴ See footnote 11.

- The domicile of the decedent at death.
- That the decedent died intestate.
- The identity of the decedent’s heirs and their respective shares of the estate.
- The petitioner is entitled and qualified to be appointed as PR.
- Whether a bond is required, and, if so, the basis for determining the bond amount.
- Whether the administration is to be supervised or unsupervised, and, if supervised, a statement as to the scope of the PR’s duties and powers.
- An order formally declaring that the decedent died intestate.
- An order formally declaring the decedent’s heirs and their respective shares.
- An order formally appointing the applicant as PR, dependent upon the applicant’s acceptance, and, if applicable, satisfaction of any bond requirement.

E. Accepting Appointment and Letters

The PR is unable to begin administration of an estate until the clerk issues letters. NMSA 45-3-103. But before the clerk may issue letters testamentary or letters of administration, the person appointed to be PR must accept the appointment by filing any required bond and a statement of acceptance of the duties of the office. *Id.* 45-3-601. The PR’s powers and duties commence upon appointment, but also relate back in time to give legal effect to the acts of the person appointed as PR, which occurred prior to appointment. *Id.* 45-3-701(A). A PR also may ratify the acts of others made before appointment if the acts both benefited the estate and would have been proper for a PR to have done. *Id.* 45-3-701(C).

The UPC provides very little guidance as to what “letters” might be. The definition of “letters” is found at NMSA 45-1-201(A)(29) and provides simply that the term “includes letters testamentary, letters of guardianship, letters of administration and letters of conservatorship”. Otherwise, the UPC seems to rely upon the tradition of a court clerk issuing one or more “letters” in which the clerk essentially certifies that a certain person has indeed been appointed as PR of an estate and still holds that appointment as of the date of the letters. The forms found at NMRA 4B-106 and 4B-107 provide form letters of administration and letters testamentary, respectively. The form letters testamentary is illustrative and states simply:

Notice is now given that _____ (name of PR), has been appointed to serve as the personal representative of the estate of _____ (name of decedent), and has qualified as the decedent’s personal

representative by filing with the court a statement of acceptance of the duties of that office. The personal representative has all the powers and authorities provided by law and specifically, by Section 45-3-715 NMSA 1978.

Third parties who deal with a PR in good faith are protected from liability that might arise from the PR’s own breaches of fiduciary duty or some defect in the judicial process that provided the PR with authority. NMSA 45-3-714. Unfortunately, there is no clear guidance in this section, or elsewhere within the UPC, that says a third party may rely on the letters as evidence that the PR indeed is the PR.

F. Required Notices to Heirs & Devisees

1. Informal Proceedings

As previously stated, an informal proceeding may proceed without prior notice, except to the extent someone has demanded notice under NMSA 45-3-204. NMSA 45-3-306(A) (informal probate), 45-3-310 (informal appointment). The PR (or the applicant if no PR was appointed) must nevertheless provide notice of the probate and appointment to the decedent’s heirs and devisees. *Id.* 45-3-306(B) (informal probate), 45-3-310 (informal appointment). The notice of appointment must be provided within 10 days of appointment. *Id.* 45-3-310, 45-3-705(A). The notice of the informal probate, in contrast, need not be provided for 30 days. *Id.* 45-3-306(B). Of course, notice of both should be provided at the same time. A combined notice of informal probate and appointment must include the following information:

- The name and address of the PR (or applicant).
- The name and location of the court granting the informal probate.
- The date of the probate and appointment.
- Whether a bond has been filed.
- That the notice is being sent “to persons who have or may have some interest in the estate being administered”.
- That the PR is administering the estate pursuant to the UPC with or without court supervision, as is applicable.
- That the heirs and devisees are entitled to receive information from the PR regarding the PR’s administration of the estate and are entitled to petition the court in any matter relating to the estate, including distribution of assets and expenses of administration.

The least complicated method of effecting notice for these purposes, as required by the statutes, is simply to send it via first class mail to the person's last known address. NMSA 45-1-401(A)(1), 45-3-305(A), 45-3-705(B). The careful PR might, however, send the notice certified mail, return receipt requested. The PR also must file a statement with the court supplying the names and addresses of the persons notified. *Id.* 45-3-705(D). While not required and in the interest of full disclosure,¹⁵ the author's practice is to include filed stamped copies of the application and associated order along with the required statements regarding a beneficiary's rights. Note that failure to send the required notices is a breach of fiduciary duty, but does not affect the validity of the informal probate or appointment. *Id.* 45-3-306(B), 45-3-705(E).

2. Formal Proceedings

Formal proceedings may not proceed without notice as required by the UPC. NMSA 45-3-403(A). Notice is to be provided to the following persons:

- The surviving spouse.
- The decedent's children and other heirs.
- The devisees under the will, if any.
- The PR previously appointed, if any.
- All unknown persons who have any interest in the matters at issue in the formal proceeding.

NMSA 45-3-403(B). Notice is to be effected upon those persons with a known address pursuant to NMSA 45-1-401. The simplest method of effecting service under that section is to send notice via first class mail to the person's last known address at least 14 days in advance of any hearing. *Id.* 45-1-401(A)(1). A better practice is probably to send notice via both regular mail and certified mail, return receipt requested.¹⁶ Notice to unknown persons and to known persons with unknown addresses is by publication. *Id.* 45-3-403(B). Notice by publication is effected by publishing the notice at least once a week for two consecutive weeks in a newspaper published and having a general circulation in the relevant county. *Id.* 45-1-401(A)(3). If no paper is published in the relevant county, the publication must be in a newspaper with a general circulation in that county. *Id.* The last publication must appear at least 10 days before the relevant hearing. *Id.*

¹⁵ The PR does owe fiduciary duties to the estate beneficiaries.

¹⁶ The author's experience is that most folks fail to retrieve mail sent to them via certified mail, especially when it is sent by a law firm. While it is nice to have the return receipt, it is better to ensure that the Postal Service will at least leave the regular mail in the person's mail box.

IV. THE FIRST THREE MONTHS OF ADMINISTRATION

A. The PR's Duties

The PR has the specific duty to settle and distribute the estate in accordance with any will and the intestacy provisions of the UPC, if applicable. NMSA 45-3-703(A). The distribution is to be made "as expeditiously and efficiently as is consistent with the best interests of the estate". *Id.* To the extent the PR exercises a power given to him or her, the PR is to exercise that power "for the best interests of successors to the estate". *Id.* No real guidance is given as to how the interests of the estate might differ from the best interests of the successors of the estate. Perhaps they are one and the same.

Broadly speaking, the PR also is subject to the same standards of care as is applicable to a trustee. NMSA 45-3-703(A). These standards of care include the duties of loyalty and impartiality to the estate beneficiaries. *See Id.* 45-7-606 (loyalty in the context of investments), 45-7-607 (impartiality in the context of investments), 46-3A-103(b) (impartiality in the context of principal and income allocations), 46A-8-802 (loyalty specific to trusts) and 46A-8-803 (impartiality specific to trusts). The duty of loyalty requires the PR to act "solely in the interest of the beneficiaries". *Id.* 46A-8-802(A). The duty of impartiality requires the PR to act impartially as between the several beneficiaries giving due regard to the beneficiaries' respective interests. *Id.* 46A-8-803.

The reference to the standards of care applicable to trustees in section 45-3-703(A) incorporates significant duties in at least one area typically not associated with the administration of an estate and that actually conflict with a PR's duties under the UPC. Historically, careful PRs would simply divest the estate of its investments in any type of risky assets, including securities, and invest the proceeds in interest bearing accounts. A trustee, however, has the duty to invest trust assets as a prudent investor would. NMSA 45-7-603(A). Part of that duty requires the trustee to diversify trust investments, "unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying". *Id.* 45-7-604. The trustee also is required to start the diversification process upon receipt of the trust assets. *Id.* 45-7-605. The duty to diversify must be weighed against the specific duty imposed upon PRs to protect and preserve the estate and the direction to distribute the estate in kind, if possible. *Id.* 45-3-709 (preservation of the estate), 45-3-906(A) (in kind distribution). Still, instead of making a simple decision to liquidate, PRs today must weigh several factors and make decisions

as to whether investment changes need to be made in the context of the estate at issue. Certainly, the PR cannot simply sit there and hope for the best.

B. Collection and Protection of the Estate

The PR is responsible to take possession and control of the decedent's estate. NMSA 45-3-709. The PR may, however, leave real property and tangible personal property with the person presumptively entitled to it. *Id.* Nevertheless, the PR may at any time gain possession of the property if the PR determines possession is necessary for purposes of administration. *Id.*

The PR has an affirmative duty to protect and preserve the estate. NMSA 45-3-709. The PR "shall take all steps reasonably necessary for the management, protection and preservation of the estate in his possession". *Id.* This duty is particularly important in the case of assets such as real estate, continuation of closely held business operations, household furniture, furnishings, firearms, jewelry, and coin, stamp, art and other collections. The PR must provide adequate security and protection for these items. The PR therefore should secure real property and tangible personal property as soon as possible.

But first, the PR should take a physical inventory of the estate as soon as possible after the decedent's death. The PR need not wait until appointment, though the duty to act does not arise until appointment is obtained. See *Id.* 45-3-701 (duties accrue upon appointment, while the PR's actions before appointment that benefit the estate are automatically ratified). A careful PR will conduct the physical inventory with at least one other person to avoid spurious allegations of theft.

The PR also should review the estate or trust assets with an insurance agent and immediately obtain sufficient insurance coverage if it does not already exist. A fiduciary may be held personally accountable for any loss that occurs with respect to uninsured or underinsured assets.

To collect money, the PR will be required to open one or more bank accounts in the estate's name. The bank will require the PR to obtain an employer's identification number ("EIN") from the IRS to open the account. The EIN can be obtained on-line at www.irs.gov, by filling out a Form SS-4.

If necessary, the PR also has the authority to maintain an action to recover possession of the estate's property. NMSA 45-3-709. Further, the PR may avoid improper transfers the decedent might have made that would be void or voidable as against the decedent's creditors. *Id.* 45-3-710. If the decedent "gave away" assets before his death, the PR should consult the New Mexico Uniform Fraudulent Transfer Act, NMSA 56-10-14 through 56-10-25, to determine

if action to recover property might be appropriate. Note that the PR is the only party with standing to avoid pre-death transfers. *Id.* 45-3-710. But the court may appoint another party to take action, presumably if the PR fails to act. *Id.*

The following provides some specific guidance for the PR with respect to common assets found in estates.

- **Real Estate.** Real estate includes homes, vacation land and rental property, vacant land, ranch/farm property, some time shares, mineral interests and water rights. The PR will want to review the decedent's records for property tax bills, deeds and the like to ensure he or she has identified all properties. Mineral interests are particularly difficult to identify, especially if they are not producing. To identify a producing mineral interest, the PR also should look for payments and statements from an oil company. The attorney will need to review the deeds and other information collected to determine if a probate might be necessary to clear title to the real estate. The PR must review insurance coverage for all pieces of real estate. The PR can be personally liable for damages to the estate's beneficiaries caused by his or her failure to insure the property. The PR also will want to secure any buildings and consider whether new locks might be appropriate. Finally, the PR also should consider whether any repairs or maintenance might be necessary to preserve the value of the property.

- **Tangible Personal Property.** Tangible personal property includes household items, jewelry, automobiles and other items that can be handled. Typically, identification of items of tangible personal property is straightforward, because they are found on the decedent's real property. The PR must not forget, however, that tangible personal property may have been loaned to another person or might be at a shop for repair. The decedent also may have a storage unit. Again, the PR should insure all tangible personal property against loss. The PR also should take reasonable steps to secure the property.

- **Financial Accounts.** Financial accounts include bank accounts, investment accounts, and retirement accounts. To identify these types of assets, the PR will want to review the decedent's papers and monitor the mail for at least three months. Financial accounts may or may not require a probate. Accounts held as "joint tenants with right of survivorship", "pay on death", or "transfer on death" are governed by the account agreement and do not require a probate. Accounts

held as Trustee also do not require probate. Many times, reference to the account statement will provide sufficient information to determine what type account the asset might be. Sometimes, however, review of the signature card or account agreement may be necessary.

- **Retirement accounts.** IRAs, 401(k)s, 403(b)s, pensions and the like are governed by beneficiary designations. The PR will likely have to contact the custodian of the account for a copy of the designation. The PR is entitled to review the beneficiary designation because the estate might be the named beneficiary and because the asset is part of the decedent's gross estate for federal estate tax purposes.

- **Other Tangible Assets.** The PR will want to review the decedent's papers for stocks and bonds held in certificate form and other records relating to interests held in limited liability companies, limited partnerships, general partnerships and other types of business entities. The PR also will need to look for promissory notes, mortgages and other evidences of debt owed to the decedent. A visit with the decedent's accountant, or financial advisor, if any, should assist in this endeavor.

- **Life Insurance and Annuities.** Life insurance and annuities also are governed by beneficiary designations. A review of the decedent's papers will be necessary to locate information about possible policies. The PR should not forget that banks and credit card companies sometimes offer small free accidental death and dismemberment policies. Again, the estate might be the designated or default beneficiary of the policy.

- **Potential Claims Arising Before Death.** The PR should ascertain whether the decedent had any claims that accrued before death. Most causes of action survive one's death. *Cf.* NMSA 37-2-1 (stating which actions survive). The UPC provides no less than a four month tolling period if the decedent dies within four months of the expiration of the relevant statute of limitations. *Id.* 45-3-109. However, the general statute of limitations also provides a one year tolling period if the decedent dies within one year of the statute's expiration. *Id.* 37-1-11. The one year tolling period should control.

- **Liabilities and Debts.** Ultimately, the PR will be responsible to pay the decedent's liabilities and debts from the estate's assets. Again, the PR should review the decedent's mail for at least three months for statements and the like. The PR also should review the decedent's checking account statement for recurring automatic drafts

that may no longer be appropriate. If the decedent had extraordinary debts, or it seems that creditors are making questionable claims, a probate may be necessary to resolve the issue. Further, the PR should consider whether cancellation of recurring items such as phone and cable service might be appropriate to limit expenses to the estate. Note that electricity and water service to a residence, for example, typically will be a proper expense of the estate pending sale or distribution.

- **Credit Cards.** For each credit card held in the decedent's name, the PR should contact the issuing company to cancel the card. The PR should consider taking the further steps to contact each of the three major credit reporting agencies to inform them that the decedent has died.

C. The PR's Powers

The PR has broad powers as are necessary to administer the estate. NMSA 45-3-710. The PR has the same power over the title to the estate property "that an absolute owner would have, subject only to his trust to use and apply the property for the benefit of creditors and others interested in the estate". *Id.* Unless the PR is operating under a supervised administration, the PR may exercise its powers "without notice, hearing or order of court". *Id.* Of course, a PR should practice "good bedside manners" and keep the beneficiaries informed of what he or she is doing and may even seek the consent of the beneficiaries before taking significant action like selling a major asset or items of tangible personal property that might have significant sentimental value attached to them.

The UPC also enumerates several specific powers granted to a PR by default, which are found in NMSA 45-3-715(A). Those powers range from the specific power to retain assets owned by the decedent at death pending distribution, to abandoning property if, in the PR's opinion, the property is worthless or is in a condition that it presents no benefit to the estate. *Id.* 45-3-715(A)(1), (11). Note that the decedent's will might expand or restrict the default powers granted by the UPC. The enumerated powers are as follows:

A. Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in Section 45-3-902 NMSA 1978, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) retain assets owned by the decedent pending distribution or liquidation, including those in which the representative is

personally interested or which are otherwise improper for trust investment;

(2) receive assets from fiduciaries or other sources;

(3) perform, compromise or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(a) execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(b) deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent as designated in the escrow agreement;

(4) satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances;

(5) if funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including money received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements or other prudent investments which would be reasonable for use by trustees generally;

(6) acquire or dispose of an asset, including land in New Mexico or another state, for cash or on credit, at public or private sale, and manage, develop, improve, partition or change the character of an estate asset;

(7) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, or raze existing or erect new party walls or buildings;

(8) subdivide, develop or dedicate land to public use, make or obtain the vacation of plats and adjust boundaries, adjust differences in valuation on exchange or partition by giving or receiving

considerations or dedicate easements to public use without consideration;

(9) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the period of administration;

(10) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(11) abandon property when, in the opinion of the personal representative, it is valueless or is so encumbered or is in condition that it is of no benefit to the estate;

(12) vote stocks or other securities in person or by general or limited proxy;

(13) pay calls, assessments and other sums chargeable or accruing against or on account of securities unless barred by the provisions relating to claims;

(14) hold a security in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative is liable for any act of the nominee in connection with the security so held;

(15) insure the assets of the estate against damage, loss and liability and himself against liability as to third persons;

(16) borrow money with or without security to be repaid from the estate assets or otherwise and advance money when necessary for the protection or preservation of the estate;

(17) effect a fair and reasonable compromise with any debtor or obligor or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner of the assets in satisfaction of the indebtedness secured by lien;

(18) pay taxes, assessments, compensation of the personal representative and other expenses incident to the administration of the estate;

(19) sell or exercise stock subscription or conversion rights or consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprise;

(20) allocate items of income or expense to either estate income or principal as permitted or provided by law;

(21) employ persons, including attorneys, accountants, investment advisors, appraisers or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and, instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;

(22) prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties;

(23) sell, transfer, exchange or otherwise dispose of the estate or any interest in the estate for cash or on credit or for part cash and part credit at public or private sale. Security shall be taken for unpaid balances unless waived by order of the district court upon petition and good cause shown;

(24) continue any unincorporated business or venture in which the decedent was engaged at the time of his death:

(a) in the same business form for a period of not more than four months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business, including good will;

(b) in the same business form for any additional period of time that may be approved by order of the district court in a formal proceeding to which the persons interested in the estate are parties; or

(c) throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

(25) incorporate any business or venture in which the decedent was engaged at the time of his death;

(26) provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate; and

(27) satisfy and settle claims and distribute the estate as provided in the Uniform Probate Code [45-1-101 NMSA

1978].

D. Notice to Creditors

The UPC contemplates two types of notices to creditors. The PR has an affirmative duty to give written notice by mail or other delivery to any known creditor or any creditor who is reasonably ascertainable. NMSA 45-3-801(A). The notice to known creditors must be provided within three months of the PR's appointment. *Id.* The notice must (a) instruct the creditor to present its claim within two months of the later of (i) the mailing of the notice, or (ii) the publication of a general notice to creditors, if made, and (b) inform the creditor that failure to present the claim within the stated time periods bars the claim. *Id.*

The UPC does not, unfortunately, provide guidance as to what the PR should say in the notice to creditors if the two month period for presenting claims overlaps with the one-year after death statute of limitations period of NMSA 45-3-803(A)(1). See discussion under the section entitled Creditor Claims, below. It also does not specifically relieve the PR of its duty to provide notice to known creditors if the one-year period after death has already expired, or has expired before the PR has a duty to send notice. To prevent a claim that the PR somehow misled the creditor in such a situation, the notice also should probably state the decedent's date of death and that the one-year limitations period may apply.

The PR also may, but is not required, publish a notice to unknown creditors. NMSA 45-3-801(B). The publication must appear once a week for two successive weeks in a newspaper of general circulation in the relevant county. *Id.* The publication must announce the PR's appointment, the PR's address, the name of the decedent and notify the estate's creditors to present their claims within two months after the date of the first publication of the notice or be forever barred. *Id.* The author recommends that all PRs publish the notice under NMSA 45-3-801(B) even if the PR believes the estate has no creditors.

E. The Inventory

The PR is under an obligation to prepare an inventory of the decedent's property owned at the time of his or her death within three months of the PR's appointment. NMSA 45-3-706(A). The inventory must list each item with reasonable detail and its estimated value as of the date of death. *Id.* The inventory also should indicate any encumbrances associated with a particular item. *Id.* The PR also has a duty to supplement the inventory if new property comes to his or her knowledge or if the original inventory is erroneous or misleading as to description or value. *Id.* 45-3-708(A).

The PR is not required to file the inventory (or supplemental inventory) with the court and probably should not in most cases to preserve confidentiality to the extent possible. NMSA 45-3-706(B) (original inventory), 45-3-708(B) (supplemental inventory). Still, the PR must provide a copy of the inventory to interested persons who request it. *Id.* Interested persons include estate beneficiaries, heirs (even if not estate beneficiaries) and creditors. *Id.* 45-1-201(A)(26).

The author has found that most families do not want to prepare the inventory because of the bother and expense. Nevertheless, the PR should prepare the inventory in every case regardless of whether all the beneficiaries get along and whether the estate has creditors. The inventory is a critical document in each estate and establishes the PR's satisfaction of his or her duties to the estate beneficiaries. It provides the starting point for any accounting, which always should be considered. Many times, the PR will not realize that one or more of the estate beneficiaries questions the PR's integrity until well into the estate's administration. Failure to prepare and provide the inventory simply exacerbates the problem in such cases. One also should consider that the PR will ultimately be required to close the estate in one way or the other. *See* NMSA 45-3-1001 (formal proceeding to terminate administration), 45-3-1002 (alternative formal proceeding to terminate administration) and 45-3-1003 (closing estate by sworn statement). Unless all the estate beneficiaries waive the inventory and accounting, the PR will nevertheless be forced to prepare that inventory. Finally, failure to make the inventory can be grounds for removing the PR from office. *See Id.* 45-3-611(B)(6) (failure to satisfy any duty of the office is grounds for removal).

F. Ancillary Administrations

If the decedent owned real property in one or more New Mexico counties other than the county in which the administration is pending, the PR also should file a Notice of Administration in each relevant county pursuant to NMSA 45-1-404(A). The notice is filed with the county clerk and sets forth:

- The decedent's name.
- The title, court and docket number of the pending estate.
- A description of the type of administration (that is, whether the administration is supervised or unsupervised).
- The name, address and title of the PR.
- A complete description of the real property situate in the county in question.

NMSA 45-1-404(A).

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If, on the other hand, the decedent owned real property situated in a foreign jurisdiction (including a different state), then the PR or attorney should contact competent counsel in such jurisdictions to determine what is required to administer the decedent's property in those jurisdictions.

V. CREDITOR CLAIMS

A PR ignores creditor claims against the estate to his or her own peril. The PR has a fiduciary duty to administer the estate for the benefit of both creditors and beneficiaries. *See* NMSA 45-3-711 (the PR has full power over estate property, "subject to *his trust* to use and apply the property *for the benefit of creditors* and others interested in the estate" (emphasis supplied)). The UPC also places an affirmative obligation upon the PR to pay allowed claims against the estate. *Id.* 45-3-807(A). Failure to pay allowed claims in the proper order of priority exposes the PR to personal liability. *Id.* 45-3-807(B). The PR also may incur personal liability for the breach of his or her duties to creditors. *Id.* 45-3-712. The statute states:

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 fiduciary duty.

NMSA 45-3-712. The PR therefore is well advised to pay particular attention to possible creditor claims and the proper methods of dealing with such claims.

A. Deadlines

1. One-Year Statute of Limitations

All creditor claims must be presented within one year of the decedent's death, regardless of whether administration of the decedent's estate has commenced and regardless of whether the creditor knew about the decedent's death.¹⁷ NMSA 45-3-803(A)(1). There is no tolling period for claims against a decedent. *See Id.*

While the one-year limitations period is intended to bring about the quick resolution of estates, the decedent's beneficiaries also might use the statute to their own advantage. Credit card companies and other consumer debt providers typically monitor estate filings and are pretty good about presenting claims when an estate administration is started. For this reason, if the decedent had significant unsecured debts of this type, the estate's potential beneficiaries might decide to wait before initiating an administration of the

¹⁷ The one-year statute of limitations does not apply to claims against the decedent for which the decedent has liability insurance. NMSA 45-3-803(D)(2).

estate.

Regardless of what the estate beneficiaries might decide to do, the estate's creditor has an obligation to protect its claims. If the creditor suddenly stops receiving payments, it is put on notice that something is amiss. By the time it figures out that it has a claim, the creditor can no longer sue the decedent; rather, the creditor must sue a properly appointed PR. NMSA 45-3-104(A) ("No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a [PR]."), 45-3-710 (only the PR has the authority to recover property for the payment of unsecured creditors), 45-3-804(B) (creditor may initiate claim by suing the PR). But there is no PR to sue if the family has not initiated a proceeding.

The creditor is then left with the sole option of forcing the issue by filing a petition for the appointment of a PR and presenting its claim contemporaneously with the petition. See NMSA 45-3-804(A) (a creditor may "file a written statement of the claim with the appropriate court"). If the creditor accomplishes the filing within one year of the decedent's death, it likely will have preserved its claim. See *Id.* 45-3-802(C) (submission of a claim pursuant to NMSA 45-3-804 is "equivalent to commencement of a proceeding on the claim" for purposes of a statute of limitations).

While the creditor has the option of seeking to be appointed as PR, most creditors would not want to incur that type of fiduciary responsibility and might not have the requisite legal authority to do so. Even if a creditor opted to seek appointment as PR, the creditor can only seek appointment in a formal proceeding because the creditor never will have priority to serve. (See discussion of formal and informal proceedings, above.) As a result, the creditor would have to serve notice of its attempt to be appointed as PR on the family if it chose that route. The family members then can assert their respective priorities to be appointed as PR and remain in control of the process.

On its face, the one-year statute of limitations bars the claims of all possible claimants, including the state and its political subdivisions. NMSA 45-3-803(A). The statute can be misleading, however, because federal tax law also applies. Federal law requires a decedent's PR to determine the estate's estate tax liability by imposing liability for payment of the tax on the personal representative. See 26 U.S.C. 2002. The manner in which the estate tax is calculated also forces the personal representative to make inquiries into *inter vivos* taxable gifts the decedent may have made. See *Id.* 2001(b)(1) (requiring the inclusion of adjusted taxable gifts in the calculation of the tentative estate tax). A PR also has an affirmative duty to file an estate tax return for the estate, but only if the value of the

decedent's gross estate exceeds the basic exclusion amount in effect. *Id.* 6018(a)(1). Further, a personal representative has an affirmative duty to file any gift tax returns the decedent was required to file before his death. 26 C.F.R. 25.6019-1(g). A gift tax return is required to be filed to report any taxable gift. *Id.* 25.6019-1(a). The federal statute of limitations for the government to contest an estate or gift tax return is three years from the date the return is filed. 26 U.S.C. 6501(a). There is no deadline if a return is not filed. *Id.* 6501(c)(3). There are various methods for shortening the time of exposure to federal claims, but those are beyond the scope of this paper.

2. Shortening the One-Year Statute of Limitations

The Notices to Creditors under NMSA 45-3-801 and discussed above have the potential effect of shortening the one-year statute of limitations. If the PR has provided notice as required by 45-3-801, the creditors must submit their claims within two months of the notice.¹⁸ NMSA 45-3-803(A)(2). Therefore, if the administration is commenced within a short time after the decedent's death and the PR promptly sends out the required notices, the deadline for presenting a claim can be very short indeed.

B. The Creditor's Presentation of a Claim

A creditor may present its claim by way of three different methods. First, it may mail or otherwise deliver the claim to the PR. NMSA 45-3-804(A). Second, the creditor may file the claim with the court where the matter is pending.¹⁹ *Id.* Presentment is effective upon receipt by the PR or filing with the court. *Id.* Finally, the creditor may simply sue the PR in an appropriate court with jurisdiction over the PR. *Id.* 45-3-804(B).

With respect to the first two methods of presentment, the statement must include:

- The creditor's name and address.
- The amount claimed.
- The basis of the claim.
- If the claim is not yet due, the date on which the claim is due.
- If the claim is contingent or unliquidated, the nature of the uncertainty.
- If the claim is secured, a description of the security.

¹⁸ In contrast, the model UPC provides for a four month period during which the creditor may present a claim.

¹⁹ In the author's experience, creditors sometimes file their claims with the court and do not bother serving the attorney or the PR with a copy of the claim. The PR always should check the court's docket statement to determine if any creditors presented its claim in this manner.

NMSA 45-3-804(A). Mistakes as to the due date, uncertainty and description of collateral do not invalidate the presentment. *Id.*

C. Classification of Claims

The classification of claims is unimportant in estates that clearly are solvent. *See* NMSA 45-3-805(A) (statute is applicable only if “applicable assets of the estate are insufficient to pay all claims in full”). If the estate is insolvent (or might be after payment of administration expenses, family allowances and the like), however, the PR must classify claims and ensure compliance with the statutory classification scheme. *Id.* Failure to follow the classification scheme exposes the PR to potential personal liability. *Id.* 45-3-807(B). The PR also must be aware of the family and personal property allowances under NMSA 45-2-402 and 45-2-403, both of which have priority over all other claims against the estate. *See Id.* 45-3-807(A).

The PR is required to pay claims against the estate in the following order:

- The \$30,000 family allowance under NMSA 45-2-402.
- The \$15,000 personal property allowance under NMSA 45-2-403.²⁰
- Costs and expenses of administration (including PR compensation and persons employed by the PR).
- Reasonable funeral expenses.
- Debts and taxes with preference under federal law.
- Reasonable medical and hospital expenses related to the decedent’s last illness.
- Debts and taxes with preference under New Mexico law.
- All other claims.

NMSA 45-2-402 (family allowance), 45-2-403 (personal property allowance), 45-3-805(A) (all other claims against the estate), *also see* 45-3-807(A) (requiring payment of claims in this order).

D. The PR’s Allowance or Disallowance of a Claim

With respect to claims that have been properly presented, the PR may either allow or disallow the claim, by notifying the creditor of the PR’s decision. NMSA 45-3-806(A). The PR must mail the decision to the creditor within 60 days after the time for original presentation of the claim has expired. *Id.* If the PR does nothing, the PR is deemed to have allowed the

claim. *Id.* If the PR allows a claim, the PR must pay the claim in accordance with its classification. *Id.* 45-3-807(A). If the PR disallows a claim, the claim is barred unless the creditor files a petition seeking allowance of the claim within 60 days of the mailing of the PR’s notice of disallowance. *Id.* 45-3-806(A), *also see* 45-3-804(C) (same).

The PR may change an allowance to a disallowance by notifying the creditor. NMSA 45-3-806(B). The creditor then has 60 days to file a petition seeking allowance. *Id.* The PR also may switch a disallowance to an allowance, but only if the claim has not already been barred by the passage of time, the estate is solvent and all the estate’s beneficiaries consent. *Id.* 45-3-806(A), (B). Finally, the PR has the authority to compromise claims that have been presented. *Id.* 45-3-813.

E. Secured Claims

Secured claims are handled a bit differently from unsecured claims. On the one hand, the UPC does not alter or affect a secured creditor’s rights with respect to its security interest. NMSA 45-1-109. On the other, the PR still may disallow a claim that might be secured. *See Id.* 45-3-809 (“payment of a secured claim is upon the basis of the amount allowed”). To the extent the PR allows the claim, the PR may pay the claim if the creditor surrenders its security. *Id.* Otherwise, the PR may deduct the value of any portion of the security exhausted by the creditor. *Id.* 45-3-809(A).

To the extent an estate asset is encumbered and the claim is not yet due, the PR has fairly broad discretion as to what to do. *See* NMSA 45-3-814. The PR may pay the any portion of the encumbrance or renew or extend the encumbrance. *Id.* Further the PR may simply transfer the asset to the creditor in satisfaction of the creditor’s claim, if that appears to be in the estate’s best interest. *Id.*

F. The PR’s and Beneficiary’s Liability to Pay Claims

After the time for presentment has expired, the PR is required to pay allowed claims, but only to the extent the estate has sufficient funds. NMSA 45-3-807(A). If the estate is insolvent, the PR is to pay the claims in order of priority. *Id.* 45-3-805(A). With respect to multiple claims within one level of priority, the PR is to pay them proportionately. *Id.* 45-3-805(B). The statute suggests that the PR is required to pay the claims promptly after the time for presentment has expired. *Id.* 45-3-807(A) (“Upon the expiration of the earlier of the time limitations provided in Section 45-4-803 ..., the [PR] shall proceed to pay the claims allowed”). The PR incurs personal liability for failing to pay a claim only if he paid other claimants before

²⁰ The personal property allowance is satisfied first out of tangible personal property. NMSA 45-2-403.

the expiration of the time for presentment or failed to follow the order of priority. *Id.* 45-3-807(B). It is not clear that the PR escapes personal liability if he or she prematurely distributes estate property to the estate beneficiaries. *Compare Id.* 45-3-807(B) (which exposes a PR to personal liability for making certain payments to other creditors), 45-3-808 (which states that a PR generally is not personally liable unless he or she is personally at fault), and 45-3-1005 (providing a 6 month statute of limitations with respect to the rights of a creditor whose claims had not been otherwise barred). The better practice is to ensure that all allowed claims against the estate are either paid or provided for before making interim distributions to estate beneficiaries.

Generally speaking, if the PR improperly distributes property to an estate beneficiary, the beneficiary is liable to return the property or its proceeds to the estate. NMSA 45-3-909. Such an action might be necessary if the PR distributed the estate's property in a manner that left allowed claims unsatisfied.

Creditors whose claims have been allowed also have potential claims against the estate's beneficiaries to the extent the estate's assets have been distributed. NMSA 45-3-1004(A). The creditor has the choice to proceed as against only one, or many of the beneficiaries. *Id.* The beneficiaries are jointly and severally liable to satisfy the allowed claim. *Id.* 45-3-1004(B). But the beneficiary has the obligation to notify other distributees of the claims. *Id.* 45-3-1004(C).

G. Non-Probate Assets Subject to Creditor Claims

If the decedent's probate estate is insufficient to satisfy all the allowed claims against it, the creditors may look to most non-probate transfers to satisfy their claims. *See* NMSA 45-6-102. For purposes of this provision, a non-probate transfer is any transfer effective at death, other than the transfer of a survivorship interest in a joint tenancy in real property, to the extent that the transferor had the power, acting alone, to prevent the transfer by revocation or amendment. *Id.* 45-6-102(A). The provision specifically includes assets transferred by way of living trusts. *See Id.* 45-6-102(C)(2). Further, and in combination with NMSA 45-2-406, which states that the family and personal property allowances are in lieu of the personal property and homestead exemptions found in sections 42-10-1, 42-10-2, 45-2-9 and 42-10-10, the provision effectively exposes inherited retirement accounts to creditor claims.

To trigger action under the provision, the creditor must make a written demand upon the PR. NMSA 45-6-102(G). The PR does not, however, incur any personal liability for declining. *Id.* If the PR declines

or fails to proceed under the section, the creditor then may commence the proceeding in the name of the decedent's estate. *Id.* The creditor, however, must carry the costs of the proceeding. *Id.*

Only a very diligent creditor will succeed in recovering property under this section, however. The proceeding against a non-probate transferee must be brought within one year of the decedent's date of death. NMSA 45-6-102(H). The only exception to the deadline is when the PR disallowed the claim and the creditor was forced to challenge the disallowance. The creditor then has 60 days after a final allowance of the claim to bring an action against a non-probate transferor. *Id.*

V. DISTRIBUTION OF THE ESTATE

One of the PR's basic duties is to distribute the estate in accordance with the decedent's will or the laws of intestate succession "as expeditiously and efficiently as is consistent with the best interests of the estate". NMSA 45-3-703(A). Unless the PR is operating under a supervised administration, the PR may proceed without court order. *Id.* 45-3-704. If the PR requires guidance, however, the PR may invoke the district court's jurisdiction to resolve any question regarding the estate or its administration. *Id.*

When the decedent's estate is governed by a will, the PR must first look to the will for guidance as to how to handle many distribution decisions. If the will does not address them (most simple wills simply rely upon the statutes to address logistical issues), the UPC provides the answer to most basic questions.

A. Abatement of Bequests

Abatement of bequests is a typical issue, especially after debts and administration expenses are paid. The default order of abatement is as follows:

- Property that passes by intestacy.²¹
- Residuary devises.
- General devises.
- Specific devises.

NMSA 45-3-902(A). The UPC does not tell us what a general devise or a specific devise might be. Generally speaking, a general devise is one which "may be satisfied out of a testator's estate generally and is not charged upon any specific property". 80 Am. Jur. 2d Wills § 1299. A pecuniary gift (that is, a gift of a sum of money) is a common example of a general devise.

²¹ In the context of a testate estate, this category only applies if the will was poorly drafted and did not include a residuary clause. In the context of an intestacy, however, the category tells us that concept of abatement does not apply because it encompasses the entire estate.

A “specific devise” is, in contrast, “a gift or bequest of a specific or particular fund, thing, object, item, or article which is set apart, segregated, differentiated or identified and distinguished from the balance of the testator's property”. *Id.* § 1296. A common example of a specific devise is the gift of a particular home.

The consequence of this section is that the residuary devisees bear the brunt of debts and expenses of administration. In an estate with significant debts and expenses and large general and specific bequests, the residuary beneficiaries are sometimes left holding an empty bag. Specific devisees have a right to the specifically devised property if it was part of the decedent’s probate estate as of the date of death. *Id.* 45-2-606(A). If the PR sells the property to pay debts or expenses, the specific devisee still has a claim to the balance of the purchase price that is left. *Id.* 45-2-606(A)(1).

The rules are changed slightly if the decedent was married and the estate contains community property. NMSA 45-3-902(D).²² Expenses of administration, funeral expenses and separate debts are to be satisfied first from the decedent’s separate property. *Id.* 45-3-807(B). If the separate property is insufficient, then these debts and expenses are to be satisfied out of the decedent’s one-half of the community property. *Id.* The community estate of both spouses is subject to payment of community debts on the death of either spouse. *Id.* “Community debts” include all debts incurred during marriage except for separate debts. *Id.* 40-3-9(B). “Separate debts” are, generally speaking, those debts incurred before marriage. *See Id.* 40-3-9(A).

Note, however, that these abatement provisions do not apply to the payment of estate or other transfer taxes. Generally speaking and unless the will directs otherwise, estate taxes are apportioned ratably to each person that has an interest in the estate. *Id.* 45-3-923(A). Generation-skipping transfer taxes are apportioned to the skip-person receiving the direct skip. *Id.* 45-3-923(B). Apportionment of transfer taxes is a rather complicated endeavor and is beyond the scope of this paper.

B. Beneficiary Indebtedness

If the beneficiary is indebted to the estate, the PR is required to offset the beneficiary’s indebtedness against his or her distribution. NMSA 45-3-903.

C. Estate Income and Interest

During administration, the estate is likely to

receive income from various sources. The New Mexico Uniform Principal and Income Act, NMSA 46-3A-101 through 46-3A-603 and which is not part of the UPC, governs how the PR is to handle such income.

Net income attributable to property which is the subject of a specific bequest is to be distributed to the recipient of that property. NMSA 46-3A-201(1). Otherwise, and generally speaking, the net income is to be distributed among all the beneficiaries, but excluding those that received outright pecuniary bequests, based on the beneficiary’s proportionate share of the estate. *Id.* 46-3A-202(a).

Recipients of outright pecuniary bequests are entitled to receive interest at a rate of 5.0% per annum, beginning one year after the date the PR is first appointed. NMSA 45-3-904 (providing for the 5% interest), 46-3A-201(3) (stating that recipients of outright pecuniary amounts are to receive interest required by “applicable law”). If net estate income is insufficient to satisfy this provision, the interest is to be paid from principal. *Id.* 46-3A-201(3).

D. Distributions

Unless the will directs otherwise or if prudent administration of the estate requires for the sale of the estate property, the UPC directs the PR to distribute estate property in kind. NMSA 45-3-906(A). Prudent administration of the estate may require the sale of property, perhaps to preserve the estate’s value or to pay debts and expenses. On the other hand, specific devisees are entitled to receive the property devised to them. *Id.* 45-3-906(A)(1). Family allowances, personal property allowances and pecuniary bequests also may be satisfied in kind. *Id.* 45-3-906(A)(2). Note that a residuary beneficiary may request, however, that a particular item remain as part of the estate residue. *Id.* The PR may distribute the residuary estate in “any equitable manner”. *Id.* 45-3-906(A)(3). The PR or a beneficiary may petition for partition if more than one beneficiary would otherwise end up with an undivided interest in a property. *Id.* 45-3-911(A). As a result of the petition, the district court also may order the property’s sale. *Id.*

The UPC provides guidance for determining the fair market value of an asset as of the date of distribution. NMSA 45-3-906(B). The values of publically traded securities are determined as of the last price the last business day before the distribution.²³ *Id.* Debts owed to the estate by solvent debtors with no known defenses are valued at book value with accrued interest. *Id.* Assets with no readily ascertainable value

²² Section 45-3-902(D) refers to NMSA 45-2-805 as providing the rules with respect to community property. The 2011 amendments to the UPC, however, renumbered the relevant section to 45-2-807.

²³ This is different from the valuation of publically traded securities for purposes of federal transfer taxes, which is to be the mean between the highest and lowest quoted selling price on the day in question. *Cf.* 26 C.F.R. 20.2031-2(b).

are based on an appraisal as of a date not more than 30 days before the date of distribution, if reasonable.²⁴ *Id.*

Before making distributions of property in kind, the cautious PR should send a proposal for distribution. The distributees lose their right to object to the distribution on the basis of the kind to be distributed or the value of the assets to be received if they fail to object, in writing, within 30 days of receiving the proposal. NMSA 45-3-906(C). The PR may recover an asset improperly distributed to a beneficiary. NMSA 45-3-908 and 45-3-909.

PRs owe a duty to minor and incapacitated beneficiaries to make distributions in accordance with the will or NM's conservatorship statutes. NMSA 45-3-915(A), (B). The PR also may make a distribution to an agent under a durable power of attorney for the incapacitated person. *Id.* 45-3-915(C)(1). For distributions of \$10,000 or less in cash, or property worth less than \$50,000, the PR also may distribute the property to the spouse, parent or other close relative with whom the disabled person (other than a minor) resides. *Id.* 45-3-915(C)(2).

Generally speaking, the PR may distribute estate property as directed by a will to a trustee, without taking further action. NMSA 45-3-913(C).

VI. CLOSING THE ESTATE

The UPC requires that the PR eventually closes the estate. In the author's experience, the district courts, at least, will periodically require the PR to report on the status of the estate if it has not been closed. The PR has the choice of closing the estate formally or informally. The choice depends, primarily, on whether the beneficiaries are cooperative with the PR.

A. Formal Proceedings

The PR has the right, at any time, to petition the court for an order of complete settlement of the estate. NMSA 45-3-1001(A) (requiring notice to all interested persons, including heirs and devisees), 45-3-1002(A) (in the context of an informal probate, where heirs might be omitted). The petition may request the court, among other things, to consider and to approve the PR's final account and distribution of the estate, and to adjudicate the final settlement and distribution of the estate. *Id.* 45-3-1001(B)(2), (4), 45-3-1002(B), (C). The court's order may include a discharge of the PR "from further claim or demand of any interested person". *Id.* 45-3-1004(C). Proceeding formally is the best way to cut off claims when the PR is faced with unruly beneficiaries.

²⁴ Nothing requires the PR to hire an appraiser. Rather, the decision is within the PR's discretion. NMSA 45-3-707.

B. Sworn Statement

A PR also may close the estate by filing a sworn statement with the court. NMSA 45-3-1003(A). The sworn statement may not be filed any earlier than three months after the date the PR was first appointed. *Id.* The statement must state:

- The PR has determined that the time limit for presentation of creditors' claims has expired.
- The PR has, except as specified in the statement, fully administered the estate by:
 - Paying or otherwise disposing of all presented claims
 - Paying administration expenses
 - Paying all inheritance and death taxes
 - Distributing the estate's assets to the persons entitled
- The PR has sent a copy of the statement to
 - All distributees
 - All creditors and other claimants whose claims are not paid and are not barred
- The PR has sent a full written account of the administration to distributees whose interests are affected by the accounting.²⁵

NMSA 45-3-1003(A)(1), (2), (3).

Unlike formal closing proceedings, the closing statement does not discharge the PR. In fact, the PR continues to have authority to administer the estate for a one year period after filing the closing statement.²⁶ *Id.* 45-3-1003(B). Potential claimants also have six months after the date of filing of the closing statement to bring breach of fiduciary duty claims against the PR. *Id.* 45-3-1005. Claims for fraud, misrepresentation or inadequate disclosure related to the settlement of the estate are subject to the normal statute of limitations period of four years. *See Id.* 37-1-4. Note that the statute of limitations period does not accrue until the fraud or injury to property is discovered by the claimant. *Id.* 37-1-7. For these reasons, the author generally seeks a release from the distributees before filing a closing statement. When the family is getting along, the author also typically obtains a waiver of the written accounting, simply to avoid the cost of preparing one.

C. Reopening the Estate

The estate may be reopened if property is discovered after the estate is closed. NMSA 45-3-

²⁵ *Cf.* NMSA 45-3-902(A) (providing the order in which the estate is abated).

²⁶ NMRA 4B-502, which is a form closing statement under NMSA 45-3-1003, states incorrectly that the PR loses all authority to act on behalf of the estate upon filing the statement.

1008. The section makes clear that reopening the estate is not required if the property is discovered within one year of the filing of the closing statement.
Id.

A General Estate Timeline

Date of Appointment (“DOA”)
 Date of Death (“DOD”)
 Date of Filing (“DOF”)
 Date of Hearing (“DOH”)
 Date of Notice (“DON”)

Time	Action	Authority
DOD + ??	Special administrator may be appointed informally to preserve estate	45-3-614(A)
DOD + 120 hours (5 days)	Earliest time for informal probate of a will, or informal appointment of PR	45-3-302, 45-3-307(A)
DOD + 45 days	Creditor may apply to be PR	45-3-203(F)
DOD + 4 months	Earliest date a claim belonging to the decedent expires. Period may actually be DOD + 1 year (see 37-1-11)	45-3-109
DOH – 14 days	Serve notice in formal proceedings (14 days’ notice required for hearing)	45-1-401, 45-3-403(A), 45-3-414(B)
DOA + 10 days	Notice of appointment as PR (informal & formal) to heirs & devisees	45-3-705(A)
DOA + 30 days	Notice of informal probate of will to heirs & devisees	45-3-306(B)
DOA + 3 months	Prepare inventory & send to persons who have requested a copy	45-3-706(A)
DOA + 3 months	Written notice to known & reasonable ascertainable creditors	45-3-801(A)
DOA + reasonable time	Publish notice to creditors	45-3-801(B)
DON + 2 months	Creditor claims are barred if notice provided	45-3-803(A)(2)
DON + 2 months	PR may petition for settlement of estate & discharge	45-3-1001(A), 45-3-1002(A)
DON + 2 months + 60 days	Presented creditor claims are deemed allowed if PR does not send notice of disallowance	45-3-806(A)
DOA + 3 months	PR may file verified closing statement (but also no earlier than DON + 2 months)	45-3-1003(A)
DOD + 1 year	Creditor claims are barred irrespective of notice	45-3-803(A)(1)
DOA + 1 year	Interested persons may petition for accounting & settlement of estate	45-3-1001(A), 45-3-1002(A)
DOF + 6 months	Interested persons must bring action for breach of fiduciary duty in context of verified closing statement	45-3-1005
DOF + 1 year	PR may still act to administer estate after filing closing statement	45-3-1003(B)
DOD + 3 years	Deadline to initiate proceeding to administer estate, formal or informal (certain exceptions apply)	45-3-108