

UNIFORM PROBATE CODE AMENDMENTS TAKE EFFECT JAN. 1, 2012

By Jack Burton and Fletcher Catron



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For the first estate Jack Burton assisted on in the late 1960s, the personal representative's fee was \$10,000. The lawyer's fee was fixed by statute at the same amount as the personal representative's fee. These fees were a lot of money then. The same estate today, even if adjusted for inflation, would not require probate, nor would it require expensive estate planning devices. The fees associated with probate have been reduced or eliminated. Money that previously was needed to pay the personal representatives and lawyers now goes instead to the heirs, an outcome likely preferred by all New Mexicans. The difference? The Uniform Probate Code (UPC).

Members of the State Bar who practice in this area have done a tremendous public service in lobbying the State Legislature for New Mexico's codification of the UPC (NMUPC). In doing so, they voluntarily gave up the old fee system,

which encouraged them to induce personal representatives to take as high a fee as possible so the lawyers could take the same amount. In the old days, neither the personal representative nor the probate lawyer had any incentive to keep time records and many did not do so. Now, the statute and the fees have been changed so that personal

representatives and lawyers must charge on a reasonable fee basis and keep time records, resulting in much lower fees. Some personal representatives even charge no fees in small estates.

This new fee system is just one example of the changes in our state laws that have occurred as a result of codifying the UPC in New Mexico. Overall, the UPC simplifies, clarifies and modernizes probate procedure and estate planning and makes them simpler, easier and cheaper. Many small estates do not need probate because of transfer on death (TOD) bank accounts and stock accounts and homes held in joint tenancy or under TOD deeds. These innovations were not common in New Mexico, if they existed at all, when the authors began practicing law. The late Representative Tommy Foy, a longtime

chair of the New Mexico House Judiciary Committee and Uniform Law commissioner, led the way toward the modernization of our laws with the NMUPC.

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New amendments to the NMUPC and several related laws take effect Jan. 1, 2012. This article is a "heads up" for lawyers and judges so they will not be caught unawares.

The NMUPC itself received the greatest number of amendments. A new part of the code, the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, has been enacted in 30 states and is codified as Article 5A of Chapter 45 of the NMSA. This act provides

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STATE BAR AMONG "BEST PLACES TO WORK"



The *New Mexico Business Weekly* honored 30 New Mexico companies for creating outstanding workplaces at its sixth annual Best Places To Work breakfast Dec. 8 at Hotel Albuquerque. More than 90 companies nominated themselves for the Best Places to Work awards. Rankings were based on employee surveys. The 10 top-scoring com-



panies in each category were named finalists. The State Bar was among the finalists for the third straight year, placing fifth in the medium company category. Board of Bar Commissioner Member Danny Jarrett and

2012 BBC Secretary-Treasurer Martha Chicoski (*above left*) accepted the award on behalf of the State Bar staff (*above*), many of whom were on hand to celebrate the award.

a road map for addressing multi-state jurisdiction issues and prevents “granny-snatching.”

The NMUPC also has been updated to provide comprehensive, modern and fair inheritance rights and rules for children affected by adoption, divorce, remarriage and assisted reproduction. Of particular interest to a small but growing number of New Mexicans is the recently adopted extensive definition of the parent-child relationship that takes into account the potential for having children by assisted reproduction, including children resulting from sperm or egg donation and gestational agreements. Laws such as these have practical impact. For example, the Court of Appeals for the Eighth Circuit recently denied any Social Security survivor’s benefits to a daughter who was posthumously conceived with the prior, written consent of the decedent. A statutory amendment that would have allowed the benefits to be awarded became effective while the case was pending, but the amendment was not retroactive. *Beeler v. Astrue*, 641 F.3d 49 (4th Cir. 2011).

Other changes to the NMUPC relate to potentially greater recognition of testators’ intentions. Of interest to litigants in the probate area will be the reversal of the rule barring introduction into evidence of extrinsic evidence of a testator’s intent. Section 45-2-805. Of interest to tax counsel will be the new rule allowing reformation of a will to achieve the testator’s tax objectives. Section 45-2-806. These provisions mirror analogous provisions of New Mexico’s Uniform Trust Code, which have been on the books since 2003. Sections 45-4-415 & -416.

Section 45-2-804 of the NMUPC has been amended to override the result in *Oldham v. Oldham*, 2011-NMSC-007, 247 P.3d 736.¹ The Oldham Case applied common law abatement rules to hold that if a party died during a divorce proceeding, then the proceeding abated, with the result that the surviving party inherited from the decedent. The Legislature felt that parties to a divorce proceeding would not want their adversaries to inherit from them. As a result, the Legislature established that in such cases, the surviving party would be deemed to have predeceased the decedent so the surviving party could not inherit from the decedent.

Other amendments further clarify and modernize the NMUPC. These amendments include recodification of the Uniform Disclaimer of Property Interests Act (as Sections 45-2-1101, et seq.; a uniform technical amendment to this act was also included with this recodification), the Uniform Power of Attorney Act (as Article 5B of Chapter 45) and the Uniform Estate Tax Apportionment Act (from Article 9A of Chapter 45 to Sections 45-3-920, et seq.).

These recodifications bring New Mexico’s codification of the UPC more in line with the uniform codification. One reason for seeking this conformity is to facilitate the New Mexico Compilation Commission’s plan to publish the Official Comments to the UPC as annotations to the NMSA, just like the commission publishes the Official Comments to the Uniform Commercial Code (UCC). Having these comments easily accessible will level the playing field for all New Mexico judges and lawyers, specialists and non-specialists alike. Comments are “persuasive,” although not “direct authority” for the interpretation of a uniform law. *Burchard v. Allied Concord Finance Corp.*, 74 N.M. 575, 578, 396 P.2d 186 (1964) (interpreting the UCC).

Other amendments update and make the New Mexico codification of the Uniform Trust Code (UTC) more uniform. For example, Section

46A-1-107, which establishes the governing law of a trust, has been much simplified and will be entirely uniform. The amended law provides that the law governing a trust is the law of the jurisdiction, whether a state or a foreign country, designated in the trust instrument, unless that law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue. The current, nonuniform provision in the New Mexico UTC provides that if the trust instrument designates the law of a state as the governing law, that designation controls even if it is contrary to a strong public policy of another state or foreign country having the most significant relationship to the matter at issue. The nonuniform provision also states that if the trust instrument designates the law of a foreign country as the governing law, that designation controls unless the law is contrary to a strong public policy of New Mexico or the state having the most significant relationship to the matter in controversy. If no governing law is designated in the trust instrument, the governing law will remain the law of the jurisdiction having the most significant relationship to the matter at issue.

Such provisions deferring to the jurisdiction with the most significant relationship to an agreement are a hallmark of uniform laws, which generally follow the Second Restatement approach to conflict of laws. These provisions also stand in stark contrast to the New Mexico rules, which generally follow the First Restatement approach of looking to the place of the last act necessary for the formation of an agreement.

Uniform amendments to the Uniform Principal and Income Act (UPIA) conform that act to recent rulings of the Internal Revenue Service governing deferred compensation, annuities and income taxes. These changes will be of interest to tax counsel and estate planners.

On Jan. 1, 2012, as a result of these amendments, New Mexico’s codifications of the UPC, UTC and UPIA will probably be more uniform than any other state’s. This uniformity will benefit all New Mexicans by making probate procedure and estate planning even simpler, easier and cheaper than they are now.

Endnote

¹The authors thank Tom Montoya of the State Bar Family Law Section for calling the Oldham Case to their attention and recommending that it be overturned legislatively.

About the Authors

John P. (Jack) Burton is a director with the Rodey Law Firm in Santa Fe and a Uniform Law commissioner. He helped to draft the Uniform Probate Code amendments and he and Catron testified in support of them at the New Mexico Legislature. Burton co-authored this article on behalf of all of New Mexico’s Uniform Law commissioners (in alphabetical order): Raúl E. Burciaga, Jack Burton, Joseph Cervantes, Zachary J. Cook, Robert J. Desiderio, Thomas P. Foy, Sr. (Deceased, October 2011), Daniel A. Ivey-Soto, Philip P. Larragoite, Cisco McSorley, Al Park, William H. Payne, Raymond G. Sanchez, and Paula Tackett.

Fletcher R. Catron practices law with the firm of Catron, Catron & Pottow PA in Santa Fe. His work is primarily in estate planning, trusts and probate, and he is a fellow of the American College of Trust and Estate Counsel (ACTEC). He has frequently represented the position of the Real Property, Trust and Estates Section at the New Mexico Legislature with respect to proposals for probate and trust legislation, including the most recent amendments. Catron coauthored this article on behalf of the State Bar Real Property, Trust and Estate Section.