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FISCAL IMPACT REPORT

ORIGINAL DATE 1/28/15

SPONSOR Wirth LAST UPDATED _____ HB _____

SHORT TITLE Uniform Powers of Appointment Act SB 60

ANALYST A. Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY14	FY15		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Administrative Office of the District Attorneys (AODA)

SUMMARY

Senate Bill 60 proposes to enact the Uniform Powers of Appointment Act (UPAA), mirroring the Uniform Law Commission’s (“ULC”) 2013 annual meeting approved text, codifying the law of powers of appointment used by estate planners to give a third party the authority to direct the disposition of a donor’s property to specified eligible recipients. The UPAA was approved by the ULC in July of 2013 and by the American Bar Association (“ABA”) on February 10, 2014. (While other states have yet to enact the UPAA, it has also been introduced in the state of Indiana.)

The effective date of Sections 604 through 624 and Section 626 of the UPAA is July 1, 2015.

FISCAL IMPLICATIONS

According to the AOC, there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes.

SIGNIFICANT ISSUES

According to the AOC, the UPAA does not change the law, but rather codifies the scant case law addressing powers of appointment, providing needed guidance for practitioners, for clients, and

for courts. Currently, powers of appointment are commonly included in both wills and trusts, but there is very little statutory law governing their use. Instead, estate planners must rely on a patchwork of state court decisions, most of which are not binding outside the jurisdiction in which the case was decided. The bill adds clarity and direction for parties using the Probate Code. This should result in easier, more efficient probating of estates in probate and district court.

The Uniform Act governs the creation, amendment, and revocation of powers of appointment. It also: addresses the exercise of powers by the power-holder and the distribution of appointive property; provides rules for disclaimers and releases, and for contracts between a power-holder and a permissible beneficiary; and the Act sets out the rights of a power-holder's creditors to access appointive property under certain conditions.

It codifies most of the rules concerning powers of appointment already set out in the American Law Institute's recently completed *Restatement (Third) of Property*. Therefore, estate planning attorneys are already familiar with the substance of many of the Uniform Act's provisions and will welcome the legal certainty that a statute provides.

2) SB 60 proposes to amend and enact statutory sections applicable to the courts as follows:

- Section 403, within the UPAA, provides release of a power of appointment in whole or in part by a record manifesting the powerholder's intent by clear and convincing evidence, if the terms of the instrument creating the power do not provide a method or the method provided in the terms of the instrument is not expressly made exclusive. The statutory section also provides for release by substantial compliance with a method provided in the terms of the instrument creating the power.
- Section 407, within the UPAA, governing "Remedy for Breach of Contract to Appoint or not to Appoint," limits the remedy for a powerholder's breach of a contract to appoint or not to appoint appointive property to damages payable out of the appointive property or, if appropriate, specific performance of the contract.
- Section 603, "Application to Existing Relationships," provides that:
 - A. Except as otherwise provided in the Uniform 15 Powers of Appointment Act, on and after January 1, 2016:
 - (1) the Uniform Powers of Appointment Act applies to a power of appointment created before, on or after January 1, 2016;
 - (2) the Uniform Powers of Appointment Act applies to a judicial proceeding concerning a power of appointment commenced on or after January 1, 2016;
 - (3) the Uniform Powers of Appointment Act applies to a judicial proceeding concerning a power of appointment commenced before January 1, 2016 unless the court finds that application of a particular provision of the Uniform Powers of Appointment Act would interfere substantially with the effective conduct of the judicial proceeding or prejudice a right of a party, in which case the particular provision of the Uniform Powers of Appointment Act does not apply and the superseded law applies;
 - (4) a rule of construction or presumption provided in the Uniform Powers of Appointment Act applies to an instrument executed before January 1, 2016 unless there is a clear indication of a contrary intent in the terms of the instrument; and
 - (5) except as otherwise provided in Paragraphs 12 (1) through (4) of this subsection, an action done before January 1, 2016 is not affected by that act.

- Section 611 enacts a new section of the Uniform Probate Code, governing the appointment of a representative, permitting the court to appoint a representative to receive notice, give consent and otherwise represent, bind and act on behalf of a minor, incapacitated or unborn person, or a person whose identity or location is unknown, if the court determines that an interest is not represented under Chapter 45 NMSA 1978, or that otherwise available representation might be inadequate. The statutory section provides that the court may appoint a representative to represent several persons or interests. The new statutory section also provides that a representative may act on behalf of the person represented with respect to any matter arising under the UPC, whether or not a judicial proceeding concerning the estate is pending.
- Section 619 enacts a new section of the Uniform Probate Code to provide that a provision in a will purporting to penalize any interested person for contesting a will or instituting other proceedings relating to an estate is unenforceable if probable cause exists for instituting proceedings.
- Section 622 amends Section 45-3-1101 NMSA 1978, governing the “Effect of Approval of Agreements Involving Trusts, Inalienable Interests or Interests of Third Persons,” to clarify that a “court-approved” compromise is binding even though it may affect a trust or an inalienable interest, rather than any compromise.

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

RELATIONSHIP

Relates to HB124 (Appointment of Assets Between Trusts), HB184 (Uniform Trust Code Changes), and HB185 (Trustee Discretion in Distribution Sources).

ABS/bb