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FISCAL IMPACT REPORT

SPONSOR Cook **ORIGINAL DATE** 02/04/16
LAST UPDATED 02/17/16 **HB** 280/aSJC

SHORT TITLE Uniform Powers of Appointment Act **SB** _____

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with SB 155.

Duplicates SB 91.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee Amendment to HB 280 strikes provisions enacting the Uniform Powers of Appointment Act and enacting new or amending some existing provisions of the Uniform Probate Code and the Uniform Trust Code. As a result, HB 280 now enacts the Uniform Trust Decanting Act (UTDA), and expands the definition of "state" in the UTDA to include Indian tribes, pueblos, nations or bands within the United States and recognized by federal law or formally acknowledged by a U.S. state. It also amends the statutory rule against perpetuities.

In addition, the amendment renumbers remaining sections, revises the effective date provisions to reflect those changes in numbering, adds clarifying language to the definition of "court" in the UTDA and makes other grammatical changes that do not change the meaning.

Synopsis of Original Bill

House Bill 280 enacts the Uniform Powers of Appointment Act (UPAA), mirroring the Uniform Law Commission’s (“ULC”) 2013 annual meeting approved text. It codifies 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. It has been enacted by Colorado, Montana and North Carolina, and introduced in 2016 in Missouri and Virginia.

This bill enacts the Uniform Trust Decanting Act (UTDA), adopting the ULC’s 2015 approved Act (with some changes, as discussed in Significant Issues below.) The UTDA allows a trustee to reform an outdated irrevocable trust document within reasonable limits that ensure the trust will achieve the settlor’s original intent. The UTDA was approved by the ULC in July of 2015. (According to the ULC’s Legislative Fact Sheet and enactment Status Map, New Mexico is the first state to introduce the UTDA.)

In addition, in Section 3-113, SB 91 amends the Uniform Rule Against Perpetuities as adopted in New Mexico to revise the exemption for certain property held in trust. This Rule generally invalidates certain unvested property interests if they do not vest within 21 years of the death of a person now living or within 90 years of the creation of the property interest. This revision provides no termination for unvested personal property held in trust, while allowing real property to be held in trust for 365 years after the later of the date upon which the trust acquired the property or the date the trust became irrevocable.

Finally, this bill amends other provisions of the New Mexico Uniform Probate Code (UPC) pertaining to notice, time for presentation of claims, penalty clauses and closing an estate.

The effective date of Articles 1 through 6 of the UPAA, Sections 2-101 through 2-129 of the UTDA, and Section 3-124 (repealing Sections 45-2-608 and 45-2-704 NMSA 1978) is January 1, 2017. The effective date of Sections 3-101 through 3-123 and 3-125 is July 1, 2016.

FISCAL IMPLICATIONS

AOC reports minimal administrative costs for statewide update, distribution and documentation of statutory changes. Further, the UTDA require notice to the AGO in certain instances, and authorizes the AGO to ask when appropriate for direction from a court concerning the proper exercise of a decanting power when a charitable interest is involved. As a result, at least some impact on the AGO may be anticipated.

SIGNIFICANT ISSUES

Uniform Powers of Appointment Act

The AOC, citing the ULC, explains 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 courts.

The UPAA governs the creation, amendment, and revocation of powers of appointment. It also addresses the exercise of powers by the person holding the power (sometimes referred to as the powerholder) and the distribution of appointive property; provides rules for disclaimers and releases and for contracts between a powerholder and a permissible beneficiary; and 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 already familiar with the substance of many of the Uniform Act's provisions likely will welcome the legal certainty that a statute provides.

For a further description of the Articles and some of the provisions of the UPAA, please see Other Substantive Issues, below.

Uniform Trust Decanting Act

Again, AOC turns to the ULC to help explain this act and the purpose behind it:

“Decanting” is the term used to describe the distribution of assets from one trust into a second trust, like wine is decanted from the bottle to another vessel. Decanting can be a useful strategy for changing the outdated terms of an otherwise irrevocable trust, but can also be abused to defeat the settlor's intent. The UTDA allows a trustee to reform an irrevocable trust document within reasonable limits that ensure the trust will achieve the settlor's original intent. The act prevents decanting when it would defeat a charitable or tax-related purpose of the settlor.

The UTDA is promulgated in the midst of a rising tide of state decanting statutes. These statutes represent one of several recent innovations in trust law that seek to make trusts more flexible so that the settlor's material purposes can best be carried out under current circumstances. A decanting statute provides flexibility by statutorily expanding discretion already granted to the trustee to permit the trustee to modify the trust either directly or by distributing its assets to another trust. While some trusts expressly grant the trustee or another person a power to modify or decant the trust, a statutory provision can better describe the power granted, impose limits on the power to protect the beneficiaries and the settlor's intent, protect against inadvertent tax consequences, provide procedural rules for exercising the power and provide for appropriate remedies. While decanting may be permitted in some situations under common law in some states, in many states it is unclear whether common law decanting is permitted, and if it is, the circumstances in which it is allowed and the parameters within which it may be exercised.

AOC calls attention to four differences between the model act and HB 280: unlike the ULC's Model Act, HB 280 adds Subsection B to Section 2-105 to provide additional clarification as to when the UTDA or a rule of construction or presumption provided in the UTDA applies. HB 280 clarifies in Subsection C that if a right is acquired, extinguished or barred on the expiration of a prescribed period that commenced under New Mexico law other than the UTDA before January 1, 2017, the law continues to apply to the right. This bill adds Subsection B to Section 2-109 governing court involvement, to specify the actions a court may approve on application of an authorized fiduciary. Lastly, the model act contains a severability clause, while HB 280 does

not.

AGO points out that it is assigned a role under the UTDA. If the first trust contains a determinable charitable interest, the fiduciary must give notice to the AGO. Section 2-114 defines a “determinable charitable interest” as a charitable interest that is a right to a mandatory distribution currently, periodically, or on the occurrence of a specified event or after the passage of a specified time and that is unconditional or will be held solely for charitable circumstances. Further, if the first trust contains a determinable charitable interest, the second trust or trusts shall not diminish the charitable purpose, diminish the interest of an identified charitable organization that holds the charitable interest, alter any charitable purpose stated in the first-trust instrument, or alter any condition or restriction related to the charitable interest. Section 2-109 provides that on application of an authorized fiduciary, the AGO, as a person entitled to notice with respect to a charitable interest, may apply to the court to have the court provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted pursuant to the Act, or to appoint a special fiduciary authorized to determine whether it is.

For a further description of some of the provisions of the UTDA, please see Other Substantive Issues, below.

Rule Against Perpetuities

The purpose of the rule against perpetuities is to preserve the transferability of property interests. There is a continued potential for abuse by persons attempting to evade ad valorem, income and estate taxation. Eliminating or delaying requirements for conveyance of trust property out of trust may reduce the scope and number of taxable events, or opportunities to reassess the property at market value when it is conveyed out of trust.

Section 3-113 of HB 280 significantly changes the existing rule by extending the life span to 365 years, allowing the creation of what may be referred to as “dynasty trusts.” While dynasty trusts may be considered effective tools for building and preserving wealth because no estate tax can be imposed while the property interests are held in trust, its impact on the State’s ability to collect those and other taxes is adversely impacted. Dynasty trust assets may also be shielded from creditors and divorcing spouses.

Other Probate Code Changes

In Section 3-115, HB 280 repeals existing law regarding notice to creditors in the UPC, and enacts a new version that permits but does not require notice by publication or by written notice by mail or other delivery to a creditor. HB 280 also expands the time for creditors to present their claims from two to four months following any publication (which must now run for three rather than two weeks). Current law requires written notice by mail or other delivery, while notice by publication is allowed but not required. The failure to require at least some form of notice to creditors may be unintended, but could severely impact the rights of creditors if left as is.

Other amendments to the UPC are discussed in more detail below in Other Substantive Issues.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 280 conflicts with SB 155, which only enacts the UPAA. SB 155 also amends the statutory rule against perpetuities (Section 45-2-904, NMSA 1978) in a manner different than that contained in this bill. This bill duplicates SB 91 in its entirety, and also duplicates SB 155's enactment of the UPAA and its amendment of other existing statutes.

OTHER SUBSTANTIVE ISSUES

Uniform Powers of Appointment Act:

AGO provides this summary of the specific articles of the UPAA:

Article 1 (Sections 101 – 104) contains the short title (Section 101), definitions (Section 102) and scope (Sections 103 & 104) of the Act. Some of the critical definitions in the Act are: “donor” means a person that creates a power of appointment; “power of appointment” means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. “Power of appointment” does not include a power of attorney; and “powerholder” means a person in whom a donor creates a power of appointment.

Article 2 (Sections 201 – 206) details the creation, revocation and amendment of a power of appointment. Section 201 explains how a donor creates the power of appointment, and the donor may revoke or amend that power under Section 206. Section 202 directs that the power is not transferable to another person. Sections 203 – 205 explain the scope of the powerholder's authority.

Article 3 (Sections 301 – 314) addresses how the powerholder exercises the power of appointment. Under Section 301, the power of appointment is valid only if the instrument exercising the power is legally valid, is consistent with the powerholder's intent, and satisfies the donor's requirements (all of which are described in more detail in Sections 302-304). Section 305 details what appointments are permissible, and Section 307 details which are impermissible. Sections 309 through §311 explain the disposition of “unappointed” or “ineffectively appointed” property. Section 314 allows the powerholder to revoke or amend the exercise under specific circumstances.

Article 4 (Sections 401 – 407) allows the powerholder to disclaim the power of attorney (Section 401), to release a power of appointment (Sections 402-404), or to contract to either exercise or not exercise a power of appointment (Sections 405-406). Section 407 is the remedy for a breach of such a contract.

Article 5 (Sections 501 – 504) sets forth the rights of the powerholder's creditors in the appointive property. A creditor of the powerholder can reach the appointive property of a general power of appointment, in some circumstances, whether or not the general power of appointment was created by the powerholder. However, if the appointive property was of a “nongeneral” power of appointment, it is exempt from a creditor's claim (unless the property was transferred in violation of the Uniform Voidable Transactions Act, Section 56-10-14, NMSA 1978).

Article 6 (Sections 601-603) contains miscellaneous provisions of the Act. Section 601 says that consideration shall be given to the need to promote uniformity of the act.

Article 7 (Sections 701 – 727) makes technical and conforming changes to the UPC and the Uniform Trust Code, and amends the UPC regarding notice, time for presentation of claims, penalty clauses and closing an estate.

Some sections of the UPAA include:

- Section 1-403 provides for 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 1-407 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 1-603 provides that:
 - Except as otherwise provided in the UPAA, it applies to:
 - (1) a power of appointment created before, on or after January 1, 2017;
 - (2) a judicial proceeding concerning a power of appointment commenced on or after January 1, 2017; and
 - (3) a judicial proceeding concerning a power of appointment commenced before January 1, 2017 unless the court finds that application of a particular provision of the UPAA interferes substantially with the effective conduct of the judicial proceeding or prejudices a right of a party, in which case the particular provision of the UPAA of does not apply and the superseded law applies.

Additionally, a rule of construction or presumption provided in the UPAA applies to an instrument executed before January 1, 2017 unless there is a clear indication of a contrary intent in the terms of the instrument; and except as otherwise provided in Paragraphs 12 (1) through (4) of this subsection, an action taken before January 1, 2017 is not affected by the UPAA.

Uniform Trust Decanting Act

AOC calls attention these particular provisions in UTDA as HB 280 would enact it in New Mexico:

- Section 2-103 provides that the Act does not limit the power of a trustee, powerholder or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, New Mexico law other than the UTDA, common law, a court order or a nonjudicial-settlement agreement.
- Section 2-105 provides that except as otherwise provided in the UTDA, on and after

January 1, 2017, the UTDA applies to a judicial proceeding concerning a trust commenced before January 1, 2017 unless the court finds that application of a particular provision of the UTDA 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 UTDA does not apply and the superseded law applies.

- Section 2-109 governs court involvement, listing the actions a court may take on application of an authorized fiduciary, a person entitled to notice under Subsection C of Section 2-107 of the UTDA, a beneficiary or, with respect to a charitable interest, the AG or other person that has standing to enforce the charitable interest; and the actions a court may approve on application of an authorized fiduciary.
- Section 2-114(E) provides that if a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to Subsection C of this section shall be administered under New Mexico law unless the court approves the exercise of the decanting power.
- Section 2-116 provides that if a first-trust instrument does or does not specify an authorized fiduciary's compensation, the fiduciary shall not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless all qualified beneficiaries of the second trust consent to the increase in a signed record, or the increase is approved by the court.
- Section 2-118 prohibits an authorized fiduciary from exercising the decanting power to modify a provision in a first-trust instrument granting another person power to remove or replace the fiduciary unless, as one of several options, the court approves the modification and the modification grants a substantially similar power to another person.

Uniform Probate Code Changes

Additional changes to the UPC include:

- Section 3-108 enacts a new section of the Uniform Probate Code (UPC) 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 court may appoint a representative to represent several persons or interests. It 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 3-112 amends Section 45-2-704, NMSA 1978, to allow for substantial compliance with a specific reference requirement imposed in a governing document by a donor under certain circumstances.

- Section 3-113 expands an exclusion to the statutory rule against perpetuities applicable to honorary trusts and trusts for pets that are subject to a time limit of 21 years to include any property interest held in trust without limiting the time that that interest may be held in trust.
- Section 3-118 repeals an existing section of the UPC, codified at Section 45-3-905, NMSA 1978, and enacts a new UPC section providing 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 3-121 amends Section 45-3-1101, NMSA 1978, to clarify that a “court-approved” compromise is binding even though it may affect a trust or an inalienable interest, rather than any compromise

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