

# NEW MEXICO Lawyer

May 2017 Volume 12, No. 2

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The Real Property Trust and Estate Section provides these articles to support its members in the areas of real property and trusts and estates. Watch for other educational opportunities, including the Probate Institute in November and the Real Property Institute in December, brought to you by the Section's Trust and Estate and Real Property divisions. For more information on the Section, visit [www.nmbar.org/RPTE](http://www.nmbar.org/RPTE).

Sincerely,  
Sara R. Traub, Chair  
Real Property, Trust and Estate Section

# 2016 and 2017

## Changes in Probate, Trust, and Estate Planning Laws

By Fletcher R. Catron

Attorneys working in the probate, trust and estate planning areas should be aware of legislation enacted by the 2016 and 2017 sessions of the New Mexico Legislature that affect their practices. Though this is not a complete listing, it does include some of the most significant substantive changes in the law.

### I. 2016 Legislation

#### A. Notice Requirements and Time Limits

As of July 1, 2016, if notice of a hearing is required to be published to reach unknown persons or persons whose addresses cannot be discovered, the number of weekly publications was increased from two to three. NMSA 1978, § 45-1-401. This includes a hearing on a petition for appointment of a personal representative to open a probate. This three-publication rule conforms to Rule 1-004 NMRA and the Uniform Laws Commission's version of the Uniform Probate Code. *Uniform Probate Code* (1969), Rev. 2010, § 1-401, most easily accessed at [www.uniformlaws.org](http://www.uniformlaws.org).

NMSA 1978, Section 45-3-801 was amended to make the giving of notice to decedent's creditors, whether known or unknown, optional. If no notice is given,

the period in which a creditor may submit a claim remains at one year after death. NMSA 1978, § 45-3-803. If the personal representative wants to shorten that time, notice to creditors is still required, but the number of publications and the time in which to submit claims has changed. In order to bar unknown creditors, the number of required weekly publications is increased from two to three, and the time allowed to present a creditor's claim after the first publication is increased to four months from two. As before, notice to known or reasonably discoverable creditors is effective only if it is sent directly to the

creditors, and those creditors are given until the later of 60 days or the last claim date after any publication in which to file claims.

The change in the number of publications in both, Section 45-1-401 and Section 45-3-801 was enacted, in order to bring New Mexico's statute closer to the "uniform" version, to meet the notice objections expressed by the committee comments to Rule 1-004, NMRA, and to ensure that the notice objections found in *Tulsa Professional Collection Services v. Pope*, 485 U.S.478 (1988), are overcome. The official



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comments to Uniform Probate Code (1969), Rev. 2010, Section 1-401 and especially Section 1-403, have interesting discussions of the efforts taken to ensure that all notice is constitutionally adequate.

Coincident with lengthening the time for publication and filing of creditors' claims, the legislature extended the earliest date for informal closing of an estate. The earliest date for closing an estate by the sworn statement of the personal representative has been extended from three months after appointment of the personal representative to six months after the appointment. NMSA 1978, § 45-3-1003.

The Supreme Court's Probate Court forms (Rules 4B-001 *et seq.*, NMRA) have not yet caught up with these changes in the law. Attorneys using Probate Court forms, or advising *pro se* persons who might do so, should be aware of the need to modify the official forms and instructions. A committee of the Supreme Court is in the process of revising rules and forms for use in the Probate Courts.

For those interested in asset protection trusts, the time allowed for vesting under the rule against perpetuities has now generally been extended to 365 years. NMSA 1978, § 45-2-904.

## B. Uniform Acts

Powers of appointment have generally been governed by common law. Effective Jan. 1, 2017, the 2016 Legislature adopted the Uniform Powers of Appointment Act (NMSA 1978, §§ 46-11-101 *et seq.*), which codifies the law relating to creation, interpretation, exercise and termination of powers of appointment. Although the UPA contains few surprises for the practitioner, it does help answer some nagging common questions, such as the degree of specificity needed to exercise a power that explicitly requires specific reference to the power in order to exercise it. NMSA 1978, § 45-2-704.

As part of the legislation adopting the Uniform Powers of Appointment Act, sections of the Uniform Probate Code and the Uniform Trust Code were amended, including provisions relating to abatement of devises (NMSA 1978, § 45-3-9902), private agreements among successors (NMSA 1978, § 45-3-912), closing estates by sworn statements (conforming to the minimum time for closing an estate

as mentioned above), clarifying when a trustee has an insurable interest in the life of an insured (NMSA 1978, § 46A-1-113), and who may represent another in probate matters (NMSA 1978, §§ 45-3-403.1 through 403.5).

Also effective Jan. 1, 2017 is the Uniform Trust Decanting Act. NMSA 1978, §§ 46-12-101 *et seq.* Although the Uniform Trust Code provides a great deal of flexibility in the administration of trusts, the Uniform Trust Decanting Act provides statutory approval and procedures to allow a trustee to "pour over" the assets of an existing trust into a newly-created trust with substantially-different provisions. The decanting is discretionary with the trustee and does not need court approval. Decanting may not be used to reduce a beneficial interest unless the trustee already has that authority.

## II. 2017 Legislation

### A. Uniform Partition of Heirs Property Act

The 2017 Legislature passed and the governor then signed House Bill 181, 2017 Reg. Sess. (N.M. 2017) and Senate Bill 60, 2017 Reg. Sess. (N.M. 2017), described below. Both are generally effective Jan. 1, 2018.

House Bill 181 enacts the Uniform Partition of Heirs Property Act. This Act modifies existing partition statutes (NMSA 1978, §§ 42-5-1 *et seq.*) to limit the ability of a co-tenant of family property to force the sale of the lands held in common. The Act provides that other co-tenants may buy out, at a reasonable price, the co-tenant who wants to sell his or her interest, thereby protecting co-tenants who wish to remain owners of family land. The Act expresses a strong preference for actual partition by division over sale, and it expressly provides that the court may order that the land be physically partitioned by value and may not refuse division simply because of the proposition that all real property is unique. If sale is necessary, the Act establishes a commercially reasonable method of sale, as opposed to the auction sale which seems to be generally used under the terms of the current act (NMSA 1978, § 42-5-7). For those who want to understand the background of this legislation, including a discussion of the various state laws under ordinary partition statutes, the official comments to the uniform act are particularly interesting. As noted in the comments, some land grants in

New Mexico, lost to the original owners in the late 1800's and early 1900's, might still be in the hands of the descendants of those original owners had this law been in effect at the time. *Uniform Partition of Heirs Property Act* (2010), again most easily accessed at [www.uniformlaws.org](http://www.uniformlaws.org).

House Bill 181 also amends the form of the self-proving clause for wills and extends from 10 days to 30 days the time for giving notice of the appointment of personal representative, thereby conforming the time to give notice of the appointment of a personal representative (NMSA 1978, § 45-33-705) to the time to give notice of the probate of a will (NMSA 1978, § 45-3-306B). It provides that a personal representative shall not delay estate distribution because of the potential for a posthumously conceived child unless the personal representative has received written notice or actually knows of an intention to have such a child.

### B. Revised Uniform Fiduciary Access to Digital Property Act

Senate Bill 60 enacts the Revised Uniform Fiduciary Access to Digital Property Act. A fiduciary ordinarily is prevented by those hosting remote data servers from obtaining access to the principal's on-line accounts and data. If they are stored "in the cloud," an incapacitated person's bank statements, a Great American Novel written by a now-incapacitated person, the principal's family photos or the texts and emails of a decedent, commonly cannot be retrieved by a fiduciary and may be deleted by the host. This uniform act allows a fiduciary to gain access to certain information that the principal has not explicitly required to be kept private under all circumstances. It is important to note that access to digital assets must be specifically allowed by the governing document in most instances. Because of the requirement for specific reference to digital asset access, most forms of wills, powers of attorney, and revocable trusts should be drafted or amended to include this authority, even though the act will not be effective for several months. ■

#### *About the Author*

*Fletcher R. Catron practices estate planning, trust and probate law with the firm of Catron, Catron & Glassman, PA in Santa Fe. He is a Fellow of the American College of Trust and Estate Counsel and a board member of both the Elder Law Section and the Real Property, Trust and Estate Section of the State Bar of New Mexico.*

# Cellular Tower Site Leasing: Avoiding Bear Traps

By Jonathan L. Kramer

Cell tower site leases are often low impact, long-term income sources for landlords, but they fall into a narrow category of complex leases that require careful crafting to protect the landlord from having its smallest tenant turn into its biggest nightmare. This article highlights some of the issues confronting counsel for landlords in the typical boilerplate lease templates used by wireless carriers, which can leave the landlord smarting for decades.

## Their Players

The property owner is commonly approached by a land acquisition firm representing a wireless carrier. The representative will insist on using the wireless carrier's rather one-sided lease template. The representatives have little real negotiation authority. Wireless companies have in-house and contract attorneys. Only when you get past the representative to the attorneys are you really able to negotiate.

## What's Your Option?

Well-drafted leases begin with an option. The purpose of an option in a cell site lease is to hold the property for a period of time while the cell company goes through the local government permitting process. The option must be supported by consideration to be binding. Many carrier templates attempt to enter into a binding option without paying an actual option fee. Look for and reject non-cash consideration. It's usual for the option fee to be \$1,000-\$2,000 per year, payable in advance.

In addition to the option fee, the landlord should require a signing bonus in the option to fully recover its legal and other costs in granting the option and the lease terms if the option is exercised. The landlord's cost recovery at this early point is vital because the final terms of the lease will invariably contain a provision allowing the tenant to unilaterally terminate the lease almost at will. Carriers require early termination rights in their leases so they

may freely reconfigure their networks and cell site locations. More information on early terminations will be presented later in the article.

## Rent Commencement and Lease Term

Assuming that the wireless carrier elects to exercise its option, when should lease payments start? Wireless industry boilerplates allow the carrier to exercise the option and start the lease, but delay the commencement of rent payments until it begins construction, which may be several years off. Landlords should require rent to commence on the earlier of the start of construction or six months after the option is exercised.

How long is the lease term? Customarily, the initial term of the lease will run five years, with four or more 5-year renewal terms triggered solely by the tenant. The landlord will have virtually no right to terminate the lease at the end of any of the 5-year terms. This unilateral provision addresses the wireless carrier's need for long-term location security to protect its network engineering and site construction costs without the threat of landlord disturbance.

## Avoiding a Landlord's Horror

Given the decades-long term of wireless site leases, the landlord's attorney should insist upon a one-time relocation provision at the tenant's cost that allows the

landlord to trigger a cell site relocation on the landlord's property. The landlord's relocation option should become operative at the beginning of the third five-year term (10 years in to the lease). This is particularly important if the cell site is to be located on a building nearing the end of its economic life, or if the property may be redeveloped. Without such a relocation provision, or a provision that allows the landlord to terminate the lease if the building upon which the cell site is located is demolished, a landlord should expect its wireless tenant to demand anywhere between \$300,000 and \$1 million to terminate the lease and relocate the cell site to a different property.

## Two Big Questions

The first big question is "what's the rent?" The wireless company wants to reach an agreement on rent very early in the process, long before all of the lease terms have been negotiated. Strategically, this makes no sense for the landlord. Setting the rent before negotiating all of the provisions is like walking onto a car dealer's lot and telling the salesperson, 'I want to settle on the price of my new car now before we discuss the accessories.' The wireless company will tell you the rent it wants to pay at the beginning of the negotiations and try to lock the landlord into that rent. Starting rents offered by wireless companies are usually in the range of \$800-\$1,200 per month. A reasonable



approach to initial rent negotiations is to indicate that the landlord will consider the carrier's rent offer but reserve the right to adjust it based on the number of privileges the wireless tenant seeks in the lease.

The second big question is, "when does the rent escalate and by how much?" Carriers try to hide the ball by offering to escalate lease payments by 10-15 percent at the beginning of each 5-year renewal term. This approach deprives the landlord of the value of compound interest. Savvy landlord attorneys will require the rent to escalate by 2-3 percent per year. Inexperienced landlords may think these are not big differences, but compare two hypothetical cell site leases. Lease 1 has a term of 25 years, a starting rent of \$2,000 per month, and a 15 percent increase each renewal term. Lease 2 is identical to Lease 1 except that the rent increases 3 percent each year. At the end of 25 years, Lease 2 will earn the landlord nearly \$66,000 more compared to Lease 1. That's not chump change.

#### **SNDA**

Does the carrier want the landlord to obtain a subordination and non-disturbance agreement (SNDA) as part of the lease obligations? A common requirement in carrier lease templates is to require the landlord with a mortgage on the property to have its lender issue an SNDA in favor of the carrier. Essentially, an SNDA is a side contract between the lender and the wireless carrier that bars the lender from ejecting the wireless carrier if the landlord defaults on the loan. Some lenders charge their borrowers thousands of dollars to negotiate these deals. While the landlord should agree to cooperate with the carrier to obtain the SNDA, any lender costs should be borne by wireless carrier.

Are there landlord-owned properties nearby or surrounding the parcel on which the cell company wants to lease? Then beware wireless lease clauses that contain the term "surrounding properties" or some similar reference. This is a bold attempt by the wireless carrier to gain economic control over all of those surrounding properties that are owned in common (even in part) by the same landlord. The wireless carrier's goal through the surrounding properties clause is to prevent the landlord from leasing a cell site on a different property to a competitor unless

the tenant participates in the income. If found in the lease template, the landlord's attorney should simply strike all references to "surrounding properties."

#### **ROFRs**

Template leases frequently contain several right-of-first-refusal (ROFR) provisions that operate against the landlord. ROFRs bar landlords from selling a lease to a third-party without giving the tenant a first right to take that deal. A second type of ROFR enables the wireless tenant to step in during the middle of a potential sale to a third party and buy the entire property from the landlord. Both types of ROFRs harm the landlord's economic interest, and the second type can make the property commercially unmarketable. Strike ROFRs, but include a provision recognizing that the tenant's lease rights are preserved in any sale of the lease or property sale.

#### **Subleasing**

Commonly, the template lease will contain a provision allowing the tenant to sublease assign, sublicense, or in any other way retain the right to bring others onto its leasehold without the landlord's permission or providing any financial benefit to the landlord. From the landlord's perspective, subleasing or any other type of assignment should be restricted without the landlord's prior written consent, which may be withheld for any or no reason. In response, wireless carriers will usually agree to share a percentage (10 – 30 percent and sometimes even more) of the subtenant rent with the landlord. This is only fair, given that every additional tenant places a greater burden on the property and some form of landlord compensation for that additional burden should be included in the lease.

#### **Breaking Up Is Hard to Do (for the Landlord)**

Wireless lease templates contain escape clauses almost never found in any other commercial leases, allowing the tenant to terminate the lease nearly at will, commonly on 90-day notice and often with no early termination fee. Conversely, the templates sharply limit a landlord's ability to terminate the agreement, even in the event of a tenant's breach. The result is that the landlord is locked in to the lease for decades, but the carrier is not. The landlord should insist that in exchange for the tenant's privilege to terminate early,

upon early termination the carrier pay an early termination fee, usually equivalent to several years of rent.

#### **Wait a minute! \$500?**

Carriers need 24/7 access to their cell sites to perform emergency repairs. Some lease templates will contain a provision that allow the tenant to charge back the landlord \$500 for any landlord-caused delay in accessing the cell site. This charge is purely punitive and unrelated to any actual damages. The landlord's attorney should strike this and any other purely punitive lease terms.

#### **Attorneys' Fees and Venue**

Over the decades-long life of the lease it is far more likely that the tenant will sue the landlord than vice versa. A strong limitation on attorneys' fees and the addition of a venue selection clause favoring the landlord will help to reduce litigation exposure and expense.

#### **Caveat Imperium**

Cell site leasing by local governments merits an entire article of its own. Special rules and lease term considerations apply to local governments acting in their proprietary capacity as a landlord that differ markedly from private landlords. Sophisticated local governments will negotiate from their own lease form rather than work from the wireless carrier's template.

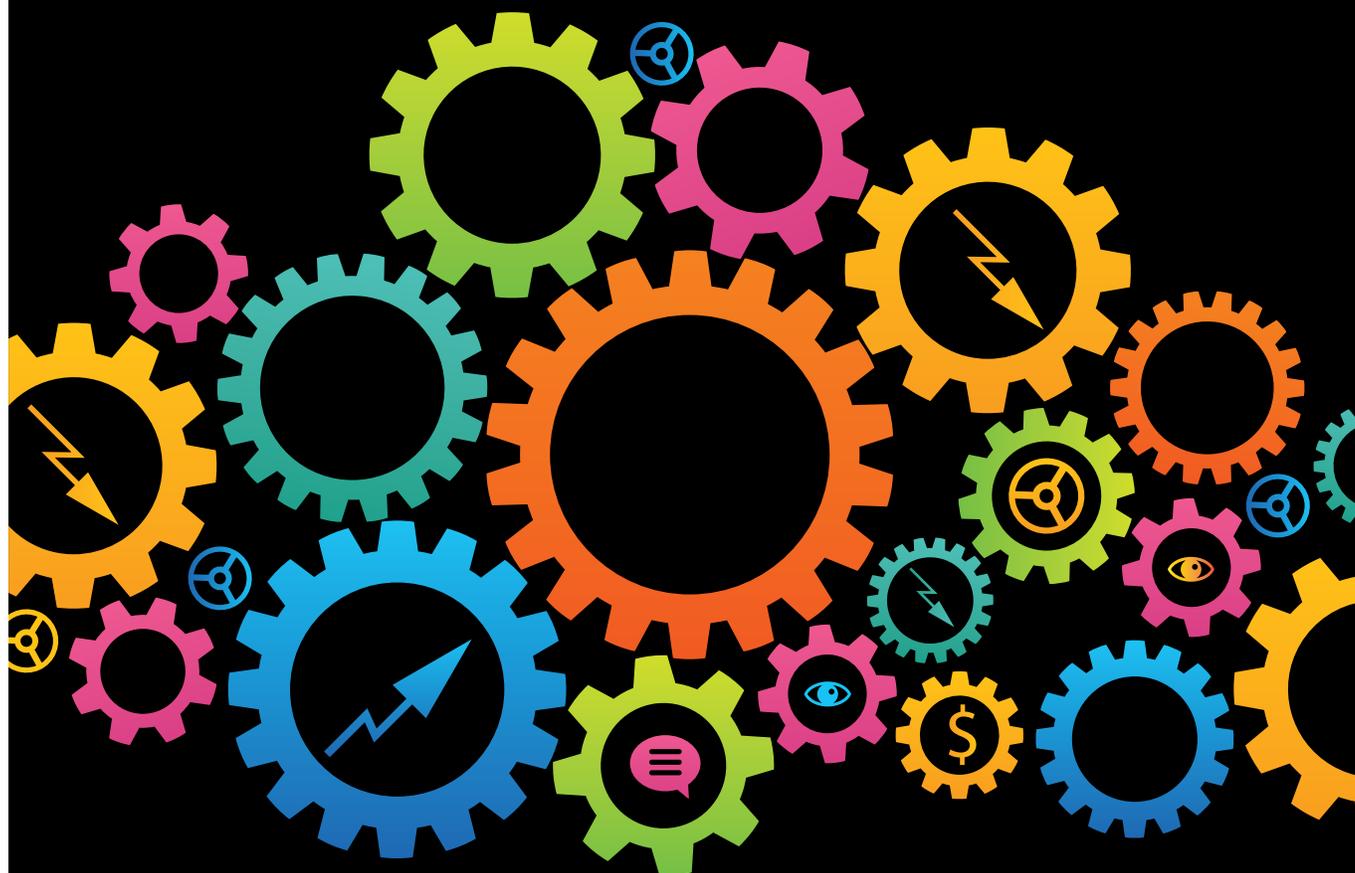
#### **Look Before Your Client Leaps**

This short primer can provide only a basic introduction to the labyrinth of terms that comprise a decades-long cell site lease. Remember that the wireless companies negotiate new leases every day whereas the landlord's attorney might engage in these negotiations once every few years. Finally, if you cannot negotiate a reasonably balanced lease on behalf of your client, it may be better to simply advise your client to walk away and let some other less sophisticated landlord make the mistakes that you will have helped your client avoid. ■

#### **About the Author:**

*Dr. Jonathan L. Kramer, J.D., LL.M., D.L.P. is a telecom lawyer licensed in New Mexico and California, and a telecommunications engineer. He founded and is the managing partner of Telecom Law Firm, PC. Dr. Kramer's clients include the cities of Albuquerque, Santa Fe and Las Cruces, as well as corporate and private landlords in New Mexico.*

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