

## NEBRASKA CHOICE OF LAW: AN UPDATED SYNTHESIS

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### I. INTRODUCTION

In 2005, I wrote an article in this *Review*<sup>1</sup> endeavoring to condense Nebraska choice-of-law principles into black-letter, Restatement-like rules. My purpose in doing so was to help busy judges and lawyers who generally lack the luxury of time necessary to navigate the shifting landscape of post-Conflicts-Revolution doctrine. The article had some success. It got cited a bit,<sup>2</sup> and some lawyers and judges have told me that it was helpful to them.

More than a decade later, it is time to update it. Some of the rules are still accurate and some need revision. A few new rules are added for completeness. Nebraska follows the Second Conflicts Restatement, which was promulgated in 1971.<sup>3</sup> With work underway on a Third Restatement,<sup>4</sup> it seems likely that at some point the Third Restatement will influence Nebraska courts, so I will note the Third Restatement drafts where they are germane.

I will not repeat all the analysis that went into the rules I drafted in 2005. Instead, I will repeat the original black-letter rules and assess them in light of developments since then. If the rule needs revision, I will offer a revised rule. In some cases, I draft new rules either for the sake of completeness or to update the analysis. Revised and new rules are so labeled. In conclusion, I condense the current rules into black letter form.

### II. GENERAL RULES

**(New) General Rule #1: Unless there is a compelling reason to depart from them, Nebraska courts follow the presumptive rules of the Restatement (Second) of the Conflict of Laws.**

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1. Patrick J. Borchers, Nebraska Choice of Law: A Synthesis, 39 CREIGHTON L. REV. 1 (2005).

2. See, e.g., *Ndunguru v. Kone, Inc.*, No. 8:07CV286, 2008 WL 53603 (D. Neb. Jan. 2, 2008); *Fireman's Fund v. Structural Sys. Tech., Inc.*, 426 F. Supp. 2d 1009 (D. Neb. 2006); Kevin Tuininga, Toward Predictable Choice of Law in Missouri, 65 J. Mo. Bar 14 (2009).

3. See, e.g., *Harper v. Silva*, 224 Neb. 645, 647-48, 399 N.W.2d 826, 828 (1987).

4. See RESTATEMENT (THIRD) CONFLICT OF LAWS (Am. Law Inst., Tentative Draft No. 4, 2018).

This rule is new. Although Nebraska courts have long purported to follow the Second Restatement,<sup>5</sup> like many other courts this primarily meant citation to the most open-ended provisions in the Second Restatement, notably sections 6 (the general “most significant relationship” test),<sup>6</sup> 145 (the general torts rule),<sup>7</sup> and 188 (the general contracts rule).<sup>8</sup> Since 2005, however, some prominent state courts have begun to cite the more specific provisions, such as Section 146 which creates a presumption that in personal injury cases the law of the state of the injury governs.<sup>9</sup>

Happily, Nebraska courts have picked up on this trend. Among the most prominent are Section 146 which points to the law of the injury state in tort cases,<sup>10</sup> Section 193 which points to the law of the location of insured risk in insurance contracts,<sup>11</sup> and Section 187 on the validity of choice-of-law clauses.<sup>12</sup> I view this as a positive development, because it gives courts a concrete starting place, as opposed to trying to balance up to eleven different abstract factors.<sup>13</sup> Moreover, the presumptive rules are just that – presumptive. If strong considerations point to a different state’s law applying, Nebraska courts have applied it. For example, in *Heinze v. Heinze*,<sup>14</sup> a case involving Nebraska’s now-repealed guest statute,<sup>15</sup> the Nebraska Supreme Court

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5. See, e.g., *Harper*, 224 Neb. at 647-48, 399 N.W.2d at 828.

6. See, e.g., *Mertz v. Pharmacists Mutual Ins. Co.*, 261 Neb. 704, 709, 625 N.W.2d 197, 203 (2001).

7. See, e.g., *Malena v. Marriott Int’l*, 264 Neb.759, 767, 651 N.W.2d 850, 857 (2002).

8. See, e.g., *Mertz*, 261 Neb. at 709, 625 N.W.2d at 203.

9. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 146 (AM. LAW. INST. 1971) (“In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.”); see also *Townsend v. Sears Roebuck & Co.*, 879 N.E.2d 893, 904 (Ill. 2007) (citing section 146); *P.V. ex rel. T.V. v. Camp Jaycee*, 962 A.2d 453, 462 (N.J. 2007) (citing section 146). Arguably, I had some role in this trend, as these decisions cited a 1997 article of mine noting that many courts ignore obviously applicable rules, and urging them to take note of the narrower, presumptive rules. See *Townsend*, 879 N.E.2d at 900 (citing Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1237 (1997)); *Camp Jaycee*, 962 A.2d at 459 (citing Borchers, *supra*, at 1237). For an example of a court ignoring specific rules, see *Allstate Ins. Co. v. Stolarz*, 613 N.E.2d 936, 940 (N.Y. 1993) (citing section 188 of the Second Restatement to a choice-of-law issue regarding an auto insurance policy where section 193 specifically covers insurance law choice).

10. See, e.g., *O’Brien v. Cessna Aircraft*, 298 Neb. 109, 140, 903 N.W.2d 432, 459 (2017); *Yoder v. Cotton*, 276 Neb. 954, 957-58, 758 N.W.2d 630, 635 (2008).

11. See, e.g., *Johnson v. U.S. Fid. & Guar. Co.*, 269 Neb. 731, 744, 696 N.W.2d 431, 442 (2005).

12. See, e.g., *Am. Nat’l Bank v. Medved*, 281 Neb. 799, 801 N.W.2d 230 (2011).

13. RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 6, 145.

14. 274 Neb. 595, 742 N.W.2d 465 (2007).

15. NEB. REV. STAT. § 25-21.237 (repealed 2010).

applied Nebraska law rather than that of the injury state because both parties were domiciled in Nebraska.<sup>16</sup>

Two other general rules are obvious, but worth stating. One concerns the approach taken by courts in diversity cases. The law, since the famous United States Supreme Court case in *Klaxon v. Stentor Electric Manufacturing Co.*,<sup>17</sup> is that federal courts sitting in diversity apply their home state's choice-of-law approach. Thus, unsurprisingly, Nebraska federal courts sitting in diversity apply Nebraska choice-of-law principles.<sup>18</sup> The other is that Nebraska courts follow the majority approach<sup>19</sup> that if neither party raises the possibility of another state's or nation's law applying, Nebraska law applies.<sup>20</sup>

This then yields two other general rules:

**(New) General Rule #2: Nebraska federal courts sitting in diversity apply Nebraska's choice-of-law principles.**

**(New) General Rule #3: If no party timely raises the possible applicability of another State's<sup>21</sup> law applying, Nebraska law applies.**

### III. TORTS

The tort rule and exceptions as set forth in 2005 read as follows:

**Tort Rule: In tort cases in which the parties or events are connected with more than one State, the law of the State in which the plaintiff is injured governs.**

**Tort Exception # 1: If the laws of the connected States conflict as to an issue of loss distribution and each party contesting that issue is domiciled (or, in the case of a business entity, has its principal place of business) in the same State and that State is not the injury State, the law of the State of the contesting parties' common domicile (or principal place of business) governs as to the contested issue. For purposes of Exception # 1, "the same State" includes States that are distinct but have identical laws on the issue being contested.**

**Tort Exception # 2: If the injury and the conduct causing the injury occur in different States, and the laws of those States**

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16. *Heinze v. Heinze*, 274 Neb. 505, 601, 742 N.W.2d 465, 470 (2007).

17. 313 U.S. 487 (1941).

18. *See, e.g.*, *Fed. Ins. Co. v. COR Clearing, L.L.C.*, 328 F. Supp. 3d 956, 959 (D. Neb. 2018).

19. HAY, BORCHERS, SYMEONIDES & WHYTOCK, *CONFLICT OF LAWS* 550-51, 558-89 (6th ed. 2018).

20. *See, e.g.*, *Nordhues v. Maulsby*, 19 Neb. App. 620, 637, 815 N.W.2d 175, 189 (2012) (citing *Forshay v. Johnston*, 144 Neb. 525, 13 N.W.2d 873 (1944)).

21. Throughout, I use "State" as a generic reference to U.S. states, as well as territories and foreign nations, and subdivisions thereof, such as provinces.

**differ as to an issue of conduct regulation, the law of the State in which the conduct occurred applies.**<sup>22</sup>

The tort rule and the first exception continue to nicely explain Nebraska law. In split domicile cases, Nebraska courts<sup>23</sup> and federal courts following Nebraska conflicts law<sup>24</sup> have applied the law of the injury state. In common domicile cases – as well as cases in which the only connection with a state is that injury occurred there – cases continue to apply the domiciliary law.<sup>25</sup>

The line between conduct regulation and loss allocation in tort law is only implicit in Nebraska law, and not expressly adopted by the Second Restatement. However, the draft Third Restatement adopts it,<sup>26</sup> and important state courts – such as the New York Court of Appeals – employ it.<sup>27</sup> The second exception has held up reasonably well. In cases in which the rule is clearly conduct regulating, and the conduct and the injury take place in different states, cases have generally applied the conduct state’s law.<sup>28</sup>

Punitive damage choice-of-law issues have arisen frequently since 2005. The Nebraska Constitution forbids the award of punitive damages.<sup>29</sup> Most states, however, allow for punitive damages, at least in some circumstances.<sup>30</sup> Cases in which the liability-creating conduct takes place in a state that allows for punitive damages, but the injury takes place in Nebraska, have proved troublesome. In my 2005 article,<sup>31</sup> I relied heavily on the federal court decision in *Fanselow v. Rice*<sup>32</sup> in which the court allowed Minnesota’s punitive damage law to apply to an accident in Nebraska, because the allegedly reckless ac-

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22. Borchers, *supra* note 1, at 6-7.

23. *See, e.g.*, *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 903 N.W.2d 432 (2017).

24. *See, e.g.*, *Ford Robinson P'ship v. Wells Fargo Cleaning Servs. Co.*, No. 8:18CV9, 2018 WL 1400428 (D. Neb. Mar. 20, 2018) (negligent misrepresentation); *Braddock v. Primus Grp., Inc.*, No. 8:13CV258, 2014 WL 12605519 (D. Neb. Feb. 5, 2014) (negligence); *BNSF Ry. Co. v. L.B. Foster Co.*, 917 F. Supp. 2d 959 (D. Neb. 2013) (products liability); *Newton v. Standard Candy Co.*, No. 8:06CV242, 2008 WL 4610019 (D. Neb. Oct. 15, 2008) (products liability); *Labeau v. Bd of Governors*, No. 8:07CV142, 2008 U.S. WL 906758 (D. Neb. Mar. 31, 2008) (negligence).

25. *See, e.g.*, *Summerford v. Covenant Transp.*, 370 F. Supp. 2d 934 (D. Neb. 2005) (workers' compensation subrogation); *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008) (battery and negligence claims); *Heinze v. Heinze*, 274 Neb. 595, 742 N.W.2d 465 (2007) (guest statute).

26. *See* RESTATEMENT (THIRD) CONFLICT OF LAWS §§ 6.04-6.06 (AM. LAW INST., Tentative Draft No. 2, 2016).

27. *See, e.g.*, *Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963).

28. *See, e.g.*, *Erickson v. U-Haul Int'l*, 278 Neb. 18, 767 N.W.2d 765 (2009) (rental vehicle liability statute); *Yoder*, 276 Neb. 954, 758 N.W.2d 630 (battery claim).

29. *See, e.g.*, *Black v. Brooks*, 285 Neb. 440, 455, 827 N.W.2d 256, 266 (2013).

30. Patrick J. Borchers, *Punitive Damages, Forum Shopping and the Conflict of Laws*, 70 LA. L. REV. 529, 542 (2010).

31. Borchers, *supra* note 1, at 11.

32. 213 F. Supp. 2d 1077, 1078-79 (D. Neb. 2002).

tions leading to the Nebraska truck-automobile accident had been made in Minnesota.<sup>33</sup> In my view, this was and is the correct approach, because punitive damages seek to regulate and deter bad conduct, so the state in which the conduct took place is most rationally applied.<sup>34</sup> Some courts since have followed *Faneslow* and allowed a claim for punitive damages to stand under the conduct-state's law.<sup>35</sup>

However, a substantial number of cases have not allowed punitive damage claims to stand on facts like this. In cases in which the liability-creating conduct took place outside of Nebraska, but the injury occurred in Nebraska, several decisions have applied Nebraska law to deny punitive damages.<sup>36</sup> In many of these cases, however, there was little other than the conduct to connect the dispute to the conduct state, and connections to Nebraska other than the location of the injury.<sup>37</sup>

A complete reconciliation of these cases is not possible. Nonetheless, punitive damages need a separate tort exception. The following tort exception does a reasonably good job of reconciling the conflicting authorities:

**(New) Tort Exception #3: In cases in which the plaintiff claims punitive damages under the law of another state, and the injury occurs in Nebraska, a claim for punitive damages will not be allowed unless the law of the State in which the conduct occurs allows for punitive damages and the conduct State has an interest in deterring the conduct that outweighs Nebraska's interest in applying its constitutional prohibition on punitive damages.**

#### IV. CONTRACTS

The contracts rules in 2005 read as follows:

**Contract Rule # 1: A choice-of-law clause not subject to an accepted contract defense (such as fraud or duress) is enforcea-**

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33. Borchers, *supra* note 1, at 11-12.

34. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003); RESTATEMENT (THIRD) CONFLICT OF LAWS §§ 6.04(d)(2) (AM. LAW INST., Council Draft No. 2, Aug. 12, 2016) (punitive damages are conduct regulating).

35. See, e.g., *Jones v. Willis Shaw Express, Inc.*, No. 8:04CV271, 2006 WL 8458275 (D. Neb. Feb. 28, 2006).

36. See, e.g., *Ford*, 2018 WL 1400428; *Jamison v. Depositors Ins. Co.*, No. 4:14CV3009, 2015 WL 1738302 (D. Neb. Apr. 15, 2015); *Kammerer v. Wyeth*, No. 8:04CV196, 2011 WL 5237754 (D. Neb. Nov. 1, 2011); *Anonymous v. Vella*, No. 8:04CV269, 2007 WL 9797661 (D. Neb. Apr. 30, 2007); *Am. Healthnet, Inc. v. Westside Cmty. Hosp., Inc.*, Nos. 8:04CV0009, 4:04CV3210, 2006 WL 861334 (D. Neb. Apr. 3, 2006); *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 903 N.W.2d 432 (2017); *Yoder*, 276 Neb. 954, 738 N.W.2d 630.

37. See, e.g., *Anonymous*, 2017 WL 9797661, at \*3; *O'Brien*, 238 Neb. at 145, 903 N.W.2d at 459.

ble if it chooses Nebraska law. A choice-of-law clause not subject to an accepted contract defense is enforceable if it chooses another State's law unless either there is no reasonable basis for the choice or the choice violates a fundamental public policy of Nebraska.

**Contract Rule # 2: Subject to the sub-rules below, the law applicable to a contract without an enforceable choice-of-law clause is that of the State in which the parties contemplated the principal performance of the contract would occur, unless each party contesting that issue is domiciled (or, in the case of a business entity, has its principal place of business) in the same State and that State is not the performance State, in which case the law of the State of the contesting parties' common domicile (or principal place of business) governs as to the contested issue. For purposes of Contract Rule # 2, "the same State" includes States that are distinct but have identical laws on the issue being contested.<sup>38</sup>**

As to the first contract rule, this is still accurate as Nebraska courts continue to rely heavily on Second Restatement section 187, which strongly prefers that choice-of-law clauses be enforced.<sup>39</sup> However, the rule needs two important clarifications.

The first involves interpretation of a choice-of-law clause. It is quite common for choice-of-law clauses to be drafted to provide that a state's law "governs" a contract, or employ similar language.<sup>40</sup> This is poor drafting, because it leaves unclear whether related causes of action – for example, tort claims arising out of the contractual relationship – are within the scope of the clause. Some states take the view that clauses drafted in this manner do not cover related causes of action, and subject them to an independent conflicts analysis.<sup>41</sup> Nebraska courts, however, construe "governing law" clauses to include closely related causes of action, including related tort claims.<sup>42</sup>

The second involves non-competition clauses. Section 187 of the Second Restatement allows for choice-of-law clauses to be overridden if the law of the state that would be applied absent a choice-of-law clause if doing so would violate "a fundamental policy of a state which

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38. See Borchers, *supra* note 1, at 13-14.

39. See, e.g., *Reefer Sys. v. Southard Fin., L.L.C.*, No. 8:16CV93, 2016 WL 4621072 (D. Neb. Sept. 6, 2016).

40. See John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 666 (2017).

41. *Id.* at 666-72.

42. See, e.g., *Pieter Kiewit Sons', Inc. v. Atser, L.P.*, 684 F. Supp. 2d 1128 (D. Neb. 2010); *Tracy Broad. Corp. v. Spectrum Scan, L.L.C.*, No. 8:06CV336, 2008 WL 394989 (D. Neb. Feb. 11, 2008).

has a materially greater interest” in the application of its law.<sup>43</sup> A common source of cases in which states following Section 187 has been non-competition clauses.<sup>44</sup>

Nebraska courts generally refuse to enforce choice-of-law clauses selecting another state’s law for a non-competition clause if the clause would prohibit competition in Nebraska and the other state’s law is materially more restrictive than Nebraska’s. In *DCS Sanitation Management, Inc. v. Castillo*,<sup>45</sup> the Eighth Circuit affirmed a Nebraska federal court’s application of Nebraska law to a non-competition agreement, even though the contract chose Ohio law.<sup>46</sup> The court decided that Ohio’s interest was minimal given that the only connection to that state was that it was the location of the headquarters of the corporation seeking to enforce the clause.<sup>47</sup> By contrast, Nebraska was the state in which the former employees would be prevented from competing and gaining employment in their chosen field.<sup>48</sup> Further, the difference between Ohio and Nebraska was material, as Ohio law allowed reformation of such clauses to make them reasonable, while Nebraska law does not.<sup>49</sup> In *Koenig v. CBIZ Benefits & Insurance Services, Inc.*,<sup>50</sup> the Nebraska federal court followed *DCS Sanitation* and refused to enforce a clause choosing Missouri law on similar facts.

Thus, a more complete and accurate first contract rule would read as follows:

**(Revised) Contract Rule # 1: A choice-of-law clause not subject to an accepted contract defense (such as fraud or duress) is enforceable if it chooses Nebraska law. A choice-of-law clause not subject to an accepted contract defense is enforceable if it chooses another State’s law unless either there is no reasonable basis for the choice or the choice violates a fundamental public policy of Nebraska. A choice-of-law clause choosing another state’s law regarding a non-competition agreement violates a fundamental public policy of Nebraska if: 1) the competition to be restrained is to occur in Nebraska and 2) the chosen law differs materially from Nebraska’s.**

**(New) Rule of Construction for Choice-of-Law Clauses: A choice-of-law clause that chooses a law to “govern” the contract, or uses similar language, includes within its scope**

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43. RESTATEMENT (SECOND) CONFLICT OF LAWS § 187(2)(b) (AM. LAW INST. 1971).

44. See, e.g., *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990).

45. 435 F.3d 892 (8th Cir. 2006).

46. *DCS Sanitation Mgmt., Inc. v. Castillo*, 435 F.3d 892, 896-97 (8th Cir. 2006).

47. *DCS Sanitation Mgmt., Inc.*, 435 F.3d at 896.

48. *Id.*

49. *Id.* at 897.

50. No. 8:04CV486, 2006 WL 680887 (D. Neb. Mar. 10, 2006).

**claims closely related to the contract claims, including tort claims arising out of the contractual relationship.**

As to the second rule, which generally points to the place of performance of the contract, there is scant authority. A large fraction of contracts employ choice-of-law clauses, or are covered by the sub-rules. Essentially the only post-2005 authorities are cases in which a choice-of-law clause has been voided, forcing the court to choose the applicable law as if there were no clause. In those cases, courts have chosen to apply the law where the performance was to take place.<sup>51</sup>

In the earlier article, I drafted three contracts sub-rules. The first is as follows:

**Contract Sub-Rule # 1: Unless subject to an enforceable choice-of-law clause, insurance contracts are governed by the law of the State where the insured risk is principally located.**<sup>52</sup>

As I noted in 2005, this rule is a combination of sections 192 and 193 of the Second Restatement.<sup>53</sup> In a major case, *Johnson v. United States Fidelity & Guaranty Company*,<sup>54</sup> the Nebraska Supreme Court faced a case in which Nebraska and Colorado law conflicted as to what damages recovered could be set off against a policy's underinsured motorist limits.<sup>55</sup> The accident that triggered liability occurred in Colorado, but the insurance policy was negotiated in Nebraska, the policyholder was a Nebraskan, and the principal location of the insured risk – the automobile – was in Nebraska.<sup>56</sup> Citing to Section 193 of the Second Restatement, the Nebraska Supreme Court reversed the trial court and held that Nebraska law, not Colorado law, applied.<sup>57</sup>

In a diversity case, a Nebraska federal court faced a case in which there arguably was more than one principal location of an insured risk, because the policy covered employee misconduct at several job locations.<sup>58</sup> The court concluded that the law of New Jersey, where the covered misfeasance took place, governed.<sup>59</sup> In *Fireman's Fund v. Structural Systems Technology, Incorporated*,<sup>60</sup> the court stated that it would have applied Nebraska law as the situs of the insured risk,

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51. See, e.g., *DCS Sanitation Mgmt., Inc.*, 435 F.3d at 897; *Koenig*, 2006 WL 680887, at \*15.

52. Borchers, *supra* note 1, at 15.

53. *Id.*

54. 269 Neb. 731, 696 N.W.2d 431 (2005).

55. *Johnson v. U.S. Fid. & Guar. Co.*, 269 Neb. 731, 736, 696 N.W.2d 431, 436-37 (2005).

56. *Johnson*, 269 Neb. at 744-45, 696 N.W.2d at 442.

57. *Id.*

58. *Fed. Ins. Co. v. COR Clearing, L.L.C.*, 328 F. Supp. 3d 956 (D. Neb. 2018).

59. *Fed. Ins. Co.*, 328 F. Supp. 3d 956.

60. 426 F. Supp. 2d 1009 (D. Neb. 2006).

except that no material difference had been shown between Nebraska law and the other potentially applicable insurance laws.<sup>61</sup> Thus, the first contract sub-rule remains an accurate statement of the law.

The second contract sub-rule reads as follows:

**Contract Sub-Rule # 2: Unless subject to an enforceable choice-of-law clause, contracts of employment and for the provision of personal services are governed by the State where the services are to be principally performed.**<sup>62</sup>

As I noted in 2005, this rule is essentially section 196 of the Second Restatement.<sup>63</sup> The sub-rule was grounded solidly on the Nebraska Supreme Court case of *Mertz v. Pharmacists Mutual Insurance Company*,<sup>64</sup> which cited to section 196.<sup>65</sup> Since 2005, there has been relatively little written on the subject by Nebraska courts. In *Thrasher v. Grip-Tite Manufacturing, Company*,<sup>66</sup> a Nebraska federal court sitting in diversity, in ruling that a choice-of-forum clause was enforceable, noted the *Mertz* adoption of section 196.<sup>67</sup> The cases refusing to enforce a choice-of-law clause in a non-competition agreement selecting non-Nebraska law for contracts that would restrain competition in Nebraska are also consistent with the second sub-rule.<sup>68</sup> Thus the second contract sub-rule remains sound.

The third contract sub-rule read as follows:

**Contract Sub-Rule # 3: Unless subject to an enforceable choice-of-law clause, a contract will be upheld against a defense of usury if the interest rate complies with Nebraska law or complies with the law of a State with which the contract has a substantial connection and the interest rate is not greatly in excess of the maximum rate allowed under Nebraska law.**<sup>69</sup>

This is section 203 of the Second Restatement written in a Nebraska-specific way. That section was adopted in a 1978 Nebraska Supreme Court case.<sup>70</sup> Since 2005, no Nebraska case has cited either section 203 or the case that adopted it. Thus, it appears that this sub-rule still accurately states the law.

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61. *Fireman's Fund v. Structural Sys. Tech., Inc.*, 426 F. Supp. 2d 1009, 1023 (D. Neb. 2006).

62. Borchers, *supra* note 1, at 16.

63. *Id.*

64. 261 Neb. 704, 625 N.W.2d 197 (2001).

65. *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 706, 625 N.W.2d 197, 201 (2001).

66. No. 8:07CV400, 2007 WL 4180716 (D. Neb. Nov. 21, 2007).

67. *Thrasher v. Grip-Tite Mfg., Co.*, No. 8:07CV400, 2007 WL 4180716, at \*17 (D. Neb. Nov. 21, 2007).

68. See *supra* notes 45-50 and accompanying text.

69. Borchers, *supra* note 1, at 17.

70. See *Shull v. Dain, Kalman & Quail, Inc.*, 201 Neb. 260, 267 N.W.2d 517 (1978).

## V. PROCEDURE

The procedural rule reads as follows:

**Procedural Matters Rule: Procedural matters are governed by Nebraska law.**<sup>71</sup>

As I noted in 2005, this rule is easy to state but hard to apply around the edges.<sup>72</sup> There are clearly procedural rules, such as the time allowed to answer a complaint or file a notice of appeal, and clearly substantive rules such as the standard of care owed to the plaintiff.<sup>73</sup> Of some consequence, at least one court has held that the right to recover attorney's fees is procedural.<sup>74</sup>

The development of far more consequence is the repeal and replacement of Nebraska's borrowing statute. Conventionally, borrowing statutes apply out-of-state statutes of limitation (particularly if they are shorter) to causes of action that "accrue" or "arise" outside the state.<sup>75</sup> In so doing, they reverse the common-law presumption that the forum applies its own statute of limitations, regardless of where the liability-creating events took place.<sup>76</sup>

Nebraska had perhaps the most bizarre and ineffectual borrowing statute in the United States. I discussed it at length in 2005,<sup>77</sup> and no purpose would be served by an extended recitation. For practical purposes, the old borrowing statute never borrowed an out-of-state limitation period, leading to baffled opinions as to the reason for the statute's existence.<sup>78</sup>

In 2006, the Nebraska legislature enacted the Uniform Conflict of Laws Limitations Act as to claims accruing after July 14, 2006.<sup>79</sup> In

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71. Borchers, *supra* note 1, at 17.

72. *Id.* at 17-18.

73. *Cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding that a tort duty owed to plaintiff is substantive).

74. *See* AT&T v. Asha Distrib., Inc., No. 8:04CV296, 2006 WL 176636 (D. Neb. Jan. 23, 2006).

75. *See, e.g.*, N.Y. C.P.L.R. § 202 (McKinney 2005) (stating as to non-resident plaintiffs "an action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued . . ."); CAL. CIV. PROC. CODE § 361 (West 1982) (stating an out-of-state statute of limitations must be applied to non-resident plaintiffs "when a cause of action has arisen in another State . . ."); OHIO REV. CODE ANN. § 2305.03(b) (West 2004) ("No civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired.")

76. *See* Sun Oil Co. v. Wortman, 486 U.S. 717 (1988).

77. Borchers, *supra* note 1, at 18-19.

78. *See, e.g.*, Calvert v. Roberts Dairy Co., 242 Neb. 664, 665, 496 N.W.2d 491, 492-93 (1993).

79. NEB. REV. STAT. §§ 25-3201 - 3207 (2006).

general, the Uniform Act provides that Nebraska borrows the statute of limitations (including tolling and accrual rules) of the law of the state whose substantive law governs the claim.<sup>80</sup> However, plaintiffs who have been Nebraska residents (defined to mean either Nebraska domiciliaries or entities having their principal place of business in Nebraska) from the time of accrual of the cause of action get the benefit of a longer Nebraska statute of limitations, even if the cause of action arose outside Nebraska.<sup>81</sup>

Thus, an exception for statute-of-limitations issues is necessary. **(New) Statute of Limitations Exception: An out-of-state statute of limitations must be applied when required by Neb. Rev. Stat. §§ 25-3201 – 3207.**

## VI. REAL PROPERTY

The real property rule reads as follows:

**Real Property Rule: Rights and interests in real property are governed by the law of the situs of the real property.**<sup>82</sup>

The situs rule remains strong, even governing questions that could seemingly be safely be removed from its grip. In *In Re Estate of Hannan*,<sup>83</sup> the Nebraska Supreme Court ruled that the Nebraska definition of the term “issue” governed as to real estate located in Nebraska, even though the decedent died domiciled in Virginia and the Nebraska Court of Appeals had reasoned that her intent was likely best determined by her home state’s law.<sup>84</sup> With no significant developments since then, there is no reason to doubt the original formulation of this rule.

## VII. TRUSTS AND WILLS

The Trusts and Wills rules are contained below:

**Succession Rule: Testate or intestate succession of interests in real property is governed by the law of the situs of real property. Testate or intestate succession of interest in personal property or intangibles is governed by the law of the decedent’s last domicile.**<sup>85</sup>

This rule is still accurate. As noted in the 2005 article, it is well supported by Nebraska case law and consistent with the Second Re-

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80. *Id.* §§ 25-3203 – 3204.

81. *Id.* § 25-3203(2).

82. See Borchers, *supra* note 1, at 21.

83. 246 Neb. 828, 523 N.W.2d 672 (1994).

84. *In re Estate of Hannan*, 2 Neb. App. 636, 513 N.W.2d 339, *rev’d* 246 Neb. 828, 523 N.W.2d 672 (1994).

85. See Borchers, *supra* note 1, at 22.

statement.<sup>86</sup> There have been no significant developments in the intervening years.

**Inter Vivos Trust Rule: The validity of an inter vivos trust in real property is determined by the law of the State in which the real property is situated. The validity of an inter vivos trust in personal property and intangibles is determined by the law of the State designated in the trust, if any, as long as there is a reasonable basis for the choice and the choice does not offend any strong public policy of Nebraska. If the trust instrument for an inter vivos trust in personal property and intangibles does not designate an applicable law, the trust's validity will generally be determined by the law of the State in which the settlor has his domicile at the time the trust is executed.**<sup>87</sup>

This rule is also still accurate and comports with the relevant provisions of the Second Restatement. The intervening years have shown no significant developments on this front.

#### VIII. FAMILY LAW

The 2005 Marriage Rule and Exception reads as follows:

**Marriage Rule: Marriages that are valid in the place of celebration are valid in Nebraska even if the marriage could not have been contracted under Nebraska law.**

**Marriage Exception: Same-sex marriages are of no effect in Nebraska even if lawful in the place of celebration. In rare other circumstance, an out-of-state marriage that was valid where celebrated may be denied effect in Nebraska if it violates the public policy of Nebraska.**<sup>88</sup>

It has long been the rule in Nebraska that the validity of a marriage is determined by the law of the place in which the ceremony is performed.<sup>89</sup> In 2005, I included an exception for same-sex marriages based upon a successful state initiative banning same-sex marriages, as well as the federal Defense of Marriage Act.<sup>90</sup> I wrote that it would require a “sea change in constitutional law” to require that same-sex marriages be recognized.<sup>91</sup> The sea change came in the form of the

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86. *Id.* at 22-23.

87. *Id.* at 23.

88. *Id.* at 23-24.

89. *See, e.g.*, *Randall v. Randall*, 216 Neb. 541, 544-45, 345 N.W.2d 319, 321 (1984) (noting that a marriage performed in Mexico is invalid because it violated the Mexican state's rule that both parties must have been divorced for a year or more).

90. Borchers, *supra* note 1, at 24.

91. *Id.*

United States Supreme Court's decision in *Obergefell v. Hodges*,<sup>92</sup> which held that the Equal Protection Clause confers a right of same-sex couples to marry on equal terms with opposite-sex couples. The 2005 same-sex marriage exception also contained a "public policy" exception for unusual cases, but as there are no reported Nebraska cases refusing to honor an out-of-state marriage, thus the entire exception should be abandoned.

**Divorce Rule: Nebraska law applies to govern an action in a Nebraska court for the dissolution of a marriage. Jurisdiction in a divorce action requires that Nebraska be the genuine domicile of at least one of the parties.**<sup>93</sup>

This remains the rule in Nebraska, however, three additions to this rule for the sake of completeness are merited. One is that federal courts do not have subject matter jurisdiction over divorce and other domestic relations actions, even if the parties are diverse and the amount in controversy exceeds \$75,000.<sup>94</sup> This is the result of the long-standing, judicially crafted domestic relations exception to federal court diversity jurisdiction.<sup>95</sup> The other is that a Nebraska court has continuing jurisdiction over property settlement agreements and questions of support of children past the age of majority.<sup>96</sup> This is the holding of *Carlson v. Carlson*.<sup>97</sup> In that case, the parties had entered into a property settlement agreement that was incorporated into the divorce decree. It contained ambiguous language regarding the father's obligation to continue to support his children after the age of majority as long as they were attending college or vocational school.<sup>98</sup> The Nebraska Supreme Court held that the District Court had continuing jurisdiction to resolve the ambiguity.<sup>99</sup> Finally, Nebraska's statutory requirement of a one year residence in the state should be noted.<sup>100</sup>

Thus, a more complete statement of the Divorce Rule reads as follows:

**(Revised) Divorce Rule: Nebraska law applies to govern an action in a Nebraska court for the dissolution of a marriage. Ju-**

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92. 135 S. Ct. 2071 (2015).

93. Borchers, *supra* note 1, at 24.

94. *See, e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992).

95. *Ankenbrandt*, 504 U.S. at 700.

96. Prior to a child reaching the age of majority, issues of child support are governed by the Uniform Interstate Family Support Act. *See infra* notes 106-10 and accompanying text.

97. 299 Neb. 526, 542, 909 N.W. 2d 351, 362 (2018) (citing *Zetterman v. Zetterman*, 245 Neb. 255, 512 N.W.2d 622 (1994)).

98. *Carlson v. Carlson*, 299 Neb. 526, 529, 909 N.W.2d 351, 355 (2018).

99. *Carlson*, 299 Neb. at 542, 909 N.W.2d at 362.

100. NEB. REV. STAT. § 42-349 (2004).

risdiction in a divorce action requires that Nebraska be the genuine domicile of at least one of the parties and a residence of one year or more in Nebraska. Nebraska courts have continuing jurisdiction to enforce and interpret divorce decrees regarding property settlement and post-age-of-majority child support issues. Nebraska federal courts lack jurisdiction over divorce and all domestic relations proceedings even if the parties are citizens of different States and more than \$75,000 is in controversy.

Of course, the question of getting a divorce is separate from how to handle the division of marital property.<sup>101</sup> Division of the marital property requires *in personam* jurisdiction over the defendant-spouse.<sup>102</sup> The Marital Property Rule in 2005 read as follows:

**Marital Property Rule: Spousal rights in real property are determined by the law of the State of the situs of the real property. Spousal rights in personal property and intangibles are determined by the law of the State of the marital domicile at the time of the acquisition of the property.**<sup>103</sup>

While this rule is still accurate, the inter-related issue of jurisdiction should be included in the rule. First, division of property requires *in personam* jurisdiction over the defendant-spouse.<sup>104</sup> The second is that once jurisdiction is acquired, Nebraska courts have continuing jurisdiction over the marital property issues.<sup>105</sup> Thus a more complete Marital Property Rule reads as follows:

**(Revised) Marital Property Rule: Spousal rights in real property are determined by the law of the State of the situs of the real property. Spousal rights in personal property and intangibles are determined by the law of the State of the marital domicile at the time of the acquisition of the property. A Nebraska court must have *in personam* jurisdiction over the de-**

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101. See, e.g., *Metzler v. Metzler*, 25 Neb. App. 757, 913 N.W.2d 733 (2018) (reasoning that the husband's domicile in Nebraska gave the District Court jurisdiction over marital status but not division of property, support, or custody issues).

102. *Metzler*, 25 Neb. App. 757, 913 N.W.2d 733. One issue that arises is that a court cannot directly by decree attempt to affect title to out-of-state land, because the Full Faith and Credit Clause does not require the situs state to recognize the decree. This is the holding of *Fall v. Eastin*, 215 U.S. 1 (1909). *Fall* was reaffirmed in *Baker v. General Motors Corp.*, 522 U.S. 222, 239 (1998) (stating that "one State's judgment cannot automatically transfer title to land in another State"). This difficulty is easily avoided, however, because with *in personam* jurisdiction a court can order the parties to convey the land under pain of contempt if they refuse. See HAY, BORCHERS, et. al., *supra* note 19, at 1393-95.

103. Borchers, *supra* note 1, at 25.

104. *Id.*

105. *Carlson*, 299 Neb. at 542, 909 N.W. 2d at 362.

**pendant-spouse to divide the marital property but has continuing jurisdiction once it is acquired.**

The 2005 Family Support Rule read as follows:

**Family Support Rule: The obligation and the measure, if any, of the family support is generally determined by the law of the State that is the domicile of the person that is receiving the support.**<sup>106</sup>

Nebraska, as required by the federal government, has enacted the most recent version of the Uniform Interstate Family Support Act (“UIFSA”).<sup>107</sup> The 2005 Family Support Rule was founded mainly on the Nebraska Supreme Court’s decision in *Groseth v. Groseth*.<sup>108</sup> There the Nebraska Supreme Court interpreted an earlier version of UIFSA’s choice-of-law provision, which provided that if a Nebraska District Court took jurisdiction as the responding tribunal that presumptively Nebraska law applied, as Nebraska was the home of persons receiving support.<sup>109</sup> Since then, however, UIFSA has been amended, and now includes several interlocking provisions that bear on choice of law, depending on from what tribunal the support order emanated, the current domicile of the parties, and other considerations.<sup>110</sup> As a result, attempting to generalize would lead to erroneous analysis. Therefore, an accurate rule requires simply directing one to the current version of UIFSA:

**(Revised) Family Support Rule: In family support matters, jurisdiction and choice of law are governed by the most recent version of the Uniform Interstate Family Support Act in force in Nebraska, which appears in Nebraska Revised Statutes §§ 42-701 through 42-751.01.**

Child custody matters are also governed by a uniform act, in this case Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”). The 2005 Child Custody Rule reads as follows:

**Child Custody Rule: A Nebraska court applies Nebraska law to custody disputes if the Nebraska court has jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”).**<sup>111</sup>

Nebraska has adopted the current version of the UCCJEA.<sup>112</sup> The UCCJEA defines a child’s “home state” as “the state in which a child lived with a parent or a person acting as a parent for at least six

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106. Borchers, *supra* note 1, at 25.

107. NEB. REV. STAT. §§ 42-701 – 751.01.

108. 257 Neb. 525, 600 N.W.2d 159 (1999).

109. *Groseth v. Groseth*, 257 Neb. 525, 558, 600 N.W.2d 159, 169 (1999).

110. *See, e.g.*, NEB. REV. STAT. §§ 42-716, 42-739, 42-746.

111. Borchers, *supra* note 1, at 26.

112. NEB. REV. STAT. §§ 43-1226 – 43-1266.

consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned.”<sup>113</sup> In general, the UCCJEA gives exclusive jurisdiction to the courts of a child’s home state.<sup>114</sup> Registration of orders from the child’s home state is a ministerial matter, unless the registering party is seeking to modify the order.<sup>115</sup> Because of the frequency of interstate disputes over custody, the UCCJEA is a frequent source of litigation.<sup>116</sup> The basic goal of the UCCJEA, and its predecessor the UCCJA, is to prevent judicially-aided snatching of children by a non-custodial parent to seek a new custody order in the state to which the child had been removed.<sup>117</sup> The UCCJEA operates in harmony with a federal statute and an international convention, to which the United States is a party, to avoid having children caught in a literal conflict of laws.<sup>118</sup> As the UCCJEA has not been amended since its enactment in 2003, the assumption continues to be that if Nebraska has jurisdiction it applies its own law.<sup>119</sup> Thus, the Child Custody Rule remains unchanged.

## IX. CONCLUSION

As with the 2005 rules, these do not cover the entire waterfront of conflicts issues, but they do cover the most frequently litigated. As with Restatements, for the sake of clarity, below are current rules in black letter form.

### A. GENERAL RULES

**General Rule #1: Unless there is a compelling reason to depart from them, Nebraska courts follow the presumptive rules of the Restatement (Second) of the Conflict of Laws.**

**General Rule #2: Nebraska federal courts sitting in diversity apply Nebraska’s choice-of-law principles.**

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113. *Id.* § 43-1227(7).

114. *Id.* § 43-1238.

115. *See, e.g.*, *Hollomon v. Taylor*, 303 Neb. 121, 926 N.W.2d 670 (2019).

116. *See, e.g.*, *DeLima v. Tsevi*, 301 Neb. 933, 921 N.W.2d 89 (2018); *Heiden v. Norris*, 300 Neb. 171, 912 N.W.2d 758 (2018); *S.T. v. Anne T.*, 300 Neb. 72, 912 N.W.2d 262 (2018).

117. *See* Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969).

118. *See* Borchers, *supra* note 1, at 26-27.

119. *See, e.g.*, *State ex rel. Pathammavong v. Pathammavong*, 268 Neb. 1, 6-7, 679 N.W.2d 749, 755 (2004) (applying Nebraska standards for change of custody in contest between a Nebraskan mother and a Texan father).

**General Rule #3: If no party timely raises the possible applicability of another State's law applying, Nebraska law applies.**

**B. TORTS**

**Tort Rule: In tort cases in which the parties or events are connected with more than one State, the law of the State in which the plaintiff is injured governs.**

**Tort Exception # 1: If the laws of the connected States conflict as to an issue of loss distribution and each party contesting that issue is domiciled (or, in the case of a business entity, has its principal place of business) in the same State and that State is not the injury State, the law of the State of the contesting parties' common domicile (or principal place of business) governs as to the contested issue. For purposes of Exception # 1, "the same State" includes States that are distinct but have identical laws on the issue being contested.**

**Tort Exception # 2: If the injury and the conduct causing the injury occur in different States, and the laws of those States differ as to an issue of conduct regulation, the law of the State in which the conduct occurred applies.**

**Tort Exception #3: In cases in which the plaintiff claims punitive damages under the law of another State, and the injury occurs in Nebraska, a claim for punitive damages will not be allowed unless the law of the State in which the conduct occurs allows for punitive damages and the conduct state has an interest in deterring the conduct that outweighs Nebraska's interest in applying its constitutional prohibition on punitive damages.**

**C. CONTRACTS**

**Contract Rule # 1: A choice-of-law clause not subject to an accepted contract defense (such as fraud or duress) is enforceable if it chooses Nebraska law. A choice-of-law clause not subject to an accepted contract defense is enforceable if it chooses another State's law unless either there is no reasonable basis for the choice or the choice violates a fundamental public policy of Nebraska. A choice-of-law clause choosing another state's law regarding a non-competition agreement violates a fundamental public policy of Nebraska if: 1) the competition to be restrained is to occur in Nebraska and 2) the chosen law differs materially from Nebraska's.**

**Rule of Construction for Choice-of-Law Clauses:** A choice-of-law clause that chooses a law to “govern” the contract, or uses similar language, includes within its scope claims closely related to the contract claims, including tort claims arising out of the contractual relationship.

**Contract Rule # 2:** Subject to the sub-rules below, the law applicable to a contract without an enforceable choice-of-law clause is that of the State in which the parties contemplated the principal performance of the contract would occur, unless each party contesting that issue is domiciled (or, in the case of a business entity, has its principal place of business) in the same State and that State is not the performance State, in which case the law of the State of the contesting parties’ common domicile (or principal place of business) governs as to the contested issue. For purposes of Contract Rule # 2, “the same State” includes States that are distinct but have identical laws on the issue being contested.

**Contract Sub-Rule # 1:** Unless subject to an enforceable choice-of-law clause, insurance contracts are governed by the law of the State where the insured risk is principally located.

**Contract Sub-Rule # 2:** Unless subject to an enforceable choice-of-law clause, contracts of employment and for the provision of personal services are governed by the State where the services are to be principally performed.

**Contract Sub-Rule # 3:** Unless subject to an enforceable choice-of-law clause, a contract will be upheld against a defense of usury if the interest rate complies with Nebraska law or complies with the law of a State with which the contract has a substantial connection and the interest rate is not greatly in excess of the maximum rate allowed under Nebraska law.

#### D. PROCEDURE

**Procedural Matters Rule:** Procedural matters are governed by Nebraska law.

**Statute of Limitations Exception:** An out-of-state statute of limitations must be applied when required by Neb. Rev. Stat. §§ 25-3201 – 3207.

#### E. REAL PROPERTY

**Real Property Rule:** Rights and interests in real property are governed by the law of the situs of the real property.

## F. TRUSTS AND WILLS

**Succession Rule:** Testate or intestate succession of interests in real property is governed by the law of the situs of real property. Testate or intestate succession of interest in personal property or intangibles is governed by the law of the decedent's last domicile.

**Inter Vivos Trust Rule:** The validity of an inter vivos trust in real property is determined by the law of the State in which the real property is situated. The validity of an inter vivos trust in personal property and intangibles is determined by the law of the State designated in the trust, if any, as long as there is a reasonable basis for the choice and the choice does not offend any strong public policy of Nebraska. If the trust instrument for an inter vivos trust in personal property and intangibles does not designate an applicable law, the trust's validity will generally be determined by the law of the State in which the settlor has his domicile at the time the trust is executed.

## G. FAMILY LAW

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**Divorce Rule:** Nebraska law applies to govern an action in a Nebraska court for the dissolution of a marriage. Jurisdiction in a divorce action requires that Nebraska be the genuine domicile of at least one of the parties and a residence of one year or more in Nebraska. Nebraska courts have continuing jurisdiction to enforce and interpret divorce decrees regarding property settlement and post-age-of-majority child support issues. Nebraska federal courts lack jurisdiction over divorce and all domestic relations proceedings even if the parties are citizens of different States and more than \$75,000 is in controversy.

**Marital Property Rule:** Spousal rights in real property are determined by the law of the State of the situs of the real property. Spousal rights in personal property and intangibles are determined by the law of the State of the marital domicile at the time of the acquisition of the property. A Nebraska court must have *in personam* jurisdiction over the defendant-spouse to divide the marital property but has continuing jurisdiction once it is acquired.

**Family Support Rule:** In family support matters, jurisdiction and choice of law are governed by the most recent version of the Uniform Interstate Family Support Act in force in Nebraska, which appears in Nebraska Revised Statutes §§ 42-701 through 42-751.01.

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