NEBRASKA’S REAL PROPERTY TRANSFER ON DEATH ACT AND POWER OF ATTORNEY ACT: A NEW ERA BEGINS

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I. INTRODUCTION

The 2012 session of the Nebraska Unicameral witnessed the passage of two significant bills that are of major importance to Nebraska estate planning lawyers. Legislative Bill 536 enacted into Nebraska law the Nebraska Uniform Real Property Transfer on Death Act¹ ("Neb. TODA"); Legislative Bill 1113 enacted into law the Nebraska Uniform Power of Attorney Act² ("Neb. UPOAA"). Both legislative bills contained an operative date of January 1, 2013.³

These two Acts fit within the mainstream of twenty-first century estate planning practice. The Neb. TODA represents the most recent step taken by the Nebraska Unicameral in the movement toward legislative recognition of nonprobate transfers.⁴ The Neb. UPOAA represents the reality of the modern day estate planning that addresses incapacity issues related to property management.

The changes in Nebraska law represented by passage of the two Acts are very different. The Neb. TODA authorizes a form of nonprobate transfer not previously allowed under Nebraska law; the Neb. UPOAA replaces existing Nebraska statutes⁵ pertaining to so-called "durable powers" and replaces them with a comprehensive statute codifying the law of durable powers. The purpose of this Article is to

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4. See infra notes 19-25 and accompanying text.
5. Nebraska’s existing durable power of attorney statutes are codified by the Uniform Durable Power of Attorney Act and the Nebraska Short Form Act. See NEB. REV. STAT. §§ 30-2664 to -2672 (repealed 2013); NEB. REV. STAT. §§ 49-1501 to -1562 (repealed 2013).
examine the major impact that passage of the Neb. TODA and the Neb. UPOAA ("Nebraska Acts") will have on Nebraska law and potential impact for the practice of estate planning lawyers in Nebraska. The Article will selectively examine the legislative process which led to the enactment of both Nebraska Acts and highlight Nebraska unicameral amendments to the national models upon which the Nebraska Acts are based. For those interested in the role played by the Nebraska State Bar Association in the passage of the Nebraska Acts, and the interaction between the Nebraska State Bar Association and the Judiciary Committee of the Nebraska Unicameral, there are other sources which may be consulted on this point.6

This Article begins by briefly reviewing the Uniform Real Property Transfer on Death Act7 and the Uniform Power of Attorney Act8 ("Uniform Acts") upon which the Nebraska Acts are based. This will be followed by a review of the Nebraska Acts, with special emphasis on the major differences between the Uniform Acts and the Nebraska Acts. The Article concludes with an assessment of the Nebraska Acts and the likelihood of future changes in the Nebraska Acts.

II. THE NATIONAL MODELS: THE UNIFORM TRANSFER ON DEATH DEED ACT AND THE UNIFORM POWER OF ATTORNEY ACT

A. Uniform Acts—Background

The Uniform Law Commission ("ULC"), formerly known as The National Conference of Commissioners on Uniform State Law, has the goal of providing "states with non-partisan, well-conceived, and well-drafted legislation that brings clarity and stability to critical areas of

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As to the role played by the Nebraska State Bar Association Real Estate, Probate, and Trust Law Section, as well as the role played by the Study Committee that produced a report recommending that the Nebraska State Bar Association support a version of the Uniform Power of Attorney Act, see Ronald R. Volkmer, The Uniform Power of Attorney Act: The Need to Update Nebraska Statutory Law, Neb. Lw., Sept. 2011, at 11.

The Nebraska Unicameral website is the best source of information for legislative history of the Neb. TODA and the Neb. UPOAA. This website contains the legislative bills as originally introduced, the amendments offered, the Judiciary Committee Statements, citations to floor debates, the Introducer’s Statement, and fiscal notes. See Search Bills and Resolutions, Neb. Legis., http://nebraskalegislature.gov/bills (last visited Apr. 10, 2013) (choose search method for the bill to be researched; then follow hyperlinks to "Statement of Intent," "Fiscal Note," "Introduced Copy," "Date of Introduction," "Related Transcripts," and "Introduced By").


state statutory law."9 Since 1892, the ULC has produced more than 300 uniform acts, some of which have achieved national prominence due to their popularity and comprehensive nature.10 For better or worse, the various states adopting uniform acts have made changes to the ULC prototypes. In some instances the changes were fairly dramatic; in others, minor changes were needed to accommodate the local nuances of the adopting state's laws.

There is no accepted standard for judging whether a state's version of a uniform act sufficiently conforms to the ULC model so as to deserve classification of that state as one that has "adopted" the ULC prototype.11 With regard to Nebraska's adoption of the Uniform Transfer on Death Deed Act and the Uniform Power of Attorney Act, the ULC characterized Nebraska as a state that has enacted both,12 notwithstanding the fairly dramatic changes that the Nebraska unicameral made to the Uniform Real Property Transfer on Death Deed Act.

B. THE UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

1. Background; Purpose; Theory

The ULC approved the Uniform Real Property Transfer on Death Act13 ("Uniform TODA") in 2009.14 At that time thirteen states had adopted laws validating a transfer on death deed, including Missouri, Kansas, and Colorado.15 Five states enacted the Uniform TODA as of 2011; Nebraska is the only state to adopt the Act in 2012.16

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10. Id.
11. The two primary research sources for uniform laws are: (1) the National Conference of Commissioners on Uniform State Laws website, and (2) the printed and online versions of Uniform Laws Annotated. These sources contain lists of states that have "adopted" a particular uniform act. See, e.g., Legislation, UNIF. L. COMM’N, http://www.uniformlaws.org/Legislation.aspx (last visited Jan. 24, 2013) (providing a search tool for legislative acts that have addressed uniform acts).
14. Legislative Fact Sheet—Real Property Transfer on Death Act, supra note 12.
16. See UNIF. REAL PROP. TRANSFER ON DEATH ACT refs & annos (West, Westlaw through 2012 Annual Meeting of the Nat’l Conference of Comm’rs on Uni. State Laws) (Editors’ Notes: Table of Jurisdictions Wherein Act Has Been Adopted); see also Acts: Uniform Real Property Transfer on Death Act, UNIF. L. COMM’N, http://www.uniform
According to the ULC, the Act “allows an owner of real property to pass the property simply and directly to a beneficiary on the owner’s death without probate. The property passes by means of a recorded transfer on death deed.”

As others have noted, the Act “was created in recognition of a trend toward the development of asset-specific will substitutes for the transfer of property at death.”

The legal recognition of a transfer on death deed is just the latest chapter in what John Langbein famously described as the nonprobate “revolution.” The more traditional nonprobate transfers of property in Nebraska are common law joint tenancies, revocable trusts, and payable on death designations in a contract. Nebraska statutory law has recognized a variety of “asset specific” nonprobate transfers since the adoption of the Uniform Probate Code, including payable on death (“P.O.D.”) accounts in financial institutions, transfer upon death of a security, and, most recently, a transfer on death motor vehicle certificate.

Extending the “transfer on death” concept to real property is a logical development as the nonprobate revolution continues unabated. On the other hand, by entitling the transferring instrument as a “deed,” one might argue that the Uniform TODA (and statutes predating the Act) is attempting to abridge a fundamental legal distinction that has been embedded in real property law for centuries. When

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17. Legislative Fact Sheet—Real Property Transfer on Death Act, supra note 12.
20. See De Forge v. Patrick, 76 N.W.2d 733, 736 (Neb. 1956) (“This state has always recognized common law joint tenancy with right of survivorship.”).
21. See Whalen v. Swircin, 4 N.W.2d 737, 759 (Neb. 1942) (“As a general rule, a power of revocation of the trust may be reserved and such power of revocation is consistent with a valid trust.”). Additionally, the Nebraska Uniform Trust Code has specific statutory rules applicable to revocable trusts. See Neb. Rev. Stat. §§ 30-3853 to -3856 (2008).
22. Life insurance contracts are the classic contracts with payable on death designations and have been statutorily sanctioned for centuries. The Nebraska Supreme Court, in Young v. McCoy, 40 N.W.2d 540 (Neb. 1950), was hostile to the concept of a payable on death form of bank account and ruled that the form of the account rendered it an invalid testamentary transfer. McCoy, 40 N.W.2d at 543. Nebraska’s adoption of the Uniform Probate Code changed the landscape considerably with regard to payable on death provisions in contracts. See Neb. Rev. Stat. § 30-2715 (general authorization of payable on death provisions in contracts).
24. See id. §§ 30-2734 to -2746 (authorizing a transfer on death for of security registration).
25. Id. § 30-2715.01 (Supp. 2012).
it comes to real property, there has always been a fundamental divide between inter vivos and testamentary transfers: the owner of Black-acre has the legal power to convey the proverbial sticks in the bundle during life or, by valid will, to devise the property at death.26

The comment to section 12 of the Uniform TODA states that “[a] fundamental feature of a transfer on death deed under this Act is that it does not operate until the transferor’s death. The transfer occurs at the transferor’s death, not before.”27 Section 7 of the Uniform TODA declares that, “[a] transfer on death deed is nontestamentary.”28 Notwithstanding the power of the legislature to abolish fundamental legal distinctions or to create exceptions, the transfer on death “deed” might be characterized as an oxymoron, or perhaps, more accurately, a legal fiction. Traditionalists may cringe in reading that the transfer on death “deed” is nontestamentary and that, under this particular type of “deed,” no interest passes until the death of the transferor. Be that as it may, under section 5 of the Uniform TODA, the bottom line is that “[a]n individual may transfer property to one or more beneficiaries effective at the transferor’s death by a transfer on death deed.”29

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26. The decision of the Nebraska Supreme Court in Pinkham v. Pinkham, 76 N.W. 411 (Neb. 1989), is particularly apropos to the present discussion. In Pinkham, the Court invalidated a deed containing the following language: “This deed is to take effect and be in full force from and after my [the grantor’s] death.” Pinkham, 76 N.W. at 411. The court reasoned that the purported “deed” was not a deed, utilizing the following reasoning:

[The deed] did not purport to be effective as a conveyance until the death of Calvin Pinkham, so that the absolute legal title to the premises was in him at the time of his death. A deed must pass a present interest in the property, even though the right of possession and enjoyment may not accrue until some future period. A will passes no title until after the testator’s death, and this marks the essential difference between a deed and a will. The great weight of authority sustains the proposition that an instrument, in the form of a deed, which takes effect and becomes operative alone upon the death of the maker, is testamentary in character, and is not a deed.

Id. at 411 (emphasis added). The “present interest” test is one that has traditionally been used in determining whether an instrument is inter vivos or testamentary in character.

Relatedly, the classic hornbook on wills from Professor Atkinson suggests that a more “liberal construction” of the language is called for and cites cases in which the courts construed the language as “passing the fee subject to a life estate in the maker.” Thomas E. Atkinson, Handbook of the Law of Wills 187 (2d ed. 1955). Construing language of an instrument to validate it is—to say the least—a debatable approach.


28. Id. § 7, 8B U.L.A. at 137.

29. Id. § 5, 8B U.L.A. at 135.
2. Particulars of the Uniform Act; Accommodating Local Law

The Uniform TODA consists of 19 sections. The heart of the Act is contained in sections 2 through 15, which are substantive in nature. Sections 16 and 17 of the Uniform TODA contain forms and are designated as “optional” sections. The ULC website provides an excellent summary of the substantive provisions of the Uniform TODA.³⁰

The drafters of the Uniform TODA were sensitive to the fact that the Act's blueprint might not fit well with a state's existing statutory scheme. To that end, the drafters of the Uniform TODA included specific Legislative Notes to sections of the Act,³¹ recognizing that changes in the Uniform Act language might be appropriate. The drafters also recognized that harmonization of the Uniform TODA's provisions with local law might necessitate amendment of other statutes. In a sense, the ULC acknowledges that the goal of drafting a “uniform act”—one that is copied verbatim in each state—is not realistic. As will be shown in the discussion of the Nebraska version of the Act, the changes Nebraska made to the Uniform TODA's language were significant and, in the eyes of some, questionable. Be that as it may, the bottom line is that the Nebraska Unicameral did adopt a version of the Uniform TODA and, as of January 1, 2013, has legitimated a new form of transferring real property.

C. The Uniform Power of Attorney Act

1. Background; Purpose

The ULC approved the Uniform Power of Attorney Act³² (“Uniform POAA”) in 2006; it replaces the Uniform Durable Power of Attorney, which was approved in 1979.³³ Since its promulgation in 2006, thirteen states have enacted a version of the Uniform POAA, with Ne-


braska, Ohio, and West Virginia adopting their versions of the Act in 2012.34

According to the ULC, a revised Uniform POAA was imperative because over the years many states adopted non-uniform provisions to deal with issues the Uniform Probate Code and the 1987 Durable Power of Attorney Act were silent about.35 The ULC explained the need to update the 1987 Act more particularly as follows:

A national study of durable powers of attorney, conducted in 2002, revealed the need to address numerous issues not contemplated in the original Uniform Durable Power of Attorney Act such as the authority of multiple agents, the authority of later-appointed guardians, and the impact of dissolution or annulment of the principal's marriage to the agent. The study also revealed other topics about which the states had legislated, although not necessarily in a divergent manner, including: successor agents, execution requirements, portability, sanctions for dishonor of a power of attorney, and restrictions on powers that alter a principal's estate plan. In a national survey, trust and estate lawyers' responses demonstrated a high degree of consensus about the need to improve portability and acceptance of powers of attorneys as well as the need to better protect incapacitated principals.36

The ULC's abbreviated description of the Act states that the Act "provides a simple way for people to deal with their property by providing a power of attorney in case of future incapacity. While chiefly a set of default rules, the Act also contains safeguards for the protection of an incapacitated principal."37

2. Structure; Main Features of Act

The 1979 Uniform Durable Power of Attorney Act, amended in 1987, is fairly brief as it consists of five substantive sections of fairly short length.38 The Uniform POAA is a fairly complex statute, consisting of four articles that include forty-seven separate sections.39

37. Legislative Fact Sheet—Power of Attorney, supra note 12; see also Acts: Power of Attorney, supra note 34.
The complexity of is due to the number of topics that were addressed by the new Act. The Uniform Durable Power of Attorney Act validated the durable power of attorney, thereby trumping the common law agency principle that the authority of the agent ceased upon the disability of the principal.\textsuperscript{40} The ULC designed the Uniform POAA to be comprehensive in nature, addressing the many issues that arose with the increased utilization of the durable power of attorney.

In the succeeding discussion of the Nebraska version, the highlights of the Uniform POAA will be discussed, with particular emphasis on potential changes in Nebraska law and how the Nebraska version departs from the Uniform POAA. As for the Uniform POAA, the ULC provides a fairly brief “summary” or overview of the Act. The relevant portions of that summary are reproduced here as a backdrop for discussion of the Nebraska version of the Uniform POAA:

The UPOAA seeks to preserve the durable power of attorney as a low-cost, flexible, and private form of surrogate decision making while deterring use of the power of attorney as a tool for financial abuse of incapacitated individuals. It contains provisions that encourage acceptance of powers of attorney by third persons, safeguard incapacitated principals, and provide clearer guidelines for agents.

The UPOAA provides broad protection for good faith acceptance or refusal of an acknowledged power of attorney, consequences for unreasonable refusal of an acknowledged power of attorney and recognition of the portability of powers of attorney validly created under other law . . . .

Protection for the principal under the UPOAA are multi-faceted and include: mandatory as well as default fiduciary duties for the agent; liability for agent misconduct; broad standing provisions for judicial review of the agent’s conduct; and the requirement of express language to grant certain authority that could dissipate the principal’s property or alter the principal’s estate plan. Mandatory duties include acting in good faith, within the scope of the authority granted and according to the principal’s reasonable expectations (or, if unknown, the principal’s best interest). Default duties that

\textsuperscript{40} Section 5-502 of the 1969 Uniform Probate Code was the original uniform law provision upon which the Uniform Durable Power of Attorney was based. As the comment to this section noted, “This section adopts the civil law rule that powers of attorney are not revoked on death or disability until the attorney in fact has knowledge of the death or disability.” \textit{Unif. Probate Code} § 2-502 cmt. (1969), \textit{available at} \texttt{http://www.uniformlaws.org/shared/docs/probate%20code/upc_scan_1969.pdf}; see also \textit{Unif. Durable Power of Attorney Act: Prefatory Note} (1979), \textit{available at} \texttt{http://www.uniformlaws.org/shared/docs/power%20of%20attorney/orig_upc_v.pdf} (noting that sections 5-501 and 5-502 of the 1969 Uniform Probate Code provided the basis for the free-standing Uniform Durable Power of Attorney Act).
can be varied in the power of attorney include the duty to preserve the principal’s estate plan (subject to certain qualifications) and the duty to cooperate with the person who has the principal’s health-care decision making authority.41

D. MANDATORY AND DEFAULT RULES; DRAFTING

The ULC’s abbreviated description of the Uniform Power of Attorney Act42 ("Uniform POAA") states it is “chiefly a set of default rules.” The ULC’s summary of the Uniform POAA refers to “mandatory duties” and “default duties.” These points were an emphasis when the Nebraska version of the Uniform POAA was proposed in the form of Legislative Bill 1113 (“LB 1113”). When the Unicameral’s Judiciary Committee gave its report on LB 1113, the Committee report stated, “Most of these provisions are default rules that can be altered by the power of attorney, but certain mandatory provisions in these sections serve as safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent’s authority.”43 In this regard the Uniform POAA follows the approach of the Uniform Trust Code, which, by and large, consists of a set of “default” rules.44 Unlike the Uniform Trust Code, however, the Uniform POAA does not have the “mandatory rules” in one section of the Act.45 The Uniform POAA’s mandatory rules, though few, are of critical importance for the drafter of the power of attorney. Unlike default rules that operate as presumptions and may be rebutted, mandatory rules cannot be “trumped” by contrary language in the power of attorney. From a drafting standpoint, nothing is more important than understanding the distinction between the Act’s “mandatory rules” and the Act’s “default rules.”46 As the various sections of the Nebraska Uniform Power of Attorney Act47 are reviewed, special note should be taken of the sections of the Act that contain the phrases “except as otherwise pro-

41. Power of Attorney Summary, supra note 33.
44. Unif. Trust Code: Prefatory Note (amended 2005), 7C U.L.A. 364 (2006). “Most of the Uniform Trust Code consists of default rules that apply only if the terms of the trust fail to address or insufficiently cover a particular issue.” Id.
46. Another way to express this critical distinction is to carefully differentiate between the Act’s “rules of law” and the Act’s “rules of construction.” The Nebraska Probate Code, in Part 6 of Article 23, Chapter 30 of the Nebraska Revised Statutes, employs the heading “Rules of Construction” to signal that the statutory rules which follow are default rules. See Neb. Rev. Stat. §§ 30-2339 to -2350 (2008 & Supp. 2012).
vided in the power of attorney” or “unless the power of attorney pro-
vides otherwise.” These phrases unmistakably earmark the rule
stated as a “default” rule—one that may be rebutted by appropriate
language in the creating instrument.

III. THE NEBRASKA UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

A. INTRODUCTION: LB 536

Sections 1 to 23 of Legislative Bill 536 (“LB 536”), passed by the
Nebraska Unicameral during the 2012 legislative session, enacted the
Nebraska Uniform Real Property Transfer on Death Act, a version
of the ULC’s uniform model. Sections 24 to 35 of LB 536 amend Ne-
braska statutes in Chapters 30 and 76, as well as enacting into law a
new statute in Chapter 76. Section 36 states that the operative date
for LB 536 is January 1, 2013.

B. DEFINITIONS; AUTHORIZATION (§§ 76-3402; 76-3405)

The definitions section of the Nebraska Uniform Real Property
Transfer on Death Act ("Neb. TODA") mirrors the provisions of
Section 2 of the Uniform Real Property Transfer on Death Act ("Uni-
form TODA"). While the transferor and transferees under a deed
are historically referred to as the “grantor” and the “grantee,” section 76-3404 utilizes the terms “transferor,” “beneficiary,” and “designated beneficiary” in lieu of “grantor” and “grantee.” The distinction
between a “beneficiary” and a “designated beneficiary,” though tech-
nical, is what one would expect: the designated beneficiary is a person
named in the deed to receive the property; the beneficiary is a person
named as the transferee who actually receives the property.

Looking to the definitions of transferor and beneficiary more
closely, one discovers an important distinction: whereas the benefici-
cy can be an entity, including the trustee of a revocable trust, the
definition of transferor is limited to an “individual.” As the Official

54. Id. § 76-3402.
55. See id. § 76-3402(1), (2).
56. Compare id. § 76-3402(1) (defining “beneficiary” with the term “person”), with id. § 76-3402(7) (defining “transferor” with the term “individual”).
Comment to the Uniform TODA points out, the term individual “does not include an agent or other representative.” The term does not include artificial entities such as corporations, business trusts, or estates. Only individuals may lawfully execute a transfer on death deed.

The most critical definition is for the term “transfer on death deed,” which is defined as a “deed authorized under the Nebraska Uniform Real Property Transfer on Death Act.” Transfer on death deed is a term of art that has no common law background. It is something new, authorized by statute.

Section 76-3405 makes this point clear and may be characterized as the cornerstone of the Neb. TODA. It states “an individual may transfer property to one or more beneficiaries effective at the transferor’s death by a transfer on death deed.” The Nebraska Unicameral added language to section 76-3405 stating that if the subject property “is agricultural land, the transferor may designate in the transfer on death deed the disposition of the transferor’s interest in growing crops to the transferor’s estate or to one or more of the designated beneficiaries.” The statute then goes on to provide a default rule: if no designation is made by the transferor with regard to growing crops, the transferor’s interest passes to the transferor’s estate.

C. Revocability; Non testamentary Nature; Capacity (§§ 76-3406 to 3408; 76-3419)

Sections 76-3406 to 3408 of the Nebraska Uniform Real Property Transfer on Death Act (“Neb. TODA”) adopt sections 5, 6, and 7 of the Uniform Real Property Transfer on Death Act (“Uniform TODA”) verbatim. Each section consists of mandatory rules of law. Under these sections, the transfer on death deed is inherently revocable, “nontestamentary,” and carries the same capacity requirement for a transferor as for making a will.

As stated in section 76-3406, “[a] transfer on death deed is revocable even if the deed or another instrument contains a contrary provision.” The Uniform TODA’s comment to this section addresses the
topic of a contract “to make the deed irrevocable or not to revoke the transfer.” 67 The comment further states that if such a contract exists, “the promisee may have a remedy under other law if the promise is broken.” 68 Even if the promise is broken, “[t]he deed remains revocable despite the promise.” 69

With regard to such a contract, the Nebraska unicameral added a section in its version of the Uniform TODA that specifically addresses the formality requirements for such a contract. Section 76-3419 states that “[a] contract to make a transfer on death deed, or not to revoke a transfer on death deed, can be established only by a writing evidencing the contract signed by the transferor after [January 1, 2013].” 70

Section 76-3419 is similar to, but not identical to, the section of the Nebraska Probate Code 71 relating to will contracts. 72 This is the first example of many in which the Neb. TODA adopts a Nebraska Probate Code standard applicable to wills. 73

Denominating the transfer on death deed as nontestamentary means, in essence, that the formalities requirement for a will do not apply. Given the inherently testamentary nature of a transfer on death deed, it is logical to adopt the testamentary capacity standard for wills. 74

D. Legal Requirements (§§ 76-3409 and 76-3410)

1. Introduction

Section 9 of the Uniform Real Property Transfer on Death Act 75 (“Uniform TODA”), entitled “Requirements,” set forth minimal basic requirements for the validity of a transfer on death deed. Under section 9 of the Uniform TODA, to be valid, the transfer on death deed: “(1) . . . must contain the essential elements and formalities of a properly recordable inter vivos deed; (2) must state that the transfer to the designated beneficiary is to occur at the transferor’s death; and (3)
must be recorded before the transferor's death [in the appropriate recording office].”

The Nebraska Unicameral, in section 76-3410, followed the Uniform TODA model with regard to the first two stated requirements, but changed the subsection relating to the recordation requirement. The Nebraska Unicameral went even further in departing from the Uniform TODA model by introducing new formality requirements in section 76-3410 and in a new section added during the legislative process. The Nebraska changes and additions to the Uniform TODA will now be highlighted.

2. The Nebraska Version of Section 9 of the Uniform Act (§ 76-3410)

The Nebraska Uniform Real Property Transfer on Death Act’s version of section 9 in the Uniform TODA retained the requirement that the transfer on death deed “contain the essential elements and formalities” in subsection (a) of section 76-3410, but additionally required that the recording take place “within thirty days” after being executed.

Subsection (b) of section 76-3410 is a dramatic departure from section 9 of the Uniform Act. Subsection (b) of section 76-3410 states the transfer on death deed:

Shall contain the following warnings:
WARNING: The property transferred remains subject to inheritance taxation in Nebraska to the same extent as if owned by the transferor at death. Failure to timely pay inheritance taxes is subject to interest and penalties as provided by law.
WARNING: The designated beneficiary is personally liable, to the extent of the value of the property transferred, to account for medicaid reimbursement to the extent necessary to discharge any such claim remaining after application of the assets of the transferor's estate. The designated beneficiary may also be personally liable, to the extent of the value of the property transferred, for claims against the estate, statutory allowances to the transferor's surviving spouse and children,

79. Neb. Rev. Stat. § 76-3410(a). Requiring recording within 30 days after being executed demonstrates the unique nature of the transfer on death deed as there is no requirement in Nebraska deed law that mandates recording within a specified time period after execution. Indeed it is not uncommon for an inter vivos deed to be recorded after the death of the grantor.
and the expenses of administration to the extent needed to pay such amounts by the personal representative.

WARNING: The Department of Health and Human Services may require revocation of this deed by a transferor, a transferor's spouse, or both a transferor and the transferor's spouse in order to qualify or remain qualified for Medicaid assistance.\(^80\)

Notwithstanding the requirement that the deed must contain the warnings specified in subsection (b)(1), subsection (b)(2) of section 76-3410 states that a recorded transfer on death deed shall not be invalidated "because of any defects in the wording of the warnings required by this subsection."\(^81\)

The "warning label" approach introduced by the changes to section 9 of the Uniform Toda was not in the original version of Legislative Bill 536 ("LB 536") as introduced. The changes to section 9 are not explained in the Judiciary Committee amendments to LB 536. The Judiciary Committee's reported explanation of the various amendments to LB 536 included the cryptic statement that the Judiciary Committee's revised version of LB 536 "incorporates substantive and technical changes that eliminate the opposition expressed at the hearing on the bill."\(^82\)

The three topics addressed by the mandated warnings were the subject of controversy and concern in the debate over authorizing this new form of nonprobate transfer of real estate.\(^83\) As the discussion of the Nebraska version of the Uniform Toda proceeds, the subject areas addressed by the warnings will be covered in greater detail in specific sections of the Nebraska Act. As a matter of policy, the "warning label" approach may have merit notwithstanding the axiom that every person "is presumed to know the law."

3. Signature; Witnessing; Acknowledgment (§76-3409)

Section 76-3409 imposes additional formality requirements for a transfer on death deed that goes far beyond the Uniform Toda, the

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80. Id. § 76-3410(b)(1).
81. Id. § 76-3410(b)(2).
83. The various amendments offered to LB 536 on the floor of the Legislature were designed to address various concerns, including the concern that persons might be subject to undue influence in executing transfer on death deeds. See Neb. Leg., Floor Deb., 102d Leg., 2d Sess., at 11-13 (2012), available at http://www.legislature.ne.gov/FloorDocs/102/PDF/Transcripts/FloorDebate/r2day28.pdf (providing the comments of Senators Wightman and Flood on amendment AM 2046). Professor Gradwohl's article discusses the context in which the amendments to section 76-3410 were offered. See Gradwohl, supra note 6, at 273, 297-98.
Nebraska requirements for an inter vivos deed, and the Nebraska will execution statutes. Section 76-3409 requires that the transfer on death deed "be signed by the transferor or by some person in his or her presence and by his or her direction."\(^{84}\) This language is similar to the signature requirement for an attested will under the Nebraska Probate Code\(^{85}\) and is consistent with the requirement for an inter vivos deed that the instrument be "signed by the grantor or grantors."\(^{86}\)

Section 76-3409's attestation requirement—witnessing and signing by "two or more disinterested witnesses"—is similar to, but not identical to, the requirements of the Nebraska Probate Code for an attested will.\(^{87}\) Nebraska law has not required that an inter vivos deed be witnessed.

Section 76-3409 requires that the signature of the transferor and the witnesses be acknowledged; the statute includes an acknowledgment form modeled after the form for self-proved wills under the Nebraska Probate Code.\(^{88}\) Under the Nebraska Probate Code, the self-proving affidavit format for an attested will, which involves acknowledgment, is optional; it is not required for a will to be valid.\(^{89}\) Nebraska law regarding the acknowledgment of an inter vivos deed is nuanced in that a deed of homestead property, in order to be valid, needs to be acknowledged whereas a deed of non-homestead property

\(^{84}\) Neb. Rev. Stat. § 76-3409.

\(^{85}\) Compare id. § 30-2327 (2008) (providing that "every will is required to be in writing signed by the testator or in the testator's name by some other individual in the testator's presence and by his direction"), with id. § 76-3409 (requiring a signature for a transfer on death deed).

\(^{86}\) Compare id. § 76-211 (2009) (providing that "[d]eeds of real estate, or any interest therein, in this state . . . must be signed by the grantor or grantors"), with id. § 76-3409 (requiring a signature for a transfer on death deed).

\(^{87}\) Compare id. § 30-2327 ("[E]very will . . . is required to be signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will."), with id. § 76-3409 ("A transfer on death deed . . . shall be attested in writing by two or more disinterested witnesses . . . .").

\(^{88}\) See id. § 76-3409; see also id. § 30-2329.

\(^{89}\) Compare id. § 30-2329 ("Any will may be simultaneously executed, attested, and made self-proved by the acknowledgment thereof by the testator and the affidavits of witnesses, each made before an officer authorized to administer oaths under the laws of this state or under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal, in form and content . . . ."), with id. § 76-3409 (requiring that the witnesses' and transferor's signatures "shall be made before an officer authorized to administer oaths under the laws of this state or under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal, in form and content").
does not. On the other hand, in order for an inter vivos deed to be recorded, the deed must be acknowledged.

The additional requirements set forth in section 76-3409 have been criticized. No state enacting the Uniform TODA has gone as far as the Nebraska Legislature has gone in imposing additional formality requirements. It remains to be seen whether the additional formalities under section 76-3409 will continue to be a part of the Neb. TODA going forward.

E. Revocation by Subsequent Instrument; Partial Revocation (§ 76-3413)

Section 76-3413 is a fairly faithful replica of section 12 of the Uniform Real Property Transfer on Death Act ("Uniform TODA"), with some slight variations. Under this section, revocation by a subsequent instrument is permitted; once recorded, however, the transfer on death deed may not be revoked by physical act "on the deed." Under subsection (a) of section 76-3413, a recorded transfer on death deed may be revoked, in whole or in part, in any one of three ways: (1) by a subsequent transfer on death deed; (2) by revoking an instrument executed with the same formalities as a transfer on death deed; and (3) by an inter vivos deed that revokes the transfer on death deed. In each instance the revoking instrument is required to be acknowledged and recorded.

Under subsection (b) of section 76-3413, if the transfer on death deed has more than one transferor, partial revocation is permitted by the act of one transferor, leaving the other transferor's interest intact. Subsection (b) also states that a deed of "joint owners" is revoked only by an act of all the joint owners. While the comment to subsection (b) of section 12 of the Uniform TODA attempts to clarify the impact of the rules stated in subsection (b), the applicability of these rules to
tenancy in common or joint tenancy property may not be entirely clear. On the other hand, the comment does provide a clarification that is important to highlight: revocation by the transferor’s will is not permitted.

F. Effect of Transfer on Death Deed During Transferor’s Life (§ 76-3414)

Section 76-3414 is identical to section 12 of the Uniform Real Property Transfer on Death Act101 with one exception. Under the Nebraska version of section 12, a transfer on death deed does not, “[a]ffect the transferor’s or designated beneficiary’s eligibility for any form of public assistance except to the extent provided in section 76-3421.”102 In other words, the Nebraska amendment indicates that the execution of the transfer on death deed may affect the transferor’s or designated beneficiary’s Medicaid eligibility, a topic to be examined later in this Article.103 Section 76-3414 also references the effect of a transfer of death deed upon creditors of the transferor. That topic will also be examined in greater detail below.104

G. Effect of Transfer on Death Deed at Transferor’s Death (§ 76-3415)

1. Introduction

Section 76-3415 derives from section 13 of the Uniform Real Property Transfer on Death Act105 (“Uniform TODA”) and is clearly one of the most significant provisions of the Nebraska Uniform Real Property Transfer on Death Act106 (“Neb. TODA”). Section 76-3415 contains a number of rules, some of which are default rules and some of

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99. The comment to section 11 of the Uniform TODA refers to “multiple owners” in its discussion of subsection (b). UNIF. REAL PROP. TRANSFER ON DEATH ACT § 11 cmt., 8B U.L.A. at 142. Subsection (b)(2) of the Nebraska statute uses the phrase “joint owners.” “Joint owner” is a term of art that is defined in the definitions section of the Uniform TODA, as well as the Neb. TODA. NEB. REV. STAT § 76-3402(3); UNIF. REAL PROP. TRANSFER ON DEATH ACT § 2(3), 8B U.L.A. at 132. The definition of “joint owner” is broadly defined as it means a concurrent estate with a right of survivorship. Both Acts go on to explain “joint owner” includes a “joint tenant.” The definition then states, “The term includes a joint tenant.” Both conclude with the statement that the term “does not include a tenant in common without a right of survivorship.” Relatedly, the Nebraska Supreme Court has recognized a tenancy in common with a right of survivorship. Anson v. Murphy, 32 N.W.2d 271, 273 (Neb. 1948).

100. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 11 cmt., 8B U.L.A. at 141.
103. See discussion infra Part III.J.
104. See discussion infra Part III.I.
which are mandatory rules. In examining the various rules articulated in this section it is extremely important to focus upon this distinction.

More so than any other section of the Uniform TODA, the drafters of the Act recognized that section 13 of the Act brings up the “harmonization” issue: the extent to which existing nonprobate and probate rules of construction should be applied to a transfer on death deed. The Uniform Law Code crafted a special “Legislative Note” to section 13 addressing this topic.107 The comment to section 13 reiterates the theme of the associated legislative note by referring to the “desirability of extending the probate code rules to governing antilapse, revocation on divorce or homicide, survival and simultaneous death, and the elective share of the surviving spouse.”108 In Nebraska, the burning question would be: to what extent should the various rules of the Nebraska Probate Code, applicable to wills, be applied to transfer on death deeds? The Nebraska Unicameral’s response to this question will be examined in subsections (5) and (6) below.

2. General Rule and the Exceptions

The overarching rule of section 76-3415, contained in the first subsection, is that upon the death of the transferor, the property owned at death by the transferor “is transferred to the designated beneficiary in accordance with the deed.”109 This rule, however, is subject to numerous qualifications and exceptions. In other words, the expressed intention of the transferor in the deed controls unless there is a rule of law that overrides the expressed intention of the transferor. These “trumping” rules of law, located within the Neb. TOD Act or in other statutes, will be discussed in greater detail later in this Article.110

As noted above,111 there are rules of construction found in the Neb. TODA, as well as trumping rules of law. The constructional rules, as will be recalled, give rise to presumptions that may be rebutted by the language of the instrument. In the following discussion of the “subsidiary law” of wills that are to be applied to transfer on death deeds, it is extremely critical to recognize the type of rule that is being applied to the transfer on death deed.


108. Id. § 13 cmt., 8B U.L.A. at 147.


110. See discussion infra Parts III.I and III.J.

111. See supra Part III.G.1.
Section 76-3415 contains two rules of law, one relating to the title of the beneficiary and another relating to warranty liability of the transferor. With regard to the latter, subsection (d) of section 76-3415 follows the Uniform TODA in declaring that the transfer on death deed transfers property “without covenant or warranty of title even if the deed contains a contrary provision.” In other words, transfer on death deeds are inherently quitclaim deeds.

Subsection (b) of section 76-3415 states the beneficiary under the transfer on death deed takes the subject property “subject to all conveyances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor’s death.” The Nebraska version of subsection (b) does not include the language of the Uniform TODA that states, for purposes of the subsection, recording of the transfer on death deed is “deemed to have occurred at the transferor’s death.” According to the comment to section 13 of the Uniform TODA, the general rule that the beneficiary takes the transferor’s title as it exists at the time of the transferor’s death is only changed by virtue of a state’s recording act and will occur “only in rare instances.”

What the comment addresses is the possibility that a beneficiary under a transfer on death deed could qualify as a bona fide purchaser for value under a state’s recording act. Nebraska’s recording act protects “creditors and subsequent purchasers in good faith without notice.” As the comment correctly observes, “most beneficiaries under transfer on death deeds are gratuitous,” thus ruling out bona fide purchaser for value status for the beneficiary. Nebraska’s recording statute, section 76-238, was amended in Legislative Bill 536 (“LB 536”). The amendment provides that the general rule stated in section 76-238 is subject to the rules stated in three sections of the Neb. TODA. Given this amendment, it can be argued that there is no

112. NEB. REV. STAT. § 76-3415(d).
113. Id. § 76-3415(b).
114. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 13(b), 8B U.L.A. at 146.
115. Id. § 13 cmt., 8B U.L.A. at 148.
116. NEB. REV. STAT. § 76-238(1) (providing that the “deeds, mortgages, and other instruments of writing which are required to be or ... may be recorded, shall take effect and be in force from and after the time of delivering such instruments to the register of deeds for recording and not before, as to all creditors and purchasers in good faith without notice”).
117. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 13, 8B U.L.A. 148.
118. See NEB. LEG., FLOOR DEB., 102d LEG., 2d Sess., at 12 (2012), available at http://www.legislature.ne.gov/FloorDocs/102/PDF/Transcripts/FloorDebate/r2day28.pdf. The amendment adds an introductory phrase to the beginning of Nebraska Revised Statute section 76-238—specifically, the added language was, “Except as otherwise provided in sections 76-3413 to 76-3415.”
circumstance under which the beneficiary under a transfer on death deed can qualify as a bona fide purchaser for value.

4. Concurrent Transferors and Concurrent Beneficiaries

Section 76-3415, in subsections (a)(3)(4) and subsection (c), adopt default rules that mirror section 13 of the Uniform TODA. These rules deal with the interests of transferors who are concurrent owners. These rules also deal with designated beneficiaries under a transfer on death deed.

With regard to a transferor who is “joint owner,” subsection (c) of section 76-3415 articulates two rules. If the transferor is a joint owner survived by other “joint owners,” the property “belongs to the other surviving joint owner or owners with right of survivorship.” If the transferor who dies is the “last surviving joint owner,” the transfer on death deed is effective to transfer title to the beneficiary. The stated rules are what one would expect in a state recognizing common law joint tenancy, which Nebraska does.

With regard to the interests transferred to concurrent beneficiaries, subsection (a) of section 76-3415 states two default rules. The first, under subsection (a)(3) is that the beneficiaries take as tenants in common, following traditional Nebraska law. Oddly enough, the statute does not use the term “tenants in common”; the statute simply states that the interests are transferred “to the beneficiaries in equal and undivided shares with no rights of survivorship.” This result is consistent with the approach of the Nebraska Uniform Probate Code with regard to transfers by will and to what is sometimes referred to as the “lapse in the residue” issue. This approach is an appropriate segue into the next topic: the application of Nebraska Probate Code rules to transfers effectuated by a transfer on death deed.

120. Note that this phrase is defined in the Neb. TODA. See supra Part III.B.
122. Id. § 76-3415(c)(2).
123. See De Forge v. Patrick, 76 N.W.2d 733, 736 (Neb. 1956) (“This state has always recognized common law joint tenancy with right of survivorship.”).
124. Neb. Rev. Stat. § 76-3415(a)(3). Oddly enough, the statute does not use the term “tenants in common”; the statute simply states that the interests are transferred “to the beneficiaries in equal and undivided shares with no rights of survivorship.” Id.
126. Id. § 30-2344(b) (2008) (providing that if the residue is devised to two or more persons and the share of the one of the residuary devisees fails for any reason, that share passes to “the other residuary devisee, or to the other residuary devisees in proportion to their interests in the residue”).
5. Adoption of Nebraska Probate Code Rules to Transfer on Death Deeds

As noted previously, the “Legislative Note” to section 13 of the Uniform TODA invited states adopting the Act to consider “extending” existing probate rules governing antilapse, revocation by divorce, revocation by homicide, survival and simultaneous death, and the elective share of a surviving spouse to transfer on death deeds.127 The Nebraska Unicameral responded affirmatively to this invitation by extending certain Nebraska Probate Code rules to transfer on death deeds. This was accomplished through the Unicameral’s changes to section 13 of the Uniform TODA and by an amendment to the Nebraska Probate Code.

At this juncture, it is important to note that Nebraska’s version of the Uniform Probate Code is, by and large, based upon the version of the Uniform Probate Code that existed in 1974.128 Similarly, Nebraska has not updated its version of the Uniform Simultaneous Death Act since its enactment in 1947.129 The legislative note to section 13 of the Uniform TODA references the Uniform Probate Code and the Uniform Simultaneous Death Act in the context of the most recent, updated versions of those acts. Thus the challenge of “extending” the existing probate code rules in Nebraska to transfer on death deeds is a bit more complicated than in other states that have adopted the latest versions of the Uniform Probate Code and Uniform Simultaneous Death Act. Had Nebraska enacted the latest versions of these two uniform acts, the topics of antilapse and simultaneous death could have been handled by the extension of the rules in those two uniform acts to transfer on death deeds. The Nebraska Unicameral could have specifically and explicitly extended existing probate rules in these two areas to transfer on death deeds, but it failed to do so.130

However, the Unicameral did extend Nebraska Probate Code rules to transfer on death deeds in the following areas: elective share; survivorship; revocation by divorce; and revocation by homicide. Extension of the Nebraska Probate Code rule regarding creditors’ claims is a topic to be discussed later in this Article.131

127. See supra Part III.G.1.
128. The Nebraska version of the Uniform Probate Code was enacted into law in 1974 with the passage of LB 354. However, the Unicameral provided that the “operative date” of the new probate code would be January 1, 1977. See Neb. Rev. Stat. § 30-2901.
129. See id. §§ 30-121 to -128.
130. The antilapse rule (applicable to wills) is found in section 30-2343 of the Nebraska Revised Statutes; the simultaneous death rules are located in sections 30-121 to -128 of the Nebraska Revised Statutes.
131. See infra Part III.H.2.
6. **Elective Share; Survivorship; Revocation by Divorce; Revocation by Homicide**

Section 76-3415 deals generally with the topic of legal effects and consequences that arise upon the death of the transferor. While the general rule is that the property subject to the transfer on death deed passes upon the transferor’s death to the one or more designated beneficiaries, it is the stated exceptions to this rule that are the heart of section 76-3415.

Section 76-3415 is prefaced by the introductory clause, “Except as otherwise provided in the transfer on death deed, in this section, or in Sections 30-2313 to 30-2319 . . . the following rules apply.”132 Sections 30-2313 to 30-2319 are the Nebraska Probate Code sections relating to the elective share of the surviving spouse, which LB 536 did not amend. The overriding issue is whether the transfer under a transfer on death deed is includible in the calculation of the “augmented estate” under section 30-2314. The answer is clearly yes,133 unless specified exceptions under section 30-2314 are applicable.134

With regard to the issue of survivorship by the beneficiary, section 76-3415(a)(2) extends to the transfer on death deed the Nebraska Probate Code “overlive” rule applicable to wills: unless trumped by language in the deed, the beneficiary under the transfer on death deed must survive the transferor by 120 hours.135 The beneficiary failing to meet this requirement is deemed to have predeceased the transferor.136

With regard to revocation by divorce, the Nebraska version of section 13 of the Uniform TODA was amended adding a new subsection. Under section 76-3415(e), the principles of the revocation by divorce statute in the Nebraska Probate Code are applied to transfer on death deeds.137

With regard to revocation by homicide, the Nebraska Unicameral amended the Nebraska Probate Code’s “slayer statute” and extended the principles of that statute to include transfers under transfer on death deeds.138 Additionally, the introductory clause of section 76-

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132. **NEB. REV. STAT.** § 76-3415(a) (emphasis added).
133. *See id.* § 30-2314(a)(1)(ii) (including within the augmented estate “any transfer to the extent to which the decedent retained at death a power alone or with any other person to revoke such transfer”).
134. *See id.* § 30-2314(c) (listing exceptions to the general rules stated in the preceding subsections).
135. *See id.* § 76-3415(a)(2).
136. *Id.*
137. *See id.* § 76-3415(e). The Nebraska revocation by divorce statute is narrow in scope, applying only to transfers “by will.” *See id.* § 30-2333.
138. *See id.* § 30-2354(d) (providing that the designated beneficiary who feloniously and intentionally kills the transferor or transferors of a transfer on death deed, or aids
H. LIABILITY FOR CREDITOR CLAIMS AND STATUTORY ALLOWANCES
   (§ 76-3417)
   1. Introduction and Overview

   Section 15 of the Uniform Real Property Transfer on Death Act140
   ("Uniform TODA"), labeled "Liability for Creditor Claims and Statu­
   tory Allowances," provides two alternatives. The first alternative is
   for states that have an existing statute that comprehensively handles
   creditors' rights and nonprobate transfers; the second alternative is
   for the states that do not have this comprehensive statute.141 Because
   Nebraska does not have a comprehensive statute dealing with credi­
   tors' rights and nonprobate transfers, it was logical to assume that
   Nebraska's approach to this topic would follow the second alternative
   outlined in section 15 of the Uniform TODA. And that is exactly the
   approach taken by the Nebraska Unicameral in section 76-3417.

   The Uniform Law Commission characterized the approach outlined
   in the second alternative to section 15 of the Uniform TODA as a
   "second-best approach" because its scope is limited to the at death
   rights of creditors of the transferor after the transferor's death and
   applies only to transfer on death deeds and not other "nonprobate
   mechanisms."142 While the Nebraska approach may indeed represent
   the "second-best" approach, the Nebraska version of section 15 has the
   virtue of consistency in that section 30-3415 applies the same rule to
   transfer on death deeds that the Nebraska Probate Code and the Ne­
   braska Uniform Trust Code applies to other nonprobate transfers.

   2. The Nebraska Rule as to Creditor Claims and Statutory
      Allowances

   Section 76-3417 is composed of five subsections, with subsection
   (a) outlining the circumstances under which the beneficiary of the
   transfer on death deed is subjected to personal liability143 arising out

139. See id. § 76-3415(a) (providing that "[e]xcept as otherwise provided [in] ... section 30-2354 . . . , the following rules apply").
142. Id.
143. See NEB. REV. STAT. § 76-3417(a) (Supp. 2012) (stating that under specified cir­
    cumstances "a transfer under the Nebraska Uniform Real Property Transfer on Death
    Act subjects the beneficiary to personal liability" for payment of creditor claims, statu­
    tory allowances, and expenses of administration of the transferor's estate) (emphasis
    added).
of claims against the transferor's estate, expenses of administration of the transferor's estate, and statutory allowances for the transferor's surviving spouse and children. The introductory clause of subsection (a) clearly states that liability of a transferee under this section is limited to cases in which the transferor's estate is insolvent. Otherwise stated, the probate assets are the assets the personal representative must first liquidate in paying creditor claims, administration expenses, and statutory allowances. This approach is consistent with the Nebraska Probate Code rules regarding nonprobate transfers and the rule in the Nebraska Uniform Trust Code applicable to revocable trusts.

Subsection (b) of section 76-3417 deals with the extent of personal liability imposed upon a beneficiary under a transfer on death deed. The basic thrust of the subsection to invoke a "proportionate share" approach and to provide specific instruction as to how the "proportionate share" is calculated. The first sentence of subsection (b) requires the transferee to account to the personal representative of the transferor's estate for a "proportionate share of the fair market value of the equity in the interest received" to the extent necessary to discharge

Alternative B of section 15 of the Uniform TODA states that under specified circumstances "the property transferred . . . by a transfer on death deed" may be subjected to the claims of the transferor's creditors and statutory allowances. This is what the comment to section 15 refers to as an "in rem liability rule." With regard to this in rem liability rule, the comment states "[t]he property transferred under a transfer on death deed is liable to the transferor's probate estate for properly allowed claims and statutory allowances to the extent the estate is insufficient." UNIF. REAL PROP. TRANSFER ON DEATH ACT § 15 cmt., 8B U.L.A. at 153 (emphasis added).

While it might appear that section 76-3417(a), with its focus on the "personal liability" of the beneficiary, is not in accord with the Uniform TODA's Alternative B approach (an in rem liability rule), the two approaches seem to end with the same conclusion: the beneficiary under the transfer on death deed is liable only to the extent that probate assets of the transferor are insufficient to discharge creditor claims, statutory allowances, and expenses of administration.

144. See Neb. Rev. Stat. § 76-3417(a) (stating that, as a general rule, the beneficiary under a transfer on death deed is subjected to personal liability for creditor claims, statutory allowances, and expenses of administration only "[i]f other assets of the estate of the transferor are insufficient to pay all claims against the transferor's estate . . . ").

145. See id. § 30-2726(a) (2008) (stating that transfers under the multiple-party accounts provisions of the Nebraska Probate Code subject the transferees to liability for creditor claims, statutory allowances, and expenses of administration only "[i]f other assets of the estate are insufficient . . . "); id. § 30-2743(a) (stating that a transfer arising under the Uniform Act does not subject the transferee to liability for creditor claims, statutory allowances, taxes, or expenses of administration unless "other assets of the estate are insufficient").

146. See id. § 30-3850(a)(3) (stating the constructional rule that after the death of the settlor of a revocable trust, revocable trust assets may be resorted to for payment of creditor claims, statutory allowances, and expenses of administration "to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses and allowances")
claims and allowances. The subsection goes on to define “proportionate share” as the “proportionate share of all nonprobate transfers recovered by the personal representative for the payment of the claims and allowances under the Nebraska Uniform Real Property Transfer on Death Act and sections 30-2726, 30-2743, and 30-3850.”

While, as noted above, Nebraska does not have a comprehensive statute dealing with nonprobate transfers and the rights of creditors, the Nebraska Probate Code and the Nebraska Uniform Trust Code do have specific rules relating to certain nonprobate transfers. The most prominent example is the rule contained in the multiple-person accounts provisions of the Nebraska Probate Code. Under section 30-2726, transfers resulting from right of survivorship or a POD designation in a multiple person account is “not effective” against the estate of a deceased party to the extent needed to pay claims and allowances. Under section 30-2726(b), the extent of the liability attaching to a surviving party of a multiple party account is determined on the basis of the “proportionate share” of the amount received from the decedent, which is determined by the net contribution rule of section 30-2722. A similar approach is taken in the Nebraska Probate Code under the provisions of Nebraska’s version of the Uniform TOD Security Registration Act. Section 30-2743 of that Act utilizes the same approach as section 30-2726 in determining the proportionate share that a surviving owner or beneficiary may be required to account to the personal representative of the estate of the deceased owner. As noted previously, these rules from the Nebraska Probate Code apply only to the extent that the probate assets are insufficient to pay claims and allowances.

Nebraska’s Uniform Trust Code, in section 30-3850, deals with the topic of creditors’ claims against a deceased settlor of a revocable trust and the extent to which trust beneficiaries may be required to account to the personal representative of the settlor’s estate in situations where the probate estate is insolvent. Section 30-3850 follows the same approach as outlined in the Nebraska Probate Code and subjects the trust beneficiary to potential liability if the probate estate is

147. Id. § 76-3417(b)(1).
148. Id.
149. Id. § 30-2726(a).
150. Id. § 30-2726(b). The net contribution rule of Neb. Rev. Stat. § 30-2722 provides the basis for determining the respective ownership interests of the parties to a multiple party account while the parties are alive.
151. Compare id. § 30-2743(b) (describing what amount a surviving owner may be personally liable for), with id. § 30-2726(b) (describing what amount a surviving party or beneficiary may be personally liable for).
152. See supra note 145 and accompanying text.
Like the Uniform Probate Code rules, section 30-3850 implicitly adopts a proportionate share approach and cross-references the sections of the Nebraska Probate Code previously discussed.\textsuperscript{154}

The Nebraska Probate Code and Nebraska Uniform Trust Code rules just discussed appear to adopt a consistent approach with regard to creditors' rights and discrete nonprobate transfers. Section 76-3417, in subsections (b), (c), and (d), adopts principles and procedures outlined in the Nebraska Probate Code and Nebraska Uniform Trust Code and makes them applicable to transfer on death deeds.\textsuperscript{155} It is understandable that the Nebraska Unicameral would attempt to create a "level playing field" when it comes to the topic of nonprobate transfers and the liability of transferees for creditors' claims, statutory allowances, and expenses of administration.

If the concept of the "level playing field" were taken to its logical conclusion, Nebraska law would treat joint tenancy real estate in the same fashion as transfers under its Multiple-Person Accounts Act,\textsuperscript{156} the TOD Security Registration Act, and the Uniform Trust Act. As the comment to section 15 of the Uniform TODA astutely points out, there can be very significant differences between a transfer on death deed and a joint tenancy deed when it comes to the topic of creditors' claims and allowances.\textsuperscript{157} In Nebraska that difference is patent and Nebraska lawyers need to be aware of it.\textsuperscript{158}

A final note on this topic: recall that section 76-3410 requires a "warning label" on a transfer on death deed that includes the statement that a designated beneficiary "may also be personally liable, to the extent of the value transferred" for estate claims, administration

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\textsuperscript{153.} \textit{See} Neb. Rev. Stat. § 30-3850(a).

\textsuperscript{154.} \textit{See} id. § 30-3850(a)(4) (providing the beneficiary of the revocable trust with the ability to join other nonprobate transferees in the judicial proceeding and establishing a right of contribution from the other nonprobate transferees).

\textsuperscript{155.} \textit{See} id. § 76-3415(b)(c)(d).


\textsuperscript{157.} \textit{Unif. Real Prop. Transfer on Death Act} § 15 cmt., 8B U.L.A. at 153: Alternative B provides more creditor protection than is typically available under current law. For many transferors, the transfer on death deed will be used in lieu of joint tenancy with right of survivorship. Under the usual law of joint tenancy, the unsecured creditors of a deceased joint tenant have no recourse against the property or against the other joint tenant. Instead, the property passes automatically to the survivor, free of the decedent's debts . . . . If the debts cannot be paid from the probate estate, the creditor is out of luck. Under Alternative B, in contrast, the property transferred under a transfer on death deed is liable to the probate estate for properly allowed claims and statutory allowances to the extent the estate is insufficient.

\textsuperscript{158.} Nebraska law appears to be accord with the "usual law of joint tenancy" (as stated in the previous footnote) that "unsecured creditors of the deceased joint tenant have no recourse against the other joint tenant." See De Forge \textit{v. Patrick}, 76 N.W.2d 733, 737 (Neb. 1956) (noting that "a joint tenancy with right of survivorship . . . would vest the whole title in the survivor free from the debts of the deceased joint tenant").
\end{flushleft}
expenses and allowances.\(^\text{159}\) There may be some value in such a warning but the warning does not give any indication of when the transferee will not be personally liable. The warning serves notice that potentially all of the property being transferred might be needed to pay claims or allowances, but it does not touch upon the thorny topic of "proportionate" liability.

I.** Medicaid: Qualification and Reimbursement (§§ 76-3418 to 76-3421)\(^\text{160}\)

With regard to topic of Medicaid qualification, the starting point for discussion is Nebraska Revised Statute section 76-3414(4), which, as previously noted,\(^\text{160}\) states a transfer on death deed does not affect the transferor's or designated beneficiary's liability for public assistance "except to the extent provided in section 76-3421."\(^\text{161}\) The quoted phrase was added by the Nebraska Unicameral as it addressed the topic of Medicaid qualification and reimbursement during the legislative process.

The topic of Medicaid qualification and reimbursement became a major issue because of concern raised by the Nebraska Department of Health and Human Services.\(^\text{162}\) The Interim Study authorized by Legislative Resolution 488, completed in November of 2010, acknowledged these concerns.\(^\text{163}\) Legislative Bill 536 ("LB 536"), introduced in January of 2011, attempted to address the specific concerns of the Department of Health and Human Services by adding new provisions to the Uniform Real Property Transfer on Death Act\(^\text{164}\) ("Uniform TODA").

The first of these added sections, section 76-3421, deals with Medicaid qualification. It consists of a single sentence and states that the Department of Health and Human Services "may require" revocation of a transfer on death deed by the transferor, the spouse of the transferor, or both, "in order for the transferor to qualify or remain qualified for medicaid assistance."\(^\text{165}\) As previously noted, the "warning label" section of the Nebraska version of the Uniform TODA mandates that the transfer on death deed contain language mirroring the


\(^{160}\) See supra note 102 and accompanying text.


\(^{162}\) See Gradwohl, supra note 6, at 293 n.115 (indicating that the Department of Health and Services had expressed concerns to Senator Wightman over "Medicaid estate recoveries" and a potential fiscal impact relating to enforcement of these recoveries).

\(^{163}\) See id. at 293 n.118.


language of section 76-3421. LB 536 did not amend the Nebraska statutes on Medicaid eligibility, apparently trusting the Nebraska Department of Health and Human Service to determine the exact circumstances under which the Department will demand revocation pursuant to section 76-3421.

The second added section, section 76-3418, addresses the topic of Medicaid reimbursement. It is similar to the statute preceding it, relating to the circumstances and the extent to which a beneficiary under a transfer on death deed may be liable for a proportionate share of creditor claims, statutory allowances, and expenses of administration. Under section 76-3418, a beneficiary under a transfer on death deed is personally liable "to account for medicaid reimbursement pursuant to sections 68-919 and 76-3417 to the extent necessary to discharge any such claim remaining unpaid after application of the assets of the transferor's estate." The statute goes on to limit the liability of the beneficiary "to the value of the interest transferred to the beneficiary." Finally, the statute states the Medicaid reimbursement recovery applies to "medical assistance provided before, at the same time as, or after the signing of and the recording of the transfer on death deed."

J. INHERITANCE TAX

The Nebraska inheritance tax statutes were not amended by Legislative Bill 536 ("LB 536"). There is no doubt that a transfer under a transfer on death deed is subject to inheritance tax. During the Judiciary Committee hearing on LB 536, concerns were raised by county officials over the issue of enforcement of the inheritance tax

166. Compare id. ("The Department of Health and Human Services may require revocation of a transfer on death deed by a transferor, a transferor's spouse, or both a transferor and the transferor's spouse in order for the transferor to qualify or remain qualified for medicaid assistance."), with id. § 76-3410(b)(1) (providing the required warning, which includes the language, "WARNING: The Department of Health and Human Services may require revocation of this deed by a transferor, a transferor's spouse, or both a transferor and the transferor's spouse in order to qualify or remain qualified for medicaid assistance").


168. Id. § 76-3417.

169. Id. § 76-3418.

170. Id.

171. Id.

and potential loss of revenue. These enforcement concerns were addressed by Judiciary Committee amendments that were added to LB 536 and will be discussed below.

The Nebraska Uniform Real Property Transfer on Death Act enacted two sections with specific references to the Nebraska inheritance tax. In section 76-3410, one of the “warning labels” required under this section calls attention to the fact that the property transferred “remains subject to inheritance taxation” and that failure to pay inheritance taxes may result in additional interest and penalties. Section 76-3420(b) states that there is no bona fide purchaser protection against an inheritance tax lien arising under section 76-2003.

K. BONA FIDE PURCHASER PROTECTION (§ 76-3420)

Section 76-3420 was a late addition to Legislative Bill 536 (“LB 536”), being added by the Judiciary Committee after a hearing on the bill. Subsection (a) of section 76-3420 addresses the status of a purchaser or a lender who acquires an interest from the beneficiary under a transfer on death deed. The subsection appears to provide maximum bona fide purchaser protection to the purchaser or lender “whether or not the conveyance by the transfer on death deed was proper.” The only exception is with regard to inheritance tax liens, as previously noted, in subsection (b). While the Unicameral did amend the Nebraska recording statute to take into account transfer


174. See infra notes 185-94 and accompanying text.


176. Neb. Rev. Stat. § 76-3410(b)(1) (Supp. 2012). As Professor Gradwohl has pointed out in his article, the interest and penalties that arise upon failure to timely pay the inheritance tax are significant. See Gradwohl, supra note 6, at 312 (noting that a penalty of 5% per month up to a maximum penalty of 25% of the amount due may be assessed, as well as interest at the rate of 14% per annum).


178. The Judiciary Committee replaced the originally introduced bill (LB 536) with Amendment 1668, which incorporated the Judiciary Committee amendments to the introduced version of LB 536. See Amendment 1668, 102d Leg., 2d Sess. (Neb. 2011), available at http://nebraskalegislature.gov/FloorDocs/102/PDF/AM/AM1668.pdf. The Judiciary Committee statement, reporting on the amendments made to LB 536, makes no specific reference to the addition of section 76-3420. Thus the legislative history of section 76-3420(a) is nowhere to be found.

179. See Neb. Rev. Stat. § 76-3420 (Supp. 2012) (stating that a purchaser or a lender who acquires an interest from the beneficiary of a transfer on death deed “takes title free of any claims of the estate, personal representative, surviving spouse, creditors, and any other person claiming by or through the transferee of the transfer on death deed”).
on death deeds, the changes made to the recording statute do not cross-reference section 76-3420, a gap that might need to be remedied.

L. REAL ESTATE TRANSFER STATEMENT; DEATH CERTIFICATE FILING
   (§ 76-3412; § 76-2,126)

Section 76-3412 is one of the additions to the Nebraska Uniform Real Property Transfer on Death Act ("Neb. TODA") that came about due to the interrelationship between the transfer on death deed and the provisions of Nebraska law requiring the filing of a real estate transfer statement. According to section 76-3412, the required statement must be filed "at the time that the conveyance ... becomes effective due to the death of the transferor or the death of a surviving joint tenant of the transferor." In order to fully appreciate the significance of section 76-3412 and the changes made to other statutes in chapter 76 of the Nebraska Revised Statutes, one must understand the background of the statement being referred to in section 76-3412 and the circumstances under which the filing of a death certificate is now required.

Section 76-214 of the Nebraska Revised Statutes requires the filing of Form 521—the "Real Estate Transfer Statement"—before a deed may be recorded. As a transfer on death deed must be recorded, the requirement of filing Form 521 would apply to a transfer on death deed’s recording. In two sections of Legislative Bill 536 ("LB 536"), the Nebraska legislature addressed the timing issue with respect to the filing of Form 521. Under section 76-3412, the filing of Form 521—"as provided in subdivision (2)(a) of section 76-214"—must be filed upon the death of the transferor or upon the death of the surviving joint tenant of the transferor.

Turning now to the changes made to section 76-214 by LB 536, the timing issue of the filing of Form 521 becomes more complicated because of the introduction of a new requirement introduced by LB 536. This new requirement—the filing of a death certificate—was the result of Judiciary Committee amendments to LB 536. The Judiciary Committee not only added a new section to the Neb. TODA and

180. See supra notes 116-18 and accompanying text.
183. See id., § 76-214(a) (2009) (requiring the filing of "a completed statement as prescribed by the Tax Commissioner"). The statement requires that the actual consideration for the transfer be disclosed along with other information. The Tax Commissioner has promulgated Form 521 as directed by the statute.
184. Id. § 76-3412.
amended existing section 76-214, it also added a new section to chapter 76, which is now codified as section 76-2,126, stating:

If a conveyance of real estate was pursuant to (1) a transfer on death deed due to the death of the transferor or the death of the surviving joint tenant of the transferor, (2) a joint tenancy deed due to the death of a joint tenant, or (3) the expiration of a life estate, then a death certificate shall be filed with the register of deeds to document the transfer of title to the beneficiary of the transfer on death deed, to the surviving joint tenant or joint tenants, or to the holder of an interest in real estate which receives that interest as a result of the death of a life tenant.\textsuperscript{186}

Additionally, LB 536 added to the first subsection of 76-214, the following statement:

If a death certificate is recorded as provided in subsection (2) of this section, this statement may require a date of death, the name of the decedent, and whether title is affected as a result of a transfer on death deed, a joint tenancy deed, or the expiration of a life estate or by any other means.\textsuperscript{187}

As is apparent, the timing of the filing of Form 521 for the transfer on death deed ignited a broader concern about the enforcement of the Nebraska inheritance tax and the mechanism by which counties would receive notice of nonprobate transfers triggering a potential inheritance tax.\textsuperscript{188} The Judiciary Committee’s statement, in reporting the changes to LB 536, noted specifically that, “[t]he intent of this change [requiring the filing of a death certificate when the Form 521 is filed] is to give counties additional notice of property being transferred on death for purposes of collecting inheritance taxes.”\textsuperscript{189} What the Judiciary Committee failed to highlight in its statement was the addition of a new statute in chapter 76, section 76-2,126, which requires the filing of a death certificate “to document the transfer of title.”\textsuperscript{190}

With the new requirement of a filing of death certificate for certain transfers, and the change in the timing for the filing of Form 521, questions may arise that might possibly affect the marketability of the title transferred. Recall that the transfer on death deed must be filed within thirty days after the deed is executed (and before the transfered by a death certificate when a transfer of property occurs by way of a transfer on death deed, a joint tenancy deed, or the expiration of a life estate.”).

\textsuperscript{186.} \textit{NEB. REV. STAT.} \textsection 76-2,126.  
\textsuperscript{187.} \textit{Id.} \textsection 76-214.  
\textsuperscript{188.} \textit{See supra} notes 176-77 and accompanying text.  
\textsuperscript{189.} \textit{See NEB. LEG. COMM. ON THE JUDICIARY, COMM. STATEMENT ON LEGIS. B. 536, at 2.}  
\textsuperscript{190.} \textit{NEB. REV. STAT.} \textsection 76-2,126.
feror’s death).191 Form 521, however, does not need to be filed until the transferor’s death (along with the death certificate).192 It is not clear what the consequences would be if the Form 521 is not filed or if the death certificate is not filed upon the transferor’s death. Surely there would be a marketability of title problem that is likely to arise. Ostensibly the failure to file the Form 521 is a misdemeanor pursuant to section 76-215.193 Another potential issue is whether these new requirements—applicable to joint tenancy deeds and transfers resulting upon “the expiration of a life estate”—will be retroactively applied.194

IV. THE NEBRASKA UNIFORM POWER OF ATTORNEY ACT

A. INTRODUCTION

The Uniform Power of Attorney Act195 ("Uniform POAA"), promulgated by the ULC in 2006, consists of forty-seven sections arranged under four articles.196 As codified in the Nebraska Revised Statutes, the Nebraska Uniform Power of Attorney Act,197 retains the same format of the Uniform POAA. In contrast to the Nebraska Uniform Real Property Transfer on Death Act,198 few changes were made by the Unicameral to the Uniform POAA’s provisions.

Senator Mike Flood, the introducer of Legislative Bill 1113 ("LB 1113"), summarized the purpose of LB 1113 as follows:

Legislative Bill 1113 would adopt the Nebraska Uniform Power of Attorney Act ("the Act"), which is based on the Uniform Power of Attorney Act that was drafted by the National

191. Id. § 76-3410(a)(4).
192. Id. § 76-214(2).
193. See id. § 76-215 (stating that a person who fails to file the statement required by section 76-214 “shall be deemed guilty of a misdemeanor” and may be fined in an amount up to $500). In its heading, this statute refers to the “tax statement,” which is how Form 521 is commonly referred to.
194. Because the transfer on death deed is a new legal form of transfer authorized by the Neb. TODA, there is no potential issue of retroactivity of the statutes as applied to transfer on death deeds. However, there is a lurking question as whether existing joint tenancy deeds are subject to the new requirement of a filing of a death certificate. (This may be a moot issue, however, as the customary practice is for lawyers to file a death certificate to “document the title.”)
Conference of Commissioners on Uniform State Laws and approved by it 2006.

Sections 1-23 of the Act contain all of the general provisions that pertain to creation and use of a power of attorney. Most of these provisions are default rules that can be altered by the power of attorney, but certain mandatory provisions in these sections serve as safeguards for the protection of the principal, the agent, and persons who are asked to rely on the agent’s authority.

Sections 24-40 provide default definitions for the various areas of authority that can be granted to an agent. Most of these definitions come from the Uniform Statutory Form Power of Attorney Act (1988); however, the language is updated where necessary to reflect modern day transactions. Section 24 identifies certain areas of authority that must be granted with express language because of the propensity of such authority to dissipate the principal’s property or alter the principal’s estate plan.

Sections 41-42 contain statutory forms that are designed for use by lawyers as well as lay persons. Step-by-step prompts are given for designation of the agent, successor agents, and the grant of authority. Section 42 contains a sample agent certification form.

Sections 43-45 contain miscellaneous provisions concerning the relationship of the Act to other law and pre-existing powers of attorney.199

Senator Flood’s statement of intent was adopted by the Judiciary Committee as its own when the Judiciary Committee voted to advance LB 1113 to the first stage of legislative consideration.200

The section break-down of LB 1113, as described in Senator Flood’s statement of intent, corresponds to the four articles comprising the UPOAA. What follows is a review of the most significant of the forty-five sections of LB 1113 utilizing the UPOAA’s organizational structure.


1. Definitions (§ 30-4002)

This section defines fifteen terms. All of the definitions are important, but some of the definitions are critical in understanding the various provisions and scope of the Nebraska Uniform Power of Attorney Act201 ("Neb. POAA"). No term is more basic to the understanding of the Act than the term "power of attorney," which is defined as follows:

Power of attorney means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.202

This section proceeds to define "agent" and "principal" as follows:

Agent means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney in fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent’s authority is delegated.203

Principal means an individual who grants authority to an agent in a power of attorney.204

While these definitions appear to be consistent with common law and custom, a closer look at the terms "principal" and "agent" is warranted. The definition of agent contains the word "person," which is a defined term whereas the definition of principal refers to an "individual." "Person" is defined as:

[A]n individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.205

Under the definitions given, the principal can only be an individual, whereas an agent can be an entity.

Although denominated under section 30-4001 as the "Nebraska Uniform Power of Attorney Act," the Neb. POAA's chief focus is upon durable powers of attorney, as was true of the statute the new act replaced.206 Under section 30-4002, the term "durable" means "not

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203. Id. § 30-4002(1).
204. Id. § 30-4002(10).
205. Id. § 30-4002(7).
terminated by the principal's incapacity." 207 Incapacity, in turn, is defined as:

[The] inability of an individual to manage property or property affairs effectively because the individual:
(a) Has an impairment in the ability to receive and evaluate information or make or communicate responsible decisions even with the use of technological assistance for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or lack of discretion in managing benefits received from public funds; or
(b) Is:
   (i) Missing;
   (ii) Detained, including incarcerated in a penal system; or
   (iii) Outside the United States and unable to return. 208

The legislative note accompanying section 102 of the Uniform Power of Attorney Act 209 ("Uniform POAA"), the definitions section, states that a jurisdiction enacting the Uniform POAA should review its "guardianship, conservatorship, or other protective proceedings statutes and amend, if necessary for consistency, the definition of incapacity." 210 The special committee of the Nebraska State Bar Association's Real Estate, Probate and Trust Law Section recommended changes to Nebraska guardianship and conservatorship statutes to harmonize the incapacity definitions in those acts with the Neb. POAA, but its recommendations were not accepted by the Nebraska State Bar Association. 211

2. Applicability (§ 30-4003)

This section deals with the scope of the Neb. POAA, as well as specific exceptions to the Act. Section 30-4003 states that the Neb.

207. Id. § 30-4002(3).
208. Id. § 30-4002(6).
211. The Legislative Forum meeting of the Nebraska State Bar Association's Real Estate Probate Section met on July 14, 2010 to consider the "Report of the Uniform Power of Attorney Act Study Committee." Included with the agenda for that meeting was a 39 page report by that Committee. See NEB. STATE BAR ASS'N REAL PROP., PROBATE, & TRUST LAW SECTION, REPORT OF THE UNIFORM POWER OF ATTORNEY ACT STUDY COMMITTEE (2010) [hereinafter STUDY COMMITTEE REPORT], available at http://nebar.com/associations/8143/files/2011_UPOAAReport.pdf.

The Study Committee's view was that there should be consistency in the Nebraska Probate Code with regard to the definitions of "incapacity" and "incapacitated persons" in the Nebraska conservatorship and guardianship statutes so that the same legal standards applies to the guardian, conservatorship, and power of attorney laws. See STUDY COMMITTEE REPORT, supra, at 43.
POAA “applies to all powers of attorney” and proceeds to list the exceptions. These exceptions are:

1. A power to the extent it is coupled with an interest in the subject of the power, including a power given to or for the benefit of a creditor in connection with a credit transaction;
2. A power to make health care decisions;
3. A proxy or other delegation to exercise voting rights or management rights with respect to an entity; and
4. A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.\(^{212}\)

Nebraska health care powers of attorney are governed by article 34 of chapter 30 of the Nebraska Revised Statutes.\(^ {213} \) The only section of article 34 that was amended by Legislative Bill 1113 (“LB 1113”) was section 30-3408, which simply changed to cross-reference to Nebraska’s durable power of attorney statute.\(^ {214} \)

The comment to section 103 of the Uniform POAA offers further insight as to why the particular exceptions to the Act were crafted. According to the section 103 comment, the exceptions were appropriate due to the subject matter and objectives of the delegation of the authority, or the agent’s role in the delegation of authority.\(^ {215} \) The comment also notes that in certain instances, the delegation of authority and the exercise of that authority are governed by specific statutes, such as the statutes dealing with the exercise of management rights or voting rights with respect to an entity.\(^ {216} \) As to the exception for “governmental forms,” the comment notes that the agent’s authority “emanates from other law and is generally for a limited purpose.”\(^ {217} \)

3. Presumption of Durability (§ 30-4004)

Section 30-4004, following section 104 of the Uniform POAA, states “[a] power of attorney created after January 1, 2013 . . . is durable unless it expressly provides that it is terminated by the incapacity of the principal.”\(^ {218} \) Section 30-2665 of the Nebraska Revised Statutes, which was repealed as of January 1, 2013, required that certain language be included in the power of attorney before it is deemed a

\(^{212}\) Neb. Rev. Stat. § 30-4003.


\(^{214}\) See id. § 30-3408(2) (referencing the “Nebraska Uniform Power of Attorney Act”).


\(^{216}\) Id. § 103 cmt., 8B U.L.A. at 68.

\(^{217}\) Id. It is at least arguable that a federal government form might be deemed to be substantive in nature so as to raise a federal preemption issue.

\(^{218}\) Id. § 104, 8B U.L.A. at 68.
“durable” power. 219 This change in Nebraska law is significant; it is similar to the change brought about by Nebraska’s adoption of the Uniform Trust Code 220 (“Neb. UTC”). Under the Neb. UTC, there is a presumption that a trust is revocable. 221

4. Execution of Power of Attorney (Formalities Requirement) (§ 30-4005)

When the Study Committee of the Nebraska State Bar Association (“NSBA”) reviewed the Uniform POAA, no topic in the Uniform POAA generated as much debate and discussion within the Committee as the formalities requirement for a power of attorney. While the approach of the Uniform Law Commission only encouraged acknowledgment—which would require the presence of a notary public or other person authorized to take acknowledgments—the NSBA in the end recommended that acknowledgment be a formal requirement for the creation of a valid power of attorney. 222 LB 1113 followed the NSBA’s recommendation and section 30-4005 is the statutory provision mandating acknowledgment of the principal’s signature. 225

While this is clearly a change in Nebraska law, it is not a departure from the customary practice of Nebraska lawyers. As the comment to section 105 of the Uniform POAA states, “As a practical matter, an acknowledged signature is required if the power of attorney will be recorded by the agent in conjunction with the execution of real estate documents on behalf of the principal.” 224 Nebraska is not the only state to reject the Uniform Law Commission approach and to require an acknowledgment. 225

When Nebraska adopted its version of the Uniform Probate Code, 226 the formalities requirements for the execution of a will were

219. NEB. REV. STAT. § 30-2665 (repealed 2013). The statute provided that a power is durable if the writing contained either of the following language: (1) “This power of attorney shall not be affected by subsequent disability or incapacity of the principal”; or (2) “This power of attorney shall become effective upon the disability or incapacity of the principal.” Id. The statute also allowed for “similar words” if the language showed the intent of the principal to create a power that “shall be exercisable notwithstanding the principal’s subsequent disability or incapacity.” Id.


221. Id. § 30-3854(a) (providing that “[u]nless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust”).

222. See Volkmer, supra note 6, at 14.


225. See, e.g., ME. REV. STAT. tit. 18-A, § 5-905(a) (Supp. 2012) (“A power of attorney under this Part is not valid unless it is acknowledged before a notary public or other individual authorized by law to take acknowledgments.”). Maryland has enacted a new durable power of attorney statute that also requires the principal’s acknowledgment before a notary public. See MD. CODE ANN., EST. & TRUSTS § 17-110 (West Supp. 2012).

reduced. Similar to the analysis involving the Nebraska Uniform Real Property Transfer on Death Act, the Nebraska Unicameral added to the formalities requirement in the Neb. POAA. While the acknowledgment requirement for a power of attorney can be viewed as inconsistent with the Nebraska Probate Code's will execution requirements, it is consistent with the approach taken in Legislative Bill 536, which introduced the Nebraska Uniform Real Property Transfer on Death Act.

5. **Validity of Power of Attorney (§ 30-4006); Governing Law (§ 30-4007)**

   Nebraska Revised Statutes section 30-4006 tracks the language of section 106 of the Uniform POAA except for one addition. LB 1113 added an additional sentence to subsection (1) which states that both the county court and the district court, in determining the validity of a power of attorney, have concurrent jurisdiction. Meanwhile, Nebraska's section 30-4007 tracks the language of section 107 of the Uniform POAA. While the heading of section 107 is "Meaning and Effect of Power of Attorney," a more accurate heading would be "Governing Law."

   Subsection (1) of section 30-4006 references the January 1, 2013 operative date of the Neb. POAA in declaring as of that date, a power of attorney must comply with the Neb. POAA. Subsection (2) of section 30-4006 addresses the status of those powers of attorney that were executed before January 1, 2013. As to those powers, subsection (2) states that the power is valid "if its execution complied with the law of this state as it existed at the time of execution."

   In other words, no valid Nebraska power of attorney was invalidated as of January 1, 2013, when the Neb. POAA law took effect. Subsection (3) of section 30-4006 addresses the validity of powers of attorney executed

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227. Prior to the adoption of the Uniform Probate Code, Nebraska statutory law did not recognize holographic wills. With the adoption of the Uniform Probate Code, Nebraska statutory law, for the first time, authorized a holographic will. See id. § 30-2328 (2008) (stating minimal requirements for a will that does not include attestation by witnesses).

228. Id. §§ 76-3401 to 3423 (Supp. 2012).

229. Compare id. § 30-4006 (providing the formalities required in the execution of power of attorney), with supra Part III.D.3 (describing the additional formalities requirements associated with the Nebraska Uniform Real Property Transfer on Death Act).


231. Id. § 30-4006(1).


234. Id. § 30-4006(2).
out of state. These powers are valid in Nebraska if: (1) the law of the

governing jurisdiction is satisfied; or (2) the requirements for a mili-
tary power of attorney under the applicable federal statute are satis-

\[235\] Subsection (4) of section 30-4007 provides that an
electronically transmitted copy or a photocopy “has the same effect as
the original” unless another statute requires an original copy.\[236\] This
subsection, along with other sections of the Neb. POAA to be dis-
cussed, is designed to promote acceptance of the copy of the power of
attorney that is tendered to third parties.

Section 30-4007, based upon section 107 of the Uniform POAA,
consists of one sentence. As the comment to section 107 indicates, the
section is designed to deal with the issue of “inter-jurisdictional” use of
powers of attorney and to provide “an objective means for determining
what jurisdiction’s law the principal intended to govern.”\[237\] Section
30-4007 provides that the “meaning and effect of a power of attorney is
determined by the law of the jurisdiction indicated in the power,” and,
if no such indication exists, “by the law of the jurisdiction in which the
power of attorney was executed.”\[238\] The statutory form that is in-
cluded in the Neb. POAA specifically states that the document being
executed is a “Nebraska Statutory Form Power of Attorney” and refer-
ences the “Nebraska Uniform Power of Attorney Act.”\[239\] Clearly the
use of the statutory form will give a clear indication of the principal’s
intent to have Nebraska law govern. As to the “inter-jurisdictional
use of powers of attorney,” the comment to section 107 states that sec-
tion 107 “clarifies that the principal’s intended grant of authority will
neither be enlarged nor narrowed by virtue of the agent using the
power in a different jurisdiction.”\[240\] Given the fact that principals
often own property in more than one jurisdiction, the clarifying rules
of section 107 are extremely helpful and pertinent.

6. Nomination of Conservator/ Guardian; Relation of Agent to
Court-Appointed Fiduciary (§ 30-4008)

Subsection (1) of section 30-4008 is consistent with section 108(a)
of the Uniform POAA in authorizing a principal to nominate a guardi-
ian or conservator in the power of attorney.\[241\] The extent to which

\[235\] Id. § 30-4006(3).
\[236\] Id. § 30-4006(4).
\[237\] UNIF. POWER OF ATTORNEY ACT § 107, 8B U.L.A. at 72.
\[238\] NEB. REV. STAT. § 30-4007.
\[239\] Id. § 30-4041.
\[240\] UNIF. POWER OF ATTORNEY ACT § 107, 8B U.L.A. at 72.
\[241\] NEB. REV. STAT. § 30-4008(1) (providing for nomination of a guardian or conser-
vator if protective proceedings are instituted after the power of attorney is executed).
the nominated person in a power of attorney is entitled to priority in a judicial proceeding is not addressed, a change from prior law.242

Subsection (2) of section 30-4008 addresses the issue of the legal relationship of the agent appointed under a durable power of attorney to a conservator later appointed by a court. Subsection (2) of section 30-4008 follows the language of the Nebraska Durable Power of Attorney Act,243 rather than utilizing the language of the Uniform POAA.244 The extent to which the court-appointed fiduciary may revoke the power of attorney without a court order is not specifically addressed in section 30-4008; that particular issue would be governed by the Nebraska conservatorship statutes.245

7. When Power of Attorney Effective (§ 30-4009)

Section 30-4009 mirrors the language of section 109 of the Uniform POA. The most significant change brought about by this section is the subsection (1) rule that a power of attorney “is effective when executed” unless the principal states in the instrument that the power becomes effective “at a future date or upon the occurrence of a future event or contingency.”246 The Nebraska Durable Power of Attorney Act247 required that certain language be present in the power in order for it be categorized as a “durable power,” whereas subsection (1) of section 30-4009 does not require “magic words” in order to create a durable power.248

Section 30-4004 creates the presumption that a power of attorney is durable and section 30-4009(1) creates the presumption that the power of attorney is presently effective. Of course a drafter is free to

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242. Section 30-4008(1) merely states that the nomination by the principal is “for consideration by the court.” The Nebraska Uniform Durable Power of Attorney Act stated the court “shall make its appointment” in accordance with the nomination contained in the power of attorney “except for good cause or disqualification.” Id. § 30-2667(2) (repealed 2013).
243. Id. §§ 30-2664 to -2772 (repealed 2013).
244. Id. § 30-4008(2). Subsection (2) of section 30-4008(2) tracks the language of the comparable provision in the now repealed Nebraska Uniform Durable Power of Attorney Act. See id. § 30-2667(1) (repealed 2013).
245. See id. § 30-2639(c) (providing that a court, acting in the best interest of the protected person, “may pass over a person having priority and appoint a person having lower priority or no priority”). The Nebraska Supreme Court decision in Conservatorship of Anderson v. Lasen, 628 N.W.2d 233 (Neb. 2001), discusses the accountability of an agent under a power of attorney to a court-appointed fiduciary. With regard to the accountability of an agent appointed under a durable power to the trustee of the principal’s revocable trust, see In re Guardianship and Conservatorship of Garcia, 631 N.W.2d 464 (Neb. 2001).
246. NEB. REV. STAT. § 30-4009 (emphasis added).
248. See supra note 219 and accompanying text (providing the “magic words” that used to be required).
draft a power of attorney that is not “durable” and is also free to draft a so-called “springing power”—one that becomes effective in the future upon the happening of a specified event or contingency.

Subsections (2) and (3) of section 30-4009 provide rules for the “springing powers.” Subsection (2) states that if the power of attorney is to become effective upon the happening of a future event or contingency, the instrument creating the power “may authorize one or more persons to determine in a writing or other record that the event of contingency has occurred.” Subsection (3) elaborates further upon the general rule provided in subsection (2). Subsection (3) deals with the most common type of springing power, namely, a power that becomes effective upon the principal’s “incapacity.” The overriding issue presented in this scenario is: who determines whether the principal is indeed “incapacitated”? Subsection (3) indicates that the instrument may designate a person or persons to make that determination and that such person’s or persons’ decision as to whether the principal is “incapacitated” is authoritative and binding.

But what if the power of attorney does not specify a person to make the decision as to incapacity or suppose the person so designated is “unable or unwilling to make such a determination?” Subsection (3) fills in the gaps created by these situations with a default rule. Under subsection (3), in such circumstances the determination of incapacity may be verified, in writing, by any of the following: (a) a licensed physician; (b) a licensed psychologist; (c) the court; (d) an appropriate governmental official. According to the comment to section 109, the “default mechanism” of subsection (3) is available only if “no incapacity determination has been made”; it may not be used to “challenge the determination made by the principal’s authorized designee.”

Subsection (4) of section 30-4009 goes back to the situation in which the principal has designated a person to make the incapacity determination. Under subsection (4), in this instance, the designation qualifies that person, for purposes of the Health Insurance Portability and Accountability Act, to act as the principal’s “personal representative.”

250. Id. § 30-4009(3).
251. Id. Section 30-4009 departs from the language of Uniform POAA section 109 in deleting the phrase “attorney at law” in the listing of persons empowered to make a determination of incapacity.
8. Termination of Power of Attorney or Agent’s Authority (§ 30-4010)

Section 30-4010 follows the language of section 110 of the Uniform POAA. Like subsections (a) and (b) of the Uniform POAA’s section 110, subsections (1) and (2) of Nebraska’s section 30-4010 respectively differentiate between circumstances under which the power of attorney terminates and the circumstances under which the agent’s authority terminates. Meanwhile, like subsections (c) and (d) of the Uniform POAA’s section 110, subsections (3) and (4) of Nebraska’s section 30-4010 delineate circumstances under which the power is not invalidated. That is, subsections (c) and (d) in the Uniform POAA list circumstances that do not invalidate the acts of the agent.255

Especially noteworthy in section 30-4010 are three rules not previously found in the Nebraska power of attorney statutes. The first new rule is akin to a “revocation by divorce” statute.256 Under subsection (2), an agent’s authority is terminated if “[a]n action is filed for the dissolution or annulment of the agent’s marriage to the principal or their legal separation, unless the power of attorney otherwise provides.”257 The second new rule relates to so-called “stale powers.” Under subsection (3), unless otherwise provided in the instrument, an agent’s authority continues “notwithstanding a lapse of time since the execution of the power of attorney.”258 The third new rule, found in subsection (6), is that the execution of a power of attorney does not revoke a prior power of attorney by inconsistency alone.259 According to the comment to section 110 of the Uniform POAA, “The requirement of express revocation prevents inadvertent revocation when the principal intends for one agent to have limited authority that overlaps with broader authority held by another agent.”260 With regard to third party reliance on the power of attorney, subsections (d) and (e) in section 110 of the Uniform POAA and subsections (4) and (5) in section 30-4010 protect that third party who acts in reliance on the power

255. See UNIF. POWER OF ATTORNEY ACT § 110, 8B U.L.A. at 76.
256. See NEB. REV. STAT. § 30-2333 (treating the testator’s spouse named in the will as predeceasing the testator if the divorce takes place after the execution of the will).
257. Id. § 30-4010(2)(c).
258. Id. § 30-4010(3).
259. Id. § 30-4010(6).
260. UNIF. POWER OF ATTORNEY ACT § 110 cmt., 8B U.L.A. at 76. The Study Committee of the Nebraska Bar Association had recommended a change in this subsection (providing a default rule that the execution of power of attorney revokes a power of attorney previously executed), but the Study Committee’s recommendation was not approved by the Nebraska State Bar Association. See STUDY COMMITTEE REPORT, supra note 211, at 10.
without actual knowledge that the power has been terminated or the agent’s authority has been terminated. 261

9. Coagents and Successor Agents (§ 30-4011)

Subsections (1), (2), and (3) of section 30-4011, dealing with agents and successor agents, provide several default rules that, in the words of the comment to this section, “merit careful consideration by the principal.” 262 This caveat is particularly apropos as it highlights the fact that the selection of an agent, the decision to utilize coagents, and the appointment of a successor agent or agents, are critically important decisions for the principal.

If the principal does select two or more persons to act as coagents, subsection (1) states, as a default rule, that “each coagent may exercise its authority independently.” 263 The comment to section 111 states that this default rule exists “to discourage the practice of executing separate, co-extensive powers of attorney in favor of different agents” and to facilitate acceptance of powers of attorney. 264 One might question whether the default rule does in fact discourage the practice of naming coagents because a default rule that required the coagents to act by majority or unanimous consent might cause the principal to think twice about utilizing coagents. 265 It is probably true that the default rule stated promotes greater third party acceptance, but this benefit might be gained at the significant risk of having each agent going off in different directions, independently of one another.

Whether the new default rule is correct or not, a more practical problem has to do with the effect of the new default rule on existing powers of attorney naming coagents. If the Nebraska power of attorney executed before January 1, 2013, required coagents to act together or allowed them to act independently of each other, 266 it would appear that passage of the Neb. POAA would not change the specific requirements set forth in the creating document. While it is true that under section 30-4045(1) that the new act “applies to a power of attorney

265. The comment to section 111 points out, however, that a default rule requiring unanimous consent would “impede” the use of a power of attorney “especially among agents who do not share close physical or philosophical proximity.” That is true and practical problems are likely to arise when the coagents do not share “philosophical proximity” (an interesting way to describe coagents who cannot get along or see eye to eye).
266. The instrument creating the power of attorney should address this issue in some fashion; the drafter is in control of determining which rule to govern.
created before, on, or after January 1, 2013, the rule enunciated in section 30-4011(1) is a default rule and thus, the language of the creating instrument controls, regardless of the change in the default rule.

If a power of attorney executed before January 1, 2013, does not specify whether the coagents have to act jointly, the question then becomes which default rule applies: (1) the “new” default rule of the Neb. POAA, or (2) the ostensible common law rule that requires joint action? There appears to be no simple answer to this question, although the Nebraska Supreme Court has stated a general rule that a statute is prospective in its application unless expressly made retroactive.

The Statutory Form Power of Attorney included in the Neb. POAA does have specific language regarding coagents. In the “Important Information” section of the statutory form, the form states, “This form provides for designation of one agent.” This section of the form proceeds to note if the principal wants to name a coagent, the portion of the form designated “Special Instructions” is the place to name the coagent. The form then reiterates the statutory rule that coagents “are not required to act together unless you include that in the Special Instructions.”

Subsection (2) provides for the naming of a successor agent or agents, and then states that, as a default rule, the successor agent or agents have the same authority as that granted to the original agent. The Neb. POAA’s statutory form addresses this topic by pointing out if the original agent is unable or unwilling to act, the power of attorney ends unless a successor agent is named. The statutory form has a section entitled “Designation of Successor Agent.”

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268. See id. § 30-4011(1) (providing that “[u]nless the power of attorney otherwise provides, each coagent may exercise its authority independently”) (emphasis added).
269. See Restatement (Second) of Agency § 41(2) (1958) (“Unless otherwise agreed, authority given in one authorization to two or more persons to act as agents includes only authority to act jointly, except in the execution of a properly delegable authority.”).
270. See Kratochvil v. Motor Club Ins. Ass’n, 588 N.W.2d 565 (Neb. 1999) (stating that legislative acts affecting substantive rights operate prospectively unless the legislature make it clear the statutory change is be retroactive). On the other hand, constitutional problems arise if the court determines that a vested right would be impaired by retroactive application. Perhaps the real question is whether the change (if indeed that is what it is) in Neb. Rev. Stat. § 30-4011(1) is “procedural” and thus capable of being retroactively applied.
272. Id.
273. Id.
274. Id. § 30-4011.
275. Id. § 30-4041.
Agent(s) (Optional)," which includes a blank for the appointment of a “Second Successor Agent.”\textsuperscript{276} The form again reinforces what the comment to section 111 of the Uniform POAA refers to as the “more prudent practice” of naming one original agent and one or more successor agents.\textsuperscript{277}

Subsections (3) and (4) deal with the potential liability of an agent for the actions of a coagent. The non-controversial default rule of subsection (3) is that an agent is not liable for the acts of another agent unless the agent participates in or conceals the other agent’s breach of fiduciary duty.\textsuperscript{278} Subsection (4) provides that an agent who has actual knowledge of breach or imminent breach of fiduciary duty by another agent has a duty to notify the principal; failure to do so can result in liability for the reasonably foreseeable damages that could have been avoided had the knowing agent taken action.\textsuperscript{279}

10. Reimbursement/Compensation; Agent’s Acceptance (§§ 30-4012 to -4013)

Section 30-4012 states a default rule, that the agent is entitled “reasonable” compensation and reimbursement of expenses reasonably incurred on behalf of the principal.\textsuperscript{280} This default rule is spelled out in the statutory form as well, with an indication that the “reasonable compensation” rule can be overridden in the “Special Instructions.”\textsuperscript{281}

Section 30-4013 states a default rule that the agent “accepts” appointment “by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.”\textsuperscript{282} The statutory form of the Neb. POAA contains the Uniform POAA sections labeled “Important Information for Agent,” as well as an added optional section at the end of the form entitled “Optional Signature for Agent.”\textsuperscript{283} The Nebraska “Optional Signature for Agent” was a recommendation of the Study Commission based, in part, upon the practice of some Nebraska attorneys in drafting powers of appointment.

\textsuperscript{276} Id.
\textsuperscript{277} Id.
\textsuperscript{278} Id. § 30-4011(3).
\textsuperscript{279} Id. § 30-4011(4).
\textsuperscript{280} Id. § 30-4012.
\textsuperscript{281} Id. § 30-4041.
\textsuperscript{282} Id. § 30-4013.
\textsuperscript{283} Id. § 30-4041.
11. Agent's Duties (§ 30-4014)

Section 30-4014 of the Neb. POAA is based on section 114 of the Uniform POAA and, with two minor exceptions, mirrors the language of section 114. Section 30-4014 is one of the more critically important provisions of the Neb. POAA in that it clarifies the existing law considerably in two respects. First, it specifies in detail what it means for the agent to be held to fiduciary duties. Second, it specifies which duties of the agent are mandatory rules and which are default rules. Furthermore, section 30-4014 addresses the scope of agent duties. The section provides three “nonliability” rules for agents. It also provides a presumptive rule that holds certain agents to a higher standard of care. Finally, section 30-4014 addresses the question of accountability—that is, beyond having a duty to account to the principal, under what circumstances is the agent required to account to third parties.

The mandatory rules articulated in subsection (1) of section 30-4014 are accurately summarized in the comment to section 114 of the Uniform POAA as the agent’s duties to act: (1) in accordance with the principal’s reasonable expectations, if known, and otherwise in the principal’s best interest; (2) in good faith, and (3) only within the scope of authority granted. The statutory form spells out these mandatory duties in the section entitled, “Important Information for Agent.”

The Nebraska Supreme Court, in the 2008 case of Archbold v. Reifenrath, spelled out in some detail the duties of an agent who is in a “fiduciary relationship” with the principal. One of the duties spelled out by the court in Archbold is the duty of the agent “to adhere faithfully to the instructions of the principal, even at the expense of the agent’s own interest.” Additionally, the Archbold court emphasized that the agent is required “to act solely for the principal’s benefit.” The Archbold court’s pronouncements seem consistent with the mandatory duties spelled in subsection (1) of section 30-4014.
Subsection (2) of section 30-4014 articulates six non-mandatory rules pertaining to the agent’s duties. The most generic of these default rules is the duty of the agent to act “with the care, competence, and diligence ordinarily exercised by agents in similar circumstances.” Another default rule that deserves attention is the fourth stated rule. Under this default rule, the agent has a duty to account—to “keep a record of all receipts, disbursements, and transactions made on behalf of the principal.” This is clearly good practice for the agent to follow for if the agent is called upon to account, the agent who has created a “paper trail” can provide the critical evidence as to whether the agent’s actions deviated from the standard of care set forth in the instrument or the default standard.

Part of section 30-4014’s significance also stems from its creation of protective measures for the agent. As the comment to section 114 of the Uniform POAA explains it, “[t]wo [of the default duties specified in subsection (2)] protect the principal’s previously-expressed choices. These are the duty to cooperate with the person authorized to make health-care decisions for the principal . . . and the duty to preserve the principal’s estate plan.” The former duty is self-explanatory, but the latter is highly nuanced due to the interaction between subsections (2) and (3). Under subsection (2) of section 30-4014, the agent’s goal to preserve the principal’s estate plan is qualified by the following language:

[to] the extent known by the agent, if preserving the plan is consistent with the principal’s best interest based on all relevant factors, including:

(i) The value and nature of the principal’s property;
(ii) The principal’s foreseeable obligations and need for maintenance;
(iii) Minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and
(iv) Eligibility for a benefit, a program, or assistance under a statute or regulation.

Subsection (3) of section 30-4014 goes on to state a nonliability rule dealing specifically with the agent’s failure to preserve the estate plan of the principal. Under subsection (3), the agent who “acts in

291. Neb. Rev. Stat. § 30-4014(2). The subsection (2) rules are rules of construction as indicated by the introductory phrase, “Except as otherwise provided in the power of attorney.” Id. (emphasis added).
292. Id. § 30-4014(2)(c).
293. Id. § 30-4014(2)(d).
good faith is not liable” to any beneficiary of the principal for failure to “preserve” the principal’s estate plan. 296

Section 40-4014 contains two additional protective rules in separate subsections. Subsections (6) and (7) of section 40-4014, protective rules that benefit the agent, are consistent with similar provisions in the Nebraska Uniform Trust Code (“Neb. UTC”). In subsection (6), the agent finds protection from liability if the value of the principal’s property declines so long as there is no breach of duty to the principal. 297 Subsection (7) protects the agent from liability in those situations in which the agent delegated authority to another person authorized by the principal, provided the agent exercised care, competence, and diligence when selecting and monitoring the person chosen by the agent. 298 Subsection (5) also deals with agent liability as it sets the standard of liability for an agent who the principal selected “because of special skills or expertise” that the agent possessed or claimed to possess. In such circumstances, the “special skills or expertise” of the agent must be considered when determining whether the agent acted “with care, competence, and diligence under the circumstances.” 299

Subsection (4) of section 30-4014 deserves a closer look because it provides further refinement of the presumptive rule in subsection 2 that an agent must “act loyally for the principal’s benefit.” 300 Subsection (4) states that, “An agent that acts with the care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.” 301 According to the comment to section 114 of the Uniform POAA, “[t]his position is a departure from the traditional common law duty of loyalty which required an agent to act solely for the benefit of the principal.” 302 The Uniform Law Commission (“ULC”) recognized that while the Uniform Trust Code 303 generally states a “sole interest” test for a trustee, certain state statutes have moved away from that test and recognize that “loyalty to the principal can be compatible with

296. Id. § 30-4014(3).
297. Id. § 30-4014(6). The corresponding rule in the Neb. UTC is Nebraska Revised Statute section 30-3892(b).
298. Id. § 30-4014(7). The corresponding rule in the Neb. UTC is Nebraska Revised Statute section 30-3888.
299. Id. § 30-4014(5). There is a corresponding rule in the Neb. UTC for this subsection as well. See id. § 30-3871.
300. Id. § 30-4014(2)(a).
301. Id. § 30-4014(4).
302. UNIF. POWER OF ATTORNEY ACT § 114 cmt., 8B U.L.A. at 82.
an incidental benefit to the agent.” The ULC justified its decision to favor a “best interest” test over a “sole interest” test on the ground that most agents under powers of attorney are family members “who have an inherent conflict of interest with the principal.”

A discussion of the duty of loyalty invariably focuses upon self-dealing transactions in which the trustee or the agent stands to personally benefit. Under the so-called “no-further inquiry” rule, the trustee’s self-dealing transaction can be set aside regardless of whether the trustee acted reasonably or in good faith. Note that the presumptive rule of subsection (4) rejects the “no-further inquiry rule” by stating an agent “is not liable solely because the agent . . . has an individual or conflicting interest in relation to . . . principal.”

The “no-further inquiry rule” is generally stated as a rule of construction, which means that the creating instrument can dispense with the no-further inquiry rule by authorizing the trustee or the agent to enter into self-dealing transaction. Section 40-4014, in subsection (2), similarly states that the duty of loyalty by the agent to act for the principal’s benefit is a default rule that may be rebutted by language in the power of attorney.

It should also be pointed out at this juncture that not all self-dealing transactions fit into the same category. As will be later shown, the specter of the agent making gifts to himself or herself raises special concerns that will be highlighted by other sections of the Act. There is a difference in degree when comparing a situation in which the agent personally benefits in a contract involving self-dealing with a situation in which the agent personally benefits by receiving a gift of the principal’s property. It would seem that subsection (4), when considered in the context of other sections of the Neb. POAA, although referring to an agent “benefitting” from a relationship with the principal, strikes a proper balance between different types of self-dealing transactions under which the agent “benefits.”

With regard to existing Nebraska law, section 30-4014 appears to clarify the standard by which self-dealing agents will be judged. Re-

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305. **Id.**
306. **See Restatement (Third) of the Law of Trusts § 78 cmt. b (2007) (stating that in the case of self-dealing transaction “it is immaterial that the trustee may be able to show that the action was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee”).**
308. **See id. § 30-3867(b)(1) (providing that the duty of loyalty may be waived or modified “by the terms of the trust”); Restatement (Third) of the Law of Trusts § 78(1) (stating the duty of loyalty can be rebutted by the “terms of the trust”).**
309. **Neb. Rev. Stat. § 30-4014(2).**
310. **See discussion infra Part IV.C.4.**
turning to the above-cited Archbold case, the court acknowledged the sole interest test could apply to an agent.\(^3\) However, the court went on to state that "[a]n attorney in fact, under the duty of loyalty, always has the obligation to act in the best interest of the principal unless the principal voluntarily consents to the attorney in fact engaging in an interested transaction after full disclosure."\(^3\) The Nebraska court's approach supports the approach of subsection (4) endorsing the "best interest" test over the "sole interest" standard.

The Nebraska statutory form contained in the Neb. POAA gives specific instructions to the agent under the heading "Agent's Duties."\(^3\) This section of the statutory form provides a clear and accurate summarization of the mandatory and default rules under section 30-4014. It calls attention to the fact that certain of these duties can be overridden in the "Special Instructions" section of the form.\(^3\) While the length of the statutory form is increased by providing directions and a précis of the law, the benefits of lengthening the form far outweigh the burdens.

12. Exoneration of Agent (§ 30-4015)

Section 30-4015(1), mirroring the language of section 115 of the Uniform POAA, states the general rule that an exculpatory provision in a power of attorney relieving the agent from liability for breach of fiduciary duty is valid.\(^3\) However, under subsection (1)(a), the exoneration language will not be effective to relieve the agent of liability for a breach committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal.\(^3\) Subsection (1)(b) states an alternative ground for voiding the exculpatory clause: the exculpatory language is found to be "a result of an abuse of a confidential or fiduciary relationship with the principal."\(^3\)

Unlike the Uniform POAA, subsection (2) of section 30-4015 goes further in creating a presumption as to when an exculpatory provision is deemed a result of an abuse of a confidential or fiduciary relationship. Subsection (2), modeled upon a comparable provision of the Neb.

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\(^3\) Archbold, 744 N.W.2d at 707 ("An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal, to act solely for the principal's benefit in all matters connected with the agency, and to adhere faithfully to the instructions of the principal, even at the expense of the agent's own interest.").

\(^3\) Id. at 707 (emphasis added).

\(^3\) N. REv. STAT. § 30-4041.

\(^3\) Id.

\(^3\) Id. § 30-4015(1).

\(^3\) Id. § 30-4015(1)(a).

\(^3\) Id. § 30-4015(1)(b).
UTC, focuses upon the identity of the drafter. If the exculpatory term was drafted or caused to be drafted by the agent, the presumption of abuse of a confidential relationship arises “unless the agent proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the principal.”

Nebraska estate planning attorneys need to be aware of the rule that applies when an exculpatory clause is inserted in the power of attorney and the agent named in the power of attorney either drafted, or caused to be drafted, the power of attorney in question. However, under subsection (1)(a), the exoneration language will not be effective to relieve the agent of liability for a breach committed dishonestly, with improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal.

13. Judicial Relief (§ 30-4016)

Section 30-4016 follows closely the language of section 116 of the Uniform POAA as only minor modifications were made to this section. The stated goal is protect the principal against financial abuse. To that end, section 30-4016 clarifies the issue of who has standing to petition the appropriate court to either construe a power of attorney or review the agent’s actions. Subsection (1)’s listing of nine categories of persons or entities who would have the requisite standing to seek judicial relief is new to Nebraska law; nothing comparable existed in Nebraska statutory law prior to the passage of LB 1113. Most notable among the nine categories listed are the very broadly worded categories of a person “that demonstrates sufficient interest in the principal’s welfare” as well as a “governmental agency having regulatory authority to protect the welfare of the principal.”

Subsection (2) of section 30-4016 states a “trumping” rule: a principal who has the capacity to revoke agent’s authority or the power of attorney has the power to have a petition dismissed under this section by filing an appropriate motion. According to the comment to section 116 of the Uniform POAA, subsection (2) operates as a “check and

318. Id. § 30-3897(b).
319. Id. § 30-4015(2).
321. The two changes to section 116 that the Study Committee recommended and the Nebraska Unicameral accepted are: (1) the substitution of the word “issue” for “descendants” in subsection 1(d); and (2) adding the words “or would otherwise qualify as a devisee under that remains unprovoked” to subsection (1)(e). See Neb. Rev. Stat. § 30-4016(1); Study Committee Report, supra note 211, at 13-14.
324. Id. § 30-4016(2).
balance" on the narrow scope of section 116(a)(8), which significantly limits the number of persons who can request the agent to account.325

14. Agent's Liability (§ 30-4017)

Section 30-4017 addresses the topic of measure of damages for an agent who breaches duties owed under the Neb. POAA. In addition, the section addresses the potential liability of the defaulting agent for attorneys' fees and costs. With regard to the measure of damages, section 30-4017, following section 117 of the Uniform POAA, articulates a standard damage formula.326 However, section 30-4017, modeled upon the Neb. UTC, departs from the Uniform POAA by adding a liability rule. Under subsection (2), the agent may be held liable for costs and expenses, including reasonable attorney's fees, as ordered by a court "as justice may require."327

15. Acceptance/Reliance upon Acknowledged Power of Attorney (§ 30-4019)

Section 30-4019, as well as the succeeding section 30-4020, are designed to achieve one of the over-arching goals of the Act: to "encourage" acceptance of a power of attorney by third parties.328 To encourage acceptance, section 30-4019, based upon section 119 of the Uniform POAA, broadly protects persons who in good faith accept an acknowledged power of attorney.329 Subsection (2) of section 30-4019 narrowly addresses the concern over a valid signature by the principal. In tandem with section 30-4005, subsection (2) allows a third party, who is without actual knowledge that the signature is not genuine, to rely upon the presumption that the signature is valid.330

Subsection (3) of section 30-4019 is similar to subsection (2) but is broader in scope. Under subsection (3), the person who is good faith accepts an acknowledged power of attorney without actual knowledge

325. The Nebraska counterpart to section 116(a)(8) is NEB. REV. STAT. § 30-4016(1)(h).
326. Id. § 30-4017(1) (stating that the defaulting agent is liable for the amount required to "restore the value of the principal's property to what it would have been had the violation not occurred").
327. Id. § 30-4017(2). The comparable provision of the Neb. UTC is NEB. REV. STAT. § 30-3893. The comment to section 117 of the Uniform POAA notes that the remedies under the Uniform POAA are "not exclusive"; other statutes addressing the topic of financial abuse may also be invoked. See UNIF. POWER OF ATTORNEY ACT § 117 cmt., 8B U.L.A. at 88.
330. NEB. REV. STAT. § 30-4019(2).
that the power of attorney is void, invalid, or terminated, or not within the scope of the authority granted to the agent, is protected.\textsuperscript{331} As the comment to Uniform POAA section 119 points out, “[T]he Act places the risk that a power of attorney is invalid upon the principal” rather than upon the person accepting the power.\textsuperscript{332} According to this comment, this approach is “essential to [the effectiveness of a durable power of attorney] as an alternative to guardianship.”\textsuperscript{333}

Subsection (4) of section 30-4019 provides that a third party, asked to accept an acknowledged power of attorney, may make certain requests of the agent and rely upon the agent’s response to such requests without further investigation. These requests include the following: (1) the request of an agent’s certification of a factual matter; (2) the request for an opinion of counsel as to any matter of law concerning the power of attorney; (3) the request for an English translation of the power of attorney.\textsuperscript{334} Subsection (6) of section 30-4019 re-affirms the “actual knowledge” test in the context of a third party that conducts activities through employees. Under this subsection, a person is not charged with actual knowledge of a fact unless the employee conducting the transaction has actual knowledge of the fact.\textsuperscript{335}

16. Liability for Refusal to Accept Acknowledged Power of Attorney ($30-4020)

In the Uniform Law Commission’s summary of the Uniform POAA, the drafters of the Act stated that section 120 of the Uniform POAA specifies “consequences for unreasonable refusal of an acknowledged power of attorney.”\textsuperscript{336} Two alternative versions of section 120 are included in the Uniform POAA. Alternative A’s scope extended to all acknowledged powers of attorney while Alternative B’s scope extended only to statutory form powers of attorney. The Nebraska Unicameral opted for Alternative A, with additions to section 120 as recommended by the Nebraska State Bar Association’s Study Committee.\textsuperscript{337}

\begin{itemize}
  \item \textsuperscript{331} \textit{Id.} § 30-4019(3).
  \item \textsuperscript{332} \textit{See Unif. Power of Attorney Act} § 119 cmt., 8B U.L.A. at 88.
  \item \textsuperscript{333} \textit{Id.}
  \item \textsuperscript{334} \textit{Neb. Rev. Stat.} § 30-4019(4).
  \item \textsuperscript{335} \textit{Id.} § 30-4019(6). LB 1113, as introduced, following the recommendation of the Study Committee of the Nebraska State Bar Association, departed from the Uniform POAA’s “actual knowledge” standard in several respects. The only amendment on the floor of the Unicameral to LB 1113 put back into LB 1113 the “actual knowledge” standard of the Uniform POAA. \textit{See Amendment 1668, 102d Leg., 2d Sess. (Neb. 2011), available at http://nebraskalegislature.gov/FloorDocs/102/PDF/AM/AM1668.pdf.}
  \item \textsuperscript{336} \textit{Power of Attorney Summary, supra note 33.}
  \item \textsuperscript{337} The changes to subsection (2) and the addition of a new subsection to section 30-4020 were contained in the Study Committee’s Report and were incorporated into section 30-4020. \textit{See Study Committee Report, supra note 211, at 19.}
\end{itemize}
Subsection (1) of section 30-4020, identical to the comparable section of Uniform POAA section 120, begins by stating that, except as otherwise provided in subsection (2), a person who is requested to accept an acknowledged power of attorney has the following options: that person may either accept the power of attorney or "request a certification, a translation, or an opinion of counsel" within seven business days after presentation of the power of attorney for acceptance.\(^{338}\) If the latter course is chosen and the person so requesting receives the certification, translation, or opinion of counsel, then the requesting person has five business days to "accept" the power.\(^ {339}\) Subsection (1) also states that the person making a request for acceptance "may not require an additional or different form of power of attorney for authority granted" by the power.\(^ {340}\)

Subsection (2) of section 30-4020 lists the bases upon which a person may legally refuse to accept a power of attorney presented to that person. The first six stated grounds for refusal in subsection (2) mirror the provisions of section 120(b) of the Uniform POAA.\(^ {341}\) In a departure from the Uniform POAA section 120, section 30-4020, subsection (2) adds two additional bases for refusal to accept an acknowledged power of appointment: (1) actual knowledge of a pending judicial proceeding involving the validity or scope of the power, and (2) insufficient evidence presented with regard to the occurrence of the event or contingency whereby a "springing" power becomes effective.\(^ {342}\)

Subsection (3) of section 30-4020 is an additional subsection not found in the Uniform POAA’s section 120 Alternative A. Subsection (3) enumerates two additional bases that are not legitimate grounds for refusing to accept an acknowledged power of attorney: (1) the refusal to accept is based "exclusively upon the date the power of attorney was executed" (the so-called "stale power" defense), and (2) the "refusal is based exclusively on a mandate that an additional or different power of attorney form must be used."\(^ {343}\)


\(^{339}\) Id. § 30-4020(1)(b).

\(^{340}\) Id. § 30-4020(1)(c).

\(^{341}\) Id. § 30-4020(2)(a)-(f).

\(^{342}\) Id. § 30-4020(2)(g)-(h). These additional subsections were recommended by the Study Committee. See Study Committee Report, supra note 211, at 19. The Study Committee’s recommendations were based upon changes by the State of Wisconsin in its adoption of the Uniform POAA. See Wis. Stat. § 244.20(1)(g)-(h) (Supp. 2012).

\(^{343}\) Neb. Rev. Stat. § 30-4020(3)(a)-(b). Like the other changes made to section 120 Alternative A, these changes were recommended by the Study Committee and were borrowed from the Wisconsin version of the Uniform POAA. See Wis. Stat. § 244.20(2)(a)-(b) (Supp. 2012); Study Committee Report, supra note 211, at 19.
Subsection (4) of section 30-4020 follows the Uniform POAA model outlining the remedies in the case of wrongful refusal to accept an acknowledged power of attorney. These remedies include a court order mandating acceptance of the power or liability for reasonable attorney's fees and costs in any action confirming the validity or scope of the power or one in which the court mandates acceptance of the power.344

C. Article 2: Authority (Neb. Rev. Stat. §§ 30-4024 to -4040)

1. Introduction and Overview

Article 2 of the Uniform Power of Attorney Act345 ("Uniform POAA"), with the beguilingly simple title of "Authority," consists of seventeen sections (sections 201 to 217). The Nebraska Uniform Power of Attorney Act346 ("Neb. POAA"), in sections 30-4024 to -4040, mostly mirrors the language of the Uniform POAA. Because the Neb. POAA deviations from the Uniform POAA are relatively insignificant,347 the discussion of Article 2 that follows heavily relies on the provisions of the Uniform POAA.

From the standpoint of drafting a durable power of attorney, the Uniform POAA's Article 2 provisions are of utmost significance. The general comment to Article 2 explains the article "provides the default statutory construction for authority granted in a power of attorney."348 Thus, Nebraska's sections 30-4024, 30-4025, and 30-4026 are more general in nature, as the section headings indicate.349 Additionally, Nebraska's sections 30-4027 through 30-4040 describe authority with respect to various subject matters—the specific grants of authority.350 Of the fourteen sections dealing with specific grants of authority, the most important of these is section 30-4040, addressing the topic of "gifts."

347. The changes recommended by the Study Committee were in UPOAA sections 201, 211, 215, and 217. See Study Committee Report, supra note 211, at 19-32. All of the recommended changes were incorporated into the Neb. POAA.
349. See Neb. Rev. Stat. §§ 30-4024 to -4026 (Supp. 2012). The section headings for these sections are, respectively, "Authority that requires specific grant; grant of general authority," "Incorporation of authority," and "Construction of authority generally."
350. The section headings for the various sections indicate the depth and breadth of the variety of specific subject areas covered: Real Property; Tangible personal property; Stocks and bonds; Commodities and options; Banks and other financial institutions; Operation of entity or business; Insurance and annuities; Estates, trusts, and other beneficial interests; Claims and litigation; Personal and family maintenance; Benefits from governmental programs or civil or military service; Retirement plans; Taxes; and Gifts.
2. Authority that Requires Specific Grant; Grant of General Authority (§ 30-4024)

Section 30-4024 is virtually identical to the Uniform POAA section 201 and, as the comment to Uniform POAA section 201 emphasizes, the section "distinguishes between grants of specific authority that require express language in a power of attorney and grants of general authority."351 The rationale for requiring specific grants of authority for those powers listed in subsection (1) of section 30-4024 is, according to the comment to section 201, "the risk those acts pose to the principal's property and estate plan."352

Subsection (2) of section 30-4024 takes an additional step in attempting to safeguard the principal who does in fact grant to the agent one of the powers specifically enumerated under subsection (1). An additional default rule then applies and distinguishes between grants of power to an agent who is an ancestor, the spouse, or issue of the principal versus an agent who is not in those categories. Under subsection (2), the agent who is not in the category of ancestor, spouse, or issue must be granted explicit authority to create in the agent, or in a person the agent is legally obligated to support, an interest in the principal's property.353

Gift-making by the agent is one of the specific powers listed in subsection (1). However, subsection (4) of section 30-4024 indicates that, "unless the power of attorney otherwise provides," the grant of authority to make gifts is governed by another section of Article 2.354 That section is section 30-4040, which is the section specifically dealing the agent's power to make gifts.

The comment to section 201 of the Uniform POAA reiterates that "[n]otwithstanding a grant of authority to perform any of the enumerated acts in subsection [(1)], an agent is bound by the mandatory fiduciary duties [found in other sections of the Act] as well as the default duties that the principal has not modified."355 This comment is a forceful reminder that the Uniform POAA is not simply a set of default rules that may be modified by the principal; one of the virtues of the Uniform POAA is that it does articulate the mandatory rules which, without the Uniform POAA, would be speculative and uncertain.

352. Id. The subsection (1) powers requiring "an express grant" are those grants of power allowing the agent to effect a gratuitous transfer.
354. Id. § 30-4024(4).
3. Incorporation of Authority (§ 30-4025)

The drafter of the power of attorney has a choice with regard to how to go about describing the powers granted to the agent. The first option is to simply list the powers granted in the creating instrument and state that the agent shall have only the powers explicitly granted in the instrument. The second approach is to use an “incorporation by reference approach.” Section 30-4025 of the Neb. POAA specifically addresses using this option.

As the comment to the Uniform POAA section 202 notes, section 30-4025 provides two methods of incorporating into a power of attorney the Uniform POAA's statutory construction for authority over various subject matters: a reference in the creating document to either (1) the descriptive terms or terms utilized in the Neb. POAA (articulated in sections 30-4027 to -4040), or (2) the statutory section number or numbers describing the authority that is specifically granted. In either case, the reference incorporates to the subject topic or to the section number and incorporates the entire section referenced or cited as if it were set out in full in the creating document. The drafter is free to modify any authority incorporated by reference.

4. Gifts (§ 30-4040)

When it comes to the principal's granting of specific powers to an agent, there is no topic as sensitive or as problematic as the gifting power granted to the agent. Needless to say, the issue becomes doubly problematic if the gifting power includes the power of the agent to make gifts to himself or herself. Section 30-4040, dealing specifically with the authority of the agent to make gifts, needs to be read in combination with section 30-4024, previously discussed.

Subsection (1) of section 30-4040 is definitional; it clarifies the section's scope by including transfers that are not outright gifts to a donee, but are the functional equivalent to an outright gift. Subsection (2) provides a very specific and very important default rule with regard to the power of the agent to make gifts. Under subsection (2), the agent's authority to make gifts is limited in an amount, per donee, not exceeding the annual limits of the federal gift tax exclusion, or twice that amount if there is gift-splitting by the donor and the

356. NEB. REV. STAT. § 30-4025.
357. Id.
358. Id. § 30-4025(3).
359. Id. § 30-4040 (stating that a gift for the benefit of a person includes: (1) a gift in trust; (2) a transfer under the Nebraska Uniform Transfer to Minors Act; and (3) a transfer to a so-called “529 Plan”).
donor's spouse. Subsection (3) reiterates and emphasizes that gift giving by the agent must be consistent with the principal's objectives if actually known, and, if not known, consistent with the principal's best interests. The subsection then goes on to list the relevant factors involved in determining whether a gift is in the principal's "best interest."

No sections of the Neb. POAA are as sensitive and as critical as the sections relating to the agent's authority to make gifts. The drafter can, without question, authorize the agent to make gifts of the principal's property—unlimited in amount—to any person, including the agent, if the authority is specifically granted. A potential danger lurking, however, is the free-wheeling authority of the agent to make gifts, causing the legal relationship of the principal and agent to be classified as a general power of appointment. If the agent is the holder of a general power of appointment, taxation and creditor's rights are lurking issues.

Finally, it should be mentioned that the powers granted to an agent under section 30-4036, relating to personal and family maintenance, are "neither dependent upon, nor limited by, authority that an agent may or may not have with respect to gifts under" the Neb. POAA. Under section 30-4036, the authority of the agent to make payments "to maintain the customary standard of living" extends not only to the principal's spouse, children (who may be adults), "other individuals legally entitled to be supported by the principal," but also to "individuals whom the principal has customarily supported or indicated the intent to support." Thus, an agent's authority to make "support" payments under a "customary standard of living," may, in

360. Id. § 30-4040(2)(a)-(b).
361. Id. § 30-4040(3).
362. Id. These factors are: (a) the nature and value of the principal's property, (b) the foreseeable obligations of the principal and maintenance needs, (c) minimization of taxes, (d) eligibility for benefits or assistance under statutorily created programs, and (e) the principal's gift giving pattern of giving. Id.
363. The Nebraska Supreme Court in Archbold v. Reifenrath stated that "no gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument and there is shown a clear intent on the part of the principal to make such a gift." 744 N.W.2d 701, 707 (2008) (emphasis added).
364. See Restatement (Second) of the Law of Property, Donative Transfers § 11.1 (1986) (defining a power of appointment as "authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property"); id. § 11.4 (stating that "[a] power of appointment is general if it is exercisable in favor of . . . the donee of the power, the donee's creditors, the donee's estate, or the creditors of the donee's estate").
367. Id. § 30-4036(1)(a)(i)-(iii) (emphasis added).
the eyes of some, morph into a transfer that is more like a gift than a payment for "support."


1. Introduction

Section 30-4041 and -4042 are based upon sections 301 and 302 of the Uniform Power of Attorney Act368 ("Uniform POAA"). Section 30-4041 provides for a statutory form power of attorney. While the Nebraska version of the statutory form does not depart substantially from section 301 of the Uniform POAA, the changes that were made are significant enough to warrant further discussion. Section 30-4042 is a faithful replica of section 302 of the Uniform POAA. This section provides a form for an agent's certification to third parties, which is designed to promote third party acceptance of powers of attorney.

2. Statutory Form Power of Attorney (§ 30-4041)

A statutory form power of attorney raises policy issues that will be discussed in a broader context in the concluding section of this Article. At this point, the focus is upon the particulars of section 30-4041—the Nebraska statutory form power of attorney. The Study Committee of the Nebraska State Bar Association's Real Estate, Probate, and Trust Law Section spent a great deal of time and effort examining the Uniform POAA model and then comparing it with the changes other states made in adopting a version of the Uniform POAA's model form. The changes recommended by the Study Committee were incorporated into Legislative Bill 1113, with one exception, and ultimately adopted by the Unicameral.369

The most significant of the recommendations of the Study Committee that became part of the statutory form are: (1) a section added to the form entitled "Release of Information," authorizing the disclosure of information to the agent "by any governmental agency, business, creditor, or third party who may have information pertaining to


369. The recommendations of the Study Committee are detailed at pages 38 and 39 of the Study Committee Report. See Study Committee Report, supra note 211, at 38-39. The one recommendation of the Study Committee that the Nebraska State Bar Association's Real Estate, Probate and Trust Section rejected was related to the Study Committee's recommendation as to section 110. See supra Part IV.B.8. The Section's rejection of the Study Committee recommendations had the practical effect of having Nebraska law conform the Uniform POAA rule that the execution of a power of attorney does not automatically revoke existing powers of attorney.
[the principal’s] assets”;370 and (2) an optional section at the end of the form whereby the agent signs the form and states, “I HAVE READ AND ACCEPT THE DUTIES AND LIABILITIES OF THE AGENT AS SPECIFIED IN THIS POWER OF ATTORNEY."371

The format of the form provides necessary information for the principal so that the principal can make informed choices as to the options the form presents. As the comment to Uniform POAA section 301 notes, “[s]tep-by-step prompts are given for designation of the agent, successor agents, and the grant of authority.”372

The form likewise serves to educate both the principal and the agent as to the duties of the agent, some of which are statutorily required duties. Because the Nebraska Uniform Power of Attorney Act373 requires an acknowledgment in order for the form to be valid, the form contains an acknowledgment section.374 At two different places, the form cautions the user of the form to seek legal advice if there are questions about the form.375

3. Agent’s Certification (§ 30-4042)

Section 30-4042, identical to section 302 of the Uniform POAA provides a form that may be used by the agent to certify critically important facts concerning the power of attorney.376 Like the statutory form contained in the preceding section of the Uniform POAA, the agent certification form includes an acknowledgment, of the agent’s signature. This form is one of the key measures designed to facilitate third party acceptance of durable powers.


371. Id. § 30-4041. Wisconsin also added to the statutory form the optional agent’s signature at the end of the statutory form. See Wis. Stat. § 244.61 (2012). While the agent need not be present at the time the power of attorney is executed, the ideal practice is to have the agent present and have the agent “formally accept” the appointment by signing the power of attorney at the end. Given the requirement of acknowledgment, the notary public is a necessary party to the execution of the power of attorney.


374. The acknowledgment requirement is found in Neb. Rev. Stat. § 30-4005. It is arguable that the statutory form, in the section entitled “Important Information,” should contain a warning in bold print that the power of attorney is not valid until it has been duly acknowledged.

375. Neb. Rev. Stat. § 30-4041. The caveats are found in the initial section of the form under the heading “IMPORTANT INFORMATION” and in the section entitled “IMPORTANT INFORMATION FOR AGENT.”

376. Id. § 30-4042.
V. CONCLUSION

The preceding review of the Nebraska Uniform Real Property Transfer on Death Act377 ("Neb. TODA") and the Nebraska Uniform Power of Attorney Act378 ("Neb. POAA") (collectively, "Nebraska Uniform Acts") has revealed that the Nebraska Unicameral made significant changes to the Uniform Real Property Transfer on Death Act379 ("Uniform TODA") while making relatively few changes to the Uniform Power of Attorney Act380 ("Uniform POAA") (collectively "Uniform Acts"). For purposes of this Article, it has been less important to dwell on the reasons for the changes made than to examine the substance of the changes made.

One of the glaring discrepancies between the two Nebraska Uniform Acts is the omission of the statutory form in the Neb. TODA compared to the presence of two statutory forms in the Neb. UPOAA. Professor John Gradwohl has written an excellent article discussing the policy reasons for the legislative decision to include statutory forms in a comprehensive statute.381 While Professor Gradwohl is critical of the Nebraska Unicameral's decision to omit the statutory form in the Neb. TODA and to add the "disinterested witness" requirement,382 he regards the "warning labels" that are statutorily required as "consumer friendly."383

Perhaps the most significant change the Nebraska Unicameral made in enacting the Uniform POAA was to require an acknowledgment by the principal in order for the power of attorney to be valid.384 As noted previously, this issue has proved to be one that has been battled over at the national level and undoubtedly the debate will continue as part of the long-standing evaluation of "formalism" in the law. Nebraska power of attorney law has been changed as a result of the passage of the Uniform POAA inasmuch as a power of attorney is now presumed to be durable.385

Critics of both Nebraska Uniform Acts have raised questions as to the necessity and desirability of changing Nebraska law. With regard to the Neb. TODA's transfer on death deed, clearly something new has been introduced into the estate planning world, and, any time there is change, certain lawyers are likely to react with the familiar refrain,

381. Gradwohl, supra note 6.
382. Id. at 316-21.
383. Id. at 311.
385. Id. § 30-4009.
"We've gotten along fine without this; why is it needed?" Other critics have raised issues with regard to the alleged unknown consequences of going down the road of providing a new form of nonprobate transfer. Finally, some critics of the transfer on death deed are wary of an instrument that might encourage "do it yourself" estate planning—an echo of the concerns raised about the inclusion of statutory forms in statutes.386

Some lawyers have questioned the need for new power of attorney legislation inasmuch as Nebraska has had, for a number of years, two sets of statutes that dealt with powers of attorney.387 Whether these statutes have served Nebraskans well is a topic for debate. Whether the new Neb. POAA will serve the public and the lawyering community better is a legislative policy judgment. So on this particular topic, the debate is not whether to introduce something that heretofore had not been legally possible. Rather, the real issue is about a statute providing, by and large, a set of comprehensive default and mandatory rules governing powers of attorney.

Specific to the Neb. POAA, my views may be influenced by the fact that I chaired the Nebraska State Bar Association Real Estate, Probate, and Trust Law Study Committee. My discussions with Nebraska estate planning attorneys, with regard to durable powers of attorney, have reinforced my view that, like the bulk of estate planning issues, the critical step is in the drafting of the agreement. Because most of the rules in the Neb. POAA are default rules, the drafter is free to craft the legitimate options the principal has chosen by appropriate drafting. Whether the requirement of acknowledgment of a power of attorney is good policy is debatable; clearly best practice norms would dictate that a power of attorney be acknowledged. Adding this additional formal requirement may ease some of the concerns raised about "do it yourself" estate planning.

Specific to the Neb. TODA, I am in general agreement with the over-arching concept of allowing this new form of nonprobate transfer, but am not in agreement with the Unicameral's decisions to add additional formalities requirements and to delete the statutory form. Adding an additional option for transferring property at death is simply a tool which, if properly and thoughtfully utilized, can facilitate wealth transfer in accord with a transferor's legitimate goals.

386. As Professor Gradwohl notes in his article, the concern about "do it yourself" estate planning necessarily involves a discussion of what constitutes the "unauthorized practice of law." See Gradwohl, supra note 6, at 298-310.

387. NEB. REV. STAT. §§ 30-2664 to -2672 (repealed 2013) (Uniform Durable Power of Attorney Act); NEB. REV. STAT. §§ 49-1501 to -1562 (repealed 2013) (Nebraska Short Form Act).
Having studied the two acts intensely and having followed the legislative fates of the two acts in the Nebraska Unicameral, I am in agreement with the thesis of Professor Gradwohl’s article that the statutory forms play a crucial role in both Nebraska Uniform Acts.\(^{388}\) The failure of the Nebraska Unicameral to include the statutory form in the transfer on death deed act is a flaw that needs to be corrected. With regard to the “disinterested witness” requirement, there is already an indication that the Nebraska Unicameral is moving in the direction of changing that requirement.\(^{389}\)

With regard to the Neb. POAA, the Unicameral’s decision to include the statutory forms is, in the author’s opinion, laudable. The Study Committee that recommended changes in the Neb. POAA worked very diligently to provide a statutory form that would serve the public interest. The result was, admittedly, a fairly lengthy form. However, the importance of the sections entitled “Important Information” (for the principal) and “Important Information For Agent” should not be underestimated. Giving the lay public accurate and concise legal information is critical in this day and age when the public is increasingly resorting to downloaded forms.

Nebraska lawyers are now living in a world of nonprobate transfers and easy availability to estate planning forms and kits that may be downloaded. No set of statutes can address the many policy issues involved in making transfer on death deeds and the drafting of durable powers of attorney to everyone’s satisfaction. I believe the Nebraska Unicameral has taken two steps forward in the progress and reform of the law by enacting the Neb. TODA and the Neb. POA. But the Unicameral’s actions are not providing magic wands for the public. Nebraska estate planning lawyers will be the ones, ultimately, responsible for the implementation of these acts. The challenge then, is for Nebraska lawyers to use these acts in a thoughtful and selective manner in the craft of designing estate plans.

\(^{388}\) I would add that I am in whole-hearted agreement with Professor Gradwohl’s concluding remarks about the necessity for “open discussion” and transparency, particularly when it comes to the role of the Nebraska State Bar Association in the legislative process. See Gradwohl, supra note 6, at 324.

\(^{389}\) See Legis. B. 345, 103d Leg., 1st Sess. (Neb. 2013), available at http://nebraskalegislature.gov/FloorDocs/Current/PDF/Intro/LB345.pdf. Legislative Bill 345 (“LB 345”), as introduced on January 18, 2013, would have removed the requirement that the witnesses be “disinterested” and would have stated that any transfer on death deed with two witnesses, whether they are disinterested or interested, would be valid. As amended and enacted, LB 345 continues to require that the witnesses to a transfer on death deed be disinterested, but it also defines who constitutes a “disinterested witness.” Furthermore, the amended and enacted LB 345 also: (1) requires a cover sheet be filed with the Register of Deeds in coordination with the requirement for filing of transfer on death deeds and death certificates; and (2) allows a person up to 90 days after the death of the transferor (or last remaining transferor) to challenge whether a witness was disinterested.