

LEGISLATURE OF NEBRASKA
ONE HUNDRED SEVENTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 470

Introduced by DeBoer, 10.

Read first time January 15, 2021

Committee: Judiciary

- 1 A BILL FOR AN ACT relating to decedents' estates; to adopt the Uniform
- 2 Powers of Appointment Act.
- 3 Be it enacted by the people of the State of Nebraska,

1 Section 1. Sections 1 to 38 of this act shall be known and may be
2 cited as the Uniform Powers of Appointment Act.

3 Sec. 2. In the Uniform Powers of Appointment Act:

4 (1) Appointee means a person to which a powerholder makes an
5 appointment of appointive property.

6 (2) Appointive property means the property or property interest
7 subject to a power of appointment.

8 (3) Blanket exercise clause means a clause in an instrument which
9 exercises a power of appointment and is not a specific exercise clause.
10 The term includes a clause that:

11 (A) expressly uses the words "any power" in exercising any power of
12 appointment the powerholder has;

13 (B) expressly uses the words "any property" in appointing any
14 property over which the powerholder has a power of appointment; or

15 (C) disposes of all property subject to disposition by the
16 powerholder.

17 (4) Donor means a person that creates a power of appointment.

18 (5) Exclusionary power of appointment means a power of appointment
19 exercisable in favor of any one or more of the permissible appointees to
20 the exclusion of the other permissible appointees.

21 (6) General power of appointment means a power of appointment
22 exercisable in favor of the powerholder, the powerholder's estate, a
23 creditor of the powerholder, or a creditor of the powerholder's estate.

24 (7) Gift in default clause means a clause identifying a taker in
25 default of appointment.

26 (8) Impermissible appointee means a person that is not a permissible
27 appointee.

28 (9) Instrument means a record.

29 (10) Nongeneral power of appointment means a power of appointment
30 that is not a general power of appointment.

31 (11) Permissible appointee means a person in whose favor a

1 powerholder may exercise a power of appointment.

2 (12) Person means an individual, estate, trust, business or
3 nonprofit entity, public corporation, government or governmental
4 subdivision, agency, or instrumentality, or other legal entity.

5 (13) Power of appointment means a power that enables a powerholder
6 acting in a nonfiduciary capacity to designate a recipient of an
7 ownership interest in or another power of appointment over the appointive
8 property. The term does not include a power of attorney.

9 (14) Powerholder means a person in which a donor creates a power of
10 appointment.

11 (15) Presently exercisable power of appointment means a power of
12 appointment exercisable by the powerholder at the relevant time. The
13 term:

14 (A) includes a power of appointment not exercisable until the
15 occurrence of a specified event, the satisfaction of an ascertainable
16 standard, or the passage of a specified time only after:

17 (i) the occurrence of the specified event;

18 (ii) the satisfaction of the ascertainable standard; or

19 (iii) the passage of the specified time; and

20 (B) does not include a power exercisable only at the powerholder's
21 death.

22 (16) Record means information that is inscribed on a tangible medium
23 or that is stored in an electronic or other medium and is retrievable in
24 perceivable form.

25 (17) Specific exercise clause means a clause in an instrument which
26 specifically refers to and exercises a particular power of appointment.

27 (18) Taker in default of appointment means a person that takes all
28 or part of the appointive property to the extent the powerholder does not
29 effectively exercise the power of appointment.

30 (19) Terms of the instrument means the manifestation of the intent
31 of the maker of the instrument regarding the instrument's provisions as

1 expressed in the instrument or as may be established by other evidence
2 that would be admissible in a legal proceeding.

3 Sec. 3. Unless the terms of the instrument creating a power of
4 appointment manifest a contrary intent:

5 (1) the creation, revocation, or amendment of the power is governed
6 by the law of the donor's domicile at the relevant time; and

7 (2) the exercise, release, renunciation, or disclaimer of the power,
8 or the revocation or amendment of the exercise, release, renunciation, or
9 disclaimer of the power, is governed by the law of the powerholder's
10 domicile at the relevant time.

11 Sec. 4. The common law and principles of equity supplement the
12 Uniform Powers of Appointment Act except to the extent modified by the
13 Uniform Powers of Appointment Act or law of this state other than the
14 Uniform Powers of Appointment Act.

15 Sec. 5. (a) A power of appointment is created only if:

16 (1) the instrument creating the power:

17 (A) is valid under applicable law; and

18 (B) except as otherwise provided in subsection (b) of this section,
19 transfers the appointive property; and

20 (2) the terms of the instrument creating the power manifest the
21 donor's intent to create in a powerholder a power of appointment over the
22 appointive property exercisable in favor of a permissible appointee.

23 (b) Subdivision (a)(1)(B) of this section does not apply to the
24 creation of a power of appointment by the exercise of a power of
25 appointment.

26 (c) A power of appointment may not be created in a deceased
27 individual.

28 (d) Subject to an applicable rule against perpetuities, a power of
29 appointment may be created in an unborn or unascertained powerholder.

30 Sec. 6. A powerholder may not transfer a power of appointment. If a
31 powerholder dies without exercising or releasing a power, the power

1 lapses.

2 Sec. 7. Subject to section 9 of this act, and unless the terms of
3 the instrument creating a power of appointment manifest a contrary
4 intent, the power is:

5 (1) presently exercisable;

6 (2) exclusionary; and

7 (3) except as otherwise provided in section 9 of this act, general.

8 Sec. 8. Unless the terms of the instrument creating a power of
9 appointment manifest a contrary intent, the power is nongeneral if:

10 (1) the power is exercisable only at the powerholder's death; and

11 (2) the permissible appointees of the power are a defined and
12 limited class that does not include the powerholder's estate, the
13 powerholder's creditors, or the creditors of the powerholder's estate.

14 Sec. 9. (a) In this section, adverse party means a person with a
15 substantial beneficial interest in property which would be affected
16 adversely by a powerholder's exercise or nonexercise of a power of
17 appointment in favor of the powerholder, the powerholder's estate, a
18 creditor of the powerholder, or a creditor of the powerholder's estate.

19 (b) If a powerholder may exercise a power of appointment only with
20 the consent or joinder of an adverse party, the power is nongeneral.

21 (c) If the permissible appointees of a power of appointment are not
22 defined and limited, the power is exclusionary.

23 Sec. 10. A donor may revoke or amend a power of appointment only to
24 the extent that:

25 (1) the instrument creating the power is revocable by the donor; or

26 (2) the donor reserves a power of revocation or amendment in the
27 instrument creating the power of appointment.

28 Sec. 11. A power of appointment is exercised only:

29 (1) if the instrument exercising the power is valid under applicable
30 law;

31 (2) if the terms of the instrument exercising the power:

1 (A) manifest the powerholder's intent to exercise the power; and
2 (B) subject to section 14 of this act, satisfy the requirements of
3 exercise, if any, imposed by the donor; and

4 (3) to the extent the appointment is a permissible exercise of the
5 power.

6 Sec. 12. (a) In this section:

7 (1) Residuary clause does not include a residuary clause containing
8 a blanket exercise clause or a specific exercise clause.

9 (2) Will includes a codicil and a testamentary instrument that
10 revises another will.

11 (b) A residuary clause in a powerholder's will, or a comparable
12 clause in the powerholder's revocable trust, manifests the powerholder's
13 intent to exercise a power of appointment only if:

14 (1) the terms of the instrument containing the residuary clause do
15 not manifest a contrary intent;

16 (2) the power is a general power exercisable in favor of the
17 powerholder's estate;

18 (3) there is no gift in default clause or the clause is ineffective;
19 and

20 (4) the powerholder did not release the power.

21 Sec. 13. Unless the terms of the instrument exercising a power of
22 appointment manifest a contrary intent:

23 (1) except as otherwise provided in subdivision (2) of this section,
24 a blanket exercise clause extends to a power acquired by the powerholder
25 after executing the instrument containing the clause; and

26 (2) if the powerholder is also the donor of the power, the clause
27 does not extend to the power unless there is no gift in default clause or
28 the gift in default clause is ineffective.

29 Sec. 14. A powerholder's substantial compliance with a formal
30 requirement of appointment imposed by the donor, including a requirement
31 that the instrument exercising the power of appointment make reference or

1 specific reference to the power, is sufficient if:

2 (1) the powerholder knows of and intends to exercise the power; and

3 (2) the powerholder's manner of attempted exercise of the power does
4 not impair a material purpose of the donor in imposing the requirement.

5 Sec. 15. (a) A powerholder of a general power of appointment that
6 permits appointment to the powerholder or the powerholder's estate may
7 make any appointment, including an appointment in trust or creating a new
8 power of appointment, that the powerholder could make in disposing of the
9 powerholder's own property.

10 (b) A powerholder of a general power of appointment that permits
11 appointment only to the creditors of the powerholder or of the
12 powerholder's estate may appoint only to those creditors.

13 (c) Unless the terms of the instrument creating a power of
14 appointment manifest a contrary intent, the powerholder of a nongeneral
15 power may:

16 (1) make an appointment in any form, including an appointment in
17 trust, in favor of a permissible appointee;

18 (2) create a general power in a permissible appointee;

19 (3) create a nongeneral power in any person to appoint to one or
20 more of the permissible appointees of the original nongeneral power; or

21 (4) create a nongeneral power in a permissible appointee to appoint
22 to one or more persons if the permissible appointees of the new
23 nongeneral power include the permissible appointees of the original
24 nongeneral power.

25 Sec. 16. (a) Subject to section 30-2343, an appointment to a
26 deceased appointee is ineffective.

27 (b) Unless the terms of the instrument creating a power of
28 appointment manifest a contrary intent, a powerholder of a nongeneral
29 power may exercise the power in favor of, or create a new power of
30 appointment in, a descendant of a deceased permissible appointee whether
31 or not the descendant is described by the donor as a permissible

1 appointee.

2 Sec. 17. (a) Except as otherwise provided in section 16 of this
3 act, an exercise of a power of appointment in favor of an impermissible
4 appointee is ineffective.

5 (b) An exercise of a power of appointment in favor of a permissible
6 appointee is ineffective to the extent the appointment is a fraud on the
7 power.

8 Sec. 18. If a powerholder exercises a power of appointment in a
9 disposition that also disposes of property the powerholder owns, the
10 owned property and the appointive property must be allocated in the
11 permissible manner that best carries out the powerholder's intent.

12 Sec. 19. To the extent a powerholder of a general power of
13 appointment, other than a power to withdraw property from, revoke, or
14 amend a trust, makes an ineffective appointment:

15 (1) the gift in default clause controls the disposition of the
16 ineffectively appointed property; or

17 (2) if there is no gift in default clause or to the extent the
18 clause is ineffective, the ineffectively appointed property:

19 (A) passes to:

20 (i) the powerholder if the powerholder is a permissible appointee
21 and living; or

22 (ii) if the powerholder is an impermissible appointee or deceased,
23 the powerholder's estate if the estate is a permissible appointee; or

24 (B) if there is no taker under subdivision (A) of this subdivision,
25 passes under a reversionary interest to the donor or the donor's
26 transferee or successor in interest.

27 Sec. 20. To the extent a powerholder releases or fails to exercise
28 a general power of appointment other than a power to withdraw property
29 from, revoke, or amend a trust:

30 (1) the gift in default clause controls the disposition of the
31 unappointed property; or

1 (2) if there is no gift in default clause or to the extent the
2 clause is ineffective:

3 (A) except as otherwise provided in subdivision (B) of this
4 subdivision, the unappointed property passes to:

5 (i) the powerholder if the powerholder is a permissible appointee
6 and living; or

7 (ii) if the powerholder is an impermissible appointee or deceased,
8 the powerholder's estate if the estate is a permissible appointee; or

9 (B) to the extent the powerholder released the power, or if there is
10 no taker under subdivision (A) of this subdivision, the unappointed
11 property passes under a reversionary interest to the donor or the donor's
12 transferee or successor in interest.

13 Sec. 21. To the extent a powerholder releases, ineffectively
14 exercises, or fails to exercise a nongeneral power of appointment:

15 (1) the gift in default clause controls the disposition of the
16 unappointed property; or

17 (2) if there is no gift in default clause or to the extent the
18 clause is ineffective, the unappointed property:

19 (A) passes to the permissible appointees if:

20 (i) the permissible appointees are defined and limited; and

21 (ii) the terms of the instrument creating the power do not manifest
22 a contrary intent; or

23 (B) if there is no taker under subdivision (A) of this subdivision,
24 passes under a reversionary interest to the donor or the donor's
25 transferee or successor in interest.

26 Sec. 22. Unless the terms of the instrument creating or exercising
27 a power of appointment manifest a contrary intent, if the powerholder
28 makes a valid partial appointment to a taker in default of appointment,
29 the taker in default of appointment may share fully in unappointed
30 property.

31 Sec. 23. If a powerholder makes an appointment to a taker in

1 default of appointment and the appointee would have taken the property
2 under a gift in default clause had the property not been appointed, the
3 power of appointment is deemed not to have been exercised and the
4 appointee takes under the clause.

5 Sec. 24. A powerholder may revoke or amend an exercise of a power
6 of appointment only to the extent that:

7 (1) the powerholder reserves a power of revocation or amendment in
8 the instrument exercising the power of appointment and, if the power is
9 nongeneral, the terms of the instrument creating the power of appointment
10 do not prohibit the reservation; or

11 (2) the terms of the instrument creating the power of appointment
12 provide that the exercise is revocable or amendable.

13 Sec. 25. As provided by section 30-2352:

14 (1) A powerholder may renounce all or part of a power of
15 appointment.

16 (2) A permissible appointee, appointee, or taker in default of
17 appointment may renounce all or part of an interest in appointive
18 property.

19 Sec. 26. A powerholder may release a power of appointment, in whole
20 or in part, except to the extent the terms of the instrument creating the
21 power prevent the release.

22 Sec. 27. A powerholder of a releasable power of appointment may
23 release the power in whole or in part:

24 (1) by substantial compliance with a method provided in the terms of
25 the instrument creating the power; or

26 (2) if the terms of the instrument creating the power do not provide
27 a method or the method provided in the terms of the instrument is not
28 expressly made exclusive, by a record manifesting the powerholder's
29 intent by clear and convincing evidence.

30 Sec. 28. A powerholder may revoke or amend a release of a power of
31 appointment only to the extent that:

1 (1) the instrument of release is revocable by the powerholder; or
2 (2) the powerholder reserves a power of revocation or amendment in
3 the instrument of release.

4 Sec. 29. A powerholder of a presently exercisable power of
5 appointment may contract:

6 (1) not to exercise the power; or
7 (2) to exercise the power if the contract when made does not confer
8 a benefit on an impermissible appointee.

9 Sec. 30. A powerholder of a power of appointment that is not
10 presently exercisable may contract to exercise or not to exercise the
11 power only if the powerholder:

12 (1) is also the donor of the power; and
13 (2) has reserved the power in a revocable trust.

14 Sec. 31. The remedy for a powerholder's breach of a contract to
15 appoint or not to appoint appointive property is limited to damages
16 payable out of the appointive property or, if appropriate, specific
17 performance of the contract.

18 Sec. 32. (a) In this section, power of appointment created by the
19 powerholder includes a power of appointment created in a transfer by
20 another person to the extent the powerholder contributed value to the
21 transfer.

22 (b) Appointive property subject to a general power of appointment
23 created by the powerholder is subject to a claim of a creditor of the
24 powerholder or of the powerholder's estate to the extent provided in the
25 Uniform Voidable Transactions Act.

26 (c) Subject to subsection (b) of this section, appointive property
27 subject to a general power of appointment created by the powerholder is
28 not subject to a claim of a creditor of the powerholder or the
29 powerholder's estate to the extent the powerholder irrevocably appointed
30 the property in favor of a person other than the powerholder or the
31 powerholder's estate.

1 (d) Subject to subsections (b) and (c) of this section, and
2 notwithstanding the presence of a spendthrift provision or whether the
3 claim arose before or after the creation of the power of appointment,
4 appointive property subject to a general power of appointment created by
5 the powerholder is subject to a claim of a creditor of:

6 (1) the powerholder, to the same extent as if the powerholder owned
7 the appointive property, if the power is presently exercisable; and

8 (2) the powerholder's estate, to the extent the estate is
9 insufficient to satisfy the claim and subject to the right of a decedent
10 to direct the source from which liabilities are paid, if the power is
11 exercisable at the powerholder's death.

12 Sec. 33. (a) Except as otherwise provided in subsection (b) of this
13 section, appointive property subject to a general power of appointment
14 created by a person other than the powerholder is subject to a claim of a
15 creditor of:

16 (1) the powerholder, to the extent the powerholder's property is
17 insufficient, if the power is presently exercisable; and

18 (2) the powerholder's estate, to the extent the estate is
19 insufficient, subject to the right of a decedent to direct the source
20 from which liabilities are paid.

21 (b) Subject to subsection (c) of section 35 of this act, a power of
22 appointment created by a person other than the powerholder which is
23 subject to an ascertainable standard relating to an individual's health,
24 education, support, or maintenance within the meaning of 26 U.S.C.
25 2041(b)(1)(A) or 26 U.S.C. 2514(c)(1), as such sections existed on
26 January 1, 2021, is treated for purposes of the Uniform Powers of
27 Appointment Act as a nongeneral power.

28 Sec. 34. (a) For purposes of the Uniform Powers of Appointment Act,
29 and except as otherwise provided in subsection (b) of this section, a
30 power to withdraw property from a trust is treated, during the time the
31 power may be exercised, as a presently exercisable general power of

1 appointment to the extent of the property subject to the power to
2 withdraw.

3 (b) On the lapse, release, or waiver of a power to withdraw property
4 from a trust, the power is treated as a presently exercisable general
5 power of appointment only to the extent the value of the property
6 affected by the lapse, release, or waiver exceeds the greater of the
7 amount specified in 26 U.S.C. 2041(b)(2) and 26 U.S.C. 2514(e) or the
8 amount specified in 26 U.S.C. 2503(b), as such sections existed on
9 January 1, 2021.

10 Sec. 35. (a) Except as otherwise provided in subsections (b) and
11 (c) of this section, appointive property subject to a nongeneral power of
12 appointment is exempt from a claim of a creditor of the powerholder or
13 the powerholder's estate.

14 (b) Appointive property subject to a nongeneral power of appointment
15 is subject to a claim of a creditor of the powerholder or the
16 powerholder's estate to the extent that the powerholder owned the
17 property and, reserving the nongeneral power, transferred the property in
18 violation of the Uniform Voidable Transactions Act.

19 (c) If the initial gift in default of appointment is to the
20 powerholder or the powerholder's estate, a nongeneral power of
21 appointment is treated for purposes of the Uniform Powers of Appointment
22 Act as a general power.

23 Sec. 36. In applying and construing the Uniform Powers of
24 Appointment Act, consideration must be given to the need to promote
25 uniformity of the law with respect to its subject matter among states
26 that enact it.

27 Sec. 37. The Uniform Powers of Appointment Act modifies, limits, or
28 supersedes the Electronic Signatures in Global and National Commerce Act,
29 15 U.S.C. 7001 et seq., but does not modify, limit, or supersede section
30 101(c) of that act, 15 U.S.C. 7001(c), or authorize electronic delivery
31 of any of the notices described in section 103(b) of that act, 15 U.S.C.

1 7003(b).

2 Sec. 38. (a) Except as otherwise provided in the Uniform Powers of
3 Appointment Act, on and after the effective date of this act:

4 (1) the Uniform Powers of Appointment Act applies to a power of
5 appointment created before, on, or after the effective date of this act;

6 (2) the Uniform Powers of Appointment Act applies to a judicial
7 proceeding concerning a power of appointment commenced on or after the
8 effective date of this act;

9 (3) the Uniform Powers of Appointment Act applies to a judicial
10 proceeding concerning a power of appointment commenced before the
11 effective date of this act unless the court finds that application of a
12 particular provision of the Uniform Powers of Appointment Act would
13 interfere substantially with the effective conduct of the judicial
14 proceeding or prejudice a right of a party, in which case the particular
15 provision of the Uniform Powers of Appointment Act does not apply and the
16 superseded law applies;

17 (4) a rule of construction or presumption provided in the Uniform
18 Powers of Appointment Act applies to an instrument executed before the
19 effective date of this act unless there is a clear indication of a
20 contrary intent in the terms of the instrument; and

21 (5) except as otherwise provided in subdivisions (1) through (4) of
22 this subsection, an action done before the effective date of this act is
23 not affected by the Uniform Powers of Appointment Act.

24 (b) If a right is acquired, extinguished, or barred on the
25 expiration of a prescribed period that commenced under law of this state
26 other than the Uniform Powers of Appointment Act before the effective
27 date of this act, the law continues to apply to the right.