

Interim Study
Judiciary Committee of the Nebraska Legislature
Uniform Real Property Transfer on Death Act

Legislative Resolution 488

Introduced by
Senator Wightman, District 36
Senator Ashford, District 20
Senator Nelson, District 6

November 2010

Nebraska State Legislature

SENATOR JOHN M. WIGHTMAN

District 36
PO Box 100
Lexington, Nebraska 68850
(308) 324-4863

Legislative Address:
State Capitol
PO Box 94604
Lincoln, Nebraska 68509-4604
(402) 471-2642
jwightman@leg.ne.gov



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MEMORANDUM

TO: Members of the Judiciary Committee and the Introducers of LR 488
Senator Brad Ashford, Chairperson
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Senator Mark Christensen
Senator Colby Coash
Senator Brenda Council
Senator Scott Lautenbaugh
Senator Kent Rogert
Senator John Wightman
Senator John Nelson

FROM: Roger S. Keetle, Legislative Aide *RSK*
Senator John Wightman

DATE: November 22, 2010

RE: Interim Study of the Uniform Real Property Transfer on Death Act

I am pleased to submit an Interim Study of a proposed Nebraska Uniform Real Property Transfer on Death Act. The study was conducted pursuant to Legislative Resolution 488, introduced by Senators Wightman, Ashford and Nelson during the 2010 regular session.

LR 488 states that its purpose is:

to analyze and compare the provisions of LB 756 (2010), a bill to adopt the Nebraska Uniform Real Property Transfer on Death Act, with current Nebraska law. The Uniform Real Property Transfer on Death Act was adopted by the National Conference of Commissioners on Uniform State Laws in July 2009. Thirteen states had legislation authorizing "transfer on death deeds" prior to adoption of the uniform act. LB 756 contains the uniform act with substantial modifications applicable to the State of Nebraska. The study shall be a section-by-section analysis and comparison of the proposed Nebraska legislation, together with additional relevant considerations

and recommendations.

To prepare this in-depth study, LR 488 states: “In order to carry out the purpose of the resolution, the committee should seek the assistance of professors at the University of Nebraska College of Law and Creighton University School of Law and other interested persons as the committee deems necessary and beneficial.” Pursuant to this direction, the primary study group consisted of Roger S. Keetle, Legislative Aide to Senator Wightman, Professor John M. Gradwohl, University of Nebraska College of Law, and Professor Ronald R. Volkmer, Creighton University School of Law.

The study group consulted William J. Lindsay, Jr., a partner in the Omaha law firm, Gross & Welch, P.C., LLO, a long time proponent of legislation on this subject. The study group received correspondence from M. Douglas Deitchler, a Lincoln attorney, concerning LB 756. The study group met with representatives of the National Conference of Commissioners on Uniform State Laws, the Nebraska State Bar Association, and the Nebraska Department of Health and Human Services. The study group corresponded and conferred with representatives of the title insurance industry in Nebraska.

The interim study work product consists of the official text of the Uniform Real Property Transfer on Death Act, its official commentary on the Act, the text of LB 756, and section-by-section Nebraska comments prepared by the study group. The report follows a general format with the following headings:

- (1) Each section of the official text of the Uniform Real Property Transfer on Death Act (September 30, 2009),
- (2) The official commentary of the National Conference of Commissioners on Uniform State Laws to the section,
- (3) The related section of LB 756 (2010), and
- (4) LR 488 Comment analyzing and comparing the section with current Nebraska law.

It is the intent of LR 488 that this interim study will be made a part of the permanent record of the Nebraska Uniform Real Property Transfer on Death Act introduced in the 2011 regular session and that it will be made available for reference by persons interested in such legislation during its consideration by the Legislature and after its enactment.

LR 488 had a goal “to provide a reliable understanding of the implications of adopting a Nebraska Uniform Real Property Transfer on Death Act.” This document is intended to fulfill that objective.

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A. Legislative Resolution 488

Introduced by Wightman, 36; Ashford, 20; Nelson, 6.

PURPOSE: The purpose of this resolution is to analyze and compare the provisions of LB 756 (2010), a bill to adopt the Nebraska Uniform Real Property Transfer on Death Act, with current Nebraska law. The Uniform Real Property Transfer on Death Act was adopted by the National Conference of Commissioners on Uniform State Laws in July 2009. Thirteen states had legislation authorizing “transfer on death deeds” prior to adoption of the uniform act. LB 756 contains the uniform act with substantial modifications applicable to the State of Nebraska. The study shall be a section-by-section analysis and comparison of the proposed Nebraska legislation, together with additional relevant considerations and recommendations. In order to carry out the purpose of this resolution, the committee should seek the assistance of professors at the University of Nebraska-Lincoln, College of Law and the Creighton University, School of Law and other interested persons as the committee deems necessary and beneficial. The goal of the study is to provide a reliable understanding of the implications of adopting a Nebraska Uniform Real Property Transfer on Death Act.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDRED FIRST LEGISLATURE OF NEBRASKA, SECOND SESSION:

1. That the Judiciary Committee of the Legislature shall be designated to conduct an interim study to carry out the purposes of this resolution.
2. That the committee shall upon the conclusion of its study make a report of its findings, together with its recommendations, to the Legislative Council or Legislature.

B. NCCUSL Prefatory Note To Uniform Act

One of the main innovations in the property law of the twentieth century has been the development of asset-specific will substitutes for the transfer of property at death. By these mechanisms, an owner may designate beneficiaries to receive the property at the owner's death without waiting for probate and without the beneficiary designation needing to comply with the witnessing requirements of wills. Examples of specific assets that today routinely pass outside of probate include the proceeds of life insurance policies and pension plans, securities registered in transfer on death (TOD) form, and funds held in pay on death (POD) bank accounts.

Today, nonprobate transfers are widely accepted. The trend has largely focused on assets that are personal property, such as the assets described in the preceding paragraph. However, long-standing uniform law speaks more broadly. Section 6-101 of the Uniform Probate Code (UPC) provides: “A *provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary*” (emphasis supplied). [The Nebraska Probate Code provision is Neb. Rev. Stat. §30-2715.]

A small but growing number of jurisdictions have implemented the principle of UPC §6-101 by enacting statutes providing an asset-specific mechanism for the nonprobate transfer of land. This is done by permitting owners of interests in real property to execute and record a transfer on death (TOD) deed. By this deed, the owner identifies the beneficiary or beneficiaries who will succeed to the property at the owner's death. During the owner's lifetime, the beneficiaries have no interest in the property, and the owner retains full power to transfer or encumber the property or to revoke the TOD deed.

Thirteen states have enacted statutes authorizing TOD deeds. In the chronological order of the statutes' enactment, the states are: Missouri (1989), Kansas (1997), Ohio (2000), New Mexico (2001), Arizona (2002), Nevada (2003), Colorado (2004), Arkansas (2005), Wisconsin (2006), Montana (2007), Oklahoma (2008), Minnesota (2008), and Indiana (2009).

The time is ripe for a Uniform Act to facilitate this emerging form of nonprobate transfer and to bring uniformity and clarity to its use and operation.

C. Section By Section Comparison of Uniform Act (September 30, 2009) with LB 756 (2010)

1. Section 1. Short Title

a. Uniform Act

This [act] may be cited as the Uniform Real Property Transfer on Death Act.

b. LB 756

Sections 1 to 21 of this act shall be known and may be cited as the Nebraska Uniform Real Property Transfer on Death Act.

2. Section 2. Definitions

a. Uniform Act

In this [act]:

(1) “Beneficiary” means a person that receives property under a transfer on death deed.

(2) “Designated beneficiary” means a person designated to receive property in a transfer on death deed.

(3) “Joint owner” means an individual who owns property concurrently with one or more other individuals with a right of survivorship. The term includes a joint tenant[,][and] [owner of community property with a right of survivorship[,][and tenant by the entirety]. The term does not include a tenant in common [or owner of community property without a right of survivorship].

(4) “Person” means an 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.

(5) “Property” means an interest in real property located in this state which is transferable on the death of the owner.

(6) “Transfer on death deed” means a deed authorized under this [act].

(7) “Transferor” means an individual who makes a transfer on death deed.

b. NCCUSL Comment

Paragraph (1) defines a beneficiary as a person that receives property under a transfer on death deed. This links the definition of a “beneficiary” to the definition of a “person.” A beneficiary can be any person, including the trustee of a revocable trust.

Paragraph (2) defines a designated beneficiary as a person designated to receive property in a transfer on death deed. This links the definition of a “designated beneficiary” to the definition of a “person.” A designated beneficiary can be any person, including a revocable trust.

The distinction between a “beneficiary” and a “designated beneficiary” is easily illustrated. Section 13 provides that, on the transferor’s death, the property that is the subject of a transfer on death deed is transferred to the designated beneficiaries who survive the transferor. If X and Y are the designated beneficiaries but only Y survives the transferor, then Y is a beneficiary and X is not. A further illustration comes into play if Section 13 is made subject to the state’s antilapse statute. If X fails to survive the transferor but has a descendant, Z, who survives the transferor, the antilapse statute may create a substitute gift in favor of Z. In such a case, the designated beneficiaries are X and Y, but the beneficiaries are Y and Z.

Paragraph (3) provides a definition of a “joint owner” as an individual who owns property with one or more other individuals with a right of survivorship. The term is used in Sections 11 and 13.

Paragraph (4) is the standard Uniform Law Commission definition of a “person.”

The effect of paragraph (5) is that the act applies to all interests in real property located in this state that are transferable at the death of the owner.

Paragraph (6) provides that a “transfer on death deed” is a deed authorized under this act. In some states with existing transfer on death deed legislation, the legislation has instead used the term “beneficiary deed.” The term “transfer on death deed” is preferred, to be consistent with the transfer on death registration of securities. See Article 6, Part 3, of the Uniform Probate Code, containing the Uniform TOD Security Registration Act.

Paragraph (7) limits the definition of a “transferor” to an individual. The term “transferor” does not include a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any legal or commercial entity other than an individual. The term also does not include an agent or other representative. If a transfer on death deed is made by an agent on behalf of a principal or by a conservator, guardian, or judge on behalf of a ward, the principal or ward is the transferor. By way of analogy, see Uniform Trust Code §103(15) (defining “settlor”) and the accompanying Comment (excluding an individual “acting as the agent for the person who will be funding the trust”). The power of an agent to make or revoke a transfer on death deed on behalf of a principal is determined by other law, such as the Uniform Power of Attorney Act, as indicated in the Comments to Sections 9 and 11.

c. LB 756

Sec. 2. For purposes of the Nebraska Uniform Real Property Transfer on Death Act:

(1) Beneficiary means a person that receives property under a transfer on death deed;

(2) Designated beneficiary means a person designated to receive property in a transfer on death deed;

(3) Joint owner means an individual who owns property concurrently with one or more other individuals with a right of survivorship. The term includes a joint tenant. The term does not include a tenant in common;

(4) Person means an individual, a corporation, a business trust, an estate, a trust, a partnership, a limited liability company, an association, a joint venture, a public corporation, a government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity;

(5) Property means an interest in real property located in this state which is transferable on the death of the owner;

(6) Transfer on death deed means a deed authorized under the Nebraska Uniform Real Property Transfer on Death Act; and

(7) Transferor means an individual who makes a transfer on death deed.

d. LR 488 Comment

Most of the definitions contained in section 2 are unique to the Uniform Real Property Transfer on Death Act. The subsection (4) definition of “person” is consistent with the definition of “person” contained in the Nebraska Uniform Trust Code (Neb. Rev. Stat. § 30-3803(10)).

The subsection (3) definition of “joint owner” in LB 756 should be amended in the third and concluding sentence. The sentence “The term does not include a tenant in common” should be amended by adding the following phrase “without a right of survivorship.” According to the Nebraska Supreme Court decision in *Anson v. Murphy*, 149 Neb. 716, 32 N.W.2d 271 (1948), a tenancy in common with a right of survivorship is recognized under Nebraska law.

3. Section 3. Applicability

a. Uniform Act

This [act] applies to a transfer on death deed made before, on, or after [the effective date of this [act]] by a transferor dying on or after [the effective date of this [act]].

b. NCCUSL Comment

This section provides that the act applies to a transfer on death deed made before, on, or after the effective date of the act by a transferor dying on or after the effective date of the act. This section is consistent with the Uniform Probate Code's provisions governing transfer on death registration of securities. Those provisions "appl[y] to registrations of securities in beneficiary form made before or after [effective date], by decedents dying on or after [effective date]." Uniform Probate Code §6-311.

c. LB 756

Sec. 3. The Nebraska Uniform Real Property Transfer on Death Act applies to a transfer on death deed made before, on, or after the operative date of this act by a transferor dying on or after the operative date of this act.

d. LR 488 Comment

Similarly, the Minnesota enactment in 2008 states "This article is effective August 1, 2008, and applies to instruments of conveyance of real property recorded on or after that date, regardless of an instrument's date of execution." Minnesota Laws 2008, c. 341, art. 2, § 9.

4. Section 4. Nonexclusivity

a. Uniform Act

This [act] does not affect any method of transferring property otherwise permitted under the law of this state.

b. NCCUSL Comment

This section provides that the act is nonexclusive. The act does not affect any method of transferring property otherwise permitted under state law.

One such method is a present transfer with a retained legal life estate. Consider the following examples:

Example 1. A conveys Blackacre to B while reserving A's right to remain in possession until A's death. By this conveyance, A has made a present transfer of a future interest to B. The transfer is irrevocable. The future interest will ripen into possession at A's death, even if B fails to survive A.

Example 2. A executes, acknowledges, and records a transfer on death deed for Blackacre, naming B as the designated beneficiary. During A's lifetime, no interest passes to B, and A may revoke the deed. If unrevoked, the deed will transfer possession to B at A's death only if B survives A.

As illustrated in these examples, the two methods of transfer have different effects and are governed by different rules.

c. LB 756

Sec. 4. The Nebraska Uniform Real Property Transfer on Death Act does not affect any method of transferring property otherwise permitted under the law of this state.

d. LR 488 Comment

It is a standard principle that enactment of a statute displaces prior law only to the extent provided in the new legislation. The Nebraska Uniform Trust Code, for example, displaces the common law of trusts and principles of equity only "to the extent modified by the code or another statute of this state." Neb. Rev. Stat. § 30-3806. For that reason, a retained legal life

estate, Example 1 in the NCCUSL Comment, the creation of a joint tenancy in real property, and any other method of transferring property presently permitted under Nebraska law is not affected by adoption of the Nebraska Uniform Real Property Transfer on Death Act.

5. Section 5. Transfer on Death Deed Authorized

a. Uniform Act

An individual may transfer property to one or more beneficiaries effective at the transferor's death by a transfer on death deed.

b. NCCUSL Comment

This section authorizes a transfer on death deed and makes it clear that the transfer is not an inter vivos transfer. The transfer occurs at the transferor's death.

The transferor is an individual, but the singular includes the plural. Multiple individuals can readily act together to transfer property by a transfer on death deed, as in the common case of a husband and wife who own the property as joint tenants or as tenants by the entirety. On the effect of a transfer on death deed made by joint owners, see Section 13(c) and the accompanying Comment.

The transferor may select any form of ownership, concurrent or successive, absolute or conditional, contingent or vested, valid under state law. Among many other things, this permits the transferor to reserve interests for his estate (e.g., mineral interests); to specify the nature and extent of the beneficiary's interest; and to designate one or more primary beneficiaries and one or more alternate beneficiaries to take in the event the primary beneficiaries fail to survive the transferor. This freedom to specify the form and terms of the transferee's interest comports with the fundamental principle of American law recognized by the Restatement (Third) of Property (Wills and Other Donative Transfers) §10.1 that the donor's intention should be "given effect to the maximum extent allowed by law." As the Restatement explains in Comment c to §10.1, "American law curtails freedom of disposition only to the extent that the donor attempts to make a disposition or achieve a purpose that is prohibited or restricted by an overriding rule of law."

Notwithstanding this freedom of disposition, transferors are encouraged as a practical matter to avoid formulating dispositions that would complicate title. Dispositions containing conditions or class gifts, for example, may require a court proceeding to sort out the beneficiaries' interests. Other estate planning mechanisms, such as trusts, may be more appropriate in such cases.

c. LB 756

Sec. 5. An individual may transfer property to one or more beneficiaries effective at the transferor's death by a transfer on death deed.

d. LR 488 Comment

Section 5 legitimates a form of transfer not previously authorized by Nebraska law. [See LR 488 Comment to Section 7 which discusses the change in Nebraska law.]

Note that this authorization is limited to “*individual*” transferors, although the NCCUSL Comment notes that the “singular includes the plural.” *See also*: Section 2 (7) definition of “transferor” and the NCCUSL Comment to Paragraph (7).

The term “transfer on death deed” is a term of art; the requirements for such a deed are spelled out in Section 9.

6. Section 6. Transfer on Death Deed Revocable

a. Uniform Act

A transfer on death deed is revocable even if the deed or another instrument contains a contrary provision.

b. NCCUSL Comment

A fundamental feature of a transfer on death deed under this Act is that the transferor retains the power to revoke the deed. Section 6 is framed as a mandatory rule, for two reasons. First, the rule prevents an off-record instrument from affecting the revocability of a transfer on death deed. Second, the rule protects the transferor who may wish later to revoke the deed.

If the transferor promises to make the deed irrevocable or not to revoke the deed, the promisee may have a remedy under other law if the promise is broken. The deed remains revocable despite the promise.

c. LB 756

Sec. 6. A transfer on death deed is revocable even if the deed or another instrument contains a contrary provision.

d. LR 488 Comment

This section also needs to be read the context of the requirements for a transfer on death deed spelled out in Section 9.

The NCCUSL Comment notes that a contract not to revoke a revocable deed might be valid “under other law.” However, the remedy for breach of such a promise would be an action at law for damages. This is analogous to the situation involving a contract not to revoke a will where the will remains valid notwithstanding the breach of a contract not to revoke. See discussion of Section 17, *Contract to Make or Not to Revoke Transfer on Death Deed*. As the NCCUSL Comment notes, “the deed remains revocable” (and valid), notwithstanding the breach of the promise.

7. Section 7. Transfer on Death Deed Nontestamentary

a. Uniform Act

A transfer on death deed is nontestamentary.

b. NCCUSL Comment

This section is consistent with Uniform Probate Code §6-101(a), which provides: “A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary.”

As the Comment to Uniform Probate Code §6-101 explains, because the mode of transfer is declared to be nontestamentary, the instrument of transfer is not a will and does not have to be executed in compliance with the formalities for wills, nor does the instrument need to be probated.

Whether a document that is ineffective as a transfer on death deed (e.g., because it has not been recorded before the transferor’s death) should be given effect as a testamentary instrument will depend on the applicable facts and on the wills law of the jurisdiction. Section 2-503 of the Uniform Probate Code provides in pertinent part: “Although a document ... was not executed in compliance with Section 2-502, the document ... is treated as if it had been executed in compliance with that section if the proponent of the document ... establishes by clear and convincing evidence that the decedent intended the document ... to constitute ... (iii) an addition to or alteration of the [decedent’s] will”

c. LB 756

Sec. 7. A transfer on death deed is nontestamentary.

d. LR 488 Comment

As noted in the NCCUSL Comment, the significance of declaring that a transfer on death is “nontestamentary” is that the instrument does not have to be executed in compliance with the statute of wills nor does the instrument need to be probated.

In terms of the broader sweep of wealth transfer law over the past forty years, the trend toward legitimating so-called “nonprobate transfers” has been the primary basis for what has

been referred to as the “nonprobate revolution.” In short, the nonprobate revolution has been characterized by the classification of what were historically were regarded as “testamentary transfers” as *inter vivos* (nontestamentary) transfers.

In theory the distinction between “giving” (inter vivos transfers) and “leaving” (testamentary transfers) is sharp and clear as the NCCUSL Comment to Section 7 notes. Under a testamentary transfer, the transfer *occurs at the transferor’s death*. In a transfer on death deed, the transfer occurs at the transferor’s death but the transfer on death deed does not need to comply with the statute of wills since the transfer is “nontestamentary.” (However, Section 9 does require that the transfer on death deed “must contain the essential elements and formalities of a properly recordable inter vivos deed.”)

Nebraska law has mirrored the national trend in its recognition of various forms of transfers as “nontestamentary.” Both the Supreme Court of Nebraska and the Nebraska Legislature have played significant roles in moving Nebraska law in the direction of greater acceptance of nonprobate transfers.

The Nebraska Supreme Court decision of *Young v. McCoy*, 152 Neb. 138, 40 N.W.2d 540 (1950), took the traditional approach to the topic of nonprobate transfers in ruling that a P.O.D. (Payable on Death) form of bank account was not authorized by Nebraska statutes. The court stated that:

An instrument which by its terms is to operate to convey an interest in property only after the death of the grantor is testamentary in character and passes no present interest in the property. Such a purported conveyance is void for the reason that it is in effect a will and, the statutory requirements for the execution of a will not having been met, it has no validity as such.

40 N.W.2d at 542.

On the other hand, the Nebraska Supreme Court, in the 1942 case of *Whalen v. Swircin*, 141 Neb. 650, 4 N.W.2d 737, held that a revocable inter vivos trust was not to be deemed a

testamentary transfer for purposes of statutes of wills compliance. The *Whalen* court emphasized that the legal title to the trust property vested in the trustee during the settlor's lifetime whereas a "will does not take effect until the death of the testator."

The Nebraska Legislature's adoption of the Uniform Probate Code in 1974 (effective January 1, 1977) included Article VI of the Uniform Probate Code which was labeled "Non-Probate Transfers." This Article included rules for "Multiple-Party Accounts" and a more generalized section (§6-201) entitled "Provisions Relating to Effect of Death." Section 6-201 was designed to authorize a variety of contractual arrangements which previously had been characterized as "testamentary."

In 1989 the National Conference of Commissioners on Uniform State Laws revised Article VI, of the Uniform Probate Code and the Nebraska Legislature updated the Nebraska Probate Code in 1993 by adopting the revised Article VI provisions of the UPC. (Neb. Rev. Stat. §§ 30-2715 to -2746). The updated Article VI provisions were contained in three subparts: (1) Provisions Relating to Effect of Death; (2) Multiple-Person Accounts and (3) Uniform TOD Security Registration. The Part Three provisions were new to Nebraska law in 1993; these provisions authorized securities to be registered in a Transfer on Death form of ownership. Under Neb. Rev. Stat. § 30-2742, the transfer on death resulting from a registration in beneficiary form was stated to be "not testamentary."

The Nebraska Legislature's adoption of the Uniform Trust Code in 2003 added specific statutory rules applicable to revocable trusts (Neb. Rev. Stat. §§ 30-3853 to 30-3856) while continuing the rule under Nebraska law that a revocable trust is nontestamentary.

There is further discussion of the development of Nebraska law in the LR Comment on Section 15, Liability For Creditor Claims and Statutory Allowances.

With regard to the NCCUSL Comment:

(1) Nebraska statutory law *does include* UPC Section 6-101(a); *see* Neb. Rev. Stat. § 30-2715 as amended in 2010 to include motor vehicle certificates of title.

(2) The Nebraska Probate Code *does not include* Section 2-503 referenced in the NCCUSL Comment.

8. Section 8. Capacity of Transferor

a. Uniform Act

The capacity required to make or revoke a transfer on death deed is the same as the capacity required to make a will.

b. NCCUSL Comment

This section provides that the capacity required to make or revoke a transfer on death deed, which is a revocable will substitute, is the same as the capacity required to make a will. It is appropriate that a will and a transfer on death deed require the same level of capacity, for both mechanisms are revocable and ambulatory, the latter term meaning that they do not operate before the grantor's death. This approach is consistent with the Restatement (Third) of Property (Wills and Other Donative Transfers) §8.1(b), which applies the standard of testamentary capacity, and not the standard of capacity for inter vivos gifts, to revocable will substitutes: "If the donative transfer is in the form of a will, a revocable will substitute, or a revocable gift, the testator or donor must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property." This section is also consistent with Uniform Trust Code §601: "The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will."

A transfer on death deed is not affected if the transferor subsequently loses capacity. On the ability of an agent under a power of attorney to make or revoke a transfer on death deed, see the Comments to Sections 9 and 11.

c. LB 756

Sec. 8. The capacity required to make or revoke a transfer on death deed is the same as the capacity required to make a will.

d. LR 488 Comment

"Any individual who is eighteen or more years of age or who is not a minor and who is of sound mind may make a will" Neb. Rev. Stat. § 30-2326. Concerning trusts, "The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the

actions of the trustee of a revocable trust, is the same as that required to make a will.” Neb. Rev. Stat. § 30-3853.

9. Section 9. Requirements

a. Uniform Act (with Legislative Note)

A transfer on death deed:

(1) except as otherwise provided in paragraph (2), 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 public records in [the office of the county recorder of deeds] of the [county] where the property is located.

Legislative Note: Because a transfer on death deed does not have present effect and is revocable, it may be useful to title searchers and insurers if the recording or indexing of the deed identifies it as a transfer on death deed. Information about how a recorder of deeds should record and index a transfer on death deed is available from the recorders of deeds in states having experience with such deeds. By way of example, the recorder of deeds of Clay County, Missouri, uses a grantor-grantee index that is fully searchable online, at http://recorder.claycogov.com/pages/online_access.asp.

b. NCCUSL Comment

Paragraph (1) requires a transfer on death deed to contain the same essential elements and formalities, other than a present intention to convey, as are required for a properly recordable inter vivos deed under state law. "Essential elements" is a term with a long usage in the law of deeds of real property. The essential elements of a deed vary from one state to another but commonly include the names of the grantor and grantee, a clause transferring title, a description of the property transferred, and the grantor's signature. In all states, the essential elements of a properly recordable deed include the requirement that the deed be acknowledged by the grantor before a notary public or other individual authorized by law to take acknowledgments. See Thompson on Real Property §92.04(c) (observing that a "certificate of acknowledgment or attestation is universally required to qualify an instrument for recordation"). In the context of transfer on death deeds, the requirement of acknowledgment fulfills at least four functions. First, it cautions a transferor that he or she is performing an act with legal consequences. Such caution is important where, as here, the transferor does not experience the wrench of delivery because the transfer occurs at death. Second, acknowledgment helps to prevent fraud. Third, acknowledgment facilitates the recording of the deed. Fourth, acknowledgment enables the rule in Section 11 that a later acknowledged deed prevails over an earlier acknowledged deed.

Paragraph (2) emphasizes an important distinction between an inter vivos transfer and a transfer on death. An inter vivos transfer reflects an intention to transfer, at the time of the conveyance, an interest in property, either a present interest or a future interest. In contrast, a transfer on death reflects an intention that the transfer occur at the transferor's death. Under no circumstances should a transfer on death be given effect inter vivos; to do so would violate the transferor's intention that the transfer occur at the transferor's death.

Paragraph (3) requires a transfer on death deed to be recorded before the transferor's death in the county (or other appropriate administrative division of a state, such as a parish) where the land is located. If the property described in the deed is in more than one county, the deed is effective only with respect to the property in the county or counties where the deed is recorded. The requirement of recordation before death helps to prevent fraud by ensuring that all steps necessary to the effective transfer on death deed are completed during the transferor's lifetime. The requirement of recordation before death also enables all parties to rely on the recording system. For these reasons, all thirteen states that have already enacted transfer on death deed statutes require the deed to be recorded before the transferor's death.

An individual's agent may execute a transfer on death deed on the individual's behalf to the extent permitted by other law, such as the Uniform Power of Attorney Act. This act does not define, but instead relies on other law to determine, the authority of an agent.

c. LB 756

Sec. 9. A transfer on death deed:

(1) Except as otherwise provided in subdivision (2) of this section, 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 public records in the office of the register of deeds of the county where the property is located.

d. LR 488 Comment

This section provides that a transfer on death deed must meet the formal requirements of a recordable inter vivos deed, transfer the property at the transferor's death, and be recorded prior to the transferor's death. Neb. Rev. Stat. § 76-211 states the general requirements for deeds:

Deeds of real estate, or any interest therein, in this state, except leases for one year or for a less time, if executed in this state, must be signed by the grantor or grantors, being of lawful age, and be acknowledged or proved and recorded as directed in sections 76-216 to 76-237.

A transfer on death deed cannot have inter vivos effect. See NCCUSL Comment to Paragraph (2), above. It cannot contain a warranty of title. See Section 13(d), below.

10. Section 10. Notice, Delivery, Acceptance, Consideration Not Required

a. Uniform Act

A transfer on death deed is effective without:

(1) notice or delivery to or acceptance by the designated beneficiary during the transferor's life; or

(2) consideration.

b. NCCUSL Comment

This section makes it clear that a transfer on death deed is effective without notice or delivery to or acceptance by the beneficiary during the transferor's lifetime (paragraph (1)) and without consideration (paragraph (2)).

Paragraph (1) is consistent with the fundamental distinction under this Act between a transfer on death deed and an inter vivos deed. Under the former, but not under the latter, the transfer occurs at the transferor's death. Therefore, there is no requirement of notice, delivery, or acceptance during the transferor's life. This does not mean that the beneficiary is required to accept the property. The beneficiary may disclaim the property, as explained in Section 14 and the accompanying Comment.

Paragraph (2) is consistent with the law of donative transfers. A deed need not be supported by consideration.

c. LB 756

Sec. 10. A transfer on death deed is effective without:

(1) Notice or delivery to or acceptance by the designated beneficiary during the transferor's life; or

(2) Consideration.

d. LR 488 Comment

The topics of this section – notice, delivery, acceptance, consideration – have been considered by the Nebraska appellate courts on numerous occasions in cases involving deeds.

The first and third topics – notice and acceptance – are rather easily dealt with in the context of Nebraska case law. The second and fourth topics – delivery and consideration – deserve a closer look and more extended discussion.

Since the TOC Deed must be recorded during the lifetime of the transferor, there is an adequate substitute for the common law requirement of delivery during lifetime. Since the TOD Deed is essentially a testamentary transfer and does not convey an interest or enforceable right during the lifetime of the transferor, there is an adequate substitute for the common law requirement of consideration.

Notice and Acceptance:

According to syllabus five of the Nebraska Supreme Court’s decision in *Johns v. Carr*, 167 Neb. 545, 93 N.W.2d 831 (1958):

Assent of the grantee is not an essential element of the delivery of a deed; neither is it necessary that the grantee have knowledge of the deed prior to the death of the grantor.

As to the lack of knowledge by the grantee, *see also: Smith v. Black*, 143 Neb. 244, 9 N.W.2d 193 (1943); *Cook v. Hall*, 18 Neb. App. 168, 778 N.W.2d 744 (Neb. App. 2009) (“It is not necessary for delivery of a deed that grantees have knowledge of the deed prior to the death of the grantor.”).

Consideration:

According to syllabus three of the Nebraska Supreme Court decision in *Brunson v. Kahler*, 176 Neb. 735, 127 N.W.2d 281 (1964), “As a general rule a delivered deed passes title even if there is no consideration.”

While the general rule is supported by Nebraska case law, there are Nebraska cases involving “failure of consideration” that resulted in the deed being cancelled. In the case of

Lewelling v. McElroy 148 Neb. 309, 27 N.W.2d 268 (1947), the Supreme Court of Nebraska stated that:

We have repeatedly held that where a grantor conveys land in consideration of an agreement of the grantee to support, maintain, and care for the grantor during his lifetime, and the grantee neglects or refuses to comply with the contract, the deed may be set aside and the title quieted in the grantor. (citing from prior discussion)

27 N.W.2d at 271.

Delivery:

Numerous Nebraska appellate cases state that, as a general rule, “It is essential to the validity of a deed that there be a delivery.” Nebraska case law goes one step further in requiring that “without a delivery *in the lifetime of the grantor*, there is no valid deed of conveyance.” *Short v. Kleppinger*, 163 Neb. 729, 733; 81 N.W.2d 182, 186 (1957) (emphasis added). By contrast, the NCCUSL Comment states, in part, that with regard to a transfer on death deed, “[T]here is no requirement of ... delivery during the transferor’s lifetime.”

Section 10’s abolition of the delivery requirement is supplanted by the requirement in Section 9 that the transfer on death deed “must be recorded before the transferor’s death ...in the office of the register of deeds of the county where the property is located.” This requirement further emphasizes the distinction between an “inter vivos” deed and a transfer on death deed. Recordation of an inter vivos deed is prima facie evidence of delivery. *Ehlers v. Seip*, 136 Neb. 722, 287 N.W.202 (1939).

Numerous Nebraska cases discuss the requirement of delivery in the context of the alleged inter vivos transfer being testamentary in character, *i.e.*, not intended to take effect until the death of the grantor. This line of case law, questioning the adequacy of delivery *during the grantor’s lifetime*, fits equally well under the LR 488 Comment to Section 7, *supra*. If the court

finds that the requirement of delivery has been met, along with other requirements, then the transfer is deemed inter vivos and statute of wills compliance does not come into play.

On the other hand, if the court determines that the delivery requirement has not been met, the court will conclude that the deed fails, no inter vivos transfer has taken place, and that the grantor retains title to the land. *See: Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994) (testimony of grantee showed the “testamentary intent of the deed”); *Mosel v. Zieg*, 180 Neb. 810, 146 N.W.2d 72 (1966) (unrecorded deed in safety deposit box; “the facts show an attempted testamentary disposition of the property, which can only be done by compliance with the will statute”).

11. Section 11. Revocation by Instrument Authorized; Revocation by Act Not Permitted

a. Uniform Act

(a) Subject to subsection (b), an instrument is effective to revoke a recorded transfer on death deed, or any part of it, only if the instrument:

(1) is one of the following:

(A) a transfer on death deed that revokes the deed or part of the deed expressly or by inconsistency;

(B) an instrument of revocation that expressly revokes the deed or part of the deed; or

(C) an inter vivos deed that expressly revokes the transfer on death deed or part of the deed; and

(2) is acknowledged by the transferor after the acknowledgment of the deed being revoked and recorded before the transferor's death in the public records in [the office of the county recorder of deeds] of the [county] where the deed is recorded.

(b) If a transfer on death deed is made by more than one transferor:

(1) revocation by a transferor does not affect the deed as to the interest of another transferor; and

(2) a deed of joint owners is revoked only if it is revoked by all of the living joint owners.

(c) After a transfer on death deed is recorded, it may not be revoked by a revocatory act on the deed.

(d) This section does not limit the effect of an inter vivos transfer of the property.

b. NCCUSL Comment

This section concerns revocation by instrument and revocation by act. On revocation by change of circumstances, such as by divorce or homicide, see Section 13 and the accompanying Comment.

Subsection (a) provides the exclusive methods of revoking, in whole or in part, a recorded transfer on death deed by a subsequent instrument. Revocation by an instrument not specified, such as the transferor's will, is not permitted.

The rule that a transfer on death deed may not be revoked by the transferor's subsequent will is a departure from the Restatement (Third) of Property (Wills and Other Donative Transfers) §7.2 comment e (see also the corresponding Reporter's Note), which encourages the revocability of will substitutes by will. However, there is a sound reason for the departure in the specific case of a transfer on death deed. A transfer on death deed operates on real property, for which certainty of title is essential. This certainty would be difficult, and in many cases impossible, to achieve if an off-record instrument, such as the grantor's will, could revoke a recorded transfer on death deed. The rule in this Act against revocation by will is also consistent with the uniform acts governing multiple-party bank accounts. See Uniform Probate Code §6-213(b) ("A right of survivorship arising from the express terms of the account, Section 6-212, or a POD designation, may not be altered by will.")

A recorded transfer on death deed may be revoked by instrument only by (1) a subsequently acknowledged transfer on death deed, (2) a subsequently acknowledged instrument of revocation, such as the form in Section 17, or (3) a subsequently acknowledged inter vivos deed containing an express revocation clause. Consider the following examples:

Example 1. T executes, acknowledges, and records a transfer on death deed for Blackacre. Later, T executes, acknowledges, and records a second transfer on death deed for Blackacre, containing an express revocation clause revoking "all my prior transfer on death deeds concerning this property." The second deed revokes the first deed. The revocation occurs when the second deed is recorded. (For the result if the second deed had not contained the express revocation clause, see Example 5.)

Example 2. T executes, acknowledges, and records two transfer on death deeds for Blackacre. Both deeds expressly revoke "all my prior transfer on death deeds concerning this property." The dates of acknowledgment determine which deed revoked the other. The first deed is acknowledged November 1; the second deed is acknowledged December 15. The second deed is the later acknowledged, so it revokes the first deed. The revocation occurs when the second deed is recorded.

Example 3. T executes and acknowledges a transfer on death deed for Blackacre. T later executes and acknowledges a revocation form. Both instruments are recorded. Because the revocation form is acknowledged later than the deed, the form revokes the deed. The revocation occurs when the form is recorded.

Example 4. T executes and acknowledges a transfer on death deed for Blackacre. T later executes and acknowledges an inter vivos deed conveying Blackacre and expressly revoking the transfer on death deed. Both instruments are recorded. Because the inter vivos deed contains an express revocation provision and is acknowledged later than the transfer on death deed, the inter vivos deed revokes the transfer on death deed. The revocation occurs when the inter vivos deed is recorded. (For the result if the inter vivos deed had not contained an express revocation clause, see the discussion below on “ademption by extinction.”)

The same rules apply whether the revocation is total or partial. In the previous examples, suppose instead that the initial transfer on death deed provides for the transfer of two parcels, Blackacre and Whiteacre, and that the subsequent instrument revokes the transfer on death deed as to Blackacre. The subsequent instrument revokes the transfer on death deed in part.

If the property described in the original deed is in more than one county, the revocation is effective only with respect to the property in the county or counties where the revoking deed or instrument is recorded.

Subsection (a)(1)(A) speaks of revocation “expressly or by inconsistency.” This provision references the well-established law of revocation by inconsistency of wills. Consider the following examples:

Example 5. T executes, acknowledges, and records a transfer on death deed for Blackacre naming X as the designated beneficiary. Later, T executes, acknowledges, and records a transfer on death deed for the same property, Blackacre, containing no express revocation of the earlier deed but naming Y as the designated beneficiary. Later, T dies. The recording of the deed in favor of Y revokes the deed in favor of X by inconsistency. At T’s death, Y is the owner of Blackacre.

Example 6. T, the owner of Blackacre in fee simple absolute, executes, acknowledges, and records a transfer on death deed for Blackacre naming X as the designated beneficiary. Later, T executes, acknowledges, and records a transfer on death deed containing no express revocation of the earlier deed but naming Y as the designated beneficiary of a life estate (or a mineral interest) in Blackacre. Later, T dies. The recording of the deed in favor of Y partially revokes the deed in favor of X by inconsistency. At T’s death, Y is the owner of a life estate (or a mineral interest) in Blackacre, and X is the owner of the remainder.

The question is sometimes raised whether a recorded inter vivos deed without an express revocation clause operates as a revocation of an earlier transfer on death deed. The answer highlights the important distinction between “revocation” and “ademption by extinction.” See Atkinson on Wills §134. Revocation means that the instrument is rendered void. Ademption by extinction means that the transfer of the property cannot occur because the property is not owned by the transferor at death. The doctrines are different.

In some instances, revocation and ademption have the same practical effect: the designated beneficiary of the property receives nothing. Nothing in this section changes that fact,

as indicated in subsection (d). However, there are other instances where the doctrines have differing effects. Consider the following illustration, drawn from the law of wills.

Example 7. T executes a will devising Blackacre to A. Later, T becomes legally incompetent, and G is appointed as T’s conservator. G, acting within the scope of his authority, sells Blackacre to B for \$100,000. Later, T dies.

The law of wills provides that the devise to A is adeemed rather than revoked. This means that A is not entitled to Blackacre but is entitled to a pecuniary devise in the amount of \$100,000. See Atkinson on Wills §134; *Wasserman v. Cohen*, 606 N.E.2d 901, 903 (Mass. 1993); Uniform Probate Code §2-606(b). The result is designed to effectuate T’s presumed intention.

The Joint Editorial Board for Uniform Trust and Estate Acts has begun a conversation on whether the Uniform Probate Code’s provisions on ademption should be extended to nonprobate transfers, thus harmonizing the treatment of wills and will substitutes on this aspect of the law. This act accepts the well recognized distinction between revocation and ademption in order to leave the door open for such future harmonization, which would effectuate the presumed intention of nonprobate grantors.

Subsection (b) supplies rules governing revocation by instrument in the event of a transfer on death deed made by multiple owners. Subsection (b)(1) provides that revocation by a transferor does not affect a transfer on death deed as to the interest of another transferor. Subsection (b)(2) provides that a transfer on death deed of joint owners is revoked only if it is revoked by all of the living joint owners. This rule is consistent with Uniform Probate Code §6-306, which provides in pertinent part: “A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.” Subsection (b)(2) applies only to a deed of joint owners. A joint tenant who severs the joint tenancy, thereby destroying the right of survivorship, is no longer a joint owner.

Subsection (c) provides that a recorded transfer on death deed may not be revoked by a revocatory act performed on the deed. Such an act includes burning, tearing, canceling, obliterating, or destroying the deed or any part of it.

This statute does not define, but instead looks to other law to determine, the authority of an agent. An individual’s agent may revoke a transfer on death deed on the individual’s behalf to the extent permitted by other law, such as the Uniform Power of Attorney Act.

c. LB 756

Sec. 11. (a) Subject to subsection (b) of this section, an instrument is effective to revoke a recorded transfer on death deed, or any part of it, only if the instrument:

(1) Is one of the following:

(A) A transfer on death deed that revokes the deed or part of the deed expressly or by inconsistency;

(B) An instrument of revocation that expressly revokes the deed or part of the deed; or

(C) An inter vivos deed that expressly revokes the transfer on death deed or part of the deed; and

(2) Is acknowledged by the transferor after the acknowledgement of the deed being revoked and recorded before the transferor's death in the public records in the office of the register of deeds of the county where the deed is recorded.

(b) If a transfer on death deed is made by more than one transferor:

(1) Revocation by a transferor does not affect the deed as to the interest of another transferor; and

(2) A deed of joint owners is revoked only if it is revoked by all of the living joint owners.

(c) After a transfer on death deed is recorded, it may not be revoked by a revocatory act on the deed.

(d) This section does not limit the effect of an inter vivos transfer of the property.

d. LR 488 Comment

This section is consistent with Nebraska statutory and case law on revocation and also is consistent with Nebraska law on related issues of severance and ademption.

The NCCUSL Comment notes that the Section 11 rule against revocation by will is consistent with Uniform Probate Code § 6-213(b). The Nebraska Probate Code citation to this section is Neb. Rev. Stat. § 30-2724 (as to multiple party accounts and POD designations, “A

right of survivorship arising from the express terms of the account . . . or a POD designation, may not be altered by will.”).

With regard to Example 7 in the NCCUSL Comment, the Nebraska Probate Code’s “nonademption” rule is found in Neb. Rev. Stat. § 30-2346 (nonademption of specific devises in certain cases; sale by conservator; unpaid proceeds of sale, condemnation, or insurance). See: *In re McClow’s Estate*, 205 Neb. 739, 290 N.W.2d 186 (1980) (decedent, during her lifetime, sold specifically devised property; beneficiaries of specific bequest contained in will entitled to unpaid balance at her death; partial ademption related only to amount actually received by decedent during her lifetime).

With regard to the NCCUSL Comment as to subsection (b), the Nebraska Probate Code’s enactment of Uniform Probate Code § 6-306 is Neb. Rev. Stat § 30-2739: “The designation of a TOD or POD beneficiary on a registration in beneficiary form has no effect on ownership until the owner’s death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.”

As to the Nebraska statutory law pertaining to severances, see: Neb. Rev. Stat. §§ 76-118(4), 76-2,109.

As to interaction between the Nebraska “nonademption” statute (§ 30-2346, above) and a sale by holder of a durable power of attorney, see: *In re Estate of Bauer*, 270 Neb. 91, 700 N.W.2d 572 (2005) (sale by holder of durable power of attorney during lifetime resulted in “ademption by implied revocation” of the specific devise and of the proceeds from sale of the property).

Consideration should be given to adding “who were transferors” at the end of Section 11(b)(2) for the reason that not all joint owners might be transferors.

12. Section 12. Effect of Transfer on Death Deed During Transferor's Life

a. Uniform Act

During a transferor's life, a transfer on death deed does not:

(1) affect an interest or right of the transferor or any other owner, including the right to transfer or encumber the property;

(2) affect an interest or right of a transferee, even if the transferee has actual or constructive notice of the deed;

(3) affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed;

(4) affect the transferor's or designated beneficiary's eligibility for any form of public assistance;

(5) create a legal or equitable interest in favor of the designated beneficiary; or

(6) subject the property to claims or process of a creditor of the designated beneficiary.

b. NCCUSL Comment

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.

Paragraph (1): A transfer on death deed, during the transferor's lifetime, does not affect the interests or property rights of the transferor or any other owners. Therefore, the deed does not, among many other things: affect the transferor's right to transfer or encumber the property inter vivos; sever a joint tenancy or a joint tenant's right of survivorship; trigger a due-on-sale clause in the transferor's mortgage; trigger the imposition of real estate transfer tax; or affect the transferor's homestead or real estate tax exemptions, if any.

Paragraph (2): A transfer on death deed does not affect transferees, whether or not they have notice of the deed. Like a will, the transfer on death deed is ambulatory. It has no effect on inter vivos transfers.

Paragraph (3): A transfer on death deed, during the transferor's lifetime, does not affect pre-existing or future creditors, secured or unsecured, whether or not they have an interest in the property or notice of the deed.

Paragraph (4): A transfer on death deed, during the transferor's lifetime, does not affect the transferor's or designated beneficiary's eligibility for any form of public assistance, including Medicaid. On this point, the drafting committee specifically disapproves of the contrary approach of Colo. Rev. Stat. §15-15-403.

Paragraph (5): During the transferor's lifetime, a transfer on death deed does not create a legal or equitable interest in the designated beneficiary. The beneficiary does not have an interest that can be assigned or encumbered. Note, however, that this rule would not preclude the doctrine of after-acquired title. A warranty deed from a designated beneficiary to a third party would operate to pass the beneficiary's title to the third party after the transferor's death.

Paragraph (6): A transfer on death deed, during the transferor's lifetime, does not make the property subject to claims or process of the designated beneficiary's creditors. The deed has no more effect than a will.

If a transferor combines an inter vivos transfer of an interest in property (such as a mineral interest) with a transfer on death of the remainder interest, the inter vivos transfer may have present effect even though the transfer on death does not occur until the transferor's death.

c. LB 756

Sec. 12. During a transferor's life, a transfer on death deed does not:

(1) Affect an interest or right of the transferor or any other owner, including the right to transfer or encumber the property;

(2) Affect an interest or right of a transferee, even if the transferee has actual or constructive notice of the deed;

(3) Affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed;

(4) Affect the transferor's or designated beneficiary's eligibility for any form of public assistance;

(5) Create a legal or equitable interest in favor of the designated beneficiary; or

(6) Subject the property to claims or process of a creditor of the designated beneficiary.

d. LR 488 Comment

This section establishes that there is no legal effect of the transfer on death deed during the lifetime of the transferor. These provisions are key to understanding the TOD concept. Lifetime matters take priority over a TOD Deed even if the TOC Deed is first in time.

This section codifies rules that there is no transfer of any interest or right in the property under a transfer on death deed until the death of the transferor. The section is consistent with current Nebraska law as to interests and rights in deeds undelivered during the transferor's lifetime, revocable trusts, and other forms of nonprobate property.

The section states that during the transferor's lifetime, a transfer on death deed does not affect the transferor's, a transferee's, a designated beneficiary's, a creditor's, or any other owner's interests or rights in the property. This applies despite any actual or constructive notice of the transfer on death deed (which seems likely from its having been recorded).

Subparagraph (4) specifies that a transfer on death deed does not "affect the transferor's or designated beneficiary's eligibility for any form of public assistance," expressly disapproving in the NCCUSL Comment a "contrary approach" of Colorado. It does not appear that any other state having transfer on death deed legislation takes a "contrary approach."

Subparagraphs (5) and (6) state that during a transferor's lifetime, a transfer on death deed does not create any interest in the designated beneficiary or subject the property to claims of a creditor of the designated beneficiary.

Subparagraph (2) restates what is contained in other portions of the Act as well that a transfer on death deed does not affect the interests or rights of transferees of inter vivos transfers of the property during the transferor's lifetime.

13. Section 13. Effect of Transfer on Death Deed at Transferor's Death

a. Uniform Act (with Legislative Note)

(a) Except as otherwise provided in the transfer on death deed[,][or] in this section[,][or in [cite state statutes on antilapse, revocation by divorce or homicide, survival and simultaneous death, and elective share, if applicable to nonprobate transfers]], on the death of the transferor, the following rules apply to property that is the subject of a transfer on death deed and owned by the transferor at death:

(1) Subject to paragraph (2), the interest in the property is transferred to the designated beneficiary in accordance with the deed.

(2) The interest of a designated beneficiary is contingent on the designated beneficiary surviving the transferor. The interest of a designated beneficiary that fails to survive the transferor lapses.

(3) Subject to paragraph (4), concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship.

(4) If the transferor has identified two or more designated beneficiaries to receive concurrent interests in the property, the share of one which lapses or fails for any reason is transferred to the other, or to the others in proportion to the interest of each in the remaining part of the property held concurrently.

(b) Subject to [cite state recording act], a beneficiary takes the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. For purposes of this subsection and [cite

state recording act], the recording of the transfer on death deed is deemed to have occurred at the transferor's death.

(c) If a transferor is a joint owner and is:

(1) survived by one or more other joint owners, the property that is the subject of a transfer on death deed belongs to the surviving joint owner or owners with right of survivorship; or

(2) the last surviving joint owner, the transfer on death deed is effective.

(d) A transfer on death deed transfers property without covenant or warranty of title even if the deed contains a contrary provision.

Legislative Note: *In light of the growing harmonization of the rules governing probate and nonprobate transfers, states enacting this act should consider extending to nonprobate mechanisms, such as transfer on death deeds, the probate rules governing antilapse, revocation by divorce, revocation by homicide, survival and simultaneous death, and the elective share of a surviving spouse.*

One of the significant trends in the law of property in the twentieth century has been the growing harmonization of the constructional and substantive rules governing deathtime transfers, whether the transfers occur in or outside of the probate process. Section 7.2 of the Restatement (Third) of Property (Wills and Other Donative Transfers) provides: "Although a will substitute need not be executed in compliance with the statutory formalities required for a will, such an arrangement is, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions."

The Uniform Probate Code contains statutory provisions treating wills and will substitutes alike for many purposes, including (1) antilapse; (2) revocation by divorce; (3) revocation by homicide (the "slayer rule"); (4) survival and simultaneous death; and (5) the elective share of a surviving spouse.

In some cases, the harmonization is achieved by applying the relevant rule to any "governing instrument," which is defined in Uniform Probate Code §1-201(18) as "a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profitsharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type." The Uniform Probate Code's rules on revocation by divorce, revocation by homicide, and survival and simultaneous death apply to any governing instrument. See Uniform Probate Code §§2-702 (survival and simultaneous death), 2803 (revocation by homicide), 2-804 (revocation by divorce).

For the elective share, the Uniform Probate Code treats wills and will substitutes alike by defining the decedent's "augmented estate" to include both probate and nonprobate transfers. See Uniform Probate Code §2-203(a).

For antilapse, the Uniform Probate Code has separate sections treating wills (§2-603) and will substitutes (§§2-706, 2-707), but the latter are modeled on the former.

See also the Legislative Note to Section 14 on disclaimers.

b. NCCUSL Comment

Subsection (a) states four default rules, except as otherwise provided by the transfer on death deed, by this section, or by other provisions of state law governing nonprobate transfers. On this last, and the desirability of extending the probate rules governing antilapse, revocation on divorce or homicide, survival and simultaneous death, and the elective share of the surviving spouse to nonprobate instruments such as transfer on death deeds, see the Legislative Note.

The four default rules established by subsection (a) are these. First, the property that is the subject of an effective transfer on death deed and owned by the transferor at death is transferred at the transferor's death to the designated beneficiaries as provided in the deed. The rule implements the transferor's intention as described in the deed. Consider the following example:

Example 1. A executes, acknowledges, and records a transfer on death deed for Blackacre naming X as the primary beneficiary and Y as the alternate beneficiary if X fails to survive A. Both X and Y survive A. Blackacre is transferred to X at A's death in accordance with the provisions of the deed.

This default rule implements the fundamental principle that the provisions of the deed control the disposition of the property, unless otherwise provided by state law.

The drafting committee approves of the result in *In re Estate of Roloff*, 143 P.3d 406 (Kan. Ct. App. 2006) (holding that crops should be transferred with the land under a transfer on death deed because this result would be reached on the same facts with any other deed).

The bracketed language at the beginning of subsection (a) enables a state to make the default rules subject to other statutes, such as an antilapse statute or a statute providing for revocation on divorce. Consider the following examples:

Example 2. A executes, acknowledges, and records a transfer on death deed for Blackacre naming X as the primary beneficiary and Y as the alternate beneficiary if X fails to survive A. In fact, X and Y fail to survive A, who is survived only by X's child, Z. Assume that the state's antilapse statute applies to transfer on death deeds and creates a substitute gift in Z. (For such a statute, see Uniform Probate Code §2-706.) Blackacre is transferred to Z at A's death in accordance with the provisions of the deed as modified by the antilapse statute.

Example 3. A executes, acknowledges, and records a transfer on death deed for Blackacre naming her spouse, X, as the primary beneficiary and Y as the alternate beneficiary if X fails to survive A. Later, A and X divorce. Assume that the state's statute on revocation by divorce applies to transfer on death deeds and revokes the designation in favor of X, with the effect that the provisions of the transfer on death deed are given effect as if X had disclaimed. (For such a statute, see Uniform Probate Code §2-804.) Assume further that the effect of the putative disclaimer is that X is treated as having failed to survive A. (See the Uniform Disclaimer of Property Interests Act §6(a)(3)(B).) Blackacre is transferred to Y at A's death in accordance with the provisions of the deed as modified by the revocation on divorce and disclaimer statutes.

Note that the property must be owned by the transferor at death. Property no longer owned by the transferor at death cannot be transferred by a transfer on death deed, just as it cannot be transferred by a will. This is the principle of ademption by extinction, discussed in the Comment to Section 11.

In almost every instance, the transferor will own the property not only at death but also when the transfer on death deed is executed, but the latter is not imperative. Consider the following example. H and W, a married couple, hold Blackacre as tenants by the entirety. H executes, acknowledges, and records a transfer on death deed for Blackacre in favor of X. W later dies, at which point H owns Blackacre in fee simple absolute. Later, H dies. Under the law of some states, there may be a question whether the transfer on death deed is effective, given that H executed it when Blackacre was owned, not by H and W, but by the marital entity. The correct answer is that the transfer on death deed is effective at H's death because Blackacre is owned by H at H's death. See, e.g., *Mitchell v. Wilmington Trust Co.*, 449 A.2d 1055 (Del. Ch. 1982) (mortgage granted by one tenant by the entirety is not void upon execution but remains inchoate during the lives of both spouses, and becomes a valid lien if the spouse who executed the mortgage survives the other spouse or if the spouses get divorced).

The second default rule established by subsection (a) is that the interest of a designated beneficiary is contingent on surviving the transferor. This default rule treats wills and will substitutes alike. The interest of a designated beneficiary who fails to survive the transferor lapses. On the desirability of extending statutory antilapse protection to will substitutes such as transfer on death deeds, see the Legislative Note.

The third default rule established by subsection (a) is that concurrent beneficiaries receive equal and undivided interests with no right of survivorship among them. This default rule is consistent with the general presumption in favor of tenancy in common. See *Powell on Real Property* §51.02. The rule is also consistent with Uniform Probate Code §6-212 governing multiple-party accounts and §6-307 governing the transfer on death registration of securities.

The fourth and last default rule established by subsection (a) is that, in the event of the lapse or failure of an interest to be held concurrently, the share that lapses or fails passes proportionately to the surviving concurrent beneficiaries. Consider the following example:

Example 4. A executes, acknowledges, and records a transfer on death deed for Blackacre naming X, Y, and Z as the designated beneficiaries. X and Y survive A, but Z fails to survive A. The transfer on death deed is effective and, in the absence of an antilapse statute, transfers Blackacre to X and Y. This default rule is consistent with the transferor's probable intention in the absence of an antilapse statute and also with Uniform Probate Code §2-604(b) on the lapse of a residuary devise. On the desirability of extending statutory antilapse protection to will substitutes such as transfer on death deeds, see the Legislative Note.

Subsection (b) concerns the effect of transactions during the transferor's life. The subsection states an intermediate rule between two extremes. One extreme would provide that transactions during the transferor's life affect the beneficiary only if the transactions are recorded before the transferor's death. This would unfairly disadvantage the transferor's creditors and inter vivos transferees. The other extreme would provide that transactions during the transferor's life always supersede the beneficiary's interest, even if the recording act would provide otherwise. Between these two positions is the rule of subsection (b).

Subsection (b) provides that the beneficiary's interest is subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. "Liens" includes liens arising by operation of law, such as state Medicaid liens.

The only exception to this rule arises when the state recording act so provides. The state recording act will so provide only when two conditions are met: (1) the inter vivos conveyance or encumbrance is unrecorded throughout the transferor's life (the legal fiction in this subsection protects persons who transact with the transferor and record any time before the transferor's death); and (2) the beneficiary is protected by the recording act. These two conditions will be met only in rare instances. Most beneficiaries of transfer on death deeds are gratuitous, whereas state recording acts typically protect only purchasers for value. See Powell on Real Property §82.02.

Subsection (c) provides that the survivorship right of a joint owner takes precedence over the transfer on death deed. This rule is consistent with the law of joint tenancy and wills: the right of survivorship takes precedence over a provision in a joint tenant's will.

Subsection (d) states the mandatory rule that a transfer on death deed transfers the property without covenant or warranty of title. The rule is mandatory for two reasons: first, to prevent mishaps by uninformed grantors; and second, to recognize that a transfer on death deed is a will substitute. The rule of this section is consistent with the longstanding law of wills. As stated by Sir Edward Coke, "an express warranty cannot be created by will." Coke on Littleton 386a.

c. LB 756

Sec. 13. (a) Except as otherwise provided in the transfer on death deed, in this section, or in sections 30-2313 to 30-2319 (elective share of surviving spouse), section 30-2354, or the

Uniform Simultaneous Death Act, on the death of the transferor, the following rules apply to property that is the subject of a transfer on death deed and owned by the transferor at death:

(1) Subject to subdivision (2) of this subsection, the interest in the property is transferred to the designated beneficiary in accordance with the deed;

(2) The interest of a designated beneficiary is contingent on the designated beneficiary surviving the transferor by one hundred twenty hours. If the deed provides for a different survival period, the deed shall determine the survival requirement for beneficiaries. The interest of a designated beneficiary that fails to survive the transferor by one hundred twenty hours or as otherwise provided in the deed lapses;

(3) Affect an interest or right of a secured or unsecured creditor or future creditor of the transferor, even if the creditor has actual or constructive notice of the deed; and

(4) If the transferor has identified two or more designated beneficiaries to receive concurrent interests in the property, the share of one which lapses or fails for any reason is transferred to the other, or to the others in proportion to the interest of each in the remaining part of the property held concurrently.

(b) Subject to sections 23-1501 to 23-1527, a beneficiary takes the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests to which the property is subject at the transferor's death. For purposes of this subsection and sections 23-1501 to 23-1527, the recording of the transfer on death deed is deemed to have occurred at the transferor's death.

(c) If a transferor is a joint owner and is:

(1) Survived by one or more other joint owners, the property that is the subject of a transfer on death deed belongs to the surviving joint owner or owners with right of survivorship;

or

(2) The last surviving joint owner, the transfer on death deed is effective.

(d) A transfer on death deed transfers property without covenant or warranty of title even if the deed contains a contrary provision.

(e) If after recording a transfer on death deed the transferor is divorced or his or her marriage is dissolved or annulled, the divorce, dissolution, or annulment revokes any disposition or appointment of property made by the transfer on death deed to the former spouse unless the transfer on death deed expressly provides otherwise. Property prevented from passing to a former spouse under a transfer on death deed because of revocation by divorce, dissolution, or annulment passes as if the former spouse failed to survive the transferor. For purposes of this section, divorce, dissolution, or annulment means any divorce, dissolution, or annulment which would exclude the spouse as a surviving spouse within the meaning of section 30-2353. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.

d. LR 488 Comment

Paragraph (a) provides first that property that is the subject of a transfer on death deed and is owned by the transferor at death passes as provided in the transfer on death deed. The transfer on death deed is expressly subject to the elective share of a surviving spouse under applicable Nebraska statutes. Property does not pass to a designated beneficiary in a transfer on death deed who feloniously kills the transferor. See Section 23, below. The NCCUSL Legislative Note, above, suggests that consideration be given to the harmonization with other existing state

statutes. LB 756 provides that a designated beneficiary must survive the transferor by 120 hours in order to take an interest under a transfer on death deed. If the designated beneficiary does not survive the transferor by 120 hours, the transfer on death deed does not convey the property under the deed. LB 756 does not adopt the provisions of the Nebraska anti-lapse statute, section 30-2343, for the reason that the determinations under that section might tend to complicate, rather than simplify, issues arising from transfers on death deeds and should preferably be handled under standard probate procedures. Revocation by divorce is covered in Paragraph (e), below, of section 13. The reference to the Uniform Simultaneous Death Act (section 13, page 5, lines 21-22) should be deleted. Use of the 120-hour condition of survival makes the Uniform Simultaneous Death Act irrelevant.

Subparagraph (a) (2) states the requirement that a designated beneficiary must survive the transferor by 120 hours unless otherwise provided in the transfer on death deed. Nebraska applies a comparable 120-hour condition of survival to devisees under a will, in section 30-2339, and to intestate succession, homestead allowance and exempt property, in section 30-2304. Two drafting changes are suggested for this subparagraph: (1) on page 6, line 7, add as the second word in the line “designated” to that the sentence reads “survival requirement for designated beneficiaries.” (2) on page 6, line 9, strike “lapses” and add “shall be treated as if the designated beneficiary predeceased the transferor”.

Subparagraph (a)(3) of LB 756 contains a major error in that it repeats the language of Section 12 (a)(3) instead of the official text of the Uniform Act. Section 13 (a)(3) of the Uniform Act states:

(3) Subject to paragraph (4), concurrent interests are transferred to the beneficiaries in equal and undivided shares with no right of survivorship.

In Subparagraph (a)(4), it is suggested that on page 6, line 15, the words “lapses or” be deleted for the reasons that “fails for any reason” covers the issue and use of “lapses” may cause uncertainty as to the significance of that term in the Nebraska enactment.

Paragraph (b) provides that the beneficiary takes property under a transfer on death deed subject to all recorded instruments and other interests to which the property is subject at the transferor’s death. The statutory references in LB 756, Paragraph (b), page 6, lines 19-25, to “sections 23-1501 to 23-1527” are in error. The proper reference should be to Neb. Rev. Stat. § 76-238 in both places. Section 76-238 should also be amended by adding a reference to the effect that “For purposes of this section, the recording of a transfer on death deed under the Nebraska Uniform Real Property Transfer on Death Act shall be deemed to have occurred at the transferor’s death.”

Paragraph (c) deals with joint ownership of property by two or more persons. In subparagraph (c)(2), on page 7, line 6, after “deed” add “of the last surviving joint owner transferor”.

Paragraph (d) prohibits a transfer on death deed from containing a warranty of title.

Paragraph (e) adds to the official text of the uniform act a provision that a divorce, dissolution or marriage revokes a transfer on death deed. Only a court order which terminates the status of husband and wife revokes the transfer on death deed. A Nebraska divorce court would have authority to deal with an interest in the subject property apart from the Nebraska Uniform Real Property Transfer on Death Act. Also, a transferor can convey property to an ex-spouse by a transfer on death deed recorded after the divorce. Consideration should be given to deletion of the third sentence of Paragraph (e), page 7, lines 18-21, for the reason that section 30-2353 contains provisions on remarriage and other issues which might unnecessarily confuse

the transfer on death deed provisions.

14. Section 14. Disclaimer

a. **Uniform Act (with Legislative Note, but omitting suggested conformity amendments to the official text of the Uniform Disclaimer of Property Interests Act)**

A beneficiary may disclaim all or part of the beneficiary's interest as provided by [cite state statute or the Uniform Disclaimer of Property Interests Act].

Legislative Note: States should check their disclaimer statutes for any necessary amendments.

b. **NCCUSL Comment**

A beneficiary of a transfer on death deed may disclaim the property interest the deed attempts to transfer. While this section relies on other law, such as the Uniform Disclaimer of Property Interests Act, to govern the disclaimer, two general principles should be noted.

First, there is no need under the law of disclaimers to execute a disclaimer in advance. During the transferor's life, a designated beneficiary has no interest in the property. See Section 12. Nothing passes to the designated beneficiary while the transferor is alive, hence there is no need to execute a disclaimer during that time.

Second, an effective disclaimer executed after the testator's death "relates back" to the moment of the attempted transfer, here the death of the transferor. Because the disclaimer "relates back," the beneficiary is regarded as never having had an interest in the disclaimed property. The Uniform Disclaimer of Property Interests Act (UDPIA) reaches this result, without using the language of relation back, in UDPIA §6(b)(1): "The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable" As the Comment to UDPIA §6 explains, "This Act continues the effect of the relation back doctrine, not by using the specific words, but by directly stating what the relation back doctrine has been interpreted to mean."

c. **LB 756**

Sec. 14. A beneficiary may disclaim all or part of the beneficiary's interest as provided by section 30-2352.

d. **LR 488 Comment**

Amendment of Neb. Rev. Stat. § 30-2352, Renunciation of Succession, is contained in section 22 of LB 756, set out in paragraph 24 below. This section serves as a convenient

reference within the Nebraska Uniform Real Transfer on Death Act that interests are subject to disclaimer under the general rules applicable to other types of property.

15. Section 15. Liability For Creditor Claims and Statutory Allowances

a. Uniform Act Alternatives (with Legislative Note)

Alternative A

A beneficiary of a transfer on death deed is liable for an allowed claim against the transferor's probate estate and statutory allowances to a surviving spouse and children to the extent provided in [cite state statute or Section 6-102 of the Uniform Probate Code].

Alternative B

(a) To the extent the transferor's probate estate is insufficient to satisfy an allowed claim against the estate or a statutory allowance to a surviving spouse or child, the estate may enforce the liability against property transferred at the transferor's death by a transfer on death deed.

(b) If more than one property is transferred by one or more transfer on death deeds, the liability under subsection (a) is apportioned among the properties in proportion to their net values at the transferor's death.

(c) A proceeding to enforce the liability under this section must be commenced not later than [18 months] after the transferor's death.

Legislative Note: Alternative A is for a state with an existing statute governing creditors' rights in nonprobate transfers, such as Uniform Probate Code §6-102. States are encouraged to enact such statutes, thereby treating nonprobate transfers comprehensively. Alternative B is a second-best approach, supplying creditor protection but governing only transfer on death deeds and not other nonprobate mechanisms.

b. NCCUSL Comment

Alternative A defers to other law, such as Uniform Probate Code §6-102, to establish the liability of a beneficiary of a transfer on death deed for creditor claims and statutory allowances.

Uniform Probate Code (UPC) §6-102 was added in 1998 to establish the principle that recipients of nonprobate transfers can be required to contribute to pay allowed claims and statutory allowances to the extent the probate estate is insufficient. The fundamental rule of

liability is contained in UPC §6-102(b): “Except as otherwise provided by statute, a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against the decedent’s probate estate and statutory allowances to the decedent’s spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received or controlled by that transferee.” The other provisions of UPC §6-102 implement this liability rule.

For states not favoring the comprehensive approach of UPC §6-102(b) or the equivalent, Alternative B provides an in rem liability rule applying to transfer on death deeds. The 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.

One of the functions of probate is creditor protection. UPC §6-102, referenced in Alternative A, attempts to provide comprehensive creditor protection within the realm of nonprobate transfers. In addition, this Act in 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. See Comment 5 to UPC §6-102. 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.

c. LB 756

Sec. 15. (1) If other assets of the estate of the transferor are insufficient to pay all claims against the transferor’s estate and statutory allowances to the transferor’s surviving spouse and children, a transfer resulting from a beneficiary designation under the Nebraska Uniform Real Property Transfer on Death Act is not effective against the estate of a transferor to the extent needed to pay all claims against the transferor’s estate and statutory allowances to the transferor’s surviving spouse and children.

(2)(a) A beneficiary who receives property through a transfer on death deed upon the death of the transferor is liable 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 the claims and allowances described in subsection (1) of this

section remaining unpaid after application of the transferor's estate. For purposes of this subdivision (a), the fair market value shall be determined as of the date of death of the transferor. For purposes of this subdivision (a), the beneficiary's proportionate share means 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.

(b) A proceeding to assert the liability for claims against the estate and statutory allowances may not be commenced unless the personal representative has received a written demand by the surviving spouse, a creditor, a child, or a person acting for a child of the transferor. The proceeding must be commenced within one year after the death of the transferor.

(3) A beneficiary against whom a proceeding to account is brought may join as a party to the proceeding a surviving party or beneficiary of any other transfer on death deed for the same transferor or any other asset of the transferor subject to sections 30-2726, 30-2743, and 30-3850.

(4) Assets recovered by the personal representative pursuant to this section shall be administered as part of the transferor's estate.

(5) Nothing in this section shall be construed to limit the rights of creditors under other laws of this state.

d. LR 488 Comment

Nebraska has not adopted the 1998 amendments to the Uniform Probate Code providing a comprehensive treatment of nonprobate transfers. See the Legislative Note and NCCUSL Comment, above. The Nebraska Uniform Probate Code enacted in 1974, however, contains an orderly and very practical recognition that some types of property pass outside of the probate estate and that sometimes the probate estate assets are insufficient to satisfy all of the claims

against it. The Nebraska Uniform Probate Code expressly provides for the transfer at death of various types of property apart from any probate proceeding and expressly provides for a claims procedure and for action of a Personal Representative with respect to that property if the probate estate assets are not sufficient to satisfy obligations of the probate estate.

Section 15 of LB 756 utilizes Alternative B, above, of the Uniform Real Property Transfer on Death Act. It is patterned upon and coordinated with three present Nebraska statutes.

Neb. Rev. Stat. § 30-2726 provides with respect to a transfer resulting from a right of survivorship or POD designation under the applicable statutes:

(a) If other assets of the estate are insufficient, a transfer resulting from a right of survivorship or POD designation under sections 30-2716 to 30-2733 is not effective against the estate of a deceased party to the extent needed to pay claims against the estate, statutory allowances to the surviving spouse and children, taxes, and expenses of administration.

(b) A surviving party or beneficiary who receives payment from an account after death of a party is liable to account to the personal representative of the decedent for a proportionate share of the amount received to which the decedent, immediately before death, was beneficially entitled under section 30-2722, to the extent necessary to discharge the amounts described in subsection (a) of this section remaining unpaid after application of the decedent's estate. A proceeding to assert the liability for claims against the estate and statutory allowances may not be commenced unless the personal representative has received a written demand by the surviving spouse, a creditor, a child, or a person acting for a child of the decedent. The proceeding must be commenced within one year after death of the decedent.

(c) A surviving party or beneficiary under sections 30-2716 to 30-2733 against whom a proceeding to account is brought may join as a party to the proceeding a surviving party or beneficiary of any other account of the decedent or a surviving owner or beneficiary under sections 30-2734 to 30-2745 of any securities or securities account of the decedent or proceeds thereof.

(d) Sums recovered by the personal representative must be administered as part of the decedent's estate. This section does not affect the protection from claims of the personal representative or estate of a deceased party provided in section

30-2732 for a financial institution that makes payment in accordance with the terms of the account.

Neb. Rev. Stat. § 30-2743 provides with respect to a transfer resulting from a right of survivorship or POD designation or TOD registration under the applicable statutes:

(a) If other assets of the estate are insufficient, a transfer resulting from a right of survivorship, POD designation or TOD registration under sections 30-2734 to 30-2745 is not effective against the estate of a deceased owner to the extent needed to pay claims against the estate, statutory allowances to the surviving spouse and children, taxes, and expenses of administration.

(b) A surviving owner or beneficiary who receives registered or reregistered securities or securities accounts or proceeds thereof after the death of a party is liable to account to the personal representative of the decedent for a proportionate share of the amount received to which the decedent, immediately before death, was beneficially entitled, to the extent necessary to discharge the amounts described in subsection (a) of this section remaining unpaid after application of the decedent's estate. A proceeding to assert the liability for claims against the estate and statutory allowances may not be commenced unless the personal representative has received a written demand by the surviving spouse, a creditor, a child, or a person acting for a child of the decedent. The proceeding must be commenced within one year after the death of the decedent.

(c) A surviving owner or beneficiary against whom a proceeding to account is brought may join as a party to the proceeding a surviving owner or beneficiary under sections 30-2734 to 30-2745 of any other security or securities account of the decedent or proceeds thereof or a surviving party or beneficiary of any account under sections 30-2716 to 30-2733.

(d) Sums recovered by the personal representative must be administered as a part of the decedent's estate. This section does not affect the protection from claims of the personal representative or estate of a deceased owner provided in section 30-2741 for an issuer or registering entity that makes payment in accordance with the terms of the security registration.

Similarly, the Nebraska Uniform Trust Code in Neb. Rev. Stat. § 30-3850(3) and

(4) provides with respect to a transfer to a trust that was revocable at the transferor's death:

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the

settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances. A proceeding to assert the liability for claims against the estate and statutory allowances may not be commenced unless the personal representative has received a written demand by the surviving spouse, a creditor, a child, or a person acting for a child of the decedent. The proceeding must be commenced within one year after the death of the decedent. Sums recovered by the personal representative of the settlor's estate must be administered as part of the decedent's estate. The liability created by this subdivision shall not apply to any assets to the extent that such assets are otherwise exempt under the laws of this state or under federal law.

(4) A beneficiary of a trust subject to subdivision (a)(3) of this section who receives one or more distributions from the trust after the death of the settlor against whom a proceeding to account is brought may join as a party to the proceeding any other beneficiary who has received a distribution from that trust or any other trust subject to subdivision (a)(3) of this section, any surviving owner or beneficiary under sections 30-2734 to 30-2745 of any other security or securities account of the decedent or proceeds thereof, or a surviving party or beneficiary of any account under sections 30-2716 to 30-2733.

Section 295 of LB 354 (1974) [then Uniform Probate Code § 6-201, codified as Neb. Rev. Stat. § 30-2714 (Reissue 1975), now Neb. Rev. Stat. § 30-2715] stated:

(a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance or other written instrument effective as a contract, gift, conveyance, or trust is deemed to be nontestamentary, and this code does not invalidate the instrument or any provision . . . (3) that any property which is the subject of the instrument shall pass to a person designated by the decedent

(b) Nothing in this section limits the rights of creditors under other laws of this state.

LB 354 (1974) also contained a provision that “No multiple-party account will be effective against an estate of a deceased party to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration, including statutory allowances to the surviving spouse, minor children and dependent children, if other assets of the estate are insufficient.”

[LB 354 § 288, then Uniform Probate Code § 6-107, codified as Neb. Rev. Stat. § 30-2707 (Reissue 1975)].

These statutes remained unchanged until 1993. In LB 250, the 1993 Legislature passed new statutes for nonprobate transfers and repealed the former sections.

Section 1 of LB 250 (1993) updated the language of the previous Section 30-2714 which was codified as Neb. Rev. Stat. § 30-2715 (Reissue 1995), its current statutory number.

The 1993 enactment stated:

(a) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, individual retirement plan, employee benefit plan, trust, marital property agreement, or other written instrument of a similar nature is nontestamentary. . . .

(d) This section does not limit rights of creditors under other laws of this state.

Section 12 of LB 250 (1993) enacted provisions subjecting surviving parties and beneficiaries of specified “accounts” to contribution to the PR for claims of creditors if the probate estate assets were not sufficient. This section became Neb. Rev. Stat. § 30-2726, set out above. It has remained unchanged since 1993.

Section 28 of LB 250 (1993) is part of the Uniform Transfer on Death Security Registration sections. It also has remained unchanged since 1993 and provides in Neb. Rev. Stat. § 30-2742:

(a) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and sections 30-2734 to 30-2745 and is not testamentary.

(b) Sections 30-2734 to 30-2745 do not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state.

Section 29 of LB 250 (1993) enacted Neb. Rev. Stat. § 30-2743, set out above. It also has remained unchanged since then.

The foregoing was the status of Nebraska law with respect to nonprobate property and creditors' claims involving nonprobate property in 1994 when current Neb. Rev. Stat. § 68-919 relating to the medical assistance program reimbursement was first enacted. It should also be noted that the members of the 1994 Nebraska Legislature were essentially the same body which had passed LB 250 in 1993.

Section 39 of LB 1224 (1994), now Neb. Rev. Stat. § 68-919(1), established the conditions upon which the Department of Health and Human Services can seek reimbursement. Section 39 stated: "(1) The estate of a decedent who has received medical assistance benefits under the medical assistance program established under section 68-1018 shall be indebted to the Department of Social Services for the total amount paid for medical assistance on behalf of the decedent if:". Section 39 also provided: "(4) In any probate proceedings in which the department has filed a claim under this section, no additional evidence of foundation shall be required for the admission of the department's payment record supporting its claim if the payment record bears the seal of the department, is certified as a true copy, and bears the signature of an authorized representative of the department." Section 40 of LB 1244 additionally amended Neb. Rev. Stat. § 30-2487 (the Probate Code provision on priority of claims) to give a significant priority to "claims filed by the Department of Social Services pursuant to section 39 of this Act" over most other claims against the estate and even debts and taxes with preferences under other Nebraska laws.

The Legislature has not only continued the prior rules with respect to nonprobate property since 1993 and 1994 but has enhanced the statutes significantly twice since then. Enactment of the Nebraska Uniform Trust Code in 2003 (LB 130, § 50) added the language in Neb. Rev. Stat. § 30-3850(3) and (4), set out above.

The 2010 Nebraska Legislature adopted provisions for motor vehicle certificates of title with transfer on death designations. Section 24 of LB 712 (2010) amended Neb. Rev. Stat. § 30-2715(a) by adding “certificate of title” to the list of statutorily recognized nonprobate transfers. Section 23 of LB 712 added language relating to motor vehicle transfer on death certificates of title, which has been codified as Neb. Rev. Stat. § 30-2715.01:

(1) A person who owns a motor vehicle may provide for the transfer of such vehicle upon his or her death or the death of the last survivor of a joint tenancy with right of survivorship by including in the certificate of title a designation of beneficiary or beneficiaries to whom the vehicle will be transferred on the death of the owner or the last survivor, subject to the rights of all lienholders, whether created before, simultaneously with, or after the creation of the transfer-on-death interest. A trust may be the beneficiary of a transfer-on-death certificate of title. The certificate of title shall include the name of the owner, the name of any tenant-in-common owner or the name of any joint-tenant-with-right-of-survivorship owner, followed in substance by the words transfer on death to (name of beneficiary or beneficiaries or name of trustee if a trust is to be the beneficiary). The abbreviation TOD may be used instead of the words transfer on death to.

(2) A transfer-on-death beneficiary shall have no interest in the motor vehicle until the death of the owner or the last survivor of the joint-tenant-with-right-of-survivorship owners. A beneficiary designation may be changed at any time by the owner or by the joint-tenant-with-right-of-survivorship owners then surviving without the consent of any beneficiary by filing an application for a subsequent certificate of title.

(3) Ownership of a motor vehicle which has a designation of beneficiary as provided in subsection (1) of this section and for which an application for a subsequent certificate of title has not been filed shall vest in the designated beneficiary or beneficiaries on the death of the owner or the last of the joint-tenant-with-right-of-survivorship owners, subject to the rights of all lienholders.

The notice to creditors requirement of the Nebraska Uniform Probate Code was amended in 2008 (LB 928 § 1) to require the Personal Representative to mail notice to the Department of Health and Human Services in situations where the decedent might have been eligible for benefits. That amendment added the following language to Neb. Rev. Stat. § 30-2483:

If the decedent was fifty-five years of age or older or resided in a medical institution as defined in subsection (1) of section 68-819, the notice shall also be mailed to the Department of Health and Human Services with the decedent's social security number and, if available upon reasonable investigation, the name and social security number of the decedent's spouse if such spouse is deceased.

16. Section 16. Optional Form of Transfer on Death Deed

a. Uniform Act (with Legislative Note)

The following form may be used to create a transfer on death deed. The other sections of this [act] govern the effect of this or any other instrument used to create a transfer on death deed:

(front of form)

REVOCABLE TRANSFER ON DEATH DEED

NOTICE TO OWNER

You should carefully read all information on the other side of this form. You May Want to Consult a Lawyer Before Using This Form.

This form must be recorded before your death, or it will not be effective.

IDENTIFYING INFORMATION

Owner or Owners Making This Deed:

Printed name

Mailing address

Printed name

Mailing address

Legal description of the property:

PRIMARY BENEFICIARY

I designate the following beneficiary if the beneficiary survives me.

Printed name

Mailing address, if available

ALTERNATE BENEFICIARY – Optional

If my primary beneficiary does not survive me, I designate the following alternate beneficiary if that beneficiary survives me.

Printed name

Mailing address, if available

TRANSFER ON DEATH

At my death, I transfer my interest in the described property to the beneficiaries as designated above.

Before my death, I have the right to revoke this deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS DEED

Signature Date

[(SEAL)]_____

Signature Date

[(SEAL)]_____

ACKNOWLEDGMENT

(insert acknowledgment for deed here)

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

What does the Transfer on Death (TOD) deed do? When you die, this deed transfers the described property, subject to any liens or mortgages (or other encumbrances) on the property at your death. Probate is not required. The TOD deed has no effect until you die. You can revoke it at any time. You are also free to transfer the property to someone else during your lifetime. If you do not own any interest in the property when you die, this deed will have no effect.

How do I make a TOD deed? Complete this form. Have it acknowledged before a notary public or other individual authorized by law to take acknowledgments. Record the form in each

[county] where any part of the property is located. The form has no effect unless it is acknowledged and recorded before your death.

Is the “legal description” of the property necessary? Yes.

How do I find the “legal description” of the property? This information may be on the deed you received when you became an owner of the property. This information may also be available in [the office of the county recorder of deeds] for the [county] where the property is located. If you are not absolutely sure, consult a lawyer.

Can I change my mind before I record the TOD deed? Yes. If you have not yet recorded the deed and want to change your mind, simply tear up or otherwise destroy the deed.

How do I “record” the TOD deed? Take the completed and acknowledged form to [the office of the county recorder of deeds] of the [county] where the property is located. Follow the instructions given by the [county recorder] to make the form part of the official property records. If the property is in more than one [county], you should record the deed in each [county].

Can I later revoke the TOD deed if I change my mind? Yes. You can revoke the TOD deed. No one, including the beneficiaries, can prevent you from revoking the deed.

How do I revoke the TOD deed after it is recorded? There are three ways to revoke a recorded TOD deed: (1) Complete and acknowledge a revocation form, and record it in each [county] where the property is located. (2) Complete and acknowledge a new TOD deed that disposes of the same property, and record it in each [county] where the property is located. (3) Transfer the property to someone else during your lifetime by a recorded deed that expressly revokes the TOD deed. You may not revoke the TOD deed by will.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

Do I need to tell the beneficiaries about the TOD deed? No, but it is recommended.

Secrecy can cause later complications and might make it easier for others to commit fraud.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, you are encouraged to consult a lawyer.]

***Legislative Note:** This section and the next section are bracketed for states wishing to provide optional statutory forms. An enacting jurisdiction should review its statutory requirements for deeds and for acknowledgments and amend the statutory forms provided in Sections 16 and 17 where necessary for conformity with those requirements. If an enacting jurisdiction changes the act, the jurisdiction should review the answers to the common questions in Sections 16 and 17 to ensure the answers remain accurate.*

b. NCCUSL Comment

The form in this section is optional. The section is based on Section 4 of the Uniform Health-Care Decisions Act.

Ten of the thirteen states with transfer on death deed statutes provide a statutory form. See Ariz. Stat. §33-405(K); Ark. Stat. §18-12-608(h), Colo. Stat. §15-15-404; Kans. Stat. §593502; Minn. Stat. §507.071(24); Mont. Stat. §72-6-121(13); Nev. Stat. §111.109(6); N.M. Stat. §45-6-401(C); Ohio Code §5302.22(A); Okla. H.B. 2639 §3.

The transfer on death deed is likely to be used by consumers for whom the preparation of a tailored inter vivos revocable trust is too costly. The form in this section is designed to be understandable and consumer friendly.

For examples of statutory forms containing answers to questions likely to be asked by consumers, see the Illinois statutory forms for powers of attorney. 755 Ill. Comp. Stat. 45/3-3 (power of attorney for property); 755 Ill. Comp. Stat. 45/4-10 (power of attorney for health care).

c. LB 756

Sec. 18. The following form may be used to create a transfer on death deed. The other provisions of the Nebraska Uniform Real Property Transfer on Death Act govern the effect of this or any other instrument used to create a transfer on death deed:

(front of form)

REVOCABLE TRANSFER ON DEATH DEED

NOTICE TO OWNER

You should carefully read all information on the other side of this form. You May Want to Consult a Lawyer Before Using This Form. If you are married and both spouses do not sign this deed, the deed may be void.

This form must be recorded before your death, or it will not be effective.

IDENTIFYING INFORMATION

Owner or Owners Making This Deed:

.....
.....

Printed name.....

Mailing address

Printed name.....

Mailing address.....

Legal description of the property:

.....

PRIMARY BENEFICIARY

I designate the following beneficiary if the beneficiary survives me.

Printed name.....

Mailing address, if available.....

ALTERNATE BENEFICIARY - Optional

If my primary beneficiary does not survive me, I designate the following alternate beneficiary if that beneficiary survives me.

Printed name.....

Mailing address, if available.....

TRANSFER ON DEATH

At my death, I transfer my interest in the described property to the beneficiaries as designated above.

Before my death, I have the right to revoke this deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS DEED

.....

(SEAL)

Signature.....

Date.....

(SEAL)

Signature.....

Date.....

ACKNOWLEDGEMENT

(insert acknowledgement for deed here)

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

What does the Transfer on Death (TOD) deed do? When you die, this deed transfers the described property, subject to any liens or mortgages (or other encumbrances) on the property at your death. Probate is not required. The TOD deed has no effect until you die. You can revoke it

at any time. You are also free to transfer the property to someone else during your lifetime. If you do not own any interest in the property when you die, this deed will have no effect.

How do I make a TOD deed? Complete this form. Have it acknowledged before a notary public or other individual authorized by law to take acknowledgements. Record the form in each county where any part of the property is located. The form has no effect unless it is acknowledged and recorded before your death.

Is the “legal description” of the property necessary? Yes.

How do I find the “legal description” of the property? This information may be on the deed you received when you became an owner of the property. This information may also be available in the office of the register of deeds for the county where the property is located. If you are not absolutely sure, consult a lawyer.

Can I change my mind before I record the TOD deed? Yes. If you have not yet recorded the deed and want to change your mind, simply tear up or otherwise destroy the deed.

How do I “record” the TOD deed? Take the completed and acknowledged form to the office of the register of deeds of the county where the property is located. Follow the instructions given by the register of deeds to make the form part of the official property records. If the property is in more than one county, you should record the deed in each county.

Can I later revoke the TOD deed if I change my mind? Yes. You can revoke the TOD deed. No one, including the beneficiaries, can prevent you from revoking the deed.

How do I revoke the TOD deed after it is recorded? There are three ways to revoke a recorded TOD deed: (1) Complete and acknowledge a revocation form, and record it in each county where the property is located. (2) Complete and acknowledge a new TOD deed that disposes of the same property, and record it in each county where the property is located.

(3) Transfer the property to someone else during your lifetime by a recorded deed that expressly revokes the TOD deed. You may not revoke the TOD deed by will.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

Do I need to tell the beneficiaries about the TOD deed? No, but it is recommended. Secrecy can cause later complications and might make it easier for others to commit fraud.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, you are encouraged to consult a lawyer.

d. LR 488 Comment

The Nebraska Uniform Real Property Transfer on Death Act provides a valuable real estate transaction option and estate planning tool not contained in current Nebraska statutory or common law. The optional form of Revocable Transfer on Death Deed and Common Questions About the Use of This Form give valuable information on the law and practice and should lead to the proper and standardized use of transfer on death deeds.

Two warnings should be added to the deed form and explanatory information. There should be a warning that the property transferred remains subject to Nebraska Inheritance Taxation to the same extent as if owned outright by the transferor at death. There should also be a warning that the designated beneficiary is personally liable 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 (as discussed in the LR 488 Comment on Section 16 of LB 756, Medicaid Recovery, above).

17. Section 17. Optional Form of Revocation

a. Uniform Act

The following form may be used to create an instrument of revocation under this [act].
The other sections of this [act] govern the effect of this or any other instrument used to revoke a transfer on death deed.

(front of form)

REVOCATION OF TRANSFER ON DEATH DEED

NOTICE TO OWNER

This revocation must be recorded before you die or it will not be effective. This revocation is effective only as to the interests in the property of owners who sign this revocation.

IDENTIFYING INFORMATION

Owner or Owners of Property Making This Revocation:

Printed name

Mailing address

Printed name

Mailing address

Legal description of the property:

REVOCATION

I revoke all my previous transfers of this property by transfer on death deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS REVOCATION

Signature Date

[(SEAL)]

_____[(SEAL)]_____

Signature Date

ACKNOWLEDGMENT

(insert acknowledgment here)

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

How do I use this form to revoke a Transfer on Death (TOD) deed? Complete this form.

Have it acknowledged before a notary public or other individual authorized to take acknowledgments. Record the form in the public records in [the office of the county recorder of deeds] of each [county] where the property is located. The form must be acknowledged and recorded before your death or it has no effect.

How do I find the “legal description” of the property? This information may be on the TOD deed. It may also be available in [the office of the county recorder of deeds] for the [county] where the property is located. If you are not absolutely sure, consult a lawyer.

How do I “record” the form? Take the completed and acknowledged form to [the office of the county recorder of deeds] of the [county] where the property is located. Follow the instructions given by the [county recorder] to make the form part of the official property records. If the property is located in more than one [county], you should record the form in each of those [counties].

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, consult a lawyer.]

b. NCCUSL Comment

The form in this section is optional. The section is based on Section 4 of the Uniform Health-Care Decisions Act.

Six of the thirteen states with transfer on death deed statutes provide a statutory form for revocation. See Ariz. Stat. §33-405(L); Ark. Stat. §18-12-608(i), Colo. Stat. §15-15-405; Minn. Stat. §507.071(25); Mont. Stat. §72-6-121(14); Nev. Stat. §111.109(7).

The aim of the form in this section is to be understandable and consumer friendly.

c. LB 756

Sec. 19. The following form may be used to create an instrument of revocation under the Nebraska Uniform Real Property Transfer on Death Act. The other provisions of the act govern the effect of this or any other instrument used to revoke a transfer on death deed.

(front of form)

REVOCATION OF TRANSFER ON DEATH DEED

NOTICE TO OWNER

This revocation must be recorded before you die or it will not be effective. This revocation is effective only as to the interests in the property of owners who sign this revocation.

IDENTIFYING INFORMATION

Owner or Owners of Property Making This Revocation:

.....
.....

Printed name.....

Mailing address.....

Printed name.....

Mailing address.....

Legal description of the property:

.....
REVOCATION

I revoke all my previous transfers of this property by transfer on death deed.

SIGNATURE OF OWNER OR OWNERS MAKING THIS REVOCATION

.....
(SEAL)

Signature.....

Date.....

(SEAL)

Signature.....

Date.....

ACKNOWLEDGEMENT

(insert acknowledgement here)

(back of form)

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

How do I use this form to revoke a Transfer on Death (TOD) deed? Complete this form.

Have it acknowledged before a notary public or other individual authorized to take acknowledgements. Record the form in the public records in the office of the register of deeds of each county where the property is located. The form must be acknowledged and recorded before your death or it has no effect.

How do I find the “legal description” of the property? This information may be on the TOD deed. It may also be available in the office of the register of deeds for the county where the property is located. If you are not absolutely sure, consult a lawyer.

How do I “record” the form? Take the completed and acknowledged form to the office of the register of deeds of the county where the property is located. Follow the instructions given by the register of deeds to make the form part of the official property records. If the property is located in more than one county, you should record the form in each of those counties.

I am being pressured to complete this form. What should I do? Do not complete this form under pressure. Seek help from a trusted family member, friend, or lawyer.

I have other questions about this form. What should I do? This form is designed to fit some but not all situations. If you have other questions, consult a lawyer.

d. LR 488 Comment

The optional Revocation of Transfer on Death Deed and Common Questions About the Use of This Form give valuable information on the law and practice relating to revocation of transfer on death deeds and should lead to proper and standardized practices throughout the State of Nebraska.

18. Section 18. Uniformity of Application and Construction

a. Uniform Act

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

b. LB 756

Sec. 20. In applying and construing the Nebraska Uniform Real Property Transfer on Death Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

c. LR 488 Comment

This provision is standard in Uniform Acts; the Nebraska Legislature enacted a virtually identical provision in the Nebraska Uniform Trust Code. *See*: Neb. Rev. Stat. § 30-38,108.

19. Section 19. Relation To Electronic Signatures in Global and National Commerce Act

a. Uniform Act

This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

b. LB 756

Sec. 21. The Nebraska Uniform Real Property Transfer on Death Act modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq., but does not modify, limit, or supersede section 101(c) of that act, 15 U.S.C. 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. 7003(b).

c. LR 488 Comment

This section is similar to provision in the Nebraska Uniform Trust Code. *See*: Neb. Rev. Stat. § 30-38,109.

20. Section 20. Repeals

a. Uniform Act (with Legislative Note)

The following are repealed:

Legislative Note: This section is for states wishing to replace their transfer on death deed statutes with this Act.

b. LB 756

Sec. 26. Original sections 30-2352, 30-2354, and 76-902, Reissue Revised Statutes of Nebraska, are repealed.

21. Section 25. Operative Date

a. Uniform Act

This [act] takes effect

b. LB 756

Sec. 25. This act becomes operative on January 1, 2011.

c. LR 488 Comment

The operative date should be advanced to January 1, 2012. Section 3 of LB 756, above, provides that the Act “applies to a transfer on death deed made before, on, or after the operative date of this act by a transferor dying on or after the operative date of this act.”

22. Medicaid Recovery

a. LB 756

Sec. 16. Real property shall be subject to recovery of medical assistance paid as provided in section 68-919 even if a transfer on death deed is recorded. The right to recover 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. Upon the death of the transferor, the beneficiary may notify the Department of Health and Human Services of the death of the transferor and provide to the department a certified copy of the death certificate of the transferor. A copy of the notice to the department and of the certified copy of the death certificate may be recorded with the register of deeds. The department shall record a statement of the amount of recoverable medical assistance, and if the amount is zero, the department shall so state, within sixty days after notice has been sent to the department. If the department fails to record such a statement during that sixty-day period, recovery under section 68-919 is waived. If the department's statement shows that no medical assistance has been provided, then the department may instead mail the statement to the beneficiary. The cost of recording the department's statement shall be added to the medical assistance amount to be recovered. If the medical assistance amount has not been paid to the department within one hundred twenty days after the department has recorded the statement, the department may foreclose upon the property in the same manner as provided for a mortgage. The amount of the medical assistance recovery by the department shall be superior to the title of the beneficiary. If husband and wife are joint owners of a piece of real property that has a transfer on death deed, the notification by the beneficiary shall not be made until both husband and wife

have died. If there are joint owners other than spouses, the notification shall not be made until all joint owners who signed the transfer on death deed have died.

b. LR 488 Comment

The Uniform Real Property Transfer On Death Act is designed with an intention that the various claims of creditors, surviving spouses and others will be dealt with through the procedures otherwise applicable to nonprobate transfers in each of the fifty states adopting the Uniform Real Property Transfer on Death Act. Section 16 of LB 756 was intended to relate the recovery of medicaid assistance by the Nebraska Department of Health and Human Services to Nebraska's existing procedures for enforcing claims. Section 16 of LB 756 was poorly crafted and did not carry out this purpose of continuing Nebraska's statutory procedures for asserting claims against recipients of nonprobate property. Those procedures are specified in Section 15 of LB 756 and are explained in detail in the LR 488 Comment on that section, above.

Section 16 should be substantially redrafted. The crux of the section should be:

A beneficiary to whom an interest is transferred by a transfer on death deed shall be personally liable to account for medicaid reimbursement pursuant to section 68-919 and section 15 of the Nebraska Uniform Real Property Transfer on Death Act to the extent necessary to discharge any such claim remaining unpaid after application of the assets of the transferor's estate. Such liability shall be limited to the value of the interest transferred to the beneficiary. The right to recover 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.

The Department of Health and Human Services apparently has sufficient authority at present to require a medicaid recipient (or other person) to state on oath the nature and extent of her or his property interests and to advise the Department of any changes. The number of medicaid recipients using transfer on death deeds is likely to be relatively small compared with the total number of transferors of transfer on death deeds. Further, the amount of property or income involved in transfer on death deeds by medicaid recipients will be relatively small. If the

large amount of property or income is involved, the transferor would not be entitled to medicaid benefits in the first place. If the present authority for requiring disclosures does not cover transfer on death deeds, the authority should be specified in section 68-919.

The Department of Health and Human Services objected to section 16 of LB 756 in 2010 to the extent that it established a new and unfunded method of enforcing claims after the death of a transferor. The foregoing revision of section 16, and possibly section 68-919, should address those concerns, not initiate major new issues relating to real estate titles, not require additional funding for the Department, and maintain a consistency and integration with long standing Nebraska claims procedures under the Nebraska Uniform Probate Code. Changing general state law concerning recovery of medicaid benefits is outside of the scope of the Uniform Transfer of Real Property on Death Act and is also outside the scope of this legislative study report.

23. Contract To Make or Not To Revoke Transfer on Death Deed

a. LB 756

Sec. 17. A contract to make a transfer on death deed, or not to revoke a transfer on death deed, if executed after the operative date of this act, can be established only by a writing signed by the transferor evidencing the contract.

b. LR 488 Comment

This section mirrors subsection (3) of section 30-2351, contracts concerning succession, which states:

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after January 1, 1977, can be established only by . . .
(3) a writing signed by the decedent evidencing the contract.

The purpose of this section in LB 756 would be more clear if stated following the second reference to “deed,”: “can be established only by a writing evidencing the contract signed by the transferor after the operative date of this act.”

24. Renunciation of Succession

a. LB 756

Sec. 22. Section 30-2352, Reissue Revised Statutes of Nebraska, is amended to read:

30-2352 (a)(1) A person (or the representative of a deceased, incapacitated, or protected person) who is an heir, devisee, person succeeding to a renounced interest, donee, beneficiary under a testamentary or nontestamentary instrument, donee of a power of appointment, grantee, surviving joint owner or surviving joint tenant, beneficiary, or owner of an insurance contract or any incident of ownership therein, beneficiary or person designated to take pursuant to a power of appointment exercised by a testamentary or nontestamentary instrument, person who has a statutory entitlement to or election with respect to property pursuant to the Nebraska Probate Code, designated beneficiary of a transfer on death deed, or recipient of any beneficial interest under any testamentary or nontestamentary instrument, may renounce in whole or in part, or with reference to specific parts, fractional shares, undivided portions or assets thereof, by filing a written instrument of renunciation within the time and at the place hereinafter provided.

(2) The instrument shall (i) describe the property or part thereof or the interest therein renounced, (ii) be signed and acknowledged by the person renouncing in the manner provided for in the execution of deeds of real estate, (iii) declare the renunciation and the extent thereof, and (iv) declare that the renunciation is an irrevocable and unqualified refusal to accept the renounced interest.

(3) The appropriate court in a proceeding under section 30-3812, may direct or permit a trustee under a testamentary or nontestamentary instrument to renounce any restriction on or power of administration, management, or allocation of benefit upon finding that such restrictions

on the exercise of such power may defeat or impair the accomplishment of the purposes of the trust whether by the imposition of tax or the allocation of beneficial interest inconsistent with such purposes or by other reason. Such authority shall be exercised after hearing and upon notice to qualified beneficiaries as defined in section 30-3803, in the manner directed by the court.

(b) The instrument specified in (a)(1) and (a)(2) must be received by the transferor of the interest, his or her legal representative, the personal representative of a deceased transferor, the trustee of any trust in which the interest being renounced exists, or the holder of the legal title to the property to which the interest relates. To be effective for purposes of determining inheritance and estate taxes under articles 20 and 21 of Chapter 77, the instrument must be received not later than the date which is nine months after the later of (i) the date on which the transfer creating the interest in such person is made, or (ii) the date on which such person attains age twenty-one. If the circumstances which establish the right of a person to renounce an interest arise as a result of the death of an individual, the instrument shall also be filed in the court of the county where proceedings concerning the decedent's estate are pending, or where they would be pending if commenced. If an interest in real estate is renounced, a copy of the instrument shall also be recorded in the office of the register of deeds in the county in which the real estate lies. No person entitled to a copy of the instrument shall be liable for any proper distribution or disposition made without actual notice of the renunciation and no such person making a proper distribution or disposition in reliance upon the renunciation shall be liable for any such distribution or disposition in the absence of actual notice that an action has been instituted contesting the validity of the renunciation.

(c) Unless the transferor of the interest has otherwise indicated in the instrument creating the interest, the interest renounced, and any future interest which is to take effect in possession or

enjoyment at or after the termination of the interest renounced, passes as if the person renouncing had predeceased the decedent or had died prior to the date on which the transfer creating the interest in such person is made, as the case may be, if the renunciation is within the time periods set forth in subsection (b) and if not within such time periods the interest renounced, and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest renounced, passes as if the person renouncing had died on the date the interest was renounced. The person renouncing shall have no power to direct how the interest being renounced shall pass, except that the renunciation of an interest for which the right to renounce was established by the death of an individual shall, in the case of the spouse of the decedent, relate only to that statutory provision or that provision of the instrument creating the interest being renounced and shall not preclude the spouse from receiving the benefits of the renounced interest which may be derived as a result of the renounced interest passing pursuant to other statutory provisions or pursuant to other provisions of the instrument creating the interest unless such further benefits are also renounced. In every case when the renunciation is within the time periods set forth in subsection (b) the renunciation relates back for all purposes to the date of death of the decedent or the date on which the transfer creating the interest in such person is made, as the case may be.

(d) Any (1) assignment, conveyance, encumbrance, pledge, or transfer of property therein or any contract therefor, (2) written waiver of the right to renounce or any acceptance of property or benefits therefrom or an interest therein by an heir, devisee, person succeeding to a renounced interest, donee, beneficiary under a testamentary or nontestamentary instrument, donee of a power of appointment, grantee, surviving joint owner or surviving joint tenant, beneficiary or owner of an insurance contract or any incident of ownership therein, beneficiary or person

designated to take pursuant to a power of appointment exercised by a testamentary or nontestamentary instrument, person who has a statutory entitlement to or election with respect to property pursuant to the Nebraska Probate Code, or recipient of any beneficial interest under any testamentary or nontestamentary instrument, or (3) sale or other disposition of property pursuant to judicial process, made within the time periods set forth in subsection (b) shall not bar the right to renounce, but shall make a subsequent renunciation within the time period set forth in subsection (b) of this section ineffective for purposes of determination of inheritance and estate taxes under articles 20 and 21 of Chapter 77.

(e) Within thirty days of receipt of a written instrument of renunciation by the transferor of the interest, his or her legal representative, the personal representative of the decedent, the trustee of any trust in which the interest being renounced exists, or the holder of the legal title to the property to which the interest relates, as the case may be, such person shall attempt to notify in writing those persons who are known or ascertainable with reasonable diligence who shall be recipients or potential recipients of the renounced interest of the renunciation and the interest or potential interest such recipient shall receive as a result of the renunciation.

(f) The right to renounce granted by this section exists irrespective of any limitation on the interest of the person renouncing in the nature of a spendthrift provision or similar restriction. A trust beneficiary whose interest is subject to any limitation in the nature of a spendthrift provision or similar restriction may assign, sell, or otherwise convey such interest or any part thereof upon a finding by a court in a proceeding under section 30-3812 that the rights of other beneficiaries would not be impaired and that such assignment, sale, or other conveyance would not result in any substantial benefit to nonbeneficiaries of the trust at the expense of the trust or trust beneficiaries. Such finding may be made after hearing and upon notice to all known persons

beneficially interested in such trust, in the manner directed by the court. (g) This section does not abridge the right of any person to assign, convey, release, or renounce any property arising under any other section of this code or other statute. (h) Any interest in property which exists on July 19, 1980, may be renounced after July 19, 1980, as provided herein. An interest which has arisen prior to July 19, 1980, in any person other than the person renouncing is not destroyed or diminished by any action of the person renouncing taken under this section.

b. LR 488 Comment

This section simply adds “designated beneficiary of a transfer on death deed” to the many other types of property interest subject to disclaimer rules and procedures specified in current section 30-2352.

25. Effect of Homicide

a. LB 756

Sec. 23. Section 30-2354, Reissue Revised Statutes of Nebraska, is amended to read:

30-2354 (a) A surviving spouse, heir or devisee who feloniously and intentionally kills or aids and abets the killing of the decedent is not entitled to any benefits under the will or under this article, and the estate of the decedent passes as if such spouse, heir, or devisee had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of such devisee passes as if the devisee had predeceased the decedent.

(b) Any joint tenant who feloniously and intentionally kills or aids and abets the killing of another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and such joint tenant has no rights by survivorship. This provision applies to joint tenancies and tenancies by the entirety in real and personal property, joint accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of co-ownership with survivorship incidents.

(c) A named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills or aids and abets the killing of the principal obligee or the individual upon whose life the policy is issued is not entitled to any benefit under the bond, policy or other contractual arrangement, and it becomes payable as though such beneficiary has predeceased the decedent.

(d) Real property conveyed to a beneficiary of a transfer on death deed who feloniously and intentionally kills or aids and abets the killing of the transferor who signed the transfer on

death deed or any other owner of the real property shall pass as if the beneficiary had predeceased the transferor.

~~(d)~~ (e) Any other acquisition of property or interest by the killer or by one who aids and abets the killer is treated in accordance with the principles of this section.

~~(e)~~ (f) A final judgment of conviction of felonious and intentional killing or aiding and abetting therein is conclusive for purposes of this section. In the absence of a conviction of felonious and intentional killing or aiding and abetting therein, the court may determine by a preponderance of evidence whether the killing or aiding and abetting therein was felonious and intentional for purposes of this section.

~~(f)~~ (g) This section does not affect the rights of any person who, before rights under this section have been adjudicated, purchases, from the killer or aider and abettor for value and without notice, property which the killer or aider and abettor would have acquired except for this section, but the killer or aider and abettor is liable for the amount of the proceeds or the value of the property. Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a claim under this section.

b. LR 488 Comment

This section adds to current Nebraska section 30-2354, covering an expansive group of property interests, that the perpetrator of a homicide of the transferor does not take property under a transfer on death deed. Consideration should be given to changes in the proposed language of LB 756: (1) in subsection (d), page 24, line 17, “conveyed to” should be deleted and “specified for” substituted; “designated” should be added before “beneficiary”; so that the line

reads “Real property specified for a designated beneficiary of a transfer”; and (2) on page 24, line 21, insert “designated” before “beneficiary”.

26. Documentary Stamp Tax Exemptions

a. LB 756

Sec. 24. Section 76-902, Reissue Revised Statutes of Nebraska, is amended to read:

76-902 The tax imposed by section 76-901 shall not apply to:

(1) Deeds recorded prior to November 18, 1965;

(2) Deeds to property transferred by or to the United States of America, the State of Nebraska, or any of their agencies or political subdivisions;

(3) Deeds which secure or release a debt or other obligation;

(4) Deeds which, without additional consideration, confirm, correct, modify, or supplement a deed previously recorded but which do not extend or limit existing title or interest;

(5)(a) Deeds between husband and wife, or parent and child, without actual consideration therefor, and (b) deeds to or from a family corporation, partnership, or limited liability company when all the shares of stock of the corporation or interest in the partnership or limited liability company are owned by members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, and their spouses, for no consideration other than the issuance of stock of the corporation or interest in the partnership or limited liability company to such family members or the return of the stock to the corporation in partial or complete liquidation of the corporation or deeds in dissolution of the interest in the partnership or limited liability company. In order to qualify for the exemption for family corporations, partnerships, or limited liability companies, the property shall be transferred in the name of the corporation or partnership and not in the name of the individual shareholders, partners, or members;

(6) Tax deeds;

(7) Deeds of partition;

(8) Deeds made pursuant to mergers, consolidations, sales, or transfers of the assets of corporations pursuant to plans of merger or consolidation filed with the office of Secretary of State. A copy of such plan filed with the Secretary of State shall be presented to the register of deeds before such exemption is granted;

(9) Deeds made by a subsidiary corporation to its parent corporation for no consideration other than the cancellation or surrender of the subsidiary's stock;

(10) Cemetery deeds;

(11) Mineral deeds;

(12) Deeds executed pursuant to court decrees;

(13) Land contracts;

(14) Deeds which release a reversionary interest, a condition subsequent or precedent, a restriction, or any other contingent interest; (15) Deeds of distribution executed by a personal representative conveying to devisees or heirs property passing by testate or intestate succession;

(16) Transfer on death deeds;

~~(16)~~ (17) Deeds transferring property located within the boundaries of an Indian reservation if the grantor or grantee is a reservation Indian;

~~(17)~~ (18) Deeds transferring property into a trust if the transfer of the same property would be exempt if the transfer was made directly from the grantor to the beneficiary or beneficiaries under the trust. No such exemption shall be granted unless the register of deeds is presented with a signed statement certifying that the transfer of the property is made under such circumstances as to come within one of the exemptions specified in this section and that

evidence supporting the exemption is maintained by the person signing the statement and is available for inspection by the Department of Revenue;

~~(18)~~ (19) Deeds transferring property from a trustee to a beneficiary of a trust;

~~(19)~~ (20) Deeds which convey property held in the name of any partnership or limited liability company not subject to subdivision (5) of this section to any partner in the partnership or member of the limited liability company or to his or her spouse;

~~(20)~~ (21) Leases;

~~(21)~~ (22) Easements; or

~~(22)~~ (23) Deeds which transfer title from a trustee to a beneficiary pursuant to a power of sale exercised by a trustee under a trust deed.

b. LR 488 Comment

This section exempts real property transfer on death deeds from the documentary stamp tax for the reason that a transfer on death deed has no present effect. A transfer on death deed becomes operative only at the death of the transferor if it has not been previously revoked. A transfer takes place only at the death of the transferor, not the execution or recording of the transfer on death deed. Thus, it should be considered as a transfer at death for purposes of the documentary stamp tax. Similarly, the Minnesota Legislature exempted transfer on death deeds from the real property stamp tax in its enactment of transfer on death deed statutes in 2008. See Minnesota Stat. § 287.22(15). The language of LB 756 should be broadened to include “or revocation of transfer on death deeds.”

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