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## Legislative Enactment of Standard Forms

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# Legislative Enactment of Standard Forms

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\* Judge Harry A. Spencer Professor of Law Emeritus, University of Nebraska College of Law. I am indebted to my colleague Colleen E. Medill, Warren R. Wise Professor of Law, and my long-time sounding board and role model Judge Jan Gradwohl for their very helpful professional analysis and suggestions.

## I. INTRODUCTION

Consideration of legislative enactment of statutory forms requires a comparative analysis of current policies of consumerism with current policies underlying prohibitions on the unauthorized practice of law. In reality, that comparison is disproportionately in the hands of lawyers rather than neutrals or public consumers. Consumerism of individual lawyers and bar associations may be offset by the business side of lawyering, specious personal opinions about the unauthorized practice of law without reference to the actual rules regulating it, fears of uncontrollable practice of law by nonlawyers—especially nonlawyers armed with electronic legal information, influence of private clients of lawyers and lobbyists with competing interests, and lawyers serving as part-time legislators who instinctively prioritize the historical-traditional roles of lawyers.

Statutory forms are important in implementing the provisions and policies of the basic statute. No other form, however professionally prepared, can bestow the same validation as a legislative statement that “a [document] in substantially the following form shall be sufficient [to invoke the provisions of this Act].” That form will produce the most extensive standardization of practice relating to the subject. A statutory form can serve as a guide to understanding the substantive provisions of the statutes as well as a means of insuring that the provisions are properly given effect. Statutory forms provide an opportunity for legislatures to enact reliable, “understandable and consumer friendly”<sup>1</sup> forms. Otherwise, a variety of forms, some more complex, confusing, and costly, dealing with the same statutes, are likely to be used. The added costs will be borne by both consumers and by the legal system called upon to resolve unclear situations. Subsequent legislation affecting a statutory form can contemporaneously be amended into the statutory form and maintain the greatest currency for the form. The same professional focused attention of proponents and legislatures should be given to statutory form provisions in proposed enactments as to all major provisions at issue.

A study of the travails of statutory form provisions of the Uniform Real Property Transfer on Death Act in the Nebraska (non-partisan Unicameral) Legislature illustrates how these competing policies can favor lawyers at the expense of public consumers. The Uniform Act is intended to be an “asset specific will substitute” for non-probate transfers of real property effective at death. It contains an “understandable

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1. This is the characterization by the National Conference of Commissioners on Uniform State Laws (NCCUSL) of the transfer of real property on death deed form. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16 cmt. (2009). Similarly, the Comment to the Form of Revocation of a Transfer on Death Deed states: “The aim of the form in this section is to be understandable and consumer friendly.” *Id.* § 17 cmt.

and consumer friendly” optional statutory form quit claim deed which, unfortunately, is supported by relatively weak commentary in the official explanatory text. After consideration by groups within the Nebraska State Bar Association, the legislation, including the statutory form, was approved by the Bar Association, with a number of modifications of the official text of the Uniform Act. It was introduced in that form in the Nebraska Legislature by a lawyer-legislator at the request of the Bar Association. The statutory form provision was quietly stricken by the principal introducer on the morning of the public hearing before the Judiciary Committee at the request of a private client of the Bar Association’s lobbyists. It was stated that the Bar Association would provide a transfer of real property on death deed form, apparently without disclosure that Bar Association real estate conveyance forms are available to its members for a fee and are not directly available to the general public. It amounted to a stealth attack by lawyers during the legislative process. The Bar Association had previously studied and supported the statutory form provisions. There was no public discussion of the reasons for striking the statutory form. Subsequently, the official position of the Bar Association was changed from support to opposition of the statutory form. The interests of nonlawyer public consumers were not separately represented. The term “unauthorized practice of law” was not expressly relied upon or discussed openly but was always present in the background.

Although the statutory form had been stripped from the bill by the time it reached the legislative floor, the legislation suffered further pro-lawyer, potentially anti-consumer amendments prior to enactment. Nebraska now has real property transfer on death legislation which was designed initially to be more simple and consumer-friendly than prior law. The statutes enacted turned out to be more complicated and unfriendly than the rules for other deeds of real property, self-proved wills, and even for executing an “ordinary” will. Nevertheless, despite substantial deviations from the official text of the Uniform Act, the policies and interests of consumerism would have been best served by a statutory form incorporating the legislation as enacted.

This analysis examines why the objectives of the statutory transfer of real property on death deed form fared so poorly in the legislative arena. Each of the relevant groups involved bears some of the responsibility, from the initial preparation and presentation of the statutory form and commentary in the Uniform Act, to proponents of the legislation in Nebraska, to loosely drawn, ambiguous rules on the unauthorized practice of law, to the Judiciary Committee’s legislative study committee examining and reporting on each provision of the Act, to

the lobbyists for the Bar Association and other private clients, and to individual members of the Legislature.

## II. FRAMEWORK OF THE CURRENT ISSUES IN NEBRASKA

Prior to 2012, Nebraska statutes contained a variety of statutory forms.<sup>2</sup> Many of the forms designed for use among individuals and non-governmental entities were enacted or reflected similar provisions in uniform acts adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL).<sup>3</sup> There were statutory forms for health care power of attorney;<sup>4</sup> a statutory short form

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2. Inclusion of a form in the statutory text is distinguishable from a delegation of authority to adopt a standardized form. Statutes routinely provide general authority for executive branch departments to prescribe forms in carrying out their duties. Individual executive branch programs are ordinarily granted express authority to prescribe forms, often with information required to be in the forms. The Legislature has supplied (or recognized) the authority of the Nebraska Supreme Court to prescribe forms for implementing statutes. *See, e.g.*, NEB. REV. STAT. § 18-1741.03 (Reissue 2007) (“To insure uniformity, the Supreme Court may prescribe the form of the handicapped parking citation to be used for handicapped parking infractions.”); *id.* § 25-1011(3) (Reissue 2008) (“The Supreme Court by rule of court shall promulgate uniform garnishment forms for use in all courts of this state.”); *id.* § 25-1516(3) (“The State Court Administrator shall . . . specify uniform writs of execution and notice of exemptions forms for use in all courts of this state.”); *id.* § 29-423 (“may prescribe the form of citation” in lieu of arrest for minor specified minor violations); *id.* § 30-2420 (notice of informal appointment of a personal representative “shall be in a form prescribed by the Supreme Court”); *id.* § 32-1549 (“Supreme Court may prescribe the form of citation” for misdemeanors under the Election Act); *id.* § 43-248.03 (Cum. Supp. 2012) (“shall prescribe the form of a civil citation” for a juvenile offender civil pilot program). Some statutes require a specific stated provision to be included in a non-public document. *See, e.g.*, NEB. REV. STAT. § 45-808(3) (Reissue 2010) (notice of opportunity to cancel a contract with a credit services organization “shall be in boldface in the following form”); *id.* § 69-2105(9) (Reissue 2009) (“[e]very consumer rental purchase agreement shall contain, immediately above or adjacent to the place for the signature of the consumer, a clear, conspicuous, printed or typewritten notice, in boldface, ten-point type, in substantially the following language”); *id.* § 76-2722(1)(a) (“[t]he equity purchase contract shall contain, as the last provision before the space reserved for the homeowner’s signature, a conspicuous statement in at least twelve-point, boldface type, as follows”). Some statutory forms are solely for administration of the government. *See, e.g.*, NEB. REV. STAT. § 15-813 (Reissue 2007) (tax warrant by primary class city clerk to city treasurer); *id.* § 23-1809 (coroner’s jury inquest verdict form); *id.* § 23-1503 (record of instruments filed in the office of register of deeds).
  3. The official text of the Uniform Acts with commentary and with documents relating to the study and adoption of the official text can be found at <http://www.law.upenn.edu/bll/archives/ulc/ulc.htm>.
  4. NEB. REV. STAT. § 30-3408(1) (Reissue 2008) (“A power of attorney for health care . . . shall be in a form which complies with sections 30-3401 to 30-3432 and may be in the form provided in this subsection.”). The section was amended in 2012 to state expressly that a power of attorney for health care may be included

(“check-the-box”) power of attorney;<sup>5</sup> a statutory uniform single or multiple party (“check-the-box”) account form with “pay on death” designations;<sup>6</sup> statutory short forms of acknowledgment;<sup>7</sup> self-proved wills under the Nebraska Probate Code;<sup>8</sup> notices for substitution of trustee,<sup>9</sup> a trustee’s sale,<sup>10</sup> request for a copy of notice of default and notice of sale,<sup>11</sup> and cancellation of notice of default<sup>12</sup> under the Ne-

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in a durable power of attorney under the Nebraska Uniform Power of Attorney Act. NEB. REV. STAT. § 30-3408(2) (Cum. Supp. 2012).

5. NEB. REV. STAT. § 49-1522 (Reissue 2010) (repealed in 2012 by L.B. 1113 § 47) (“The following statutory short form, when reproduced and used in the identical indicated words or in substantially the same or more similar than dissimilar formulation of words by means of printing, typing, writing, or other method of reproduction and use or when appropriately adapted to particular circumstances . . . [and satisfying other requirements] shall create and establish an agency relationship under a power of attorney in accordance with the Nebraska Short Form Act.”). The Nebraska Short Form Act was unique to Nebraska. It also contained the following requirement:

Except for statutory short form acknowledgments and verifications, each printed or otherwise reproduced version of a statutory short form prescribed by this act which is intended for public sale or other public circulation or distribution shall bear and prominently display in or near the right top margin of the obverse of such form, in clearly discernible and easily legible format, the following notice in the identical indicated words and not in any other formulation of words:

NOTICE: CONSULT YOUR LAWYER TO DETERMINE THE LEGAL EFFECT OF THE USE OF THIS NEBRASKA STATUTORY SHORT FORM. No statutory short form prescribed by the act and required to bear such notice shall be affected by the absence of such notice . . . .

*Id.* § 49-1505(6) (repealed in 2012 by L.B. 1113 § 47). For Nebraska law on powers of attorney prior to 2012, see Cassidy Chapman, *Abuse of Powers of Attorney in Nebraska*, NEB. LAW., April 2009, at 13, available at <http://nebar.affiniscape.com/associations/8143/files/TNL-0409d.pdf>.

6. NEB. REV. STAT. § 30-2719(a) (Reissue 2008) (“A contract of deposit that contains provisions in substantially the form provided in this subsection establishes the type of account provided, and the account is governed by the provisions of sections 30-2716 to 30-2733 applicable to an account of that type.”).
7. NEB. REV. STAT. § 64-206 (Reissue 2009) (“The forms of acknowledgment set forth in this section may be used and are sufficient for their respective purposes under any law of this state. . . . The authorization of the forms in this section does not preclude the use of other forms.”).
8. NEB. REV. STAT. § 30-2329(1) (Reissue 2008) (“[a]ny will may be simultaneously executed, attested, and made self-proved . . . in form and content substantially as follows”). Additionally, there is a statutory form for making an attested will self-proved subsequent to its execution. *Id.* § 30-2329(2).
9. NEB. REV. STAT. § 76-1004 (Reissue 2009) (“sufficient if made in substantially the following form”).
10. *Id.* § 76-1007(3) (“sufficient if made in substantially the following form”).
11. *Id.* § 76-1008(1) (“shall be in substantially the following form”). There is no statutory form for notice of default, only a statement of requirements. *Id.* § 76-1006.
12. *Id.* § 76-1012(1) (“shall be sufficient if made and executed by the trustee in substantially the following form”).

braska Trust Deeds Act; transfer to<sup>13</sup> or declaration of<sup>14</sup> a Nebraska Uniform Custodial Trust and the custodial trustee's receipt and acceptance;<sup>15</sup> affidavit of biological mother of child born out of wedlock in cases of adoption;<sup>16</sup> right to reclaim abandoned property by former tenant<sup>17</sup> or another person<sup>18</sup> under the Disposition of Personal Property Landlord and Tenant Act; delinquent real property tax purchase certificate<sup>19</sup> and deed;<sup>20</sup> notice by governmental entities to the general public<sup>21</sup> or to specified individuals;<sup>22</sup> notice of trespassing animals and distraint;<sup>23</sup> writ of habeas corpus by person not in government custody;<sup>24</sup> writ of execution on judgment of restitution;<sup>25</sup> search warrant for violation of Nebraska Liquor Control Act;<sup>26</sup> notice of exemptions to the debtor in writ of execution;<sup>27</sup> notice of pendency of litigation;<sup>28</sup> a number of forms relating to elections, petitions, and ballots;<sup>29</sup> certificate of satisfaction<sup>30</sup> and lender/payoff/satisfaction notifi-

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13. NEB. REV. STAT. § 30-3519(a)(1) (Reissue 2008) ("in substantially the following form").
  14. *Id.* § 30-3519(a)(2) ("in substantially the following form").
  15. *Id.* § 30-3505(b) ("may be evidenced by a writing stating in substance").
  16. *Id.* § 43-104.09 ("shall be in substantially the following form").
  17. NEB. REV. STAT. § 69-2305(1) (Reissue 2009) ("notice . . . in substantially the form shall satisfy the requirements").
  18. *Id.* § 69-2305(2) ("notice which is in substantially the following form . . . shall satisfy the requirements").
  19. *Id.* § 77-1819 ("shall be substantially in the following form").
  20. *Id.* § 77-1839 ("shall be substantially in the following form").
  21. *See, e.g.*, NEB. REV. STAT. § 53-135.01 (Reissue 2010) (notice of renewal of retail liquor license); *id.* § 31-324 (Reissue 2008) (meeting on engineer's report to drainage district).
  22. *See, e.g.*, NEB. REV. STAT. § 2-955(1)(b) (Reissue 2007) (noxious weed control). A similar statutory notice form was enacted in 2012 as part of the Black-Tailed Prairie Dog Management Act. *See* NEB. REV. STAT. § 23-3806(d) (Cum. Supp. 2012).
  23. NEB. REV. STAT. § 54-403 (Reissue 2010) ("[t]he notice may be in the following form").
  24. NEB. REV. STAT. § 29-2815 (Reissue 2008) ("shall be in the form following").
  25. *Id.* § 25-21,230 ("shall be in the following form as nearly as practicable").
  26. NEB. REV. STAT. § 53-1,108 (Reissue 2010) ("substantially in the following form").
  27. NEB. REV. STAT. § 25-1516(4)(b) (Reissue 2008) ("in substantially the form below, which shall be printed in all capital letters").
  28. *See, e.g.*, NEB. REV. STAT. § 12-522 (Reissue 2007) (disposition of non-burial land by a cemetery association).
  29. *See, e.g.*, NEB. REV. STAT. § 32-947 (Reissue 2008) (voter's oath on ballot to vote early); *id.* § 32-1402 (form of referendum petition); *id.* § 22-198 (Reissue 2007) (ballot form for changing counties' boundary); *id.* § 2-1213.01 (ballot form for horse racing on Sunday).
  30. NEB. REV. STAT. § 76-2805(2) (Reissue 2009) ("[t]he following statutory certificate of satisfaction, when reproduced and used in the identical words or in substantially the same or a more similar than dissimilar form, shall satisfy the requirements of subsection (1) of this section").

cation<sup>31</sup> under the Nebraska Security Instrument Satisfaction Act; and forms for notification before disposition of general collateral,<sup>32</sup> notice before disposition of consumer-goods collateral,<sup>33</sup> a written financing statement,<sup>34</sup> and amendment of a written financing statement<sup>35</sup> under Article 9 (Secured Transactions) of the Uniform Commercial Code.

Two uniform acts with statutory forms were adopted in 2012.<sup>36</sup> The Uniform Real Property Transfer on Death Act was significantly weakened in the Nebraska Legislature. The bill as introduced contained the optional statutory forms and commentary (with Nebraska modifications) of the Uniform Act.<sup>37</sup> During consideration by the Judiciary Committee in 2011, however, the statutory forms and com-

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31. *Id.* § 76-2806(2) (“[t]he following statutory notification, when reproduced and used in the identical words or in substantially the same or a more similar than dissimilar form, shall satisfy the requirements of subsection (1) of this section”).

32. NEB. REV. STAT. UCC § 9-613(6) (Reissue 2001) (“[t]he following form . . . when completed . . . provides sufficient information”).

33. *Id.* § 9-614(4) (“[t]he following form of notification, when completed, provides sufficient information”).

34. *Id.* § 9-521(a) (as amended by Neb. Laws 2011, L.B. 90, § 20) (operative July 1, 2013) (“[a] filing office that accepts written records may not refuse to accept a written initial financing statement in the following form and format except for a reason set forth in section 9-516(b)”). The 2011 Nebraska legislation is part of an effort to establish national uniform forms for written financing statements and amendments.

35. *Id.* § 9-521(b) (“[a] filing office that accepts written records may not refuse to accept a written record in the following form and format except for a reason set forth in section 9-516(b)”).

36. The Nebraska Uniform Real Property Transfer on Death Act has been codified at NEB. REV. STAT. §§ 76-3401 to 76-3423 (Cum. Supp. 2012). The statutory form is not that of the Uniform Act, however, which was deleted from the legislation, but an apparently mandatory form for execution of the real property transfer on death deed modeled on the statutory form for self-proved wills. *See infra* notes 37–44 and accompanying text. The Nebraska Uniform Power of Attorney Act has been codified at NEB. REV. STAT. §§ 30-4001 to 30-4045 (Cum. Supp. 2012). It becomes a part of the Nebraska Probate Code. *Id.* § 30-2201. Both Acts have an “operative date” of January 1, 2013. L.B. 536 (Final, Second) § 36, 102d Leg., 2d Sess. (Neb. 2012) (real property transfer on death); L.B. 1113 (Final) § 48, 102d Leg., 2d Sess. (Neb. 2012) (power of attorney). Both Acts apply to instruments established before, on, or after the operative date. NEB. REV. STAT. § 76-3403 (Cum. Supp. 2012) (real property transfer on death deed); *id.* § 30-4045(1) (power of attorney). The powers granted under a power of attorney executed before the “operative date” which “grants to an agent authority to do all acts that a principal could do” (a common provision in present Nebraska powers of attorney) gives the agent the general authority of the Nebraska Uniform Power of Attorney Act. *Id.* §§ 30-4024(3), 30-4026.

37. L.B. 536 § 18, 102d Leg., 1st Sess. (Neb. 2011) (introduced January 18, 2011); L.B. 756, 101st Leg., 2d Sess. (Neb. 2010) (introduced and held for further study also contained the statutory form and commentary).



mentary were deleted<sup>38</sup> “at the request of the [Nebraska State Bar Association] Legislation Committee and the [Nebraska Land Title Association].”<sup>39</sup> During legislative floor consideration,<sup>40</sup> a requirement for two disinterested witnesses<sup>41</sup> and a mandatory<sup>42</sup> statutory form were added to the law.<sup>43</sup> The statutory form calls for the transferor’s acknowledgment and signatures of the witnesses, including statements related to the transferor’s voluntariness and apparent mental condition (based on the language of the statutory self-proved will form). The results are (1) there is no statutory deed form as contained in the Uniform Act and the initial legislative bill,<sup>44</sup> (2) the procedures

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38. L.B. 536 (AM 1668), 102d Leg., 1st Sess. (Neb. Dec. 30, 2011) [hereinafter *Substitute L.B. 536 (AM 1668)*] (placed on General File by Judiciary Committee, January 20, 2012), available at <http://www.nebraskalegislature.gov/FloorDocs/Current/PDF/AM/AM1668.pdf>.
  39. E-mail from registered lobbyist for NSBA and NLTA to the author and others (October 25, 2011) (on file with the NEBRASKA LAW REVIEW). For a discussion of the deletion of the statutory form and commentary see *infra* notes 126–134 and accompanying text.
  40. Neb. Leg. Floor Debate, Feb. 3, 2012, at 2–40, [hereinafter *Floor Debate of Feb. 3, 2012*], available at <http://www.legislature.ne.gov/FloorDocs/Current/PDF/Transcripts/FloorDebate/r2day21.pdf>.
  41. L.B. 536 (AM 2046), 102d Leg., 2d Sess. (Neb. Feb. 15, 2012) [hereinafter *AM 2046*] (2012 Neb. Legis. J. 531-534). For a discussion of Potential Glitches in Nebraska’s “Two or More Disinterested Witnesses” Requirement, see *infra* subsection IV.A.2. AM 2046 also added requirements that the deed be filed within thirty days after being executed and that if the deed does not specify a disposition of growing crops, the transferor’s interest in growing crops passes to the transferor’s estate.
  42. NEB. REV. STAT. § 76-3409 (Cum. Supp. 2012). It is difficult to see how any other provision could “in form and content substantially” comply with the statements of “willingly” and “sound mind and under no constraint or undue influence” contained in the statutory form. If the self-proved will form requirements are not complied with, there may still be a valid, probatable last will and testament. See *infra* notes 231–33 and accompanying text. If the signing and acknowledgment requirements of the transfer of real property on death deed are not “substantially” complied with, there is simply no transfer of the real property at death by the deed. The real property would remain subject to probate and to the law of wills or intestacy. See *infra* notes 247–53 and accompanying text.
  43. *AM 2046*, *supra* note 41, § 1 (“shall be signed by the transferor . . . and shall be attested in writing by two or more disinterested witnesses . . . [and] shall be made before an officer authorized to administer oaths . . . in form and content substantially as follows:”), codified at NEB. REV. STAT. § 76-3409 (Cum. Supp. 2012). The legislative floor movement for two disinterested witnesses and other restrictions intended to insure voluntariness and prevent fraud or overreaching was led by the Speaker of the Legislature who also deftly guided the Uniform Power of Attorney Act, L.B. 1113 through the 2012 Legislature with the statutory form and all informal consumer friendly provisions intact. The positions of the Speaker on the two uniform acts are difficult to reconcile.
  44. At one point in the legislative floor discussion of the proposed amendments, the principal introducer stated: “I think we’ve put enough requirements in here that it is going to be almost necessary [for an attorney] to draw the deed, to draw the document that we’re talking about, because we’re not setting out the form.” Neb.

and formalities for execution or revocation of a real property transfer on death deed are more extensive and more complicated than for other real estate conveyances, a self-proved will, an “ordinary” will, or another document that can be subject to probate, and (3) the act adds a new mandatory statutory form that relates only to witnessing and acknowledgment of the deed or a revocation of the deed and not to the other mandatory requirements for a real property transfer on death deed.

The Uniform Power of Attorney Act endured a lengthy study by the Nebraska State Bar Association.<sup>45</sup> The study report made several recommendations for changes in the statutory form provisions.<sup>46</sup> The study report was adopted by the Bar Section with a recognition that statutory forms are “controversial” and may implicate the “hotly debated” subject of “do-it-yourself estate planning.”<sup>47</sup> The Uniform Power of Attorney Act contains forms for a statutory power of attorney<sup>48</sup> and an agent’s certification as to the validity of a power of attorney and the agent’s authority.<sup>49</sup> As introduced and enacted in Nebraska, the section establishing a statutory form power of attorney sets out “Important Information” for the principal,<sup>50</sup> a “check-the-box”

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Leg. Floor Debate, Feb. 3, 2012, *supra* note 40, at 25. The Nebraska Legislature did not set out a statutory form but it is a certainty that forms will become available electronically from others.

45. See REAL PROP., PROBATE, AND TRUST LAW SECTION, NEB. STATE BAR ASS’N, REPORT OF THE UNIFORM POWER OF ATTORNEY ACT STUDY COMMITTEE [hereinafter *NSBA Report*] (2011 revisions included) (copy on file with the NEBRASKA LAW REVIEW). Members of the Nebraska State Bar Association can access the report electronically at the Real Property, Probate and Trust Section website.
46. *Id.* at 38–39.
47. Minutes From the Real Estate Probate and Trust Law Section of the Nebraska State Bar Association Annual Meeting, Alan M. Wood, (October 2011) (copy on file with NEBRASKA LAW REVIEW). Some objection to the statutory “check-the-box” form was expressed at the meeting, but the study report approved by the Section included the form and related commentary. See Ronald R. Volkmer, *The Uniform Power of Attorney Act: The Need to Update Nebraska Statutory Law*, NEB. LAW., Sept. 2011, at 11, 14, available at <http://nebar.com/associations/8143/files/TNL-0911c.pdf> (“The Study Committee Report includes UPOAA Section 301—the statutory form. This topic is controversial as well as brings up the hotly debated topics of statutory forms and do-it-yourself estate planning.”).
48. UNIF. POWER OF ATTORNEY ACT § 301 (2006) (“A document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed by [this act].”) (enacted in NEB. REV. STAT. § 30-4041 (Cum. Supp. 2012)).
49. *Id.* § 302 (“The following optional form may be used by an agent to certify facts concerning a power of attorney.”) (enacted in NEB. REV. STAT. § 30-4042 (Cum. Supp. 2012)). The study committee did not recommend changes to the official version of this form.
50. NEB. REV. STAT. § 30-4041 (Cum. Supp. 2012) (including a warning: “If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.”).

grant of items of general authority,<sup>51</sup> optional “check-the-box” grants of specific authority which otherwise the agent does not have,<sup>52</sup> a limitation on the agent’s power “to benefit the agent or a person to whom the agent owes an obligation of support,”<sup>53</sup> space for special instructions if desired, an optional form for nomination of a conservator or guardian if one is needed, a lengthy segment providing “Important Information For Agent,”<sup>54</sup> and a Study Committee recommended optional provision for signature of the agent that “I have read and accept the duties and liabilities of the agent as specified in this power of attorney.”<sup>55</sup> The act also contains provisions for judicial review and determinations concerning the power of attorney and reliance by third parties on an agent’s certification.<sup>56</sup> The legislative bill was sponsored by the Speaker of the Legislature and placed on a “fast track” for enactment in 2012 as a Speaker’s priority bill.<sup>57</sup> Both the Introducer’s Statement of Intent<sup>58</sup> and the Judiciary Committee Statement unanimously reporting the bill to the floor of the Legislature<sup>59</sup> identify the purposes of the statutory forms:

Sections 41-42 contain statutory forms that are designed for use by lawyers as well as lay persons. Step-by-step prompts are given for designation of the

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51. *Id.* Subjects of general authority are set out in sections 30-4027 to 30-4039, with related material in sections 30-4024 to 30-4026 and 30-4040. As part of the designation of an agent, the study committee recommended a Release of Information provision applicable to all agents that is included in the Nebraska statutory form. *NSBA Report, supra* note 45, at 38.
  52. The subjects on which an agent can act “only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument” are specified in sections 30-4024 and 30-4040 (Cum. Supp. 2012).
  53. NEB. REV. STAT. § 30-4041 (Cum. Supp. 2012). The Nebraska form incorporates a recommendation of the Study Committee that this limitation does not apply to application of the statutory Power of Personal and Family Maintenance. The relatively broad powers of personal and family maintenance are set out in section 30-4036. *NSBA Report, supra* note 45, at 38.
  54. NEB. REV. STAT. § 30-4041 (including the warning: “If there is anything about this document or your duties that you do not understand, you should seek legal advice.”).
  55. *Id.*; see *NSBA Report, supra* note 45, at 39 (recommending the additional provision above the agent’s signature).
  56. NEB. REV. STAT. § 30-4016 (Cum. Supp. 2012).
  57. L.B. 1113, 102d Leg., 2d Sess. (Neb. 2012) (introduced Jan. 19, 2012). L.B. 1113 was designated a Speaker’s priority bill. 2012 NEB. LEGIS. J. 583 (Feb. 21, 2012).
  58. Introducer’s Statement of Intent, Sen. Mike Flood (Feb. 15, 2012) (L.B. 1113), available at <http://www.nebraskalegislature.gov/FloorDocs/Current/PDF/SI/LB1113.pdf>.
  59. Statement of the Neb. Leg. Judiciary Comm. (Feb. 15, 2012) available at <http://www.nebraskalegislature.gov/FloorDocs/Current/PDF/CS/LB1113.pdf>. Following adoption by the legislature, the Legislative Update similarly stated: “The bill also provides statutory forms to be used by lawyers and laypersons.” Press Release, Neb. Leg., Power of Attorney Provisions Updated (April 5, 2012), available at <http://update.legislature.ne.gov/?p=7494>.

agent, successor agents, and the grant of authority. Section 42 contains a sample agent certification form.

The bill zipped to enactment without amendment of the statutory form provisions. As a result, Nebraska has a valuable and exemplary statutory power of attorney form.

### III. THE UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT

#### A. Substantive Purposes and Effects

The Uniform Real Property Transfer on Death Act is a straight forward, relatively uncomplicated act designed as an “asset-specific will substitute” for the transfer of land at death.<sup>60</sup> Its Prefatory Note explains:

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.<sup>61</sup>

The Uniform Act lists just three requirements for a TOD deed.<sup>62</sup> It must contain the essential elements and formalities of a properly recordable deed, must state that the transfer is to occur at the transferor’s death, and must be recorded during the transferor’s lifetime.

The capacity to make or revoke a transfer on death deed is the same as that to make a will.<sup>63</sup> There is no requirement of notice, delivery, or acceptance by the designated beneficiary during the transferor’s lifetime,<sup>64</sup> but the beneficiary can disclaim all or part of the property after the transferor’s death.<sup>65</sup> There is no requirement of “consideration.”<sup>66</sup> The transfer on death deed is revocable even if it contains a contrary provision.<sup>67</sup>

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60. UNIF. REAL PROP. TRANSFER ON DEATH ACT, Prefatory Note (2009). Nebraska statutes allow other specific assets to be transferred on death outside of probate. NEB. REV. STAT. § 30-2715(a) (Cum. Supp. 2012) (“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, marital property agreement, certificate of title, or other written instrument of a similar nature”); *id.* § 30-2715.01 (transfer of motor vehicle title), *id.* §§ 30-2716 to 30-2733 (Reissue 2008) (multiple-person accounts), *id.* §§ 30-2734 to 30-2745 (Uniform Transfer on Death Security Registration).

61. UNIF. REAL PROP. TRANSFER ON DEATH ACT, Prefatory Note (2009).

62. *Id.* § 9.

63. *Id.* § 8.

64. *Id.* § 10(1).

65. *Id.* § 14.

66. *Id.* § 10(2).

67. *Id.* § 6.

The Uniform Act provides that during the transferor's lifetime, the transfer of real property on death deed does not affect any interest of the transferor or the transferor's creditors, affect or create any legal or equitable interest in the designated beneficiary, subject the property to claims of the designated beneficiary's creditors, or "affect the transferor's or designated beneficiary's eligibility for any form of public assistance."<sup>68</sup> There are provisions for the enforcement of creditor claims and allowances against the estate of the transferor after death that need to be conformed to the law and procedure of each adopting state.<sup>69</sup>

## B. Statutory Form Deed for a Transfer of Real Property on Death

The Uniform Act contains statutory forms "for states wishing to provide optional statutory forms."<sup>70</sup> The front of the form is an adaptation of a standard quit claim deed:<sup>71</sup>

(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:

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68. *Id.* § 12.

69. *Id.* § 15. In Nebraska, claims and allowances are first presented to the personal representative and then, if the probate estate is insufficient, asserted by the personal representative against recipients of non-probate property. *See* NEB. REV. STAT. §§ 30-2487, 30-2726, 30-2743, 30-3850(3), (4) (Reissue 2008). Section 76-3417 (Cum. Supp. 2012) reflects these current procedures with respect to real property transfer on death deeds.

70. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16 legislative note (2009).

71. *Id.* § 16 ("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: . . ."). Section 13(d) states that "[a] transfer on death deed transfers property without covenant or warranty of title even if the deed contains a contrary provision" (codified at NEB. REV. STAT. § 76-3415(d) (Cum. Supp. 2012)).

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 \_\_\_\_\_ [(SEAL)] \_\_\_\_\_ Date \_\_\_\_\_

Signature \_\_\_\_\_ [(SEAL)] \_\_\_\_\_ Date \_\_\_\_\_

ACKNOWLEDGMENT

(insert acknowledgment for deed here)

The back of the form contains “answers to questions likely to be asked by consumers.”<sup>72</sup>

72. *Id.* § 16 cmt. The explanatory material is:

(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.

Both the form and commentary related to the form need to be reviewed under other law of an enacting state and with respect to modifications by the enacting state in the official text of the Uniform Act. Had Nebraska enacted a statutory form transfer of real property on death deed, it would have been desirable to modify the Uniform Act's statutory form to express three added Nebraska warnings.<sup>73</sup> These warnings are that (1) the property remains subject to Nebraska inheritance taxation, (2) the designated beneficiary is potentially personally liable to the transferor's estate for Medicaid reimbursement, claims against the estate and statutory allowances, and (3) the Department of Health and Human Services may require revocation of the deed as a condition for receiving Medicaid benefits.<sup>74</sup>

Nine states, Arizona, Arkansas, Colorado, Kansas, Missouri, New Mexico, Nevada, Ohio and Wisconsin, had statutory provisions for "beneficiary deeds," another term for "transfer on death deeds," when

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.

73. See L.B. 536 § 18, 102d Leg., 1st Sess. (Neb. 2011). Reciting these warnings in a statutory form deed would have had advantages of providing consumer friendly information, greater standardization of practices, and legislative validation of the sufficiency of the warnings.
74. For a legislative statement of these warnings, see *infra* notes 103–05, subsequently made mandatory conditions for a transfer of real property on death deed, codified at NEB. REV. STAT. § 76-3410(b)(1) (Cum. Supp. 2012) (although "defects in the wording of the warnings" does not invalidate a recorded transfer of real property on death deed under § 76-3410(b)(2)).

the NCCUSL Drafting Committee began the uniform act project in 2007.<sup>75</sup> Seven of the nine states contained standard form language in the text of the statutes.<sup>76</sup> Only Missouri and Wisconsin statutes did not have standard form language in the statutory text.<sup>77</sup> While the uniform act was being drafted, Minnesota,<sup>78</sup> Montana,<sup>79</sup> and Oklahoma<sup>80</sup> enacted statutes with standard form language. Indiana adopted provisions that do not have statutory form transfer of real property on death deed language.<sup>81</sup> In addition, the Drafting Committee studied a “recommended” California proposal that contained statutory deed form language.<sup>82</sup> This proposal has not been enacted.

The Drafting Committee does not appear to have focused extensively on the statutory form or its effects in carrying out the objectives of the underlying statutes. It seems to have been prompted primarily by the fact that ten of the thirteen states with “beneficiary deed” provisions had statutory forms at the time the Uniform Act was adopted by NCCUSL,<sup>83</sup> and that the “bracketed” (i.e., optional) provisions should be included “for states wishing to provide optional statutory forms.”<sup>84</sup> The Comment states that “[t]he section is based on Section

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75. Memorandum of Thomas P. Gallanis to Drafting Comm. for Unif. TOD for Real Prop. Act 59–63 (Feb. 14, 2007), *available at* [http://www.law.upenn.edu/bll/archives/ulc/tod/2007february14\\_backgroundmemo.pdf](http://www.law.upenn.edu/bll/archives/ulc/tod/2007february14_backgroundmemo.pdf).

76. *Id.*

77. *Id.*

78. MINN. STAT. ANN. § 507.071 subdiv. 24, 25 (West 2012) (relevant sections passed in 2008).

79. MONT. CODE ANN. § 72-6-121 (2011) (relevant sections passed in 2007).

80. OKLA. STAT. ANN. tit. 58, § 1253 (West 2012) (passed in 2008).

81. IND. CODE § 32-17-14-12 (2009) (P.L. 143-2009 passed in 2009).

82. Gallanis, *supra* note 75, at 73–89.

83. *See* UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16 cmt. (2009). For additional information regarding the motivation behind the adoption of the Uniform Act, see the following statement by Nat Sterling, chair of the NCCUSL drafting committee for the Uniform Transfer of Real Property on Death Act:

It has become quite a popular device in a number of states. . . . What we’ve done is we’ve taken the best. We’ve looked at every state, taken the best provisions from each state, and put together a complete act that is better than any one state in answering all the questions. This was put together with the assistance of the real estate bar, the probate bar, the title insurance industry, the banking industry, the elder law community. The experience in the states that have this has been quite favorable. There have been very few, if any problems. It’s operated smoothly. We’ve heard from title insurers and others that there was some concern at the outset, but when they worked on it in practice they found it was quite successful.

*Hearing on L.B. 536 Before the Judiciary Comm.*, 102d Leg., 1st Sess. 44–45 (Neb. Feb. 17, 2011), *available at* <http://www.legislature.ne.gov/FloorDocs/Current/PDF/Transcripts/Judiciary/2011-02-17.pdf>.

84. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16 legislative note. The chair of the NCCUSL drafting committee wrote further to the author by email on September 9, 2011:



4 of the Uniform Health-Care Decisions Act.”<sup>85</sup> Section 4 of that Act contains a lengthy optional form with an included statutory “Explanation” and with some “check-the-box” provisions.<sup>86</sup> The “statutory forms containing answers to questions likely to be asked by consumers” is comparable to Illinois statutory forms for powers of attorney.<sup>87</sup>

The NCCUSL Comment on use of the statutory transfer of real property on death form is incomplete and underdeveloped. It lacks a clear and comprehensive explanation of how the statutory form can

There are a number of reasons for the relative infrequency of statutory forms, including perhaps the perception of lawyers that they are perfectly capable of fabricating appropriate forms and the American ethos of self reliance. But the lack of standardization does cause inefficiency, and in more recent years there has been a move towards standardization, particularly with respect to court documents and forms of pleading . . . .

Where it appears appropriate to standardize a form, such as with the court documents, there is a strong impetus to specify the required contents and parameters of the form in statute and delegate the actual drafting of the form to an administrative agency. . . .

Among the other reasons for eschewing actual forms in statutes are (a) if a change is needed, it is much easier for an administrative agency to change the form than to enact corrective legislation; (b) legislators are not necessarily the best form drafters, whereas an administrative agency can engage forms experts who can help make the forms clear and user friendly; (c) there has always been a problem with state printers of legislation not having the capability of typesetting a form and, if they do have the capability, having it look the same when picked up [by] private publishers of statutes. . . .

The impetus to a statutory form of TOD deed is threefold — (a) because this is a new form of title, to give it some substance by creating the reality of a form; (b) to enable a title insurer to recognize what the document is and act accordingly (instead of having to deal with a hodge podge of do it yourself instruments that may or may not be construed to be a TOD deed[]); and (c) to make it easier for a consumer to use. . . .

It is this last point—ease of consumer use by creation of a statutory form — that has been controversial. Estate planners say that makes it too easy for a do it your-selfer to execute and get into trouble. They have a point; a consumer could easily create title issues that have to be resolved ultimately by complex quiet title litigation in place of a simple probate proceeding. On the other hand, if there is no statutory form, there will be a market and the private forms publishers will step in to fill the gap. At least a statutory form will be accurate and valid, and will inform the consumer of potential problems and necessary actions, none of which may be true of a private form. The resolution of this dilemma in the Uniform Act has been to make the forms optional — some states will adopt them and some not, depending on the politics of the state.

E-mail from Nat Sterling, Chair, NCCUSL Drafting Comm. for the Unif. Transfer of Real Prop. on Death Act, to author (Sept. 9, 2011) (on file with the NEBRASKA LAW REVIEW).

85. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16 cmt.

86. UNIF. HEALTH-CARE DECISIONS ACT § 4, 9 Part IB U.L.A., 99 (2005). The Uniform Health-Care Decisions Act is listed as presently in force in eight states. Wyoming adopted the provisions in 2005 (Laws 2005, Ch. 161) and repealed them in 2007 (noted under § 35-22-405).

87. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16 cmt.

effectuate the potential objectives and policies of the Act. Apart from the statutory deed form, the substantive provisions of the Uniform Act offer potential planning advantages over probate, transfer with retention of a life estate, joint ownership of the property, inter vivos revocable trust, and various “informal” techniques for avoiding probate.

The Comment on the statutory form states only that “[t]he 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.”<sup>88</sup> But it might also be used as a management and estate planning strategy to retain ownership of the property by the transferor during lifetime and transfer a large amount of real property at death to the trustee of a “tailored inter vivos revocable trust” or to “any other legal or commercial entity.”<sup>89</sup> Thus, an owner of depreciable real property and an interest in a legal or commercial entity might choose to retain the real property individually during lifetime and transfer it to the entity at death by a transfer of real property at death deed. The owner might receive rent from the entity during lifetime and a new income tax basis at death for the real property. The new income tax basis for the real property might be preferable to a new basis for the interest in the entity. A transfer of real property on death deed can be used to facilitate a transfer at death of the transferor’s property in a jurisdiction other than his residence, thereby allowing the property to avoid ancillary probate.<sup>90</sup> It may be helpful in charitable estate planning where retention of full ownership of the property during lifetime is desired (and a current income tax deduction is not sought). It is an alternative to delivery during lifetime to an attorney or other person for further delivery after the transferor’s death. And it certainly would be preferable to a lifetime gift that on its face purports to convey the real property during the transferor’s lifetime, but with an oral side-condition or implied understanding that the deed would not take effect until the transferor’s death.<sup>91</sup> It can be expected that estate planners and business planners will find other (and unexpected) uses for transfer of real property on death deeds.

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88. *Id.* § 16 cmt.

89. *See* NEB. REV. STAT. § 76-3402 (1), (2), (4) (Cum. Supp. 2012). “Beneficiary” and “designated beneficiary” are defined to mean “a person.” The definition of “person” includes “an individual, a corporation, an estate, a trustee of 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.”

90. One of the primary objectives of uniform legislation is to provide reliable multi-state rules and procedures. *See infra* notes 185–86 and accompanying text. The statutory transfer of real property on death deed form facilitates that process. This is not mentioned in the Comment.

91. In some of these situations, a lawyer might also be a benefitting “consumer” through supplying more reliable professional legal advice with fewer complications and at a lower cost to both the client and attorney.

Real property transfer on death deed legislation was enacted in five states during 2011. The Oregon enactment of the Uniform Act contains a statutory form transfer on death deed form.<sup>92</sup> Nevada amended its prior law and prior statutory form deed to enact the Uniform Act with its statutory forms.<sup>93</sup> North Dakota<sup>94</sup> and Hawaii<sup>95</sup> enactments did not include statutory provisions for standard forms. The Illinois Residential Real Property Transfer on Death Act,<sup>96</sup> based on the Uniform Act, does not contain statutory forms for real property transfer on death deeds or their revocation. It does, however, contain an apparently mandatory statutory form for “Notice of Death Affidavit and Acceptance of Transfer on Death Instrument”<sup>97</sup> and a requirement that a transfer on death deed or its revocation shall be prepared for another person “only by an Illinois licensed attorney.”<sup>98</sup>

To summarize, currently twelve states have enacted statutory transfer on death deed forms and seven states (including Nebraska) have real property transfer on death provisions without statutory forms.<sup>99</sup> That twelve state statutes contain workable statutory transfer on death deed forms should be an indication there is nothing inherently defective in the arrangement. The concept has been well tested and vetted.

#### IV. STATUTORY TRANSFER OF REAL PROPERTY ON DEATH DEED FORM IN THE NEBRASKA LEGISLATURE

##### A. Overview

Three significant things happened with respect to the statutory transfer of real property on death deed form during consideration by the Nebraska Legislature from 2010 to 2012. The first was that three warnings were added to the mandatory requirements for an effective transfer of real property on death deed.

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92. OR. REV. STAT. ANN. § 93.975 (West 2012).

93. NEV. REV. STAT. ANN. § 111.695 (West 2011).

94. 2011 N.D. LAWS ch. 241.

95. 2011 Haw. Sess. LAWS ch. 173.

96. 755 ILL. COMP. STAT. ANN. 27/1 (West 2011).

97. *Id.* § 27/100.

98. *Id.* § 27/95 (adding that “[n]othing in this Section, however, shall prohibit an owner from preparing his or her own transfer on death instrument or revocation”).

99. A version of the Uniform Act has been introduced in the Alaska Legislature with a statutory form and commentary. H.R. 297 § 13.48.120, 27th Leg., 2d Sess. (Alaska 2012) (introduced January 25, 2012). It was also introduced in the Council of the District of Columbia on April 17, 2012, by Councilman Phil Mendelson with a statutory form and commentary (available at [http://www.dccouncil.us/files/user\\_uploads/related\\_materials/april17\\_mendelson\\_uniformrealpropertytransfer.pdf](http://www.dccouncil.us/files/user_uploads/related_materials/april17_mendelson_uniformrealpropertytransfer.pdf)).

The second thing the Legislature did was to delete the statutory deed form and “common questions about the use of the form.” The third thing the Legislature did was to make several major changes in the bill, including the addition of a mandatory statutory form for acknowledgment and witnessing the transferor’s signature. The enactment would have been much stronger had the Legislature restored a general statutory transfer of real property on death deed form encompassing all of the mandatory requirements for its creation, especially the added requirement of “two or more disinterested witnesses.”

The bill first introduced in 2010 in Nebraska contained the optional statutory transfer of real property on death form and “common questions about the use of this form” of the Uniform Act.<sup>100</sup> Following further legislative study, the bill was reintroduced in 2011 with the statutory transfer of real property on death form incorporating three new warnings on its face.<sup>101</sup> But the three warnings were not mandatory conditions for transfer of real property on death deeds in that version of the bill. A public hearing was held in February 2011 and the bill remained in the Judiciary Committee at the end of the 2011 legislative session. The substitute bill of the Judiciary Committee sent to the full Legislature in 2012 tweaked the language of the warnings slightly, moved the three warnings from the statutory form to mandatory requirements for a transfer of real property on death, and eliminated the general statutory form and commentary.<sup>102</sup>

As amended, a Nebraska transfer on death deed must contain warnings as to inheritance taxes,<sup>103</sup> potential personal liability to the personal representative of the transferor’s estate,<sup>104</sup> and that revocation of the deed may be required as a condition for receiving Medicaid assistance.<sup>105</sup> Although the statute states that “a transfer on death

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100. L.B. 756 § 18, 101st Leg., 2d Sess. (Neb. 2010).

101. L.B. 536 § 18, 102d Leg., 1st Sess. (Neb. 2011).

102. *Substitute L.B. 536 (AM 1668)*, *supra* note 38. AM1668, which is a substitute bill, was advanced to the floor of the Legislature on January 20, 2012. 2012 NEB. LEGIS. J. 310. It was adopted by the Legislature on February 3, 2012. 2012 NEB. LEGIS. J. 430.

103. NEB. REV. STAT. § 76-3410(b)(1) (Cum. Supp. 2012) (“WARNING: The property transferred remains subject to inheritance taxation in Nebraska to the same extent as if owned by the transferor at death. Failure to timely pay inheritance taxes is subject to interest and penalties as provided by law.”).

104. *Id.* (“WARNING: The designated beneficiary is personally liable, to the extent of the value of the property transferred, to account for medicaid reimbursement to the extent necessary to discharge any such claim remaining after application of the assets of the transferor’s estate. The designated beneficiary may also be personally liable, to the extent of the value of the property transferred, for claims against the estate, statutory allowances to the transferor’s surviving spouse and children, and the expenses of administration to the extent needed to pay such amounts by the personal representative.”).

105. *Id.* (“WARNING: The Department of Health and Human Services may require revocation of this deed by a transferor, a transferor’s spouse, or both a transferor

deed shall contain the following warnings”<sup>106</sup> and an approved statement of the warnings is contained in the statute, there is a savings provision that “[n]o recorded transfer on death deed shall be invalidated because of any defects in the wording of the warnings required by this subsection.”<sup>107</sup>

Further amendment on the legislative floor added a requirement of “two or more disinterested witnesses,”<sup>108</sup> a mandatory form for the acknowledgment and witnessing requirements based upon the self-proved will statutory form,<sup>109</sup> a provision that if the property is agricultural land and the deed does not direct otherwise, the transferor’s interest in growing crops shall pass to the transferor’s estate rather than to a designated beneficiary,<sup>110</sup> and a requirement that a transfer of real property on death deed must be recorded within thirty days of its execution (in addition to “before the transferor’s death”).<sup>111</sup>

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and the transferor’s spouse in order to qualify or remain qualified for medicaid assistance.”)

106. *Id.* § 76-3410(b)(1). Section 76-3410(a)(3) requires that “[a] transfer on death deed . . . [m]ust contain the warnings provided in subsection (b).”
107. *Id.* § 76-3410(b)(2).
108. L.B. 536 (AM 2046) § 1, 102d Leg., 2d Sess. (Neb. 2012) (2012 NEB. LEGIS. J. 531–34) (codified as enacted at NEB. REV. STAT. § 76-3409 (Cum. Supp. 2012)).
109. *Id.* The requirements for standard form statements like those contained in the self-proved will form were developed as a result of discussion on the floor of the Legislature. *See Floor Debate of Feb. 3, 2012, supra* note 40.
110. L.B. 536 (AM 2046) § 3, 102d Leg., 2d Sess. (Neb. 2012) (codified as enacted at NEB. REV. STAT. § 76-3405 (Cum. Supp. 2012)). *Cf. In re Andersen’s Estate*, 83 Neb. 8, 118 N.W. 1108 (1908) (unless reserved, growing crops pass to devisee of the land); *In re Estate of Roloff*, 143 P.3d 406 (Kan. App. 2006) (transfer on death deed passes growing crops to devisee). The common law doctrine of “emblems” applies to one holding a temporary interest in real estate but does not relate to a devise or conveyance of land by the owner of the fee. *See Heinold v. Siecke*, 257 Neb. 413, 598 N.W.2d 58 (1999) (common law doctrine of emblems applied to “dispute over ownership of annual crops which are growing but unharvested upon the death of a life tenant”); BLACK’S LAW DICTIONARY 599 (9th ed. 2009). “Agricultural real estate” is defined for purposes of the Nebraska recording statute as “land which is primarily used for the production of agricultural products, including waste land lying in or adjacent to and in common ownership with land used for the production of agricultural products.” NEB. REV. STAT. § 76-238(3)(b) (Cum. Supp. 2012). The definition of agricultural products “includes grain and feed crops; forages and sod crops; and animal production, including breeding, feeding, or grazing of cattle, horses, swine, sheep, goats, bees, or poultry.” *Id.* § 76-238(3)(a). Since both sections 76-3405 and 76-238 were included in enacted L.B. 536 (2012), the agricultural definitions of the recording act would also seem to apply to transfer of real property on death deeds.
111. L.B. 536 (AM 2046) § 4, 102d Leg., 1st Sess. (Neb. 2012) (codified as enacted, NEB. REV. STAT. § 76-3410(a)(4)(i) (Cum. Supp. 2012)).

## B. Details

The Uniform Act was first introduced in the 2010 Legislature, shortly after its adoption by NCCUSL in 2009.<sup>112</sup> “Beneficiary deed” proposals had been discussed in Nebraska for several years but action was deferred until work on the Uniform Act was completed.<sup>113</sup>

The proposal was initiated by the Nebraska State Bar Association with an intention that it be held for further study and acted upon by the Legislature in the future.<sup>114</sup> The Judiciary Committee hearing in 2010 was brief and jovial. The only significant opposition was by the Nebraska Department of Health and Human Services that was concerned with the procedures and costs of Medicaid reimbursement enforcement.<sup>115</sup> There also was discussion at the committee hearing about how transfer on death deeds might affect inheritance tax revenues of Nebraska’s 93 counties. The bill was not acted upon by the Judiciary Committee during the 2010 legislative session and an Interim Study by the Judiciary Committee prior to the 2011 session was authorized.<sup>116</sup> The stated purpose of the study was to present a section-by-section comparison of the Uniform Act as introduced in Nebraska with current Nebraska law, “together with additional relevant considerations and recommendations.”<sup>117</sup>

The Interim Study of the Uniform Real Property Transfer on Death Act was submitted to members of the Judiciary Committee on November 22, 2010.<sup>118</sup> Study of the optional statutory transfer on death deed form was minimal and did not adequately reflect the sig-

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112. L.B. 756, 101st Leg., 2d Sess. (Neb. 2010).

113. *Hearing on L.B. 756 Before the Judiciary Comm.*, 101st Leg., 2d Sess. 7 (Neb. Feb. 3 2010) (testimony of William Lindsay, Jr.), available at <http://www.legislature.ne.gov/FloorDocs/101/PDF/Transcripts/Judiciary/2010-02-03.pdf>.

114. *Id.* at 1–2, 10 (statement of Senator John Wightman, the introducer of L.B. 756 (2010)) (“The Nebraska State Bar Association brought this bill to me for your consideration and for broader comment by other interested parties.”).

115. *Id.* at 4. The letter referred to in Senator Wightman’s statement was delivered later and states that the Department “believes that this bill, as written, will result in a significant reduction in Medicaid estate recoveries.” Letter from the Department of Health and Human Services to Senator Wightman (Feb. 3, 2010) (copy on file with the NEBRASKA LAW REVIEW). The Department also prompted a large fiscal note to accompany the bill representing added costs of Medicaid reimbursement enforcement.

116. L.R. 488, 101st Leg., 2d Sess. (Neb. 2010). The text of the resolution is available at 2010 NEB. LEG. J. at 1145–46 while the act of adoption is referenced at 2010 NEB. LEG. J. at 1323.

117. *Id.* at 1145.

118. The Interim Study is part of the permanent record of L.B. 536 (2011) in the Judiciary Committee. See Statement of Senator John Wightman, principal introducer, at the hearing of the Judiciary Committee, February 17, 2011. A transcript of the Judiciary Committee Hearing on L.B. 536 (2011) can be found on pages 34–56 at <http://www.legislature.ne.gov/FloorDocs/Current/PDF/Transcripts/Judiciary/2011-02-17.pdf>. *Hearing on L.B. 536 Before the Judiciary*

nificance of the statutory form in carrying out the purposes of the legislation.<sup>119</sup> Had the Interim Study presented a more thorough and analytical discussion of the statutory transfer of real property on death deed form, a statutory form might have remained in the legislative bill.

The Interim Study comment on the statutory form states that the “[a]ct provides a valuable real estate transaction option and estate planning tool not contained in current Nebraska statutory or common law” and “give[s] valuable information on the law and practice and should lead to the proper and standardized use of transfer on death deeds.”<sup>120</sup> Other than adding warnings on inheritance taxation and Medicaid reimbursement to the form and explanatory information, that is the entire statement. There is no mention of the heightened reliability for “consumers” from a statutory form which may be used authoritatively to create a transfer on death deed. There was no mention of other statutory forms in the Nebraska statutes.<sup>121</sup> There was no amplification of the term “consumers” for whom the NCCUSL Comment states: “[t]he form in this section is designed to be understandable and consumer friendly.”<sup>122</sup> Further, the NCCUSL Comment, itself, is far too restrictive in seeming to equate “consumers” primarily with persons “for whom the preparation of a tailored inter vivos trust is too costly.”<sup>123</sup> The term “consumers,” or at least persons who would benefit from a statutory form, would cover all persons connected with the use of the form, including, among others, lawyers, title insurers, lenders, persons with substantial, well-planned estates, out of state persons and entities, and even businesses supplying legal forms. It was also foreseeable at the time of the Interim Study that, although the chief proponent of the legislation was the Nebraska State Bar Association, some legislators, lawyers and others might have questions relating to the unauthorized practice of law in Nebraska. The policies underlying the unauthorized practice of law, if not the rules, themselves, were always in the background of the subject of a statutory form, even if not expressed in public conversation. The subject should have been dealt with in greater depth in the Interim Study.

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*Comm.*, *supra* note 83. A copy of the Interim Study is also on file with the NEBRASKA LAW REVIEW [hereinafter *Interim Study Report*].

119. [Personal Note: As a supporter of transfer of real property on death legislation and a participant in the Interim Study group, I am embarrassed that the potential ramifications of the statutory form under Nebraska law were not fully developed in the Interim Study as contemplated by the Legislative Resolution. I offer no excuses. I only hope that it may serve as a lesson for others. JMG]

120. *Interim Study Report*, *supra* note 118, at 65.

121. See *supra* notes 2–35 and accompanying text.

122. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16 cmt. Compare the Introducer’s Statement of Intent and Judiciary Committee Statement on the power of attorney statutory form, *supra* notes 58–59.

123. *Id.*

The version of the Uniform Act introduced in 2011 added the three warnings to the statutory form.<sup>124</sup> The requirements for a transfer on death deed remained unchanged.<sup>125</sup>

Prior to the Judiciary Committee hearing on the bill in February 2011, however, the Nebraska Land Title Association secured a proposed “friendly amendment” by the principal introducer that removed the statutory form from the bill and made the three warnings mandatory conditions for a transfer on death deed.<sup>126</sup> The entire explanation given at the legislative hearing for deletion of the statutory form was:

The sample form for a transfer on death deed is optional in LB536. In order to address concerns by the Nebraska Land Title Association, AM403 removes the optional sample form from the proposed law. Instead, the Nebraska State Bar Association will develop and provide a sample form.<sup>127</sup>

There are several aspects of this statement that were not entirely accurate. The statutory form was not simply a “sample” form. It was a form that the legislature would have determined “may be used to create a transfer on death deed”<sup>128</sup> under the enabling statutes. This legislative determination will produce greater certainty and greater standardization of practice than a mere “sample” would provide.<sup>129</sup>

The reference that “the Nebraska State Bar Association will develop and provide a sample form” does not fully explain the effects of

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124. L.B. 536 § 18, 102d Leg., 1st Sess. (Neb. 2011).

125. *Id.* § 9.

126. *See* L.B. 536 (AM 403), 102d Leg., 1st Sess. (Neb. 2011). This proposed amendment, dated the same day as the legislative hearing, is referred to in the transcript of the legislative hearing. *Hearing on L.B. 536 Before the Judiciary Comm.*, *supra* note 83, at 36. Up to that point, the Nebraska State Bar Association had supported inclusion of the statutory form. The Nebraska State Bar Association Legislation Committee reportedly changed positions and sought to have the statutory form deleted from the bill. The same law firm served as registered lobbyists for both the Nebraska Land Title Association and Nebraska State Bar Association. *See infra* note 130.

127. *Hearing on L.B. 536 Before the Judiciary Comm.*, *supra* note 83, at 36. The specific objections of the Nebraska Land Title Association to the statutory forms have not been publicly identified or openly discussed.

128. L.B. 536 § 16, 102d Leg., 1st Sess. (Neb. 2011). A statute giving the Nebraska State Bar Association authority to adopt a form with the same effect as this legislative determination would raise issues of delegation of legislative authority and separation of powers under Article II, Section 1(1) of the Nebraska Constitution.

129. State statutes are not copyrightable. It may be that nothing in the transfer of real property on death deed form or self-help comment in the deed is copyrightable and that copyright protection would not be sought by a private party in any event. Removal of the statutory form did eliminate the claim of exclusion from copyright as a state statute. *See* RALPH S. BROWN AND ROBERT C. DENICOLA, *COPYRIGHT, UNFAIR COMPETITION, AND RELATED TOPICS BEARING ON THE PROTECTION OF WORKS OF AUTHORSHIP* 186–87 (10th ed. 2009).



the change.<sup>130</sup> The Nebraska State Bar Association does provide real estate forms, but only for lawyers and for a fee as part of continuing legal education<sup>131</sup> and an online document service.<sup>132</sup> There is no indication of whether or how the Nebraska State Bar Association might make a transfer of real property on death deed form and explanatory information available to anyone other than to its own members for a fee.<sup>133</sup> The amendment resulted from a collaborative effort of the Nebraska Land Title Association and the Nebraska State Bar Association to delete the statutory form and leave the responsibility for implementation of transfer on death deed forms and explanatory information informally with the Nebraska State Bar Association.<sup>134</sup> It

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130. The same law firm was the registered lobbyist for both the Nebraska Land Title Association and the Nebraska State Bar Association. Clerk of the Legislature's Office, Nebraska Legislature, Addresses of Principals and Registered Lobbyists, *available at* <http://nebraskalegislature.gov/FloorDocs/Current/PDF/Lobby/principallist.pdf>. The Nebraska Commissioner who was the primary legislative proponent for NCCUSL in Nebraska is a former partner of the firm, continues to office with the firm, and is listed "of counsel" on the firm's website. In a similar but completely unrelated situation during the 2012 Nebraska legislative session in which members of the same law firm represented both the bar association and a private client, one of the partners "rejected the idea that a conflict existed because [the private client] didn't testify in opposition to the bill—it is just working on the language of the legislation." Paul Hammel, *Postmortem Facebook Posting: A Status Update*, OMAHA WORLD-HERALD (NEBRASKA EDITION), Feb. 1, 2012 at 1A-2A (adding that "[o]ther lobbying firms . . . have had similar dual clients in the past"). The Bar Association lobbyist stated at the Judiciary Committee hearing on L.B. 783 (2012): "[w]e have been working with Facebook on this bill for looking at issues. They have some issues with their service contracts and what their service contracts say you can and cannot do versus what this law would say, and we have been working on an amendment to clean that up." Hearing of the Judiciary Committee, 102d Leg., 2d Sess. 13, (Neb. Jan. 18, 2012), *available at* <http://www.legislature.ne.gov/FloorDocs/Current/PDF/Transcripts/Judiciary/2012-01-18.pdf>. The bill was not acted upon in 2012 and died in committee.
131. See 2005 NEBRASKA RED BOOK, a two volume Real Estate Practice Manual, intended to be updated "about every 10 years" (the prior editions of the Red Book were in 1970 and 1995), also available on CD, from the Nebraska State Bar Association. Excellent initial materials and forms have already been prepared by the Bar Association's principal spokesperson on L.B. 536 (2012), William J. Lindsay, Jr., but there is no indication that these materials and forms will become available generally to non-members of the Nebraska State Bar Association.
132. See generally NEBDOCS, <http://nebdocs.net/> (last visited Nov. 4, 2012). The terms of the 2012 Subscription Agreement specify that it is available only to members of the Nebraska State Bar Association. See [http://nebdocs.net/files/NebDOCS\\_Subscription%20Agreement\\_ProRate.pdf](http://nebdocs.net/files/NebDOCS_Subscription%20Agreement_ProRate.pdf) (last visited Nov. 4, 2012).
133. The Nebraska State Bar Association does provide "For the Public: Free Legal Information" but "currently all brochures are being updated and are not available." NEBRASKA STATE BAR ASSOCIATION, <http://www.nebar.com/displaycommon.cfm?an=1&subarticlenbr=74> (last visited May 21, 2012).
134. See email from Katie Zulkoski, Bar lobbyist to author and others (Oct. 25, 2011) ("Please note the form has not been included, at the request of the NSBA Legislation Committee and the NLTA . . .") (copy on file with NEBRASKA LAW REVIEW). There is no record of the NCCUSL spokesperson having taken part in this deci-

was done quietly, relatively late in the overall legislative process, and without separate representation or focused consideration of non-lawyer public consumer interests.

The substitute bill from the Judiciary Committee in 2012, which deleted the statutory form, added the three warnings as required elements for a transfer on death deed.<sup>135</sup> Amendments during legislative floor discussion added formalities far more rigorous than those applicable to other comparable documents. These amendments inserted requirements for two disinterested witnesses, acknowledged statements of the transferor and witnesses concerning voluntariness and that the transferor appeared to be “of sound mind and under no constraint or undue influence,” and that the deed be recorded “within thirty days after being signed.”<sup>136</sup> The acknowledgment and witnessing form is based upon the self-proved will form in the Nebraska Probate Code<sup>137</sup> and applies both to the execution and revocation of a transfer of real property on death deed.<sup>138</sup> No legislative consideration appears to have been given to a statutory deed form encompassing all of the formalities of the final bill.<sup>139</sup> A statutory form containing all of the requirements of the final bill could easily have been prepared, accompanied by a legislative determination that “the following form may be used to create a transfer on death deed.”<sup>140</sup>

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sion. For a further indication of a “collaborative effort,” see *supra* note 130. The Nebraska State Bar Association had previously supported inclusion of the statutory form and commentary.

135. *Substitute L.B. 536 (AM 1668)* § 9(a)(3), (b), *supra* note 38. The “explanation of amendments” by the Judiciary Committee states that “[t]he transfer on death deed form would be removed from the bill” but does not reflect that the three warnings, previously set out on the optional statutory form, would become mandatory conditions for any transfer on death deed under section 9 of the substitute bill. The Committee statement (filed in January 2012 when L.B. 536 was reported out of Committee) can be found at <http://www.nebraskalegislature.gov/FloorDocs/Current/PDF/CS/LB536.pdf>.
136. *AM 2046*, *supra* note 41 (adopted February 15, 2012) (2012 NEB. LEGIS. J. 531–34). *AM 2046* also added a requirement that if the deed does not specify a disposition of growing crops, the transferor’s interest in growing crops passes to the transferor’s estate.
137. NEB. REV. STAT. § 30-2329(1) (Reissue 2008).
138. *AM 2046*, *supra* note 41, ¶¶ 1, 5.
139. For legislative floor discussion, see *Floor Debate of Feb. 3, 2012*, *supra* note 40. The principal introducer during floor debate appears to have viewed the added requirements as reasons for needing legal advice rather than as an opportunity for a consumer friendly statutory form to implement the provisions of the statutes. See *supra* note 44.
140. The statutory form might have been constructed by using L.B. 536 § 18, 102d Leg., 1st Sess. (Neb. 2011) with warnings in the language now NEB. REV. STAT. § 76-3410(b)(1) (Cum. Supp. 2012), adding the requirement of recording “within thirty days after being executed” to the language on recording before death, adding explanatory information (and, better yet, clarifying language) on “disinterested witnesses,” adding explanatory information and check-the-box language pertaining to agricultural land and growing crops, and inserting the enacted stat-

The various amendments provided stronger policies of consumerism for enacting a statutory form, much like the policies of consumerism underlying the adoption of the statutory power of attorney form.

## V. DEFINING “UNAUTHORIZED PRACTICE OF LAW”

### A. National Standard

Authorization to practice law in each state and authority to regulate the unauthorized practice of law has traditionally been a prerogative of the highest court of the state. There is no fixed national definition of “practice of law.”

The issue of providing an express statement as to what constitutes the practice of law was present when the American Bar Association Commission on Multijurisdictional Practice studied and updated Rule 5.5 of the ABA Model Rules for Professional Conduct.<sup>141</sup> The Commission provided no new definition of “practice of law” and recommended that “[t]he ABA affirm its support for the principle of state judicial regulation of the practice of law.”<sup>142</sup>

The Report and recommended changes of the Commission on Multijurisdictional Practice were adopted by the ABA at its annual meeting in August 2002. At the same annual meeting in August 2002, the ABA established a new Task Force on the Model Definition of the Practice of Law.<sup>143</sup>

A year later, “the Task force decided not to attempt a single nationwide definition of practice of law, but instead recommended that every jurisdiction adopt its own definition of the practice of law.”<sup>144</sup> At its 2003 annual meeting, the ABA followed the Task Force position with a resolution that states:

RESOLVED, That the American Bar Association recommends that every state and territory adopt a definition of the practice of law.

FURTHER RESOLVED, That each state’s and territory’s definition should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity.

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utory form (perhaps with clarifying language as to “disinterested witnesses”), now NEB. REV. STAT. § 76-3409 (Cum. Supp. 2012), for witnessing and acknowledging where “Acknowledgment” appears at the end of the form.

141. The Final Report of the Commission on Multijurisdictional Practice (June 6, 2002) and some related documents can be found at [http://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/commission\\_on\\_multijurisdictional\\_practice.html](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html).

142. *Id.* at 13.

143. See STEPHEN GILLERS, ROY D. SIMON & ANDREW M. PERLMAN, REGULATION OF LAWYERS, STATUTES AND STANDARDS 376–77 (2011).

144. *Id.* at 377.

FURTHER RESOLVED, That each state and territory should determine who may provide services that are included within the state's or territory's definition of the practice of law and under what circumstances based upon the potential harm and benefit to the public. The determination should include consideration of minimum qualifications, competence and accountability.<sup>145</sup>

## **B. Nebraska Definition of What Constitutes an Authorized Practice of Law**

### *1. Separation of Powers*

The Nebraska definition of what constitutes the practice of law is contained in Nebraska Supreme Court Rules on Unauthorized Practice of Law adopted in 2008 [referred to herein as Rule or Rules].<sup>146</sup> Nonlawyers may not practice law in Nebraska “except as may be authorized by published opinion or court rule.”<sup>147</sup> Activities of lawyers are subject to the Rules of Professional Conduct.<sup>148</sup> The Nebraska State Bar Association is an “integrated” or mandatory association for lawyers by Nebraska Supreme Court rule.<sup>149</sup>

The Rules reflect the substance of ABA Resolution adopted in 2003 following the unsuccessful efforts of the ABA Task Force on the Model Definition of the Practice of Law. The Rules do not prohibit all legal activities by nonlawyers but only “unauthorized” activities. Still, as a current scheme for the civil enforcement of prohibitions against the “unauthorized” practice of law in Nebraska, the Rules appear to result in a definite “tilt” in favor of the business side of lawyering over public consumerism.

The unauthorized practice of law rules and procedures were “promulgated by the Nebraska Supreme Court pursuant to its inherent authority to define and regulate the practice of law in this state.”<sup>150</sup> What is not clear is the extent to which this inherent authority of the Supreme Court operates as a limitation on the powers of the Nebraska Legislature.

The first published opinion of the Supreme Court under the 2008 Rules distinguishes the “inherent power to define and regulate the practice of law” from its “exclusive power to determine the qualifica-

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145. *Id.*

146. NEB. CT. R. §§ 3-1001 to -1021 (2008), available at <http://www.supremecourt.ne.gov/rules/pdf/Ch3Art10.pdf>.

147. *Id.* § 3-1003.

148. See NEB. CT. R. OF PROF. COND. § 3-505.5 (2008). As to relationships with nonlawyers, see section 3-505.3 and the comments to section 3-505.5.

149. *Id.* § 3-803; *In re* Integration of Nebraska State Bar Ass'n, 133 Neb. 283, 275 N.W. 265 (1937). Lawyers are sometimes referred to as “officers of the court.” See, e.g., *In re* Estate of Reed, 267 Neb. 121, 130, 672 N.W.2d 416, 424 (2003) (“lawyers, as officers of the court, are subject to the directives of the courts”).

150. NEB. CT. R. ch. 3, art. 10, statement of intent; see *id.* § 3-1010; *State v. Yah*, 281 Neb. 383, 389–90, 796 N.W.2d 189, 195 (2011).

tions of persons who may be permitted to practice law.”<sup>151</sup> The Court stated that “[t]his inherent power is undiminished by the fact that the Legislature has made the ‘[u]nauthorized practice of law’ as defined” by statute a misdemeanor.<sup>152</sup> It explained further that “[t]here are many instances where persons’ rights have been jeopardized and sacrificed because of following the counsel and advice of unlicensed persons, giving or attempting to give legal advice.”<sup>153</sup> The decision is implicitly grounded on the constitutional separation of judicial and legislative powers.<sup>154</sup>

It is unlikely that there will be a direct confrontation between the Nebraska Legislature and Nebraska Supreme Court with respect to legislative enactment of “understandable and consumer friendly forms.” An optional statutory form with commentary to implement broader legislation falls within the potentially overlapping Nebraska constitutional jurisdictions of the Supreme Court and Legislature.<sup>155</sup> In recent years, neither the Supreme Court nor the Legislature has taken an adversarial approach to issues concerning their potentially overlapping constitutional authority. Further, the Rules are, for practical purposes, administered in the first instance by the Nebraska State Bar Association. The Nebraska State Bar Association is the enforcer of unauthorized practice of law rules on behalf of the Nebraska

151. *Yah*, 281 Neb. at 389, 796 N.W.2d at 195.

152. *Id.* at 390, 796 N.W.2d at 195.

153. *Id.* at 391, 796 N.W.2d at 195. The Nebraska Supreme Court Rules on Unauthorized Practice of Law read as follows:

[T]he privilege of representing others in our system is regulated by law for the protection of the public, to ensure that those who provide legal services to others are qualified to do so by education, training, and experience and that they are held accountable for errors, misrepresentations, and unethical practices.

Nonlawyers may be untrained and inexperienced in the law. They are not officers of the courts, are not accountable for their actions, and are not prevented from using the legal system for their own purposes to harm the system and those who unknowingly rely on them.

. . . The purpose of the rules is to protect the public from potential harm caused by the actions of nonlawyers engaging in the unauthorized practice of law.

NEB. CT. R. ch. 3, art. 10, statement of intent. Not all lawyers or nonlawyers would agree completely with this recent statement of the Supreme Court: “This is not for the benefit of lawyers admitted to practice in this state, but ‘for the protection of citizens and litigants in the administration of justice, against the mistakes of the ignorant on the one hand, and the machinations of unscrupulous persons on the other . . . .’” *Yah*, 281 Neb. at 391, 796 N.W.2d at 196 (quoting *Niklaus v. Abel Const. Co.*, 164 Neb. 842, 852, 83 N.W.2d 904, 911 (1957)). The *Niklaus* opinion in turn quotes a Colorado decision and additionally cites New Jersey, Washington and South Dakota decisions.

154. Neb. Const. art. II, § 1(1).

155. For examples of legislative authority for the Supreme Court to promulgate standard forms to implement statutory provisions, see *supra* note 2.

Supreme Court and a very impressive lobbyist before the Legislature.<sup>156</sup>

Lack of specificity and clarity in the Rules causes considerable uncertainty that also operates as a substantial deterrent to the introduction and consideration of statutory forms by the Legislature. An unsupported assertion that a statutory form constitutes or will lead to an unauthorized practice of law can derail the proposal, especially when that assertion is given support by the Nebraska State Bar Association. The Supreme Court is the final authority on whether or not legislative provisions for statutory forms and explanation do, indeed, conflict with the Supreme Court's inherent authority to define and regulate the practice of law in Nebraska.<sup>157</sup> It would seem highly beneficial for the Supreme Court to clarify by express statement that legislative enactments of statutory forms with relevant general information to carry out the provisions of a broader legislative enactment do not constitute an unauthorized practice of law. This could be done by rule or in a written opinion of the Court. The clarification would prompt a more open discussion of the policies related to the specific statutory form, add to the effectiveness of the legislation, and also enhance the Supreme Court's own public consumer driven activities to provide electronic self-help forms and information.<sup>158</sup>

Legislation within such an exception or exclusion would not authorize nonlawyers to provide information or services that would otherwise constitute the practice of law. It would sanction only forms and explanations that can be used to carry into effect the substantive features of the legislation. An individual could exercise his or her "inherent right" to use the statutory form and information for his or her own

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156. For further discussion, see *supra* notes 126–34 and accompanying text, describing deletion of the statutory form in L.B. 536 "at the request of the NSBA Legislation Committee and NLTA," an apparent change in position of the Nebraska State Bar Association from support of the provision to opposition to the provision. It is also likely that *some* (certainly not "all" and probably not "most") lawyer-legislators may not effectively differentiate their roles as "officers of the court" and their obligations to the equal legislative branch of state government.

157. See, e.g., *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 635 P.2d 730, 732 (Wash. 1981) (en banc). In *Bennion*, a statute authorized escrow agents to "select, prepare, and complete documents and instruments relating to" the transaction. *Id.* It required written warnings to all parties that the document "may substantially affect your legal rights" and is selected, prepared and completed by the escrow agent "for its own benefit and to protect its own interest in this transaction." *Id.* at 732 n.1. The written warning also advised, "[i]f you have any question regarding such documents or instruments or your rights, you should consult an attorney of your choice." *Id.* For additional discussion of state supreme court decisions invalidating legislation relating to the practice of law, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1, Reporter's Note cmt. c. (2000).

158. The Online Nebraska Supreme Court Self-Help website is <http://www.supremecourt.ne.gov/self-help>.

purposes. It would also promote reliable standardized practices for relatively routine matters which would be of benefit to lawyer consumers and to nonlawyer public consumers.

## 2. *General Definitions*

Although there may not be common or precise definitions of the “practice of law” among the states, a sound working hypothesis is that “[i]n general it may be said that a person practices law when he or she *applies the law to the facts of a particular case.*”<sup>159</sup> That “working hypothesis” would appear to reflect present Nebraska law and policies.

The basic Nebraska definition in the Rules states:

The “practice of law,” or “to practice law” is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge, judgment, and skill of a person trained as a lawyer.<sup>160</sup>

There are three key aspects of the general definition.

Application of legal principles and judgment must relate to “the circumstances or objectives of another entity or person.” Individuals have an “inherent right . . . to represent themselves in legal matters.”<sup>161</sup>

The circumstances or objectives of the other entity or person must “require” the knowledge, judgment, and skill of a person trained as a lawyer. The term “require” invokes an element of “necessity” or “need.”<sup>162</sup> This is a more stringent standard than determination of a “benefit” or merely an evaluation of what lawyers historically or generally have done. As an essential element in the determination of “unauthorized practice of law,” the term “require” means that it is “necessary” to use a trained lawyer in order to achieve a satisfactory outcome.

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159. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* 1029 (ABA 2011–2012) (emphasis in original). It also reflects the 2003 ABA Resolution, *supra* note 145, that “each state’s and territory’s definition should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity.”

160. NEB. CT. R. § 3-1001.

161. NEB. CT. R. ch. 3, art. 10, statement of intent (“Every jurisdiction in the United States recognizes the inherent right of individuals to represent themselves in legal matters.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. d (2000) (“The right extends to self-preparation of legal documents and other kinds of out-of-court legal work as well as to in-court representation.”).

162. “Require” in the sense used in the unauthorized practice of law rule means “to demand as necessary or essential (as on general principles or in order to satisfy some regulation).” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (unabridged) 1929 (1971). *See also* Heistand v. Ristau, 135 Neb. 881, 884–85, 284 N.W.2d 756, 758–59 (1939) (word “requires” in workers’ compensation statute means “compel” or “exact”).

The term “require” also speaks in the present tense as a preface to “the knowledge, judgment, and skill of a person trained as a lawyer.” Formal training to become a lawyer in the United States normally follows an earned Bachelor’s Degree at the collegiate level and culminates in an admission to practice law. A century ago, the knowledge, judgment and skill of lawyering resided mainly in a lawyer’s head or on the shelves of a library. Today, there is a tremendously vast amount of legal information easily available electronically to the general public. Persons deal, and are expected to deal, in many important consumer, financial and business transactions without seeking personal legal advice (although in a number of those situations personal legal advice might be advisable).<sup>163</sup> With respect to some legal activities, there is less difference today than in the past between “person[s] trained as a lawyer” and persons who do not have formal legal training. In any event, this element of the definition of “practice of law” should be measured by a contemporary standard and not by its historical past.

Another definitional provision in the Rules which may have relevance to the enactment of statutory forms and commentary is an illustration of activities that can constitute the “practice of law” under the Rules:

(B) Selection, drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person.<sup>164</sup>

It would seem that if the legislature has authority to enact a general statute, it would also have authority to spell out a method by which the provisions of the underlying statutory provisions can be complied with. Giving advice or service “for another entity or person,” which particularizes the general legislative road map for that person, whether based upon the form, explanatory comment on the form, or text of the statutes, can constitute an unauthorized practice of law. General information alone and without something further does not select, draft or complete a legal document for another person and should not fall within this prohibition.

Individualizing the statutory form by the services of a nonlawyer would constitute an unauthorized practice of law to the same extent it does with nonstatutory forms or any other statutory or nonstatutory matter. The Nebraska Supreme Court, itself, has made available electronically a number of practice forms with “instructions and re-

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163. The Rules, themselves, recognize some situations in which a nonlawyer can complete standardized forms for another person. See *infra* note 169.

164. NEB. CT. R. § 3-1001(B). This example does not contain the language “for compensation direct or indirect” which appears in the preceding example.



sources” through its “Self-Help” website.<sup>165</sup> The forms are primarily for persons wishing to represent themselves in court.<sup>166</sup> These practice forms and the procedures involved are far more complicated than the proposed statutory transfer on death deed form. So is the new statutory power of attorney form. As with statutory forms or statutes generally, counseling another person on the selection, use and effects of the forms and other information would constitute an unauthorized practice of law.<sup>167</sup>

### 3. *Exceptions and Exclusions*

The Rules contain “exceptions and exclusions” from the unauthorized practice of law which apply “[w]hether or not they constitute the practice of law.”<sup>168</sup> They presently except or exclude a number of non-lawyer persons, entities and lawyer-like activities.<sup>169</sup>

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165. *Nebraska Online Legal Self-Help Center*, NEBRASKA SUPREME COURT, <http://supremecourt.ne.gov/self-help/index.html> (last visited Nov. 4, 2012). The Self-Help Center warns: “The information here is **not** a substitute for legal advice. You should talk with a lawyer licensed to practice law in Nebraska to get legal advice on your issue.”

166. *Id.* “If you are interested in representing yourself in court, there are a number of forms designed specifically for your use. The Self-help page of this Web site contains forms, instructions and resources.”

167. For discussion of the line between providing only forms and information and customizing a form and information for another person, see ROTUNDA & DZIENKOWSKI, *supra* note 159, § 5.5-3(d).

168. NEB. CT. R. § 3-1004.

169. A number of persons, entities and activities are fully or as limited conditionally excluded from the prohibitions against the unauthorized practice of law “[w]hether or not they constitute the practice of law.” NEB. CT. R. § 3-1004(A) (title insurance companies and their licensed agents, real estate rental agencies, licensed real estate brokers and affiliated licensees, and employees of these entities), (B) (licensed abstractors), (C) (appearing in a representative capacity before an administrative agency), (D) (serving in a neutral capacity as mediator, arbitrator, conciliator, or facilitator), (E) (participation in labor negotiations, employee disciplinary hearings, employment grievances, arbitrations, mediating or conciliations), (F) (lobbyists), (G) (“Nonlawyers selling legal forms in any format, so long as they do not advise or counsel another regarding the selection, use, or legal effect of the forms.”), (H) (specified activities “with respect to tax laws”), (I) (specified services by certified public accountants), (J) (giving information about the application of law to a product or service which the nonlawyer lawfully provides), (K) (providing legal information for the purpose of training other employees or other members of the entity or organization), (L) (employees of an entity preparing legal documents incidental to the entity’s primary interests), (M) (“in the business of serving as fiduciaries, providing beneficiaries and interested persons with advice regarding the meaning, effect, and legal impact of wills, trusts, or plans and preparing documents incidental to the administration thereof”), (N) (employees of an entity engaging in activities “for the sole benefit of the entity or organization”), (O) (activities of lawyer employee of a nonlawyer entity or organization), (P) (nonlawyer entity “acting through lawyer employees to the extent such lawyers perform pro bono legal services for nonprofit organizations, low income clients, or otherwise in the public interest”), (Q) (nonlawyer entity acting

With respect to standardized forms, there is an exclusion for:

(G) Nonlawyers selling legal forms in any format, so long as they do not advise or counsel another regarding the selection, use, or legal effect of the forms.<sup>170</sup>

The language used in this exclusion is delightfully ambiguous. To what does the word “they” in the requirement “so long as they do not advise or counsel another regarding the selection, use or legal effect of the forms” relate? The more plausible interpretation is that “they” relates to “nonlawyers” rather than “forms.” Individual persons “advise or counsel another.” The Supreme Court has referred to the exclusion in that sense.<sup>171</sup> Forms and commentary provide general information. That is certainly accurate as to the commentary and general information contained in the recently enacted statutory power of attorney form.<sup>172</sup> Forms alone do not “advise or counsel another” under the Rules. A studied professional guess is that the Nebraska Supreme Court would interpret this exclusion to apply to commercial self-help books with forms and explanatory comments.<sup>173</sup>

Like the forms on the Self-Help website of the Supreme Court, the statutory explanatory comments in the Uniform Real Property on Death Act and Uniform Power of Attorney Act forms do give information on the “selection, use, and legal effect of the forms.” The explanatory comments make the forms more understandable and more useful in carrying out the purposes of the statutes. The Supreme Court self-help forms are a clear testament to that policy.

The issues concerning selection and use of legal forms are likely to play out nationally in dealing with electronic processes. Making forms and information with respect to the use of the forms generally available on the internet would not seem to involve the practice of law. But the follow-up by person, by interactive electronic processing, or by

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through lawyer employees providing legal services consistent with the Nebraska Rules of Professional Conduct”), (R) (insurance, guarantee, or indemnity company using an employee “or captive lawyer” to provide a defense under a reservation of rights), (S) (insurance claims adjusters), (T) (“employees and supervised volunteers of nonprofit entities whose primary purpose is assisting domestic violence and sexual assault victims”), (U) (making a required disclosure statement), and (V) (financial institutions); *see also* NEB. CT. R. § 3-1005 (nonlawyer assistants); *id.* § 3-1006 (certain other organizations authorized by general court rules to provide specified services through the use of lawyers); *id.* § 3-1004(W) (other activities determined by the Supreme Court by published opinion or court rule).

170. NEB. CT. R. § 3-1004(G).

171. *See* State v. Yah, 281 Neb. 383, 393, 796 N.W.2d 189, 196–97 (2011) (“Certain types of conduct on the part of nonlawyers are not prohibited by the rules, including [n]onlawyers selling legal forms . . .”).

172. *See* NEB. REV. STAT. § 30-4041 (Cum. Supp. 2012).

173. *See* New York Cnty. Lawyers Ass’n. v. Dacey, 234 N.E.2d 459 (N.Y. 1967) (reversing and adopting dissenting opinion in 28 A.D. 161 (App. Div. 1967), discussed in ROTUNDA & DZIENKOWSKI, *supra* note 159, at 1033–37, § 5.5-3(d)).

similar methods that apply the form and information to a specified individual may constitute an unauthorized practice of law<sup>174</sup> and subject the supplier to the jurisdiction of a relevant state.<sup>175</sup>

#### 4. *Enforcement*

The Rules create a Commission on Unauthorized Practice of Law for the civil enforcement of the Rules.<sup>176</sup> The Commission has jurisdiction over complaints of unauthorized practice of law and may deal with other matters on its own motion.<sup>177</sup> The Commission has nine members, six attorneys nominated by the Executive Council of the Nebraska State Bar Association and appointed by the Supreme Court<sup>178</sup> and three nonlawyers appointed by the Supreme Court.<sup>179</sup> The Commission may by its own rules sit in panels of three members, two lawyers and one nonlawyer.<sup>180</sup> The Executive Director of the Nebraska State Bar Association is Secretary of the Commission.<sup>181</sup> The person primarily responsible for enforcement of the Rules is the Counsel on Unauthorized Practice of Law, who must be a member and an employee of the Nebraska State Bar Association.<sup>182</sup> The Bar Association is obligated to fund the office of the Counsel on Unauthorized Practice

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174. *See, e.g.*, *Janson v. LegalZoom.com, Inc.*, 802 F.Supp. 2d (W.D. Mo. 2011). This class action was subsequently settled. Debra Cassens Weiss, *LegalZoom Can Continue to Offer Documents in Missouri Under Proposed Settlement*, ABA J., [http://www.abajournal.com/news/article/legalzoom\\_can\\_continue\\_to\\_offer\\_documents\\_in\\_missouri\\_under\\_proposed\\_settle](http://www.abajournal.com/news/article/legalzoom_can_continue_to_offer_documents_in_missouri_under_proposed_settle) (last visited Aug. 14, 2012). For other situations involving LegalZoom, see Catherine J. Lanctot, *Does LegalZoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 257–61 (2011).

175. For a discussion of the jurisdictional issues, see JOHN P. LENICH, 5 NEBRASKA PRACTICE SERIES § 3:4 (2008). There are two additional exceptions or exclusions which may apply to legislative enactment of statutory forms and statutory explanations. NEB. CT. R. § 3-1007 states that “[n]othing in these rules shall affect the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public.” Section 3-1008 provides that “[n]othing in these rules shall affect the ability of a governmental agency to carry out responsibilities provided by law.”

176. NEB. CT. R. § 3-1011(A). For a more complete identification and an application of the procedures, see discussion in *State v. Yah*, 281 Neb. 383, 796 N.W.2d 189 (2011).

177. NEB. CT. R. § 3-1012(A). The Rules do not limit the authority of judges to punish for contempt within the jurisdiction of that court and do not limit “any civil remedy or criminal proceeding which may otherwise exist with respect to the unauthorized practice of law.” *Id.* § 3-1012(B).

178. *Id.* § 3-1011(A)(1).

179. *Id.* § 3-1011(A)(2).

180. *Id.* § 3-1011(F).

181. *Id.* § 3-1012(E).

182. *Id.* § 3-1013(A), (B).

of Law.<sup>183</sup> This potentially puts the Bar Association in dual positions of being an enforcer of currently vague and misunderstood rules on the unauthorized practice of law and the primary legislative lobbyist for some public consumer oriented self-help legislation.

With respect to the enactment of statutory forms and statutory explanatory comments, there are sound policy reasons for the Supreme Court to specify that the legislation does not by itself constitute an unauthorized practice of law. As with the information in the Supreme Court's Self-Help Center, their misuse by nonlawyers may constitute an unauthorized practice of law. Articulating a scope for permissible legislation would eliminate the deterrent effects of present misperceptions of the Rules concerning the definition of "practice of law." It might also obviate what could be difficult and contentious aspects in the enforcement procedures within the Commission on Unauthorized Practice of Law.

### C. NCCUSL's Situation as to Statutory Forms in Uniform Laws

NCCUSL is in an extremely difficult situation when it comes to including statutory forms in uniform acts, especially with commentary on the selection, use and effects of the form. The basic role of NCCUSL is to design proposals for consideration by individual states. State legislatures are always free to enact the provisions as written, modify them to any degree, reject them, or take a contrary position.<sup>184</sup>

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183. *Id.* § 3-1013 (B). Since the Nebraska State Bar Association is an "integrated" or mandatory Association by Supreme Court rule, the obligation is financially that of the entire membership.

184. See correspondence of Kieran Marion, Legislative Counsel, Uniform Law Commission, to one of the Nebraska Commissioners, forwarded to the author electronically on October 15, 2011 (copy on file with the NEBRASKA LAW REVIEW):

The ULC Drafting Manual, in Appendix E, provides guidance for the drafting and structure for forms used, but unfortunately nothing about the policy of, or considerations that go into, when to use them and when not to. As near as we can tell so far, the decision is likely an individual decision act-by-act by the individual drafting committees, based on perceived need and benefit.

The use does seem to be fairly rare. There are forms in UCC9 for filings for example, and in the Notarial Act and the Unsworn Foreign Declarations Act, for use with those mechanisms. And, of course, the URPTODA has the optional forms for the TOD Deed, along with a few other acts. My personal opinion as to why they might be rare, is that they get into the nuts and bolts of state and local practice and implementation. In areas of the law where a uniform solution may not cover all of the necessary local considerations (and real property can often be one such area), they attempt a level of detail which may not be suited for all jurisdictions, and fit best where you have the potential for cross-jurisdictional (city/county/township/village) and interstate use, where you have a real need to contain variance and maintain consistency in the tool that is used. Contrast that, however, with the need for uniform filing systems, procedures, and

NCCUSL is not a significant player in defining the “practice of law” or the “unauthorized practice of law.” When it comes to inclusion of provisions for statutory forms, there is an added factor that the judicial branch of each state regulates the practice of law. Uniform acts that contain statutory forms and explanations must satisfy both the legislative and judicial branches of state government. In addition, they must be politically saleable in arenas populated by lawyers.

There are subjects that serve a very significant national policy in having a standard national statutory form, such as the forms for a written financing statement and amendment under Article 9, Secured Transactions, of the Uniform Commercial Code.<sup>185</sup> Some subjects have an advantageous, but less strong, national policy of uniformity in a statutory form, such as the statutory “check-the-box” power of attorney form, use of which often will cross state lines.<sup>186</sup> The statutory transfer on death deed form relates to real estate in only one state. The primary policy of the statutory transfer on death deed form is to more effectively carry out the provisions of that statutory scheme in an enacting state. Another strong NCCUSL objective is to standardize procedures where related or similar transactions may involve more than one state. A uniform statutory transfer on death deed form promotes that policy objective.

The statutory transfer on death deed form in the Uniform Act is a plain, standard quit claim deed. The related commentary of NCCUSL on the optional statutory form is minimal and adds little information or reasoning as to why a statutory quit claim deed is included in the Uniform Act. A Legislative Note explains that the form is intended “for states wishing to provide optional statutory forms” and that “[a]n enacting jurisdiction should review its statutory requirements for deeds” and amend the deed and explanatory material accordingly.<sup>187</sup> There is no explanation of whether or why the inclusion of the statutory form might enhance the effectiveness of the Uniform Act, other than references that the form is based on the form in the Uniform Health-Care Decisions Act and ten of the thirteen states with comparable transfer on death statutes at the time included a statutory form.<sup>188</sup> As to the “common questions about the use of this form” to

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forms under the UCC - there, that level of conformity is very critical. And, optional or “uniform” language on forms can provide valuable guidance to jurisdictions, that takes into account the intent of the drafters for the act, as those jurisdictions try to implement a uniform law.

185. *Id.*

186. *Id.*

187. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16 legislative note (2009). For a broader analysis of considerations whether or not to include a real property transfer on death deed form, see statement of the chair of the NCCUSL drafting committee, *supra* note 84.

188. *Id.* § 16 cmt.

appear on the back of the deed form, the Drafting Committee apparently relied on two Illinois statutes, statutory forms for powers of attorney and statutory power of attorney for health care, that contain answers to questions likely to be asked by consumers.<sup>189</sup> By comparison, the Uniform Power of Attorney Act contains a persuasive statement about why statutory forms are included in the Act.<sup>190</sup>

The commentary of NCCUSL is unnecessarily sparse in explaining the uses for a real property statutory transfer on death deed form. It recognizes that “[t]he 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.”<sup>191</sup> There are other important uses for the form than merely for persons who cannot afford a “tailored inter vivos revocable trust.”<sup>192</sup>

The statutory transfer on death deed form “is designed to be understandable and consumer friendly.”<sup>193</sup> There is no definition of “consumer” in the commentary. The only clue to the meaning of “consumer” from the text of the commentary is one “for whom the preparation of a tailored inter vivos trust is too costly.” That definition is far too limited as to the class of persons who will benefit as “consumers” from the enactment of this statutory form.

The Legislative Note and Comment on the statutory form are subject to a possible interpretation that its drafters were attempting to avoid or minimize an unfavorable response in those states having restrictive attitudes on the unauthorized practice of law. NCCUSL cannot change the differing views of states on what constitutes the practice of law. But it does not have to ignore the differing state definitions, either. One possible alternative would be to use the guidelines in the 2003 ABA Task Force on the Model Definition of the Practice of Law<sup>194</sup> as a standard for fashioning the commentary in the official text. Another alternative would be to rely expressly on the “working hypothesis” that publication of general information does not,

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189. *Id.*

190. UNIF. POWER OF ATTORNEY ACT art. 3 general cmt. (2006) states:

With the proliferation of power of attorney forms in the public domain, the advantage of a statutorily-sanctioned form is the promotion of uniformity in power of attorney practice. In states such as Illinois and New York, where state-sanctioned statutory forms have existed for many years, the statutory form is widely used by both lawyers and lay persons. The familiarity and common understanding achieved with the use of one statutory form also facilitates acceptance of powers of attorney. In the twenty years preceding this Act, the number of states with statutory forms has increased from only a few to eighteen.

191. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16 cmt.

192. *See supra* notes 88–91 and accompanying text.

193. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16 cmt.

194. *See supra* note 145 and accompanying text.

by itself, constitute the practice of law. The practice of law commences when that information is further individualized for another.

Both the substantive provisions and the optional statutory form with commentary serve important "consumer friendly" policies. The Legislative Note and Comment to Section 16 of the Uniform Transfer of Real Property on Death Act do not adequately express those policies as to the role of the statutory transfer of real property on death form.

## VI. ASPECTS OF CONSUMERISM

### A. Statutory Transfer on Death Deeds

#### 1. *In General*

An important policy objective of the Uniform Real Property Transfer on Death Act is to promote consumerism. The substantive provisions are intended to offer a new consumer friendly method of land transfer. The procedural provisions are intended to provide consumer friendly means of carrying out the substantive provisions of the enactment. The optional statutory form is an important element in fully achieving the purposes of the Uniform Act. No other form can provide consumers the same degree of certainty as the statutory form.

Considerable attention has been given to the substantive provisions of the Uniform Act for minimizing probate and the comparative advantages of transfer on death deeds over other forms of non-probate transfer of real property. The principal introducer described the advantages of transfer on death deeds over real property joint tenancies and retained life estates.<sup>195</sup> Joint tenancies and retained life estates create present interests in the co-owners which can potentially work to the disadvantage of the parties.<sup>196</sup>

Both the NCCUSL Comment<sup>197</sup> and the principal introducer<sup>198</sup> refer to cost savings of a transfer of real property on death deed over a revocable trust. There are other factors of potential consumerism pre-

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195. *Hearing on L.B. 536 Before the Judiciary Comm., supra* note 83, at 37 (statement of Sen. John Wightman).

196. *Id.*; see *Hearing on L.B. 756 Before the Judiciary Comm., supra* note 113, at 7 (statement of William Lindsay, Jr., spokesperson for the Nebraska State Bar Association).

197. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16 cmt. ("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.")

198. *Hearing on L.B. 536 Before the Judiciary Comm., supra* note 83, at 37 (statement of Senator John Wightman) ("[T]he difference is that a revocable trust might very well cost you \$1,000 to \$2,000 to get a revocable trust where you may be able to do this for \$50 to \$100. So somebody who just owned a home, I think if people had a substantial amount of property they would use a revocable trust, but if they just owned a home they might very likely prefer to use this method, neither of which create any current interest in the beneficiary.")

sent in the comparison of a transfer of real property on death deed with a revocable trust. A funded revocable trust requires some separate formalities of management during the lifetime of the transferor. A transfer on death deed might serve advantageously as a “pour over will” to an “unfunded” revocable trust or in substantial, well planned and well administered estates. Additionally, with respect to Nebraska law, the revocable trust need not be an expensive “tailored inter vivos revocable trust.” Nebraska recognizes an undisclosed trust “whose beneficiaries are not named nor terms declared, either in the conveyances or in a separately recorded document.”<sup>199</sup>

There are other potential consumer benefits in the substantive features of the Uniform Act. It provides a reasonable alternative to the morass of reported decisions, and what must be a tremendous amount of “practical” non-litigated lifetime planning, concerning delivery of deeds intended to operate at death, informal secret agreements allowing the grantor to continue to exercise ownership rights until death, delivery to grantee, retention by grantor of executed deed, delivery to a third person for further delivery at death, in each case recorded or not recorded.<sup>200</sup> A transfer of real property on death deed may be simpler, easier, and less costly than ancillary probate procedures under the Nebraska Probate Code.<sup>201</sup> There are advantages over the affidavit procedure for small estates which is limited to a real estate valuation of \$30,000 and has other conditions for its use.<sup>202</sup>

The three warnings added in the Nebraska legislative process are also consumer friendly in giving notice of some important provisions in Nebraska statutes. The warning that the beneficiary may have personal liability to the personal representative of the transferor’s estate for claims against the estate, allowances, and administration expenses if the probate estate is insufficient reflects current procedures of the Nebraska Probate Code.<sup>203</sup> Unsecured claims are submitted first against the decedent’s estate. If the estate is insufficient, the personal representative can assert claims against the recipients of non-probate property to the extent of the value received. It is beneficial that the designated beneficiary, as well as the transferor and others,

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199. See Jeffrey T. Peetz, *Deeds*, in 1 RED BOOK REAL ESTATE PRACTICE MANUAL ¶15-2(D)(4) (Nebraska Continuing Education 2005). Similarly, Nebraska recognizes oral trusts of personal property under which the transferor retains substantial rights including a power to revoke until death. See *Whalen v. Swircin*, 141 Neb. 650, 4 N.W.2d 737 (1942).

200. See Peetz, *supra* note 199, at ¶ 15-3(L).

201. See NEB. REV. STAT. §§ 30-2501 to -2508 (Reissue 2008).

202. See NEB. REV. STAT. § 30-24,129 (Cum. Supp. 2012).

203. See NEB. REV. STAT. §§ 76-3417 (Cum. Supp. 2012), 30-2487, 30-2726, 30-2743, 30-3850(3), (4) (Reissue 2008). See also NEB. REV. STAT. § 68-919 (Reissue 2009) (claim asserted by the Dep’t of Health and Human Services in probate estate).



be aware of this potential personal liability from the outset of their involvement in the transaction.

The Medicaid warnings give notice of potential personal liability for Medicaid reimbursement if the assets of the transferor's estate are insufficient.<sup>204</sup> They also recite that the Department of Health and Human Services may require revocation by the transferor and the transferor's spouse of a transfer on death deed as a condition for receiving Medicaid assistance, a Nebraska variation on the provisions of the Uniform Act.<sup>205</sup>

The inheritance tax warning calls attention to current Nebraska law. Nebraska has an inheritance tax payable to the county where the real estate is located. Some persons believe inheritance taxation is being avoided by non-probate transfers.<sup>206</sup> The warning added in the Nebraska transfer of real property on death legislation serves not only as a "reminder" that the property is treated as if the transferor owned the property at death but also as a "warning" that the failure to pay inheritance taxes on time can result in "interest and penalties as provided by law." Failure to pay an inheritance tax within twelve months of the death of the decedent<sup>207</sup> results in a lien on the property for ten years,<sup>208</sup> a penalty of 5% per month up to a maximum of 25% of the unpaid taxes due,<sup>209</sup> interest at the rate of 14% per annum,<sup>210</sup> and personal responsibility of recipients of the property subject to tax beyond the ten year lien period "until the same shall have been paid."<sup>211</sup>

Deletion of the statutory form was not good consumerism for any group of potential consumers—not even lawyer members of the Nebraska State Bar Association or members of the Nebraska Land Title

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204. NEB. REV. STAT. § 76-3410(b)(1) (Cum. Supp. 2012). For statutory language, see *supra*, note 104.

205. *Id.* § 76-3421. This is a significant deviation from the official text and Comment of the Uniform Act. Section 12(4) of the Uniform Act states: "During a transferor's life, a transfer on death deed does not . . . (4) affect the transferor's or designated beneficiary's eligibility for any form of public assistance . . .". The related Comment states: "On this point, the drafting committee specifically disapproves of the contrary approach of Colo. Rev. Stat. § 15-15-403." The Colorado statute states that: "No person who is an applicant for or recipient of medical assistance . . . shall be entitled to such medical assistance if the person has in effect a beneficiary deed."

206. Concern over avoidance of inheritance taxes prompted amendments requiring a statement to accompany filing a death certificate "whether the title is affected as a result of a transfer on death deed, a joint tenancy deed, or the expiration of a life estate or by any other means." NEB. REV. STAT. § 76-214(1) (Cum. Supp. 2012). The warning does not cover federal estate taxation.

207. NEB. REV. STAT. § 77-2010 (Reissue 2009).

208. *Id.* §§ 77-2003, 77-2037.

209. *Id.* § 77-2010.

210. *Id.* NEB. REV. STAT. § 45-104.01 (Reissue 2010).

211. NEB. REV. STAT. § 77-2003 (Reissue 2009); *In re Estate of Reed*, 271 Neb. 653, 715 N.W.2d 496 (2006).

Association. Gone is the legislative validation that “[t]he following form may be used to create a transfer on death deed.”<sup>212</sup> No form prepared by the Nebraska State Bar Association, individual lawyers, or from online sources can carry the same level of approval as this legislative declaration. A Nebraska transfer of real property on death deed can be well crafted from available electronic sources,<sup>213</sup> but it will nevertheless lack an important legislative validation that it is effective under the statutes. There will be added and unnecessary transaction costs from the absence of a statutory form.<sup>214</sup> There may also be added judicial costs of time and resources as non-standardized instruments are challenged and litigated, either in suits to confirm a valid title or by those who potentially would benefit if the transfer on death deed is not effective to convey title.

An express legislative declaration that the statutory “form may be used to create a transfer on death deed” is likely to produce the broadest use of any transfer on death form, result in the easiest and least costly acceptance of any form, and produce the greatest standardization of practice by all consumers. It seems strange that the Nebraska Land Title Association would object to a legislatively determined form effective to make a transfer on death of real property. One consequence of deleting the statutory form is that a “safe harbor” for a transfer of real property on death deed is no longer available. Insurance or litigation will be needed to cover whatever variations of the form there may be. That can result in higher administrative costs to title insurers and higher title insurance costs to public consumers. The statutory transfer of real property on death deed form in the Uniform Act would have been of benefit to the group of Nebraska land title insurers both from the legislative determination of its sufficiency and from a higher degree of standardized practice.

The standardization of a statutory form would also result in the important statutory warnings being given in the language the legislature has approved. Although the warnings are a required element of a transfer on death deed,<sup>215</sup> the section also states that “[n]o recorded transfer on death deed shall be invalidated because of any defects in the wording of the warnings required by this subsection.”<sup>216</sup> The exception can lead to uncertainty as to whether a change from the statutory language is a mere “defect in the wording of the warnings” or

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212. UNIF. REAL PROP. TRANSFER ON DEATH ACT § 16 (2009); L.B. 536 § 18, 102d Leg., 1st Sess. (Neb. 2011).

213. See *supra* note 140 and accompanying text.

214. See, for example, discussion of added transaction costs from the requirement of “two or more disinterested witnesses,” *infra* notes 248–53 and related text.

215. NEB. REV. STAT. §§ 76-3410(a)(3), (b)(1) (Cum. Supp. 2012).

216. *Id.* § 76-3410(b)(2).

something worse which might invalidate the transfer. It could also become an open invitation for creative authors to attempt to improve upon the legislative draftsmanship or to express other concerns.

The Nebraska legislative procedure deleting the statutory form does not reflect sound consumerism. Advocates for nonlawyer consumers were not involved in the decisional process. The result was a product of lawyers retaining economic incentives of probate procedures and their historically significant control of the use and processing of legal forms, for whatever reasons. The statement of the principal introducer addressing “concerns” of the Nebraska Land Title Association was: “[i]nstead, the Nebraska State Bar Association will develop and provide a sample form.”<sup>217</sup> That gave the Nebraska State Bar Association the lead in preparing and vending a transfer of real property on death deed form. It preserved the role of the Nebraska State Bar Association to provide forms on a fee basis to members of the Association. It provided a greater opportunity for lawyers to benefit financially from basic estate planning, probate procedures, and a simple routine (probably electronic) task of document preparation. The Bar Association, which had carried the bill to the Legislature with the statutory form and gave the form apparent support, changed its position privately during the legislative process and opposed the statutory form.<sup>218</sup>

The “concerns” of the Nebraska Land Title Association may have been that legal knowledge, judgment and skills are necessary as a policy matter for the selection and use of a transfer of real property on death deed form. That is the traditional theory (perhaps “code”) underlying regulation of the unauthorized practice of law.<sup>219</sup> Placing a legally sufficient form in the statutes might become an enticement for nonlawyers to give advice to other persons that could potentially cause harm. At least, it could make it easier for nonlawyers to prepare an important legal instrument without legal advice (including for their own personal use as they have an “inherent” right to do). It may have been a perceived view of the type of thinking that could jeopardize enactment on the legislative floor when the bill would be reported out by the Judiciary Committee.<sup>220</sup>

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217. See *supra* note 127 and accompanying text.

218. See *supra* note 126 and accompanying text. Lawyer-lobbyists associated with the same law firm represented the Nebraska Land Title Association, the Nebraska State Bar Association, and NCCUSL.

219. See *Floor Debate of Feb. 3, 2012*, *supra* note 40, at 36 (statement of Sen. John Wightman) (“And I think we’ve put enough requirements in here that it is going to be almost necessary [for an attorney] to draw the deed, to draw the document that we’re talking about because we’re not setting out the form.”).

220. Subsequent discussion and amendment of the bill on the legislative floor may have borne this out. But, nevertheless, the surrender was made before any fight and before reliable testing was done to evaluate the strength of the perception.

A concern that the statutory transfer on death deed form might encourage an unauthorized practice of law by nonlawyers is a stretch of interpretation in an electronic age. Forms and related information will be easily obtainable by anyone interested in finding them. Just as with the Supreme Court Rules on Pro Se Practice, it is preferable that reliable forms be available for individual use rather than whatever happens to be found (mainly electronically) from other sources. The statutory transfer of real property on death deed forms would have provided a legislatively determined proper method for carrying out the scheme of the legislative enactment. What the Nebraska Land Title Association and the Nebraska State Bar Association were seeking to protect by deleting the statutory form was seemingly the economics of the practice of law.

Three things are clear with respect to the issue whether or not the legislation should have included a statutory form: (1) there was no open public discussion of the issue by the legislature; (2) there was no significant advocate for nonlawyer consumers throughout the process,<sup>221</sup> and (3) there is nothing inherently improper with nonlawyers dealing for themselves in the transfer of real property on death deed forms.

It requires no special skill or legal training to be able to successfully complete a statutory quit claim deed effective at death. Nonlawyers are called upon to perform much more difficult tasks routinely in their daily affairs. Provisions for non-probate transfers of significant personal property are well ingrained in Nebraska statutes.<sup>222</sup> There has been no evidence that serious problems have arisen with respect to either the Nebraska non-probate transfer provisions or the Nebraska statutory forms already on the books. No serious problems appear to have arisen under the transfer on death deed forms in the twelve states that have statutory forms.<sup>223</sup>

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Even with the amendments adopted during further legislative consideration, a statutory form transfer of real property on death deed form would have had significant advantages for the enactment.

221. Nonlawyer groups could have participated during the legislative process as the Nebraska Department of Health and Human Services and Nebraska County Officials acted to protect their respective interests. Only the Nebraska Realtors Association appeared at the Judiciary Committee hearing in general support of the bill, without mentioning the statutory form. *See Hearing on L.B. 536 Before the Judiciary Comm., supra* note 83, at 51 (statement of Korby Gilbertson). The proposed legislation was initiated by lawyers with apparent support for the statutory form included in the bill. The statutory form was stricken by lawyers without any apparent advocacy for nonlawyer consumers. Lobbyists for all of the significant interests at that time had an association with the same law firm.

222. *See supra* note 60.

223. *See Hearing on L.B. 536 Before the Judiciary Comm., supra* note 83, at 44–45 (statement of Nat Sterling).

A plethora of transfer on death legal forms and associated explanation is available electronically. One need not be a sophisticated researcher to locate relevant and reliable forms and information. A high school student with general directions about what to look for should be able to find a transfer of real property on death deed form and related information for a specific state in just a few minutes (perhaps from a cell phone).<sup>224</sup>

There is nothing improper with finding and using forms and information electronically as long as it is for that person's own use. The Nebraska unauthorized practice of law rules recognize an "inherent right of individuals to represent themselves in legal matters."<sup>225</sup> The Rules also exclude "[n]onlawyers selling legal forms in any format, so long as they do not advise or counsel another regarding the selection, use, or legal effect of the forms."<sup>226</sup>

It is a poor public policy choice to deny everyone access to the benefits of a statutory form because some lawyers assert that some nonlawyers might misuse the information. Those nonlawyers would be subject to the restrictions on unauthorized practice of law the same as with any other statutory or non-statutory activity. Nonlawyers will in any event have access to comparable forms and information but will be denied the consumer friendly objectives of the statutory form. Both lawyers and nonlawyer public consumers will be in a worse position because of the absence of the legislatively enacted statutory form.

## 2. *Potential Glitches in Nebraska's "Two or More Disinterested Witnesses" Requirement*

Nebraska's nonuniform requirement that a transfer of real property on death deed "shall be attested in writing by two or more disinterested witnesses"<sup>227</sup> presents important issues that might have been dealt with by a general statutory form and additional statutory text dealing with implementation of basic statutory requirements. The "disinterested witness" requirement stemmed from legislative floor discussion of the bill recommended by the Judiciary Committee.<sup>228</sup> The debate was largely anecdotal of situations involving overreaching by persons interested in the transaction.

There are strong policies for limiting the sort of overreaching some legislators may have imagined could occur in the absence of disinterested witnesses. Simply creating a requirement of "disinterested wit-

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224. It might cost some money for a commercial source, perhaps even as much as a lawyer would charge. But she or he could find the needed form and information and be able to use them successfully.

225. NEB. CT. R. ch. 3, art. 10, statement of intent.

226. NEB. CT. R. § 3-1004(G); see *supra* notes 170-75 and accompanying text.

227. NEB. REV. STAT. § 76-3409 (Cum. Supp. 2012).

228. For this floor discussion, see *Floor Debate of Feb. 3, 2012*, *supra* note 40.

nesses” without specifying what that requirement means and how that requirement can be complied with raises important logistical issues not dealt with in the Nebraska enactment. The “disinterested witness” requirement alone and without more is distressingly poor consumerism which will result in considerable uncertainty, difficult planning, and significantly increased transactional costs. At the very least, there will likely be serious issues concerning title to the real property transferred under the deed. It is surprising that the Nebraska Land Title Association, which was so active earlier in the legislative process, did not appear to participate in legislative consideration of the “disinterested witness” requirement.<sup>229</sup>

Some similar statutes do not require witnesses or “disinterested” witnesses. Some similar statutes which contain provisions for “disinterested witnesses” also have a definition relating to “disinterested” or spell out consequences less than invalidating the whole document if the requirement is not met. Nebraska deeds of Nebraska real estate must be signed and acknowledged by the grantor but do not ordinarily require witnesses to the grantor’s signature.<sup>230</sup> It is notable that “[a] will or any provision thereof is not invalid because the will is signed by an interested witness.”<sup>231</sup> The requirement is that: “[u]nless there is at least one disinterested witness to a will, an interested witness to a will is entitled to receive any property thereunder only to an amount or extent not exceeding that which is or would be the intestate share of such interested witness if the testator died intestate at the date of death.”<sup>232</sup> A self-proved will does not require that witnesses be “disinterested.”<sup>233</sup> The health care power of attorney act requires that the writing shall be “witnessed and signed by at least two adults,”<sup>234</sup> and defines a group that “shall not qualify to witness a power of attorney

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229. See *supra* notes 127, 130, and *infra* note 250, and accompanying text. The legislative interim study group “corresponded and conferred with representatives of the title insurance industry in Nebraska.” See Roger Keetle, Judiciary Comm. of the Neb. Leg., 101st Leg., 2d Sess., Interim Study of Uniform Real Property Transfer on Death Act 2 (2010), available at [http://nebraskalegislature.gov/pdf/reports/committee/judiciary/LR488\\_2010.pdf](http://nebraskalegislature.gov/pdf/reports/committee/judiciary/LR488_2010.pdf) (letter introducing the study to the members of the Judiciary Committee). The protective section for a purchaser or lender for value dealing with a beneficiary of a transfer of real property on death deed, now NEB. REV. STAT. §76-3420, was added to L.B. 536 (2011) at the request of the Nebraska Land Title Association. See *Hearing on L.B. 536 Before the Judiciary Comm.*, *supra* note 83, at 36 (statement of John Wightman).

230. NEB. REV. STAT. § 76-211 (Reissue 2009).

231. NEB. REV. STAT. § 30-2330(b) (Reissue 2008). See NEB. REV. STAT. § 30-2327 (Reissue 2008) (“signed by at least two individuals”).

232. *Id.*

233. *Id.* § 30-2329. Further, the self-proved will provision, itself, only reduces burden of proof requirements but still leaves the document subject to probate as an “ordinary” will. See *id.* §§ 30-2329(1), 30-2327.

234. *Id.* § 30-3404(5).

for health care.”<sup>235</sup> Among several ways of making an anatomical gift, the Revised Uniform Anatomical Gift Act allows a donor or other statutorily authorized person to make an anatomical gift simply by signing a donor card or other record for inclusion on a donor registry.<sup>236</sup> If the donor or other person is “physically unable to sign a record” it can be signed at the direction of the donor or other person and that signature must be “witnessed by at least two adults, at least one of whom is a disinterested witness.”<sup>237</sup> The act specifies that a “disinterested witness” is a person other than a specified group of relatives of the donor, a guardian of the individual, another adult who “exhibited special care and concern for the individual,” and a person to whom the anatomical gift could pass.<sup>238</sup> The recently enacted Nebraska Uniform Power of Attorney Act statutory text<sup>239</sup> and statutory form<sup>240</sup> require a signature and acknowledgment by the principal but do not require additional witnesses.

The Nebraska Uniform Transfer of Real Property on Death Act mandates that there be “two or more disinterested witnesses.” Otherwise, there is no valid transfer of real property on death deed. The Act omits important elements of this feature which should have been included and might have been dealt with effectively by a full statutory transfer of real property on death deed form and supporting statutory text. These “glitches” include:

(a) There is no definition of the term “disinterested witnesses.” The Nebraska Probate Code defines a “[d]isinterested witness to a will” as “any individual who acts as a witness to a will and is not an interested witness to such will.”<sup>241</sup> An “interested witness to a will means any individual who acts as a witness to a will at the date of its execution and who is or would be entitled to receive any property thereunder if the testator then died under the circumstances existing

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235. *Id.* § 30-3405(1) (the group includes “the principal’s spouse, parent, child, grandchild, sibling, presumptive heir, known devisee at the time of the witnessing, attending physician, or attorney in fact; or an employee of a life or health insurance provider for the principal. No more than one witness may be an administrator or employee of a health care provider who is caring for or treating the principal.”). The statutory form includes a “Declaration of Witnesses” that states in part “that the principal appears to be of sound mind and not under duress or undue influence, and that neither of us nor the principal’s attending physician is the person appointed as attorney in fact by this document.” *Id.* § 30-3408(1) (Cum. Supp. 2012).

236. NEB. REV. STAT. § 71-4828(b) (Cum. Supp. 2012).

237. *Id.* § 71-4828(b)(1).

238. *Id.* § 71-4825(5).

239. NEB. REV. STAT. § 30-4005 (Cum. Supp. 2012). The acknowledgment requirement was recommended by the Bar Association Study Committee. *See NSBA Report*, *supra* note 45, at 6.

240. *Id.* § 30-4041.

241. NEB. REV. STAT. § 30-2209(10) (Reissue 2008).

at the date of its execution.”<sup>242</sup> This would appear to be the most plausible definition in the minds of the legislators during the floor debate. Unlike the Nebraska Power of Attorney Act, however, the Nebraska Transfer of Real Property on Death Act is not a part of the Nebraska Probate Code.<sup>243</sup> Other statutes requiring a disinterested witness define the term in various ways.

(b). The act does not specify the time at which the “disinterest” or “interest” is to be determined. The wills statute specifies that the measuring time is the “date of its execution” and applies as “if the testator then died under the circumstances existing at the date of its execution.”<sup>244</sup> Since the real property deed does not become effective until the transferor’s death<sup>245</sup> and its recording is not effective until the transferor’s death,<sup>246</sup> it is unclear whether or not the transferor’s death may be the proper time for measurement of the requirement under the statute.

(c). The act does not specify whether or not there is a category of family members or others having some relationship to the transferor or his circumstances that are, or should be, considered “interested” or not “disinterested” witnesses to the real property transfer on death deed. This issue will need to be resolved only within the special circumstances of each transfer of real property on death deed.

(d). The act does not specify whether determination of “interest” or “disinterest” applies only to the transfer of real property on death deed or can relate to circumstances apart from the deed itself. For example, suppose that the designated beneficiary in the deed is Dennis and that his son, John, is the sole beneficiary under Dennis’s will and his sole heir in intestacy. Is John a “disinterested witness” to execution of the deed?

(e). The act contains no curative provisions, such as the wills statute which allows an interested witness to take value up to the share of an heir at law. The requirement of “disinterested witnesses” is mandatory and voids the deed. The deed might still comply technically with the requirements for a valid will and pass the property to

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242. NEB. REV. STAT. § 30-2209(22) (Reissue 2008) (“but does not include any individual, merely because of such nomination, who acts as a witness to a will by which he or she is nominated as personal representative, conservator, guardian, or trustee”).

243. See NEB. REV. STAT. § 30-2201 (Cum. Supp. 2012).

244. NEB. REV. STAT. § 30-2209(22) (Reissue 2008).

245. See NEB. REV. STAT. § 76-3405 (Cum. Supp. 2012). For hypothetical purposes, this “glitch” can be made more complicated by noting that the “interest of a designated beneficiary is contingent on the designated beneficiary surviving the transferor by one hundred twenty hours” unless the deed provides for a different survival period. See *id.* § 76-3415(a)(2).

246. See *id.* § 76-238.



the designated beneficiary through probate,<sup>247</sup> but the transfer of real property at death statute appears to negate that interpretation in stating “[a] transfer on death deed is nontestamentary.”<sup>248</sup>

There is an additional serious, overarching problem with the requirement. Even if other potential “glitches” with respect to the “disinterested witnesses” requirement are not involved, how is title to the real estate established in ideal circumstances? Suppose, for this ultra-pristine illustration, that the transferor and several monks (one of whom is a notary public) gather in a church, say prayers, and then execute a transfer of real property on death deed to an individual, unrelated to anyone involved in the signing, “upon a portable altar, to the accompaniment of chants and candle lighting.”<sup>249</sup> Some proof will be necessary to establish that the monks (or any other witnesses) are “disinterested witnesses” in order to validate the deed. If the deed does not meet the mandatory requirements of the statutes, there is no valid transfer of the real property at death by virtue of the deed. Are there planning opportunities that can minimize the logistical problems of establishing a reliable ownership of record under the deed? It would seem that third parties dealing with the beneficiary will in practice require sworn documentation as to the “disinterested witnesses” requirement. The protective statute for “a purchaser or lender for value from a beneficiary” applies only to “any interest transferred to a beneficiary by a transfer on death deed.”<sup>250</sup> The protective statutory language relates to “whether or not the conveyance by the transfer on death deed was proper” and “whether a transferor or beneficiary of the transfer on death deed acted properly in making the conveyance to the beneficiary by the transfer on death deed.”<sup>251</sup> The

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247. See NEB. REV. STAT. §§ 30-2209(53) (“Will means any instrument, including any codicil or other testamentary instrument complying with sections 30-2326 to 30-2338, which disposes of personal or real property . . . or encompasses any one or more of such objects or purposes.”), 30-2327 (requirements for execution of “ordinary” will) (Reissue 2008).

248. *Id.* § 76-3407 (Cum. Supp. 2012).

249. This scenario is taken from an article by Dennis W. Collins, *Avoiding A Will Contest—The Impossible Dream?*, 34 CREIGHTON L. REV. 7, 18–19 (2000). The issues of competency, fraud, and undue influence applicable to wills are also applicable to transfer of real property on death deeds. See NEB. REV. STAT. §§ 76-3408, 76-3403 (Cum. Supp. 2012).

250. NEB. REV. STAT. § 76-3420 (Cum. Supp. 2012). This section is based on a similar provision in the Nebraska Probate Code. See NEB. REV. STAT. § 30-24,108 (Reissue 2008). It was included in the act at the suggestion of the Nebraska Land Title Association. See *Hearing on L.B. 536 Before the Judiciary Comm.*, *supra* note 83, at 36 (statement of Sen. John Wightman) (“The Nebraska Land Title Association was concerned about the liability of a good-faith purchaser of real property transferred pursuant to the act. . . . The language clarifies that when property acquired pursuant to a real property transfer on death deed is sold, it is sold free and clear of any claims of the estate.”).

251. NEB. REV. STAT. § 76-2420.

section is directed toward the propriety of the transfer, not to whether mandatory statutory requirements for existence of the document have been complied with. The statutory words “shall” or “must” create mandatory conditions for the document to come into existence.<sup>252</sup> If there are not “disinterested witnesses,” there is no document, deed, or conveyance passing property to a beneficiary as specified in the protective statute. Similarly, the Nebraska Probate Code provisions which were adapted in creating the real property transfer act section, relate to “a distributee who has received an instrument or deed of distribution from the personal representative” and protect “whether or not the distribution was proper” and “whether a personal representative acted properly in making the distribution in kind.”<sup>253</sup> It covers issues of propriety and not whether a document came into existence in compliance with statutory requirements for establishing the document. Even in ideal circumstances, the “disinterested witness” requirement as written in the Nebraska enactment is not consumer friendly. It presents both serious legal issues and significant transaction costs.

Addition of the “disinterested witnesses” requirement by the Legislature called for further statutory explanation. The addition would also have been best served by inclusion of a general statutory form for transfer of real property on death deeds. Only that statutory form would provide legislative validation for compliance with the statutory requirements.

## **B. Comparative Consumerism of Statutory Transfer on Death Deeds and Statutory Powers of Attorney**

The statutory power of attorney form is exemplary consumerism. Its potential uses cover the full range of business, financial, and personal affairs. It has been designed from and for real world activities<sup>254</sup> and is intended “for use by lawyers as well as lay persons.”<sup>255</sup>

The statutory “check-the-box” power of attorney form is lengthy and presents an assortment of important legal elements.<sup>256</sup> Despite its appearance of complexity, it meets the NCCUSL standard intended for the simple statutory real property transfer on death quit claim deed of being “understandable and consumer friendly.” Step-by-step

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252. See NEB. REV. STAT. §§ 76-3409, 76-3410 (Cum. Supp. 2010) (mandatory requirements applicable to transfer of real property on death documents), 49-802(1) (Reissue 2010) (“Unless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter enacted shall be as follows: (1) . . . When the word shall appears, mandatory or ministerial action is presumed.”).

253. NEB. REV. STAT. § 30-24,108 (Reissue 2008).

254. See *supra* note 190.

255. See *supra* notes 58–59.

256. See NEB. REV. STAT. § 30-4041 (Cum. Supp. 2012).

prompts and other helpful information are given for use of the power of attorney statutory form.

The statutory power of attorney form implicates a much greater array of important legal considerations than a statutory transfer of real property on death form. The statutory transfer of real property on death form relates primarily to estate planning and probate. Completing the statutory "check-the-box" power of attorney form requires consideration of a dynamic group of general powers which can be entrusted to the agent, special grants of power, limitations on powers, special directions, and other legal matters contained in the form. The general powers of attorney include personal and family maintenance<sup>257</sup> and the power of attorney may expressly grant authority to perform personal estate planning matters.<sup>258</sup> Whereas the statutory transfer of real estate at death form largely gives effect to a one time transaction effective at death, the statutory power of attorney form establishes a relationship which continues over a period of time, ordinarily including occasions when the principal is personally incapacitated.<sup>259</sup> Both statutory forms are consumer friendly in serving important interests in the circumstances for which they are designed to be used.

A view of the entire legislative process enacting the real property on death act shows the influences of some lawyers in protecting estate planning and probate activities of lawyers from encroachment by non-lawyer consumers. Although initially supported by the Bar Association, deletion of the statutory real property transfer on death form was initiated by a private client of the Bar Association's lobbyists. The Bar Association participated fully in deletion of the statutory form and changed its official position from support to opposition to the statutory form.<sup>260</sup> Further substantive amendments to the legislative bill protected the formalities and economics of estate planning and probate procedures. These amendments actually enhanced, rather than diminished, the underlying policies favoring consumerism in having a statutory real property transfer on death form. Much like the more complex and legally important statutory "check the box" power of attorney form, a statutory real property transfer of real property on death form would provide greater clarity of the legal requirements and effects. A statutory real property transfer on death form including all of the further legislative deviations from the uniform act would also have been advantageous consumerism validating that the form effectuates the provisions of the statutes.

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257. *Id.* § 30-4036.

258. *Id.* §§ 30-4024, 30-4040.

259. *Id.* § 30-4004.

260. *See supra* notes 126-34 and accompanying discussion in text.

It is counterintuitive that the real estate title industry opposed a statutory transfer of real property on death form. That group would seemingly be among those most concerned with having a legislative validation from a statutory form. On the other hand, the banking industry—also permeated with lawyers—which deals routinely with power of attorney forms, supported the inclusion of the statutory “check-the-box” power of attorney.<sup>261</sup> One of the main features of the power of attorney legislation is precisely to provide a method by which persons can rely upon compliance with the substantive provisions of the statutory enactment.<sup>262</sup>

## VII. CONCLUSION

This study is primarily of only one uniform act in a single state. Yet, several conclusions of a wider nature are warranted. The recommendations actually have a single common theme. Statutory forms can be a vital component of proposed legislation and should be considered by all dealing with the proposal as a vital component of the legislation.

It starts with NCCUSL in adopting uniform acts. Statutory forms can significantly enhance the effectiveness of the uniform act even if the uniform act does not implicate national or multi-state interests and policies. The legislative notes and commentary on statutory forms deserve the same studied explanation as the substantive and other provisions of the uniform act. NCCUSL cannot change the differing rules on “unauthorized practice of law” among the states. Those issues will be present in any event whether or not they are discussed openly. NCCUSL should not sacrifice consideration of a proposed statutory form designed to carry out the purposes of the underlying statute from a perceived fear that the statutory form may spawn unnecessary “political” opposition by some lawyers or bar associations from spurious assertions concerning an “unauthorized practice of law.”

The Nebraska Supreme Court (and perhaps the highest courts of some other states) should clarify the unauthorized practice of law rules so that the enactment by the legislature of statutory forms and related information on their legal effects, use and execution do not, alone, constitute an unauthorized practice of law. This is what the current unauthorized practice of law rules provide, but the present rules are not sufficiently specific, especially for persons who may disa-

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261. The Nebraska Bankers Association formally supported the legislation at the Judiciary Committee hearing. See *Nebraska Uniform Power of Attorney Act: Hearing on L.B. 1113 Before the Judiciary Comm.*, 102d Leg., 2d Sess. 3-4 (Neb. 2012), available at <http://www.legislature.ne.gov/FloorDocs/Current/PDF/Transcripts/Judiciary/2012-02-15.pdf> (statement of Robert Hallstrom).

262. See NEB. REV. STAT. § 30-4020 (Cum. Supp. 2012) and related sections.

gree with the substance of the rules on this point. As things now stand, the lack of clarity may be a deterrent to legislative consideration of statutory forms and may operate as a shield behind which persons seeking to foster the business side of lawyering can protect that interest. In any event, the personalization of all types of statutory information for another can constitute an unauthorized practice of law.

The Legislature should devote the same focused, thorough examination to the statutory forms and commentary related to statutory forms as it gives to the substantive provisions of the proposal. This is especially applicable to legislative study reports which are intended to examine all aspects of the topic. In the case of statutory forms, the legislature may have a pivotal role in determining the comparative beneficial or detrimental "consumerism" between lawyer and nonlawyer interests. Lawyers have a powerful role with legislatures considering uniform acts. Lawyers have substantial professional and economic interests in the availability and uses of legal forms. The legislative effectiveness of nonlawyers is comparatively weak, or nonexistent, as to the "consumerism" involved in proposals for statutory forms. The Nebraska experience shows that lobbyists for the Bar Association (or speaking for NCCUSL) may contemporaneously represent other clients with differing or opposing interests.

Legislatures should be especially wary of questionable attacks on statutory forms when the issues have not been openly discussed and all interests are not involved in the decision. In the case of the statutory transfer of real property on death form, the Nebraska Legislature rejected summarily something that twelve other states have found valuable to the underlying legislation. It is important that legislatures have an open discussion of the issues pertaining to a proposed statutory form and that focused attention be given by the legislature to the effectiveness of the statutory form in carrying out the legislative purposes of the entire enactment.

Balancing current policies of consumerism with current policies underlying prohibitions on the unauthorized practice of law strongly favors inclusion of a statutory transfer of real property on death deed form. The Nebraska Uniform Real Property Transfer on Death Act would be a stronger enactment if it contained a statutory transfer of real property on death form. Failure of the Nebraska Legislature to include a statutory transfer of real property on death deed form may be due primarily to a failure of the proponents to openly and professionally analyze the role of an "understandable and consumer friendly" form in effectuating the basic purposes of the Act.