Nebraska State Bar Association

Nebraska Real Estate Title Standards

Revised October, 2013
NSBA Real Estate Practice Guidelines Committee
Approved by NSBA House of Delegates, October, 2013

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NEBRASKA STATE BAR ASSOCIATION
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NEBRASKA REAL ESTATE TITLE STANDARDS

PREFACE

In 1993, there were 103 Title Standards which had been adopted by the Nebraska State Bar Association. The standards were numbered consecutively from the first standard adopted through the 103rd standard adopted without any organization or codification by topic.

Originally, standards were reviewed and proposed by the Nebraska State Bar Association Title Standards Committee. With the increased emphasis on use of title insurance rather than abstracts of title during the l970's and early 1980's, the work of the Committee devolved more to suggesting procedures in handling title transactions than in the practice of examining abstracts. The committee recommended to the Executive Council and the House of Delegates of the Association that its name be changed to the *"REAL ESTATE PRACTICE GUIDELINES COMMITTEE"*.

In the winter of 1992 - 1993, the Real Estate Practice Guidelines Committee commenced a review of existing standards to determine their accuracy, viability and content, and of areas in which additional standards relating to the practice of real estate law and handling of real estate transactions may be needed.

The committee established seven subcommittees. Certain existing standards and topics for consideration of additional standards were assigned to each subcommittee.

Subcommittee members reviewed the content and language of standards and of the comments to standards; amended existing standards and comments; suggested and adopted new standards; and determined that certain standards should be placed in a category of *"former"* or *"historical"* standards for edification of lawyers on reviewing former procedures.

Following is the result of this study, consisting of 15 chapters with a range from a low of two standards to a chapter to as many as 11 standards to a chapter.

The Appendix includes a brief discussion of the development of title standards within the Nebraska State Bar Association and the text of standards which had previously been adopted but have now been consigned to the historical category.

The committee recommends a continuing review both of existing standards, comments to existing standards, and the necessity of additional standards to assist lawyers in determining the proper procedures to follow in real estate transactions and the status of marketability of title.

Present members of the Real Estate Practice Guidelines Committee who have worked on this project include Richard L. Anderson, Hon. William B. Cassel, Dennis W. Collins, Alan Curtiss of Alliance, John A. Daum, Allan J. Eurek, Thomas J. Fitchett, John P. Glynn, Jr., John F. Hanson, John L. Jelkin, Steven D. Johnson, William D. Kuester, Joseph W. McNamara, Jr., Joseph Polack, Douglas W. Reno, Herbert M. Sampson III, Karen M. Shuler, Ronald G. Sutter, James W. Symonds, and Alan M. Wood. Previous committee members who worked on the standards include James R. Ganz, Jr., and Douglas R. State.

Albert T. Reddish, Chairman

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CHAPTER I -- ABSTRACTS

1.1 ABSTRACT COMPILED BY TITLE OWNER

WHERE AN ABSTRACTER DULY QUALIFIED AS PROVIDED BY LAW HAS CERTIFIED AN ABSTRACT OF TITLE TO REAL ESTATE IN WHICH THE ABSTRACTER IS INTERESTED, IT IS NOT NEGLIGENCE ON THE PART OF AN EXAMINER TO ACCEPT SUCH ABSTRACT.

Approved October 19, 1995

COMMENT: Certification by such duly qualified abstracter can neither create nor remove defects of record title. It is in the nature of an additional protection to persons dealing with property. No case can be found where an abstracter or the abstracter's bondsman escaped liability on the ground that the abstracter had an interest in the property. Such a holding would be an absurdity, allowing an abstracter to profit by the abstracter's own wrong. A grantor in a warranty deed does not escape liability on grantor's warranties on the ground of an interest in the property.

Source: Standard 8

1.2 LIMITATION ON CERTIFICATE

AN ABSTRACT SHOULD BE CONSIDERED SUFFICIENTLY CERTIFIED IF IT INDICATES THAT ABSTRACTERS ON THE DATES OF THEIR RESPECTIVE CERTIFICATES WERE BONDED UNDER THE PROVISIONS OF § 76-506 PRIOR TO NOVEMBER 18, 1965; REGISTERED UNDER §§ 76-509 TO 76-528 ON OR AFTER NOVEMBER 18, 1965, AND PRIOR TO MARCH 26, 1985; AND REGISTERED UNDER THE ABSTRACTERS ACT IN §§ 76-535 THROUGH 76-558 (REISSUE 1990) THEREAFTER. IT IS NOT A DEFECT THAT AT THE DATE OF EXAMINATION OR USE OF AN ABSTRACT THE STATUTE OF LIMITATIONS MAY HAVE RUN AGAINST BONDS OF SOME OF THE ABSTRACTERS.

COMMENT: If an abstract is successively certified as provided in this standard, the same is entitled to be received in all courts as prima facie evidence of the records contained therein, without further foundation. Likewise, a policy of title insurance, issued by a title insurance company licensed to issue such policy by the State of Nebraska, is entitled to be received in court as prima facie evidence of the records contained therein. § 25-1292 (1994 Cum Supp.)

Source: Standard 22

NOTE: All section citations are to the current reissues of volumes of the Nebraska Revised Statutes, which are 1 and 1A in 1991; 2 and 2A in 1989; 3, 3A and 3B in 1993; 4 and 4A in 1990; 5 and 5A in 1994; 6, UCC in 1992; and 1994 Cumulative Supplement. For repealed sections such as 76-506 and 76-509 to 76-528 referred to in Standard 1.2, see the Reissues of statute in effect immediately prior to the repeal of those sections.

1.3 SEARCH OF COUNTY COURT RECORDS

IT SHALL BE PROPER FOR A TITLE EXAMINER TO REQUIRE THE CERTIFICATE OF THE ABSTRACTER TO REVEAL A SEARCH OF THE RECORDS OF THE COUNTY COURT OF THE COUNTY IN WHICH THE REAL ESTATE IS SITUATED FOR ANY PROCEEDINGS WHICH, BY NATURE, MAY AFFECT THE TITLE TO REAL ESTATE. TITLE INSURANCE UNDERWRITERS SHOULD ALSO COMPLETE A SEARCH OF COUNTY COURT RECORDS IN THE COUNTY WHERE THE REAL ESTATE IS SITUATED.

Approved October 19, 1995

COMMENT: Although the county court does not have jurisdiction in civil actions in which title to real estate, or mortgages or contracts relating thereto are involved, it does have exclusive jurisdiction of the probate of wills, administration of estates of deceased persons, and guardianship of minors, insane persons and idiots. Neb. Const. Art. V, □ 16; section 24-517 (Cum Supp. 1994). The county court has jurisdiction to determine the facts, upon which some questions of title to real estate may be dependent, although it does not have jurisdiction over a question of perfecting title to real estate itself. *Fischer v. Sklenar*, 101 Neb. 553, 163 N.W. 861 (1917). For example, the county court can determine the fact of the validity of a will and the fact of heirship. The title to real estate is not through the determination of the county court, but pursuant to the will or pursuant to the statutes of descent and distribution. The county court determines the facts upon which the will and the statutes operate.

Therefore, proceedings in county court for the administration of estates of deceased persons, probate of wills, and guardianship of minors and incapacitated persons as well as for conservatorship, may determine facts which may affect title to real estate. The only statutory provisions for the recording of probate records in the office of the Register of Deeds are those for the filing of attested copies of wills and certified copies of decrees of distribution in the probate of an estate, and the filing of an order for the appointment of a conservator. See Standard 9.8.

In addition, the county court has jurisdiction to determine inheritance tax, which proceeding may affect the determination of the existence of a lien upon real estate for inheritance taxes. Sections 77-2018.01 to 77-2018.07. There is no statutory provision requiring the recordation of any of the papers affecting determination of inheritance tax. The title examiner is not justified in demanding more recording upon the real estate records than the statutes provide.

Source: Standard 53

1.4 ANCIENT MORTGAGES

AN ABSTRACTER MAY OMIT ALL MORTGAGES OR TRUST DEEDS, AND ANY AFFIDAVITS, EXTENSIONS, ASSIGNMENTS, OR RELEASES RELATING THERETO, OR COURT PROCEEDINGS TO ENFORCE THE SAME WHICH DO NOT RESULT IN A COMPLETED TITLE TRANSACTION, IF THE DEBT, AS EXTENDED, HAS MATURED MORE THAN 10 YEARS PRIOR TO THE DATE OF THE ABSTRACTER'S CERTIFICATE; OR, IF NO DUE DATE IS SHOWN OR ASCERTAINABLE FROM THE MORTGAGE OR TRUST DEED AND MORE THAN 20 YEARS HAVE LAPSED SINCE THE DATE OF THE INSTRUMENT, PROVIDED THE ABSTRACT REFLECTS THE OMISSION IS PURSUANT TO THIS TITLE STANDARD, AND SECTIONS 25-202 AND 76-239.

Approved October 19, 1995

COMMENT: Suggested certification by abstracter:

> "This abstract omits all mortgages or trust deeds, and any affidavits, extensions, assignments, or releases relating thereto, or court proceedings to enforce the same which do not result in a completed title transaction, if the debt, as extended, has matured more than 10 years prior to the date of the abstracter's certificate; or, if no due date is shown or ascertainable from the mortgage or trust deed and more than 20 years have lapsed since the date of the instrument, pursuant to Title Standard 1.4, and Neb. Rev. Stat. Sections 25-202 and 76-239."

See Standard 4.5

Source: Standard 75

1.5 ABSTRACTS OF TITLE, CITY AND VILLAGE LOTS

AN ABSTRACT OF TITLE THAT COMMENCES WITH A PLAT AND DEDICATION OF LOTS WITHIN AN INCORPORATED CITY OR VILLAGE WHICH HAS NOT BEEN VACATED, IS SATISFACTORY EVIDENCE OF THE RECORD TITLE TO REAL ESTATE, AND IS TO BE CONSIDERED A COMPLETE ABSTRACT OF TITLE PROVIDED:

1. **THE PLAT WAS FILED OF RECORD ON OR BEFORE JANUARY l, 1937, AND NO ACTION WAS COMMENCED PRIOR TO SEPTEMBER 29, 1960, AS PROVIDED BY SECTION 76-275.06.**

2. **THE ABSTRACT REFLECTS IN THE CAPTION THEREOF THAT THE ABSTRACT IS PREPARED PURSUANT TO THIS TITLE STANDARD AND SECTION 76-275.06.**

3. **THE ABSTRACT INCLUDES A MARKETABLE TITLE AFFIDAVIT RECORDED PURSUANT TO SECTION 76-294 SHOWING POSSESSION TO BE IN A TITLEHOLDER, EITHER THE CURRENT RECORD OWNER OR ONE OF HIS OR HER IMMEDIATE OR REMOTE GRANTORS.**

4. **THE ABSTRACT REFLECTS ALL INSTRUMENTS RECORDED PRIOR TO THE BASIC TRANSACTION INVOLVING:**

    (a) THE GRANTING OR RESERVATION OF AN EASEMENT;

    (b) PARTY WALL OR BOUNDARY LINE AGREEMENTS;

    (c) THE GRANTING OR RESERVATION OF AN OIL, GAS, OR OTHER MINERAL INTEREST;

    (d) UNEXPIRED LEASES;

    (e) ALL DEEDS CONTAINING CONDITIONS SUBSEQUENT (SECTION 76-298);

    (f) ALL INSTRUMENTS IN WHICH THE UNITED STATES OF AMERICA OR THE STATE OF NEBRASKA ARE A PARTY, *i.e.*, PATENT AND CONVEYANCE BY STATE.

Approved October 19. 1995

Source: Standard 76

1.6 ANCIENT ACKNOWLEDGMENTS, INSTRUMENTS RECORDED 10 YEARS

WITH RESPECT TO ANY INSTRUMENT RECORDED FOR 10 YEARS OR MORE, IT SHALL NOT BE NECESSARY FOR AN ABSTRACT TO SHOW OR MAKE ANY REFERENCE CONCERNING THE ACKNOWLEDGMENT.

Approved October 19, 1995

COMMENT: Sections 76-257; 76-258; and 76-259.

It is not to be inferred from the standard that an abstract is to show all acknowledgments on instruments recorded within the current 10 year period. An abstracter may make a specific showing or may, in his certificate, make a general showing regarding acknowledgments. The abstracter may state in the certificate:

> "All acknowledgments of instruments of record are in approved form unless otherwise shown."

Source: Standard 80

1.7 SALES BY A PERSONAL REPRESENTATIVE

WHEN A PERSONAL REPRESENTATIVE UNDER THE NEBRASKA PROBATE CODE CONVEYS REAL ESTATE FOR WHICH THERE HAS BEEN A FORMAL OR INFORMAL PROCEEDING, THE EXAMINER SHOULD DETERMINE THAT ESTATE MATTERS CONCERNING THE PROCEEDINGS ARE ABSTRACTED, TOGETHER WITH LETTERS ISSUED TO THE PERSONAL REPRESENTATIVE. IF THE EXAMINER IS PRESENTED A TITLE INSURANCE COMMITMENT, THE EXAMINER SHOULD ASCERTAIN THAT LETTERS HAVE BEEN ISSUED TO THE PERSONAL REPRESENTATIVE. IT IS NOT NECESSARY TO DETERMINE WHETHER CLAIMS OR COSTS OF ADMINISTRATION HAVE BEEN PAID.

THE EXAMINER SHOULD DETERMINE THAT THERE IS EITHER PAYMENT OR RELEASE OF INHERITANCE TAX LIABILITY OR LIEN, A SHOWING OF NON-LIABILITY FOR FEDERAL ESTATE TAX OR ACCEPTANCE OF A FEDERAL ESTATE TAX RETURN AND PAYMENT OR RELEASE OF FEDERAL ESTATE TAX LIEN, AND CONVEYANCE FROM A FIDUCIARY.

IF THE SALE IS PRIOR TO SEPTEMBER 9, 1993, AND THE WILL DOES NOT CONTAIN A POWER OF SALE, THE COURT PROCEEDING SHOULD REFLECT A COURT ORDER AUTHORIZING THE SALE WITH NOTICE GIVEN AS PRESCRIBED IN SECTION 30-2220(a)(1) AND (30-2220(a)(2).

Approved October 19, 1995

COMMENT: The legislature eliminated the provisions of Section 2476(23) which required a court order with notice in the event of a sale by a personal representative where the will did not authorize the personal representative to sell real or personal property in Laws 1993, LB 315. This brought Nebraska law into conformity with Uniform Probate Code Section 3-715. Section 30-2475 provides a purchaser in good faith who buys real estate from a personal representative for value with protection. As to transactions which occurred prior to September 9, 1993, the examiner should determine that the decedent left a will containing a power of sale without restriction. If there are no restrictions on the power of sale, restrictions placed upon the personal representative by court order are effective as to a purchaser in good faith for value only if the purchaser has knowledge of the restrictions or the restrictions are endorsed on the Letters of the personal representative as provided in Section 30-2442.

The special estate tax lien is not divested prior to the lapse of 10 years from the date of death of the decedent as to probate property even though the same is sold to a purchaser for value.

Section 76-269.01 (1994 Cum. Supp.) limits an action to set aside any personal representative's deed executed prior to September 9, 1993, on the grounds that the personal representative lacked authority conferred by the will to convey without court order or that a court order authorizing sale of the real estate was invalid to a period prior to September 9, 1997.

Caveat: A purchaser should ascertain if there is risk of a conflict of interest with respect to the personal representative's transaction; if there is a possible conflict of interest, the purchaser should require compliance with Section 30-2474.

The protective provisions of Section 30-2475 apply equally to mortgagees.
See also Sections 77-2037 and 77-2102.

Source: Standards 79 and 86 and Section 76-269.01 (1994 Cum. Supp.)

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CHAPTER II -- SUBDIVISIONS & ZONING

2.1 PLAT - UNNUMBERED LOT OR LOTS

WHERE ABSTRACT SHOWS: A PLAT OF A SUBDIVISION INTO LOTS, BLOCKS, STREETS AND ALLEYS, WITH LOTS NUMBERED IN ONE BLOCK BUT UNNUMBERED IN THE OTHER BLOCKS OF THE SUBDIVISION, AND, THE LISTING AND ASSESSMENT FOR TAXATION OF LOTS BY NUMBER IN CONFORMITY TO NUMBERING OF THE NUMBERED LOTS IN SUCH BLOCK, IT IS NOT NEGLIGENT TO PASS WITHOUT OBJECTION CONVEYANCES APPEARING PRIOR TO LAST CERTIFICATION OF THE ABSTRACT IDENTIFYING AN UNNUMBERED LOT OR LOTS BY NUMBER CONFORMING TO THE LOT NUMBERING AND SEQUENCE IN THE BLOCK WHEREIN LOTS ARE NUMBERED.

Approved October 19, 1995

COMMENT: In at least one instance prior to statehood, a townsite was platted and subdivided into lots, blocks, streets and alleys; only the lots in Block One being numbered; with no comment in the dedication or the surveyor's certificate regarding numbering of the lots in the blocks other than Block One.

Ontario Land Company v. Yordy, 212 U.S. 152, 53 L. ed. 449, wherein certain blocks in a subdivision were designated reserved without number holds that lands may be sufficiently described to sustain a conveyance, although not technically or officially described, if identified by a number in harmony with the balance of the addition, - in that case as numbered blocks in regular sequence. The maxim *"That is certain which can be made certain"* was applied by resort to extrinsic evidence on the ground that: *"The office of a description is not to identify the land but to furnish the means of identification"*, and, *"It is only when it remains a matter of conjecture, after resorting to such extrinsic evidence as is admissible, that the deed will be held void for uncertainty in the description of parcels"*.

Source: Standard 73

2.2 EFFECT OF CONVEYANCE OF PARCEL WITHOUT SUBDIVISION APPROVAL

WHERE A CONVEYANCE CREATES PARCELS WHICH HAVE NOT RECEIVED SUBDIVISION APPROVAL FROM THE LOCAL ZONING JURISDICTION, THE EXAMINER SHOULD REQUIRE SUCH APPROVAL.

SUBDIVISION APPROVAL IS EFFECTIVE EVEN IF SECURED AFTER THE DATE OF THE CONVEYANCE IN QUESTION. THE ORDINANCES OF A CITY OR VILLAGE SHOULD BE REVIEWED TO DETERMINE IF A CERTAIN CLASS OF CONVEYANCE HAS BEEN APPROVED RETROACTIVELY OR EXEMPTED FROM THE APPROVAL REQUIREMENT.

SECTION 76-2,110(2) (1994 Cum. Supp.) PROVIDES AN AFFIDAVIT AND NOTICE PROCEDURE WHERE A CONVEYANCE OR THE RECORDING OF A CONVEYANCE HAS FAILED TO COMPLY WITH ANY REQUIREMENT RELATING TO SUBDIVISION APPROVAL. THE STATUTE PROVIDES THE GOVERNMENTAL AUTHORITY SHALL HAVE 120 DAYS FROM THE RECEIPT OF WRITTEN NOTICE TO RECORD AN OBJECTION IN THE OFFICE OF THE REGISTER OF DEEDS OF THE COUNTY IN WHICH THE REAL ESTATE IS SITUATED. SOME CITIES REGULARLY OBJECT TO THE CURATIVE PROCEDURE, IN WHICH EVENT, THE PROCEDURE IS NOT EFFECTIVE.

SECTION 76-2,110(1) (1994 Cum. Supp.) PLACES A LIMITATION OF JANUARY l, 1995, ON AN ACTION TO SET ASIDE, CANCEL, ANNUL, OR DECLARE VOID OR INVALID ANY CONVEYANCE IN ANY MANNER PURPORTING TO SUBDIVIDE REAL ESTATE WHICH HAS BEEN RECORDED FOR MORE THAN FIVE YEARS PRIOR TO THE COMMENCEMENT OF THE ACTION ON THE GROUND THAT THE CONVEYANCE OR RECORDING HAS FAILED TO COMPLY WITH ANY REQUIREMENT RELATING TO SUBDIVI-SION APPROVAL. UNLESS THE CONVEYANCE IS MODIFIED OR SET ASIDE BY AN ACTION COMMENCED BY JANUARY l, 1995, OR FIVE YEARS AFTER THE RECORDING OF THE CONVEYANCE, WHICHEVER IS LATER, IT IS CONCLUSIVELY PRESUMED THAT THE CONVEYANCE IS FULLY VALID NOTWITHSTANDING ANY FAILURE TO COMPLY WITH ANY REQUIREMENT RELATING TO SUBDIVISION APPROVAL.

Approved October 19, 1995

COMMENT: The statute specifically preserves the right of any municipality having zoning jurisdiction to raise, in the zoning context, objections to the subdivision. Zoning provisions may restrict the granting of building permits on the property.

Source: Section 76-2,110(l) and (2) (1994 Cum. Supp.) and Standard 100.

CHAPTER III -- ENTITIES

3.1 NAMES - CORPORATIONS, VARIATIONS & ABBREVIATIONS

WHERE A CORPORATION APPEARS IN THE CHAIN OF TITLE, VARIANCES SUCH AS THE ADDITION OR OMISSION OF THE WORD *"THE"* BEFORE THE NAME OF THE COMPANY, THE USE OF *"CO."* FOR COMPANY; *"CORP."* FOR CORPORATION; VARIANCES IN PUNCTUATION; USE, INTERCHANGEABLY, OF THE WORD *"AND"* AND AN AMPERSAND AND SIMILAR VARIATIONS MAY BE IGNORED, UNLESS OTHER CIRCUMSTANCES OR RECORD WOULD TEND TO PUT THE EXAMINER ON INQUIRY. USE OF AFFIDAVITS AND RECITALS IN CONVEYANCES TO ESTABLISH IDENTITY SHOULD BE RELIED UPON TO RESOLVE VARIATIONS OR DISCREPANCIES WHICH ARE TOO SIGNIFICANT TO IGNORE.

Approved October 19, 1995

COMMENT: *Clifford v. Thun*, 74 Neb. 831, 104 N.W. 1052 ( ), held that a notice by publication directed to *"The Globe Investment Company"* in a foreclosure suit, where the true name of the corporation was *"Globe Investment Company"*, was an immaterial variance. The abbreviations mentioned in this Standard are in common use.

The use of any other standard abbreviation for words indicating incorporated status should not require any record proof of identity.

Caveat: Take notice.

It is not uncommon to find corporations under common control to have minor variations in the corporate name. The possibility exists, therefore, that some minor variations may in fact identify separate corporate entities, thus rendering absolute certainty of identity difficult, if not impossible, without reliance on off-record inquiry.

Source: Standard 2

3.2 ALIENS AND FOREIGN CORPORATIONS

ALIENS AND FOREIGN CORPORATIONS ARE PROHIBITED FROM OWNING OR LEASING FOR MORE THAN FIVE YEARS CERTAIN LANDS IN THE STATE OF NEBRASKA. ALIENS INCLUDE DOMESTIC CORPORATIONS WHOSE BOARDS OF DIRECTORS CONSIST OF A MAJORITY OF ALIENS OR WHOSE MANAGERS ARE ALIENS. SECTIONS 76-402, 76-405 THRU 76-409.

EXCLUDED FROM THE ACT ARE LANDS WITHIN CITIES OR VILLAGES OR WITHIN THREE MILES THEREOF; MANUFACTURING OR INDUSTRIAL ESTABLISHMENTS OR REAL ESTATE INCIDENTAL THERETO; FILLING STATIONS AND BULK PETROLEUM STATIONS; RAILROADS, PUBLIC UTILITIES, AND COMMON CARRIERS; AND OIL AND GAS LEASES. A 10-YEAR GRACE PERIOD APPLIES WHEN THE TAKING OF TITLE RESULTS FROM THE ENFORCEMENT OF A LIEN OR JUDGMENT FOR ANY DEBT OR LIABILITY.

ANY ACTION MUST BE BROUGHT BY THE STATE AND MUST BE COMMENCED BEFORE TITLE IS TRANSFERRED TO A QUALIFIED GRANTEE. IF AN ACTION IS COMMENCED, THE STATE MUST PAY FULL VALUE FOR THE PROPERTY.

Approved October 19, 1995

COMMENT: If title is held by any person or entity in violation of the statute, the title examiner should pass title, but note that title must be transferred before an action is commenced by the State of Nebraska. The possibility of escheat should be noted with respect to a lender's policy or an opinion to a lender.

Source: Standard 9

3.3 CONVEYANCE OR RELEASE OF ENCUMBRANCE BY CORPORATION

A CONVEYANCE OF REAL ESTATE, RELEASE OF MORTGAGE, MECHANIC'S LIEN, JUDGEMENT LIEN OR OTHER ENCUMBRANCE EXECUTED ON BEHALF OF A CORPORATION SHOULD BE PASSED WITHOUT CALLING FOR AN AUTHORITY OF THE OFFICER SIGNING THE INSTRUMENT TO ACT FOR THE CORPORATION (UNLESS STATUTES AUTHORIZING INCORPORATION OF THE PARTICULAR TYPE OF CORPORATION SPECIFICALLY REQUIRE PRIOR APPROVAL BY THE BOARD OF DIRECTORS OR OTHER GOVERNING BODY BEFORE ANY SUCH ACTION BY THE CORPORATION CAN BE EFFECTIVE) WHEN SUCH INSTRUMENT IS SIGNED BY A PRESIDENT OR PRESIDING OFFICER OF THE BOARD OF DIRECTORS, OR ANY VICE PRESIDENT OF THE CORPORATION, WITH OR WITHOUT CORPORATE SEAL.

Approved October 19, 1995

COMMENT: This title standard has been codified; see Neb. Rev. Stat. Section 21-20,135.01. Further, Sections 76-258 and 76-270 would validate any conveyance of record for more than 10 years.

Source: Standards 11, 48 and 49

Comment approved October 18, 2001

3.4 CONVEYANCE BY RECEIVER OF FOREIGN CORPORATION

WHERE CONVEYANCES AND ASSIGNMENTS OF MORTGAGE EXECUTED BY RECEIVERS OF NONRESIDENT CORPORATIONS HAVE BEEN RECORDED FOR MORE THAN FIFTEEN YEARS, IT IS NOT NECESSARY TO REQUIRE PROOF OF THE AUTHORITY OF SUCH RECEIVERS.

Approved October 19, 1995

COMMENT: See Section 76-269.

Source: Standard 15

3.5 CONVEYANCE OF REAL PROPERTY HELD IN PARTNERSHIP NAME

REAL PROPERTY ACQUIRED BY A PARTNERSHIP AND HELD IN THE PARTNERSHIP NAME MAY BE CONVEYED ONLY IN THE PARTNERSHIP NAME. ANY CONVEYANCE FROM THE PARTNERSHIP SO MADE, AND SIGNED BY ONE OR MORE MEMBERS OF THE PARTNERSHIP, WHICH CONVEYANCE APPEARS TO BE EXECUTED IN THE USUAL COURSE OF PARTNERSHIP BUSINESS, SHALL BE PRESUMED TO BE AUTHORIZED BY THE PARTNERSHIP IN THE ABSENCE OF KNOWLEDGE OF FACTS INDICATING A LACK OF AUTHORITY; AND THE RECITALS IN THE INSTRUMENT OF CONVEYANCE SHALL BE ACCEPTED AS SUFFICIENT EVIDENCE OF SUCH AUTHORITY.

Approved October 19, 1995

COMMENT: See Section 67-310(l). This Standard applies to all partnerships formed under the Nebraska Uniform Partnership Act.

New Standard, adopted 1995.

3.6 CONVEYANCE OF REAL PROPERTY HELD IN THE NAME OF ONE OR MORE OF THE PARTNERS, BUT NOT ALL OF THE PARTNERS.

WHEN TITLE TO REAL PROPERTY IS IN THE INDIVIDUAL NAME OF ONE OR MORE, BUT NOT ALL THE PARTNERS, AND THE RECORD DOES NOT DISCLOSE THE RIGHT OF THE PARTNERSHIP AND THE GRANTEE IS WITHOUT KNOWLEDGE OF A PARTNERSHIP, THE PARTNERS IN WHOSE NAME THE TITLE IS VESTED MAY CONVEY SUCH PROPERTY IN THEIR INDIVIDUAL NAMES, PROVIDED THEIR SPOUSES JOIN IN SUCH CONVEYANCE SINCE THERE IS NO KNOWLEDGE OF THE EXISTENCE OF A PARTNERSHIP.

Approved October 19, 1995

COMMENT: See Section 67-414. This Standard applies to all partnerships formed under the Nebraska Uniform Partnership Act.

In the event that knowledge of the partnership becomes known to grantee prior to the conveyance, all partners must join in the conveyance, and a recital in the instrument of conveyance should so indicate, and in this event, their spouses are not required to join in the conveyance.

New Standard, adopted 1995.

Updated January 30, 2009

3.7 CONVEYANCE OF REAL PROPERTY HELD IN THE NAME OF ONE OR MORE OF THE PARTNERS, BUT NOT ALL OF THE PARTNERS

3.7 CONVEYANCE OF REAL PROPERTY HELD IN THE NAMES OF ALL PARTNERS. REAL PROPERTY ACQUIRED IN THE NAMES OF ALL THE PARTNERS MAY BE CONVEYED ONLY BY AN INSTRUMENT SIGNED BY ALL PARTNERS WITH A RECITAL THEREIN OF SUCH FACT.

Approved October 19, 1995

COMMENT: See Section 67-414. This Standard applies to all partnerships formed under Nebraska Uniform Partnership Act.

New Standard, adopted 1995.

Updated January 30, 2009.

3.8 CONVEYANCE OF REAL PROPERTY HELD IN LIMITED PARTNERSHIP NAME

REAL PROPERTY ACQUIRED BY A LIMITED PARTNERSHIP AND HELD IN THE PARTNERSHIP NAME MAY BE CONVEYED ONLY IN THE LIMITED PARTNERSHIP NAME. ANY CONVEYANCE FROM THE LIMITED PARTNERSHIP NAME SO MADE MUST BE SIGNED BY THE GENERAL PARTNER OR GENERAL PARTNERS, AS THE CASE MAY BE, OF THE LIMITED PARTNERSHIP. THE IDENTITY OF THE GENERAL PARTNER OR GENERAL PARTNERS MAY BE ESTABLISHED BY THE CERTIFICATE OF LIMITED PARTNERSHIP ON FILE IN THE OFFICE OF THE SECRETARY OF STATE OF NEBRASKA.

Approved October 19, 1995

COMMENT: See Section 67-256. Section 67-209 (Repealed in 1981). This Standard applies to all limited partnerships formed under the Nebraska Uniform Limited Partnership Act of 1939 and 1981.

New Standard, adopted 1995.

3.9 NO MARITAL RIGHTS IN PARTNERSHIP REAL PROPERTY

NO HOMESTEAD OR OTHER MARITAL RIGHTS ATTACH TO THE INTEREST OF A MARRIED PARTNER IN SPECIFIC PARTNERSHIP REAL PROPERTY. IF, BY RECITALS IN INSTRUMENTS IN THE CHAIN OF TITLE OR OTHERWISE, IT APPEARS THAT PARTNERSHIP REAL PROPERTY WAS CONVEYED, THE TITLE EXAMINER SHOULD NOT REQUIRE ANY EVIDENCE OF RELEASE OR NONEXISTENCE OF SUCH MARITAL RIGHTS.

Approved October 19, 1995

COMMENT: See Neb. Rev. Stat. § 67-428.

New Standard, adopted 1995.

Updated January 30, 2009.

3.10 LIMITED LIABILITY COMPANY TRANSACTIONS

INSTRUMENTS CONVEYING AN INTEREST IN REAL ESTATE TITLED IN THE NAME OF A LIMITED LIABILITY COMPANY SHOULD NOT BE PASSED WITHOUT CALLING FOR PROOF OF AUTHORITY OF THE PERSON(S) EXECUTING THE DEED ON BEHALF OF THE LIMITED LIABILITY COMPANY TOGETHER WITH EVIDENCE FROM THE SECRETARY OF STATE OF NEBRASKA THAT AT THE TIME OF THE CONVEYANCE AND TRANSFER THE COMPANY WAS IN GOOD STANDING

i) FOR TRANSACTIONS OCCURING PRIOR TO JANUARY 1, 2011, THE AUTHORITY OF THE PERSON SIGNING IS AS SET FORTH IN THE ARTICLES OF ORGANIZATION FILED WITH THE NEBRASKA SECRETARY OF STATE.

ii) FOR TRANSACTIONS AFTER JANUARY 1, 2013, THE AUTHORITY OF THE PERSON SIGNING IS AS SET FORTH IN A STATEMENT OF AUTHORITY THAT GRANTS AUTHORITY TO TRANSFER REAL PROPERTY HELD IN THE NAME OF THE LIMITED LIABILITY COMPANY FILED WITH THE SECRETARY OF STATE OF NEBRASKA AND THAT IS RECORDED BY CERTIFIED COPY IN THE OFFICE FOR RECORDING THE TRANSFER OF REAL PROPERTY.

iii) FOR TRANSACTIONS BETWEEN JANUARY 1, 2011 AND JANUARY 1, 2013, IF THE COMPANY WAS ORGANIZED UNDER AFTER JANUARY 1, 2011 PER ii) ABOVE, IF ORGANIZED PRIOR TO JANUARY 1, 2011 PER i) ABOVE, UNLESS THE COMPANY AMENDED ITS ARTICLES OF ORGANIZATION TO SUBMIT TO THE NEBRASKA UNIFORM LIMITED LIABILITY ACT.

Comment: Neb. Rev. Stat. 21-105 (2012 Cum. Supp.) relating to powers reads "A limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities, . . . " Implied therein is the power to own and sell real estate.

Prior to the Nebraska Uniform Limited Liability Act effective January 1, 2011, formerly Section 21-2617 provided "Real and personal property owned or purchased by a limited liability company shall be held and owned and conveyance shall be made in the name of the limited liability company. Instruments for the acquisition, mortgage, or disposition of property of the limited liability company shall be valid and binding upon the limited liability company if

executed by a manager of a limited liability company having a manager or by a member of a limited liability company in which the management has been retained by the members."

Neb. Rev. Stat., 21-124 (2012 Cum. Supp.) describes Certificates of Existence and Authorization.

Neb. Rev. Stat., 21-127 (2012 Cum. Supp.) describes Statements of Authority. Subsection (f) allows for reliance by third party BFP's without knowledge upon a certified copy of a Statement of Authority filed in the same office as the records of the real estate being transferred.

New Standard, adopted 10/03/2013

Approved 10/03/2013

CHAPTER IV – CONVEYANCES

4.1 TREASURER'S TAX DEEDS VOID PRIOR TO JULY 9, 1903

ALL TREASURER'S TAX DEEDS MADE PRIOR TO JULY 9, 1903, WERE ABSOLUTELY VOID AND THE RECORD OF SUCH DEED IS NOT A PROPER GROUND FOR ANY OBJECTION TO A TITLE. THE DEED BEING VOID, THE LIEN ALSO BECOMES VOID AFTER FIVE YEARS.

Approved October 19, 1995

COMMENT: See *Larson v. Dickey,* 39 Neb. 463, 58 N.W. 167, at 171 (1894); *Frank v. Scoville*, 48 Neb. 169, 66 N.W. 1113 (1896). Prior to July 9, 1903 (the effective date of Chapter 31, S.L. 1903, p. 280, now Section 77-1857), there was no statute providing an official seal for county treasurer; and it was a legal impossibility for a county treasurer to make a valid tax deed without a seal authorized by law.

Source: Standard 35

4.2 CONVEYANCE TO GRANTOR AND ANOTHER

A CONVEYANCE EXECUTED BY A PERSON OR PERSONS TO THE GRANTOR OR GRANTORS AND ANOTHER PERSON OR PERSONS AS GRANTEES, OR BY TWO OR MORE PERSONS OWNING PROPERTY TO TWO OR MORE SUCH PERSONS AS GRANTEES, IN WHICH INTENTION IS MANIFESTED TO MAKE THE GRANTEES JOINT TENANTS WITH RIGHT OF SURVIVORSHIP, HAS THE SAME EFFECT AS IF THERE WERE A CONVEYANCE FROM A STRANGER TO THE PERSONS NAMED AS GRANTEES IN SUCH CONVEYANCE.

Approved October 19, 1995

COMMENT: See Section 76-118 as to conveyances on or after August 24, 1941, and Section 76-275.01 as to conveyances prior to August 24, 1941.

Source: Standard 39

4.3 CONVEYANCE BY SURVIVING JOINT TENANT

WHEN TITLE IS ACQUIRED THROUGH THE SURVIVORSHIP OF A JOINT TENANT UNDER A VALID JOINT TENANCY, THE FOLLOWING SHOWING MAY BE REQUIRED BEFORE ACCEPTING A CONVEYANCE FROM THE SURVIVOR: (a) ANY CUSTOMARY PROOF OF RECORD SHOWING THE DEATH OF THE DECEASED JOINT TENANT, AND (b) A SHOWING OF NON-LIABILITY FOR NEBRASKA INHERITANCE TAXES, NEBRASKA ESTATE TAXES AND FEDERAL ESTATE TAXES.

Approved October 19, 1995

COMMENT: The fact of non-liability for Nebraska inheritance taxes may appear from proceedings for administration of decedent's estate, if the estate was administered, or from a special proceeding to determine inheritance tax liability under Section 77-2018.02.

See Standard 7.5 regarding joint tenancy and federal estate taxes. See also Section 77-2037.

For interest passing to a surviving spouse, see Title Standard 9.4.

Source: Standard 46

4.4 IDENTIFICATION OF RELATIONSHIP OF PLURAL GRANTEES

THE FAILURE TO IDENTIFY OR STATE THE RELATIONSHIP OF PLURAL GRANTEES IN A CONVEYANCE IS NOT A TITLE DEFECT IF SUCH IDENTITY OR RELATIONSHIP IS OTHERWISE SATISFACTORILY ESTABLISHED FROM SUBSEQUENTLY RECORDED INSTRUMENTS OR AFFIDAVITS IN THE CHAIN OF TITLE.

Approved October 19, 1995

COMMENT: The most usual example is found in the case where John Doe and Mary Doe take title, and, in a subsequent conveyance in which they are grantors, they are identified as then being husband and wife. In the absence of record evidence to the contrary, the title examiner is entitled to presume that the grantees in the first conveyance are identically the same persons as the grantors in the second conveyance and it is not necessary to furnish an affidavit that at the date of the first conveyance the grantees were then husband and wife. The principle here is the same as that involved in the comment to Standard 8.l.

Source: Standard 51

4.5 CONVEYANCES - OMISSION OF DATE

THE OMISSION OF THE DATE OF EXECUTION OR THE DATE OF ACKNOWLEDGMENT OR BOTH IN AND OF ITSELF DOES NOT INVALIDATE A CONVEYANCE.

Approved October 19, 1995

C0MMENT: This Standard is based upon the well-established legal presumption that the date of recordation is also the date of execution and acknowledgment where the actual dates of execution and acknowledgment do not appear. See Sections 76-258 and 76-259.

Source: Standard 57

4.6 CONVEYANCE BY A CONSERVATOR UNDER THE NEBRASKA PROBATE CODE

WHEN A CONSERVATOR UNDER THE NEBRASKA PROBATE CODE CONVEYS REAL ESTATE, THE EXAMINER SHOULD DETERMINE THE VALIDITY OF THE APPOINTMENT AND EXAMINE A CURRENT COPY OF THE LETTERS OF THE CONSERVATOR.

Approved October 19, 1995

COMMENT: A purchaser from a conservator under the Nebraska Probate Code in good faith for value is protected under the provisions of Section 30-2652. The conservator acquires legal title under Section 30-2649 by reason of appointment.

To ensure that no limitations have been placed upon the powers of the conservator under Section 30-2655, the examiner should review the letters of the conservator. In addition, the examiner should determine that the conservator is qualified at the time the conveyance is made.

Source: Standard 91

4.7 DOCUMENTARY STAMPS

FAILURE TO HAVE THE CORRECT AMOUNT OF NEBRASKA DOCUMENTARY STAMPS ON A DEED, OR THE COMPLETE ABSENCE OF SUCH STAMPS, SHOULD NOT BE TREATED AS A DEFECT IN TITLE OR A LIEN ON THE LAND.

Approved October 19, 1995

COMMENT: The Nebraska Documentary Stamp Tax Act, Sections 76-901 thru 76-908, creates a tax on the grantor. Section 76-904 provides that the register of deeds shall accept no deed for recording without necessary documentary stamps, and if the register of deeds improperly records a deed without collecting the proper tax, the register of deeds shall be fined. Insufficient documentary stamps, or, their complete absence, is not to be considered a lien against the land. Abstracters should show documentary stamps and the amount thereof. If the record shows "*exempt*", the abstractor should so state.

Source: Standard 92

4.8 CONVEYANCES TO A FIDUCIARY

A CONVEYANCE TO "*JOE SETTLOR TRUST*" OR *"JOE SETTLOR ESTATE"* MAY BE EFFECTIVE TO CONVEY EQUITABLE TITLE, BUT DOES NOT CONVEY LEGAL TITLE. ANY CONVEYANCE TO A FIDUCIARY SHOULD BE TO THE NAMED FIDUCIARY, STATING THE FIDUCIARY CAPACITY, *e.g. "JOHN JONES, TRUSTEE"* OR *"JOHN JONES, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOE TESTATOR, DECEASED"*.

Approved October 19, 1995

COMMENT: See Standard 14.1

A valid deed of conveyance requires a grantee in existence who is legally capable of accepting the deed and of taking and holding title to the property at the time of conveyance. A grant to a deceased person, to the estate of a deceased person, or to a trust (whether intervivos or testamentary) is void for want of a grantee in being and capable of taking the estate conveyed. 23 AmJur Second, Deeds, Sections 29 and 32 (1983).

A deed to an estate of a deceased person passed full equitable title to the executor or personal representative and was subject to reformation to place legal title in the executor. *Fisher v. Standard Investment Co.*, 145 Neb. 80, 15 NW 2d 355 (1944).

"All the other elements of a valid trust are present: (1) a competent settlor (Elizabeth R. Wright), (2) a trust property (the mineral estate) legal title to which has been transferred to (3) a competent trustee", citing Restatement Trusts Second, Section 2, Comment H (1959). *Schaneman v. Wright*, 238 Neb. 309, 470 NW 2d 566 (1991).

Restatement of Trusts Second, Section 2, defines a trust:

> A trust ... when not qualified by the word "charitable", "resulting", or "constructive", is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.

Comment "H" states:

> A trust involves three elements, namely (1) *a trustee who holds the trust property and is subject to equitable duties to deal with it for the benefit of another; (2) a beneficiary, to whom the trustee owes equitable duties to deal with the trust property for his [sic] benefit; (3) trust property, which is held by the trustee for the beneficiary. (Emphasis supplied.)*

If the original grantor is still available, a corrective deed from the original grantor to the trustee will resolve the problem. If the original grantor is incompetent, a corrective deed by a conservator authorized by the court, after notice and hearing, supplies the omission; if the original grantor is deceased and the personal representative is still acting, a corrective deed by the personal repre-sentative suffices.

Otherwise, reformation or quiet title will suffice.

Source: Standard 1020

5.1 LAND NOT HOMESTEAD - NONJOINDER OF WIFE IN CONVEYANCE - DOWER

5.1 LAND NOT HOMESTEAD - NONJOINDER OF WIFE IN CONVEYANCE - DOWER

THE TITLE EXAMINER SHOULD TREAT ALL CONVEYANCES EXECUTED PRIOR TO MAY 16, 1877, AS THE CONVEYANCE OF NON-HOMESTEAD LAND, AND WHERE A RECITAL OCCURS IN THE CONVEYANCE OR IN THE CERTIFICATE OF ACKNOWLEDGMENT STATING THAT THE TITLEHOLDER IS A NONRESIDENT OF NEBRASKA AND THERE IS NO OTHER RECORD EVIDENCE TO THE CONTRARY, THE EXAMINER SHOULD PASS THE TITLE NOTWITHSTANDING THE FACT THAT THE SPOUSE OF THE TITLEHOLDER DID NOT JOIN IN THE CONVEYANCE.

COMMENT: See also Neb. Rev. Stat. § 40-104.

As used in this Standard, the term *"conveyance"* includes mortgages, leases of land for more than a year, oil, gas or other mineral leases, and assignments and releases thereof.

Where land is not homestead, the titleholder can convey the land free from dower in case his wife is a nonresident of Nebraska without her joinder in the conveyance.

Under the Homestead Act, S.L. 1877, p. 34, joinder of spouses in the instrument was for the first time made necessary for the validity of a conveyance or encumbrance of homestead land where the owner was married. Prior thereto, joinder of spouse was necessary only for release of dower or curtesy in case they were not otherwise released or barred. See *Perry v. Ritze*, 110 Neb. 286, 193 N.W. 758 (1923); *Shields v. Horbach*, 49 Neb. 262, 68 N.W. 524 (1896); *Rector v. Rotton*, 3 Neb. 171 (1874); Foster, The Nebraska Homestead, 3 Nebraska Law Bulletin, p. 353.

The Homestead Act was enacted without emergency clause by the 14th Session of the Nebraska Legislature. Adjournment of this session occurred February 15, 1877. The act became effective May 16, 1877.

Since the facts on which homestead depends are not ordinarily shown in an abstract of title and it is difficult to formulate standards concerning them, Standard No. 5.1 is confined to the one obvious case where land could not be homestead. That should not be taken as implying that there cannot be cases where without negligence a title examiner can pass title where conveyances are executed subsequent to May 16, 1877.

Nebraska has always recognized the general rule that the domicile of the wife follows that of the husband and proof of the domicile of the husband is sufficient prima facie to establish that of the wife. See *Isaacs v. Isaacs*, 71 Neb. 537, 99 N.W. 268 (1904); *Smith v. Smith*, 19 Neb. 706, 28 N.W. 296 (1886); *Swaney v. Hutchins,* 13 Neb. 266, 13 N.W. 282 (1882).

The term *"deed"* embraces every instrument in writing by which any real estate or interest therein is created, transferred, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except last wills and leases for one year or for a less time. Section 76-203. It therefore appears that execution of an oil and gas lease, an assignment or release thereof must be joined in by the spouse of the owner of the interest being leased, assigned, or released, in the absence of nonresidence. The same proofs as to nonresidence, and requirements in the case of nonresidence apply, however, as to any conveyances affecting oil, gas or other mineral interests, and other leases of land for a term exceeding one year as in the case of other conveyances of real estate.

Source: Standard 23

Approved October 19, 1995

Updated January 30, 2009.

5.2 HOMESTEAD - DOWER, CURTESY, AND INCHOATE STATUTORY RIGHT OF INHERITANCE-FAILURE TO MENTION IN CONVEYANCE

THE FACT THAT THE NAME OF THE SPOUSE OF THE TITLEHOLDER DOES NOT APPEAR IN THE PREMISES OR BODY OF THE DEED, OR THE FACT THAT NO MENTION IS MADE OF HOMESTEAD OR THE INCHOATE STATUTORY RIGHT OF INHERITANCE IN THE CONVEYANCE, SHOULD NOT BE TREATED AS DEFECTS IN TITLE IF THE SPOUSE JOINED IN THE EXECUTION AND ACKNOWLEDGMENT OF THE CONVEYANCE.

Approved October 19, 1995

COMMENT: See *Cobbey v. Knapp*, 23 Neb. 579, 37. N.W. 485 (1888); *Radbruck v. First National Bank,* 95 Neb. 288, 145 N.W. 715 (1914).

No requirements as to the contents of the instrument are or have ever been made by the Nebraska Homestead Act. See Section 40-104. No requirements as to the contents are made by the Nebraska Statute of Frauds, Sections 36-103 and 76-211. The intent of the spouse to pass or release an interest in the land is crystal clear from the spouses performance. Otherwise, the spouse is merely practicing penmanship. The Intent Statute, Section 76-205, reinforces that Standard.

Source: Standard 24

5.3 MARITAL STATUS - DESIGNATION AS *"WIDOW"* OR *"WIDOWER"*

DESIGNATION OF A GRANTOR OR A MORTGAGOR AS *"WIDOWER"* OR *"WIDOW"* IS EQUIVALENT TO DESCRIBING THE GRANTOR OR MORTGAGOR AS *"SINGLE"* OR *"UNMARRIED"*.

Approved October 19, 1995

COMMENT: Definition of a widower: A man who has lost his wife by death and had not married again. Black's Law Dictionary, Third Edition; Webster's New International Dictionary, Second Edition; *Abrams v. Unknown Heirs of Rice*, 317 Mo. 216, 295 S.W. 83. Designation of a grantor as *"single"* or *"unmarried"* is preferable to the use of the word *"widower"* or *"widow"* where otherwise appropriate.

Source: Standard 59

5.4 SPOUSE, JOINDER OF IN ACTION

WHERE ALL PERSONS HAVING OR CLAIMING ANY INTEREST IN REAL ESTATE ARE MADE DEFENDANTS IN AN ACTION UNDER THE PROVISIONS OF SECTION 25-321 OR SECTION 25-21,113, THE SPOUSES OF KNOWN AND NAMED DEFENDANTS WHOSE WHEREABOUTS AND RESIDENCE ARE UNKNOWN ARE NOT NECESSARY DEFENDANTS IN SUCH ACTION UNLESS SUCH SPOUSES ARE IN POSSESSION OF THE REAL ESTATE INVOLVED OR THEIR INTEREST AFFIRMATIVELY APPEARS OF RECORD.

Approved October 19, 1995

COMMENT: Sections 25-321 and 25-21,113; *State ex rel. Conkey v. Ryan,* 136 Neb. 334, 285 N.W. 923 (1939).

Source: Standard 62

5.5 CONVEYANCE OF ENTIRE ESTATE UNLESS QUALIFIED

DOCUMENTS CONVEYING OR ENCUMBERING TITLE TO REAL ESTATE SIGNED BY TITLEHOLDERS AS HUSBAND AND WIFE CONVEY ALL THEIR INTEREST UNLESS A SPECIFIC RECITAL OR RESERVATION OF INTEREST IS OTHERWISE EXPRESSED.

Approved October 19, 1995

COMMENT: Language to the effect that *"Each in his and her own right"* is surplusage and offers no further validity to the interest conveyed.

A requirement such as the following is <u>not</u> meritorious:

> "In the event married persons take title to the premises as joint tenants with right of survivor, it is important that the parties execute the mortgage not only as husband and wife, but also each in his or her own right. The capacity of the grantors in the mortgage, and also the acknowledgment thereof, should be described as `husband and wife, and each in their own right' or by words of similar import."

Source: Standard 93

5.6 EFFECT OF DECREE OF DIVORCE

WHEN THE ISSUE OF THE SETTLEMENT OF THE PROPERTY RIGHTS OF THE PARTIES HAS BEEN RAISED BY THE PLEADINGS, A DECREE OF DIVORCE OR DISSOLUTION OF MARRIAGE, ENTERED BY A NEBRASKA COURT OF COMPETENT JURISDICTION, WHICH ASSIGNS TITLE TO REAL ESTATE OF THE PARTIES OR WHICH APPROVES OR SETS FORTH THE TERMS OF A PROPERTY SETTLEMENT AGREEMENT OF THE PARTIES WHICH AGREEMENT ASSIGNS THE TITLE TO THE REAL ESTATE, BY ITSELF EFFECTS THE CONVEYANCE OF THE TITLE. WHERE THE DECREE DIRECTS A CONVEYANCE OF THE REAL ESTATE WITHIN A CERTAIN TIME, OR WHERE IT APPROVES OR SETS FORTH THE TERMS OF A PROPERTY SETTLEMENT AGREEMENT OF THE PARTIES WHICH AGREEMENT REQUIRES A CONVEYANCE THEREOF WITHIN A CERTAIN TIME, THEN, UPON FAILURE OF SUCH PARTY TO CONVEY THE PROPERTY WITH THE TIME DESCRIBED, THE DECREE ITSELF EFFECTS A CONVEYANCE OF THE TITLE.

Approved October 19, 1995

COMMENT: See Sections 25-1304, 42-365, 42-366 and 42-351.

See also PATTON ON TITLES, 2d Ed., Section 522, p. 387.

Caveat: Decree entered by court in another state cannot directly determine title to real estate in this state. *Weesner v. Weesner*, 168 Neb. 346, 95 N.W. 2d 682 (1959).

Source: 96

5.7 SPOUSE NEED NOT JOIN CONVEYANCE BY NON-DOMICILIARY

IT IS NOT NECESSARY FOR THE SPOUSE OF A PERSON WHO IS NOT DOMICILED IN NEBRASKA WHO CONVEYS NEBRASKA REAL ESTATE TO JOIN IN EXECUTION OF A CONVEYANCE.

Approved October 19, 1995

C0MMENT: For law prior to January l, 1977, see Standard 5.l.

The legislature in Laws 1995, LB 872, amended Section 30-2313(c) to read:

> If a married person dies and such person (1) had been an owner of real estate in this state, and 2) had conveyed the real estate during his or her lifetime without joinder of his or her spouse in the conveyance, while domiciled outside the state, such conveyance shall be valid regardless of the law of the decedent's domicile at death. The real estate shall not be subject to any claims or interests derived from the grantor or the grantor's estate because a spouse did not join in the conveyance.

This law amended Section 30-2313(c) as previously amended by Laws 1994, LB 1116 (1994 Cum. Supp.).

The amended Section 30-2313(c) concerns relating to the application of augmented estate questions in the cas of a non-domiciliary grantor. It does not eliminate the requirements of Section 40-104 that a conveyance of homestead must be executed and acknowledged by both the husband and wife. See Standard 13.4 relating to the availability of using recitals in a conveyance.

Source: 1995 Revision of Standard 97

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CHAPTER VI -- JUDICIAL PROCEEDINGS

6.1 FAILURE TO RELEASE LIS PENDENS

FAILURE TO RELEASE A STATUTORY NOTICE OF LIS PENDENS SHOULD IN NO CASE BE TREATED AS A DEFECT IN TITLE.

Approved October 19, 1995

COMMENT: The statutory notice of lis pendens has only two purposes: (1) to serve as notice to third persons dealing with the title during the interval between the filing of the suit and the service of process, and (2) to preclude holders of unrecorded conveyances from subsequently asserting a title adverse to that of the parties to the action. *Munger v. Beard*, 79 Neb. 764, 113 N.W. 214 (1907); Section 25-531. After service of process, the pending action is itself notice to all the world that persons dealing with the title will be bound by the result of the litigation. Thus, in every such case, the examiner must look to the ultimate result of litigation as shown by the court records and not to the statutory notice in order to pass upon the merchantability of the title.

Source: Standard 6

6.2 FAILURE TO APPOINT GUARDIAN AD LITEM

IT IS NOT A DEFECT IN TITLE THAT NO GUARDIAN AD LITEM WAS APPOINTED FOR A MINOR OR INCOMPETENT DEFENDANT IN AN ACTION AFFECTING THE MINOR'S INTEREST IN THE REAL ESTATE INVOLVED.

Approved October 19, 1995

COMMENT: Failure to appoint a guardian ad litem for a minor is an irregularity only, not a jurisdictional defect, and cannot therefore, be collaterally attacked. *Manful v. Graham*, 55 Neb. 645, 76 N.W. 19 (1898); *Penn Mutual Life Ins. Co. v. Sweeney*, 132 Neb. 624, 273 N.W. 46 (1937); Section 25-309. The statute does not provide for the appointment of a guardian ad litem in the case of an in-competent.

Source: Standard 12

6.3 CONSTRUCTIVE SERVICE ON DEFENDANT

WHERE, IN THE EXAMINATION OF AN ABSTRACT, IT APPEARS THAT A PETITION OR OTHER PLEADING IN AN ACTION IN REM MAKES CERTAIN NAMED PERSONS DEFENDANTS AND MOTION AND AFFIDAVIT ARE FILED SHOWING THAT SERVICE CANNOT BE MADE WITH REASONABLE DILIGENCE BY ANY OTHER METHOD PROVIDED BY STATUTE AND AN ORDER IS ENTERED PURSUANT TO SECTION 25-517.02 AUTHORIZING SERVICE BY PUBLICATION, AND SUCH NOTICE HAS BEEN PUBLISHED AGAINST THE NAMED DEFENDANTS AND THE PROCEEDINGS HAVE BEEN CONCLUDED BY A PROPER DECREE OR ORDER OF COURT, IT IS NOT NEGLIGENCE TO APPROVE THE PROCEEDING AS SUFFICIENT TO PASS OR CONFIRM THE TITLE, EVEN THOUGH ONE OR MORE OF THE DEFENDANTS THUS SERVED WAS OR WERE IN FACT, WITHIN THE STATE WHEN THE PUBLICATION WAS MADE.

Approved October 19, 1995

COMMENT: It may be noted that under Section 25-525, a defendant who has been served by publication may, within five years after the judgment or decree, petition the court for an order opening up the decree and allowing the defendant to defend, but such a proceeding does not affect the title where it has passed to a *"purchaser in good faith"*.

Source: Standard 17

6.4 FORECLOSURE - LACK OF CERTIFICATE OF SATISFACTION

WHERE A MORTGAGE OR TRUST DEED IN THE CHAIN OF TITLE HAS BEEN PROPERLY FORECLOSED JUDICIALLY, THE LACK OF A CLERK'S CERTIFICATE OF SATISFACTION OF SUCH MORTGAGE OR TRUST DEED SHOULD NOT BE TREATED AS A DEFECT IN TITLE.

Approved October 19, 1995

COMMENT: The title derived from a judicial foreclosure action depends entirely upon the sufficiency of the proceeding as shown by the clerk's record and the clerk's certificate of satisfaction, although provided for by Section 25-2154, can add nothing to such record except expense. It is further submitted that in the case of a second mortgage defendant, who has defaulted and whose lien has not been established in the decree, the clerk would have no authority to issue such a certificate of satisfaction although the lien of the second mortgage would, nevertheless, be extinguished.

Source: Standard 18

6.5 FORECLOSURE, DEATH OF OWNER OF EQUITY OF REDEMPTION

IN THE JUDICIAL FORECLOSURE OF A MORTGAGE OR TRUST DEED, WHERE THE OWNER OF THE EQUITY OF REDEMPTION IS DEAD AND THE OWNER'S ESTATE IS UNDER ADMINISTRATION, NEITHER CLAIMANTS AGAINST THE ESTATE NOR LEGATEES ARE NECESSARY PARTIES, EXCEPT WHERE THE WILL MAKES A CHARGE UPON THE REAL ESTATE FOR A CREDITOR OR LEGATEE. UNLESS WITHIN THE EXCEPTION STATED, THE ABSENCE OF SUCH PARTIES SHOWS NO DEFECT IN TITLE. SECTION 30-2472.

Approved October 19, 1995

COMMENT: Where no special interest exists, the personal representative is the proper party defendant and only necessary party to represent all creditors and legatees. *In re Rhea*, 126 Neb. 571, 253 N.W. 876 (1934); *Lenderink v. Sawyer*, 92 Neb. 587, 138 N.W. 744 (1912).

Heirs of the mortgagor may be and usually are necessary parties.

Source: Standard 19

6.6 CONSTRUCTIVE SERVICE ON UNKNOWN DEFENDANTS AND UNKNOWN HEIRS

IN AN ACTION IN REM WHERE THE HEIRSHIP OF A DECEASED PERSON WHO HAD AN INTEREST IN THE REAL ESTATE HAS NOT BEEN LEGALLY ADJUDICATED AND THE PLAINTIFF HAS OBTAINED CONSTRUCTIVE SERVICE PURSUANT TO THE PROVISIONS OF SECTION 25-321, AGAINST *"ALL PERSONS HAVING OR CLAIMING AN INTEREST IN"* SAID REAL ESTATE, FURTHER DESCRIPTION OF UNKNOWN HEIRS SHOULD NOT BE TREATED AS A DEFECT IN TITLE.

Approved October 19, 1995

COMMENT: The provisions of Section 25-321 are so broad as to cover all cases which would be touched by the provisions of now repealed Section 25-526. Our court so interpreted the predecessors of these statutes in *Miller v. Ruzicka*, 109 Neb. 152, 190 N.W. 216 (1922), and this ruling should be equally applicable to the present statutes. It should not be implied from the foregoing Standard that all known heirs of a deceased title owner are not necessary parties defendant, and that specific provisions of Section 25-21,113 need not be complied with.

Source: Standard 25

6.7 TAX FORECLOSURE - OWNER UNKNOWN - LAND MADE A PARTY

IF THE PRESENT OWNER OF LAND IS UNKNOWN AND THE LAND IS MADE A PARTY DEFENDANT IN A TAX FORECLOSURE UNDER SECTION 77-1906 (1994 CUM. SUPP.) AND JURISDICTION OVER IT IS DULY ACQUIRED BY LEGAL PUBLICATION, THE SALE UNDER THE DECREE OF FORECLOSURE CREATES A NEW AND INDEPENDENT TITLE AND BARS ALL PRE-EXISTING LIENS OR INTERESTS.

Approved October 19, 1995

COMMENT: See *Leigh v. Green*, 64 Neb. 533, 90 N.W. 255 (1902); *Jones v. Gibson*, 119 Neb. 574, 230 N.W. 249 (1930); *Coffin v. Old Line Life Ins. Co.*, 138 Neb. 857, 295 N.W. 844 (1914). It should be noted however, that under said Section 77-1906 (1994 Cum. Supp.), the proper jurisdictional steps must be taken as in the case of service by publication on unknown defendants. This Standard is not intended to suggest that known defendants need not be joined as parties by their known names.

Source: Standard 30

6.8 CONSTRUCTIVE SERVICE - FICTITIOUS DEFENDANTS

IN THE SITUATIONS WHERE A DEFENDANT IS NOT KNOWN TO EXIST AND WHERE A DEFENDANT IS KNOWN TO EXIST BUT DEFENDANT'S REAL NAME, RESIDENCE AND WHEREABOUTS ARE UNKNOWN, IT IS NOT NECESSARY TO JOIN THAT PERSON UNDER A FICTITIOUS NAME, BUT COMPLYING WITH THE PROVISIONS OF SECTION 25-21,113 CULMINATING IN PROPER CONSTRUCTIVE SERVICE UNDER SECTION 25-21,118 IS SUFFICIENT.

Approved October 19, 1995

COMMENT: In the first situation, the real names of these defendants would necessarily be unknown and we should have a pure in rem case. However, the provisions of Section 25-21,113 literally cover the defendants in the second situation also under the phrase *"all persons"*. In this instance, this designation appears to be preferable as giving a better notice because of the description of the land which follows it. Only where the plaintiff knows enough of the defendant's true name so as to be able to designate the defendant by a name approximating the true name, followed by the words *"real name unknown"* would defendant be apt to receive actual notice. In this case, the fictitious name device would have its place and both the above sections could be utilized in the interest of safety.

See *Filley v. Dickinson*, 110 Neb. 356, 193 N.W. 914 (1923), cited by Dysart, Foreclosures in Nebraska, Section 15, p. 27, to the effect that the spouse of a party having an interest in real estate that would give rise to a statutory interest in the spouse would be cut off by decree against the party while living as completely as though made a party if the land is non-homestead.

It should not be implied from the foregoing Standard that it lessens the need for fictitious defendants who have possessory rights.

Source: Standard 65

6.9 PROOF OF MAILING OF COPY OF PUBLISHED NOTICE

THE REQUIREMENTS OF SECTION 25-520.01 OF FILING PROOF BY AFFIDAVIT OF THE MAILING OF A COPY OF PUBLISHED NOTICE IN ANY ACTION OR PROCEEDING OF ANY KIND OR NATURE WITHIN 10 DAYS AFTER THE MAILING OF THE NOTICE IS NOT JURISDICTIONAL, SO LONG AS THE NOTICE WAS MAILED WITHIN THE FIVE-DAY PERIOD REQUIRED BY SUCH SECTION.

Approved October 19, 1995

C0MMENT: In *Pitman v. Heumeier*, 81 Neb. 338, 115 N.W. 1083 (1907), the Nebraska Supreme Court held the County Court acquired jurisdiction by reason of the service of summons, and, as it acquired jurisdiction by service of summons, it was not divested of jurisdiction by reason of the failure of the sheriff to make and file his return, although the language of Section 25-510 (since repealed) as there construed included the word *"must"*.

Likewise, the purpose of mailing of notice is officially to notify the party to whom the notice is mailed of the action or proceeding. The making and filing of the affidavit of mailing a copy of the notice is immaterial to the party to whom it is mailed, and is for the purpose of furnishing proper evidence that the party has been mailed notice as required by law.

The statutory requirement of mailing notice is waived by any person who actually enters an appearance in the action or proceeding or who accepts the benefits of the proceedings even though such person has not entered an appearance. Such appearance may be in person or by an agent. *Schmehl v. Buffalo County*, 149 Neb. 277, 30 NW 2d 882 (1948); *Franse v. Armbruster*, 28 Neb. 467, 44 N.W. 481 (1890).

Source: Standard 67

6.10 AFFIDAVIT OF MAILING OF NOTICE

IT IS NOT NEGLIGENCE FOR A TITLE EXAMINER TO REFRAIN FROM OBJECTING TO THE NON-SHOWING OF MAILING OF A COPY OF ANY PUBLISHED NOTICE TO ANY PARTICULAR PERSON IN ANY PROCEEDING, WHEN AN AFFIDAVIT APPEARS OF RECORD IN SUCH PROCEEDING WITH REFERENCE TO SUCH PUBLICATION OF NOTICE, WHICH AFFIDAVIT IS IN LITERAL COMPLIANCE WITH THE REQUIREMENTS AS TO THE FORM OF THE AFFIDAVIT PRESCRIBED BY SECTION 25-520.01 AND THE VERITY OF SUCH AFFIDAVIT SHALL NOT BE QUESTIONED BY THE TITLE EXAMINER.

Approved October 19, 1995

COMMENT: The statutory requirement for mailing is cumulative and supplemental (Section 25-520.03) to the statutes on service by publication generally. There is no presumption that the party instituting the proceeding, or the party's attorney, knew the post office address of a person appearing in the abstract of title to have had a direct legal interest in the subject of the notice, but not mailed a copy of the published notice. There is no presumption that such a person did not see the notice as published. *Shonsey v. Clayton*, 107 Neb. 695, 187 N.W. 113 (1922); *Robinson v. Bressler*, 122 Neb 461, 240 N.W. 564, 90 ALR
600 (1932).

See further: *Farmers Co-Op Mercantile v. Sidner*, 175 Neb. 94, 120 NW 2d 537 (1963); *Lindgren v. School Dist. of Bridgeport*, 170 Neb. 279, 102 NW 2d 599 (1960). *cf Estate of Masopust*, 232 Neb. 936, 443 NW 2d 274 (1989).

A title examiner should assume the constitutionality of Nebraska procedures relating to service of process and publication of notices.

Source: Standards 69 and 58

6.11 JOINDER OF SPOUSE IN ACTION

Approved October 19, 1995

SEE STANDARD 5.4

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CHAPTER VII -- MORTGAGES, DEEDS OF TRUST, LIENS & ENCUMBRANCES

7.1 MORTGAGE RELEASE - FAILURE TO INCLUDE BOOK AND PAGE

FAILURE TO DESCRIBE THE BOOK AND PAGE OF THE MORTGAGE RELEASED OR THE LAND ENCUMBERED THEREBY SHOULD NOT BE TREATED AS A DEFECT IN TITLE IF THERE IS OTHER RECORD EVIDENCE IDENTIFYING WITH REASONABLE CERTAINTY THE MORTGAGE INTENDED TO BE RELEASED.

Approved October 19, 1995

COMMENT: See *Gadsden v. Latey*, 42 Neb. 128, 60 N.W. 322 (1894).

See also *Anderson v. McCloud-Love Live-Stock Commission Co.*, 58 Neb. 670, 79 N.W. 613 (1898).

Source: Standard 5

7.2 EASEMENT - EFFECT OF LIEN OR ENCUMBRANCE AGAINST

THE FACT OF THE RECORD OR NON-RECORD OF LIENS OR ENCUMBRANCES ON THE INTEREST OF A GRANTEE OR GRANTEES OR THEIR SUCCESSORS IN AN EASEMENT IS IMMATERIAL TO THE TITLE BEING TRANSFERRED.

Approved October 19, 1995

COMMENT: A purchaser of real estate which is subject to an easement cannot be prejudiced by liens and encumbrances upon the interest of the holder of the easement. Such lien or encumbrance stands or falls with the easement. It can never exceed the confines of the easement.

Where there is an easement subject to liens or encumbrances, an abstracter or title insurance underwriter can avoid encumbering the abstract of title or title insurance commitment or policy with mention of liens or encumbrances on an easement by stating in a certificate that any such liens or encumbrances are not shown.

If an action is contemplated to terminate or otherwise relieve the lands of the easement, the prospective plaintiff can have the abstract or title policy amended to reflect the status of the record as to such easement, liens, encumbrances, assignments, releases, or other instruments of record.

Source: Standard 41

7.3 JUDGMENT LIENS - EFFECT ON EQUITABLE INTEREST

A JUDGMENT OR TRANSCRIPT OF JUDGMENT IN THE DISTRICT COURT IS NOT A LIEN UPON AN EQUITABLE INTEREST IN REAL ESTATE OF A DEBTOR.

Approved October 19, 1995

COMMENT: *Nessler v. Neher*, 18 Neb. 649, 26 N.W. 471 (1886); *Dworak v. More*, 25 Neb. 735, 41 N.W. 777 (1889); *Connell v. Galligher*, 36 Neb. 749, 55 N.W. 229 (1893); *Shoemaker v. Harvey*, 43 Neb. 75, 61 N.W. 109 (1894); *First National Bank v. Tighe*, 49 Neb. 299, 68 N.W. 490 (1896); *Flint v. Chaloupka*, 72 Neb. 34, 99 N.W. 825 (1904); *Nowka v. Nowka*, 157 Neb. 57, 58 NW 2d 600 (1953).

The foregoing cases all hold that a judgment or transcript of judgment in the district court is not a lien upon an equitable interest in real estate.

However, see *Rosenfield v. Chada*, 12 Neb. 25, 10 N.W. 465 (1881), in which it was held that an equitable interest in land, coupled with the actual possession may be reached by a seizure and sale under an ordinary execution at law.

In *Nessler v. Neher*, 23 N.W. 345 (Neb. 1885), the court in following *Rosenfield v. Chada*, held that the lien of such a judgment will extend to all legal or equitable interest of the defendant in lands within the county of which such defendant is in actual possession. On rehearing in *Nessler v. Neher*, 18 Neb. 649, 26 N.W. 471 (1886), the court reversed itself and said that a judgment in the district court is not a lien upon an equitable interest in real estate. The court attempted to distinguish this case from *Rosenfield v. Chada,* but did not overrule it.

Connell v. Gallagher, supra, cites both *Rosenfield v. Chada* and *Nessler v. Neher* cases (on hearing) with approval, but on rehearing, 39 Neb. 793, 58 N.W. 438 (1894), decides the case on the theory that the grantee in a deed of real estate acquires the legal title to execution and delivery of such deed even though the deed was not recorded and was lost, and such title could levied upon by execution.

The language used in *Dworak v. More, Shoemaker v. Harvey*, and *First National Bank v. Tighe* seems to recognize that a levy by execution could be made if the equitable interest were coupled with possession, although such language is probably obiter dictum.

Nowka v. Nowka flatly states that a judgment of the district court is not a lien upon the judgment debtor's equitable interest in real estate, without mentioning any execution and *Steven v. Ford*, 187 Neb. 401, 191 NW 2d 446 (1971), citing *Nowka*, finds that commencement of an action to subject an undivided interest devised in an estate subjected the undivided interest to a lien, with priority over the lien of a later intervenor in the proceeding.

Creditor's bill. The beginning of a creditor's action gives a specific lien upon the property which it is sought to reach. *Flint v. Chaloupka, supra*; *Hilton v. Clements*, 138 Neb. 143, 291 N.W. 483 (1940), *Nowka v. Nowka, supra*.

See Section 25-1504.

Source: Standard 61

7.4 FEDERAL LIEN - RIGHT OF REDEMPTION BY UNITED STATES

WHERE A SALE OF REAL ESTATE IS MADE TO SATISFY A LIEN PRIOR TO THAT OF THE UNITED STATES, THE UNITED STATES SHALL HAVE ONE YEAR FROM THE DATE OF SALE WITHIN WHICH TO REDEEM, EXCEPT THAT WITH RESPECT TO A LIEN ARISING UNDER THE INTERNAL REVENUE LAWS, THE PERIOD SHALL BE 120 DAYS OR THE PERIOD ALLOWABLE FOR REDEMPTION UNDER STATE LAW, WHICHEVER IS LONGER. 28 U.S.C. § 2410.

Approved October 19, 1995

Source: Standard 78

7.5 SPECIAL LIEN FOR FEDERAL ESTATE & GIFT TAXES

UNLESS A TAX LIEN IS PERFECTED BY FILING AS A GENERAL LIEN UNDER SECTION 6321 OF THE INTERNAL REVENUE CODE AND UNLESS A SPECIAL LIEN UNDER SECTION 6324A OR SECTION 6324B IS ELECTED, A PURCHASER OR ENCUMBRANCER OF NON-PROBATE PROPERTY TAKES FREE FROM THE SPECIAL LIEN FOR FEDERAL ESTATE AND GIFT TAX IMPOSED UNDER SECTION 6324 OF THE INTERNAL REVENUE CODE OF 1986.

Approved October 19, 1995

COMMENT: Section 6324 of the Internal Revenue Code provides that the transfer of non-probate property (see Sections 2034 thru 2042 of the Code for the determination of what is non-probate property) to a bona fide purchaser or encumbrancer is divested of the special federal estate tax lien, and that the transfer by the donee to a bona fide purchaser or encumbrancer is divested of the special gift tax lien.

Tax liens under Section 6321, 6324A and 6324B must be filed in the office designated by the state. See Tax Management Portfolio 219, entitled Estates, Gifts and Trusts, Estate Tax Payments and Liability.

Source: Standard 82

7.6 TRUST DEED; TRUSTEE QUALIFICATIONS

A. THE FAILURE TO RECITE THE QUALIFYING STATUS OF AN INDIVIDUAL OR CORPORATION TO BE TRUSTEE IN A TRUST DEED SHALL NOT BE DEEMED A DEFECT IF A RECONVEYANCE FROM THE SAME INDIVIDUAL OR CORPORATION THEREAFTER APPEARS.

B. THE RECITATION IN THE TRUSTEE'S DEED OF THE PARTICULAR QUALIFYING STATUS OF THE TRUSTEE, (*e.g.* "MEMBER OF THE NEBRASKA STATE BAR ASSOCIATION", "LICENSED REAL ESTATE BROKER OF NEBRASKA", ETC.) WHEN EXERCISING A POWER OF SALE UNDER A TRUST DEED, SHALL BE SUFFICIENT EVIDENCE OF QUALIFICATION OF THE TRUSTEE. THIS DOES NOT AFFECT THE AUTHORITY TO SUBSTITUTE A QUALIFIED TRUSTEE FOR AN INITIAL UNQUALIFIED TRUSTEE PRIOR TO EXERCISE OF THE POWER OF SALE.

Approved October 19, 1995

COMMENT: While the better practice is to recite in the trust deed the qualifying status of the trustee, numerous trust deed instruments have been prepared reciting the name of the individual trustee without specifying the individual's qualifications to serve as trustee. Only specified classes of individuals or entities are qualified to serve as trustee. Section 76 1003 (1994 Cum. Supp.). The names of certain such entities (banks, building and loan associations, and savings and loan associations) adequately recite the entity's qualifying status. But, individuals and other entities may or may not be qualified as trustee. An examiner may rely upon the recitation of status in the trust deed.

The absence of qualifying status recital is of no importance if reconveyance appears from the same individual or entity.

But, exercise of the power of sale by an unqualified trustee may be defective. An unqualified trustee has no authority to act and the exercise of a power of sale by an unqualified trustee cannot be valid. Therefore, the examiner should require recital of the qualifying status in the trustee's deed.

This title Standard does not approve or disapprove of the substitution of a qualified trustee for an unqualified trustee prior to the exercise of the power of sale. Section 76-1004 (1994 Cum. Supp.) provides:

> "From the time the substitution is filed for record, the new trustee shall succeed to all the power, duties, authority, and title of the trustee named in the deed of trust and of any successor trustee."

Source: Standard 101

TITLE STANDARD 7.7

Judgment – Effect of Discharge in Bankruptcy

See Title Standard 12.3

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CHAPTER VIII -- NAMES

8.1 NAMES -- ABBREVIATIONS

ALL COMMON ABBREVIATIONS, DERIVATIVES AND NICKNAMES FOR CHRISTIAN NAMES, SUCH AS GEO. FOR GEORGE, JNO. FOR JOHN, CHAS. FOR CHARLES, SHOULD BE ACCEPTED AS SUFFICIENTLY ESTABLISHING THE IDENTITIES OF THE PARTIES. NO RECORD EVIDENCE OF IDENTITY SHOULD BE DEMANDED WHERE THE CHAIN OF TITLE CONTAINS SUCH NAMES SPELLED IN FULL.

Approved October 19, 1995

COMMENT: Absolute certainty with reference to the identity of parties appearing in a chain of title is impossible to attain. A signature may be forged. Different persons may have the same names. Reasonable certainty of identity is all that a title examiner should require. When all of the rest of the world knows that Geo. means George, and Chas. means Charles and nothing else, the title examiner should not relegate himself to the position of a solitary ignoramus.

The Nebraska Supreme Court has held that where the name of Archibald T. Finn appeared in both the body of a deed and the certificate of acknowledgment, and the signature was "Arch T. Finn", the variance was immaterial and admitted the deed. *Rupert v. Fenner*, 35 Neb. 587, 53 S.W. 598, 17 L.R.A. 824 (1892). See Foster, Execution and Acknowledgment of Deeds in Nebraska, 2 Nebraska Law Bulletin No. 3, p. 10.

American courts uniformly sustain the rule stated in the Standard. See PATTON ON TITLES, 2nd Edition, Section 72 and Note 81.

The principle behind the Standard is that reasonable certainty of identities of parties is all that can be required.

Source: Standard 1

8.2 CORPORATIONS - ABBREVIATIONS & VARIANCES

SEE STANDARD 3.1

Approved October 19, 1995

Source: Standard 2

8.3 SLIGHT DISCREPANCIES IN NAMES

WHERE IN THE CHAIN OF TITLE A DEED APPEARS CONVEYING TO ONE USING INITIALS ONLY FOR A FIRST OR GIVEN NAME, AND A MORTGAGE APPEARS WITH THE MORTGAGOR'S FULL NAME OF SIMILAR INITIALS, THIS SHOULD NOT BE REGARDED AS A DEFECT IN TITLE CALLING FOR ESTABLISHMENT OF IDENTITY.

SIMILARLY, WHERE THE RECORD TITLE IS IN THE FULL NAME AND THE MORTGAGOR ENCUMBERS BY INITIALS.

A SLIGHT DISCREPANCY BETWEEN THE NAME OF THE RECORD OWNER AND A MORTGAGOR IN THE CHAIN OF TITLE SHOULD NOT BE REGARDED AS A DEFECT IN THE TITLE CALLING FOR ESTABLISHMENT OF IDENTITY. THE RULE OF IDEM SONANS MAY BE APPLIED.

A RELEASE OF A MORTGAGE WHICH IMPROPERLY DESCRIBES THE NAME OF THE MORTGAGOR IS NOT A TITLE DEFECT.

Approved October 19, 1995

COMMENT: The principle on which this Standard is based is set forth in Comment to Standard No. 1.

Source: Standard 37

8.4 USE OR NON-USE OF MIDDLE NAMES OR INITIALS

THE USE IN ONE INSTRUMENT AND NON-USE IN ANOTHER OF A MIDDLE NAME OR INITIAL ORDINARILY DOES NOT CREATE A QUESTION OF IDENTITY AFFECTING TITLE, UNLESS THE EXAMINER IS OTHERWISE PUT ON INQUIRY.

Approved October 19, 1995

COMMENT: The above is Model Title Standard 5.2 proposed by Prof. Lewis M. Simes and Clarence B. Taylor. CF Standard No. 38.

See 65 Corpus Juris Secundum, "Names", § 4.

CHAPTER IX -- DECEDENTS & DECEDENTS' ESTATES

Note: A number of title standards relate to procedures under probate laws which existed prior to the effective date of the Nebraska Probate Code, January l, 1977. Those Standards appear in the appendix under the reference of historical standards, as they no longer appear to have vitality.

9.1 FIDUCIARY CONVEYANCES

UNDER SECTION 76-269, UNLESS A DEED OF CONVEYANCE, MORTGAGE, RELEASE OF MORTGAGE, OR OTHER INSTRUMENT SHALL HAVE BEEN MODIFIED OR SET ASIDE BY AN ACTION OR PROCEEDING COMMENCED WITHIN 15 YEARS FROM THE DATE OF RECORDING THEREOF, IT SHALL BE CONCLUSIVELY PRESUMED THAT THE EXECUTOR, ADMINISTRATOR, GUARDIAN, RECEIVER OR TRUSTEE WHO EXECUTED SUCH CONVEYANCE HAD DUE AUTHORITY TO EXECUTE THE SAME, NOTWITHSTANDING ANY DEFECT IN OR ABSENCE OF ANY RECORD OF THE COURT GRANTING AUTHORITY TO SUCH FIDUCIARY TO EXECUTE THE SAME.

Approved October 19, 1995

Source: Section 76-269;

New Standard, adopted 1995.

9.2 NECESSITY OF RECORDING PROBATE DOCUMENTS

IT SHOULD NOT BE REGARDED AS A DEFECT IN TITLE THAT CERTIFICATES OR PROBATE PROCEEDINGS, ATTESTED COPY OF A WILL OR A CERTIFIED COPY OF A FINAL DECREE OF DISTRIBUTION IN ESTATE PROCEEDINGS OR LETTERS OF CONSERVATORSHIP ARE NOT FILED FOR RECORD IN THE OFFICE OF THE REGISTER OF DEEDS OF THE COUNTY WHERE THE LAND IS SITUATED.

Approved October 19, 1995

COMMENT: Section 76-248 provides that an attested copy of a will may be filed in the office of the register of deeds where the land is situated; Section 30-238 directs the recording of a duly certified copy of every will devising lands or any interest in lands situated outside the county of probate. Prior statutes directed the filing of a certified copy of the decree of distribution.

The validity of title to real estate is in no case dependent upon such a filing. The original will filed in the probate court and the recording of the decree of distribution of the probate court in its own journal operate as constructive notice. The facts upon which jurisdiction depends appear in the record of the probate court. A second recording in the office register of the register of deeds may be of value as a check or cross-reference, but such second recording is not essential to the quality of title to the real estate.

Section 25-2708 directs the filing of a certificate of the pendency of probate or administration proceedings. Section 30-2650 provides the recording of letters of conservatorship and orders terminating conservatorship on the real estate records. Recording of a certificate or conservatorship letters or orders does not affect the validity of the title to real estate.

Source: Standards 29, 40 and 74

9.3 INHERITANCE TAX - DETERMINATION OF STATUS

WHERE THE COURT IN A DULY CONDUCTED PROCEEDING DETERMINES THE NEBRASKA STATE INHERITANCE TAX STATUS OF THE PROPERTY INCLUDED IN SUCH PROCEEDING AND WHEN THEREAFTER THE PROPERTY, OR A PORTION THEREOF, IS SOLD TO A BONA FIDE PURCHASER FOR VALUE, THE NEBRASKA INHERITANCE TAX STATUS OF SUCH PROPERTY SO SOLD IS NOT CHANGED IN A SUBSEQUENT INHERITANCE TAX PROCEEDING.

Approved October 19, 1995

COMMENT: See Section 77-2038.

Where a court has jurisdiction of a subject matter and the parties, it has power to decide, and judgment rendered is never void. *Wistrom v. Forsling, Sheriff,* 144 Neb. 638, 14 NW 2d 217 (1944).

A judgment by a court of competent jurisdiction affords complete protection to one who relies on it. *Bank of U.S. v. Bank of Washington*, 6 Pet 8, 8 L. Ed. 299.

A purchaser, having notice, who purchases from one without notice, will be protected in his title by the want of notice in his vendor. *Mingus v. Bell*, 148 Neb. 735, 29 NW 2d 332
(1947).

Source: Standard 64

9.4 INHERITANCE TAX LIEN ON INTERESTS PASSING TO THE SURVIVING SPOUSE

FOR A DECEASED DYING ON OR AFTER JANUARY 1, 1983, AN INHERITANCE TAX DETERMINATION IS NOT REQUIRED IF THE TITLE EXAMINER IS SATISFIED THAT ALL INTERESTS IN THE REAL PROPERTY BEING EXAMINED PASS TO THE DECEASED'S SURVIVING SPOUSE, WHETHER BY WILL OR IN ANY OTHER MANNER, INCLUDING JOINT TENANCY.

Approved October 19, 1995

COMMENT: Under Section 77-2004, effective January l, 1983, *"Interests passing to the surviving spouse by Will, in the manner set forth in Section 77-2002, or in any other manner shall not be subject to tax"*.

In light of this blanket exemption, it is unreasonable for a title examiner to require an inheritance tax determination if it is shown that all interests in the real property pass to the surviving spouse.

It is reasonable for an examiner to require customary proof of the death of the deceased and marital relationship existing at time of death. This applies even though a probate proceeding is pending or has been closed.

Source: Standard 98

9.5 PROBATE OF FOREIGN WILL

WHERE A FOREIGN WILL HAS BEEN ADMITTED TO PROBATE IN NEBRASKA, UPON THE FILING OF A DULY AUTHENTICATED COPY OF THE WILL AND ORDER OF PROBATE THEREOF BY THE FOREIGN COURT, NO REQUIREMENT SHALL BE MADE FOR THE FURNISHING OF A FURTHER RECORD OF THE PROCEEDINGS IN THE FOREIGN COURT, WHEN THE AUTHENTICATED COPY OF THE ORDER OF PROBATE THEREOF RECITES THAT SUCH WILL HAS BEEN DULY ADMITTED TO PROBATE IN ACCORDANCE WITH THE LAWS OF SUCH FOREIGN STATE.

Approved October 19, 1995

COMMENT: It still would be necessary to determine inheritance tax assessable against the devisees of Nebraska real estate. See also Standard 9.10.

Source: Standard 70

9.6 SHOWING OF FILING OF STATE ESTATE TAX RETURN

NO SHOWING OF THE FILING OF A STATE ESTATE TAX RETURN SHOULD BE REQUIRED WHERE AN ACCEPTANCE OF ESTATE TAX RETURN FROM THE INTERNAL REVENUE SERVICE IS ON FILE (1) IF IT SHOWS THAT THERE IS NO CREDIT FOR STATE ESTATE TAXES, OR (2) IF THE RECORD SHOWS PAYMENT OF STATE INHERITANCE TAXES THAT EQUAL OR EXCEED THE CREDIT SHOWN IN SUCH ACCEPTANCE.

Approved October 19, 1995

COMMENT: Section 77-2101.01 (1994 Cum. Supp.) provides that the amount of the state estate tax shall be the maximum state tax credit allowance upon the tax imposed by Chapter 11 of the Internal Revenue Code of 1986, as amended, reduced by the lesser of (1) the aggregate amount of all estate, inheritance, legacy or succession taxes paid to any state or territory, the District of Columbia, or any possession of the United States in respect of any property subject to such tax or (2) the sum of (a) the amount determined by multiplying the maximum state tax credit allowance with respect to the taxable transfer by the percentage which the gross value of the transferred property not situated in Nebraska bears to the gross value of the transferred property and (b) the amount of Nebraska inheritance taxes paid.

Section 77-2105 provides that the tax commissioner "*shall have authority to require all persons or corporations liable for payment of transfer or excise tax to file returns…*". Thus the liability for the tax and the obligation to file a return are both dependent, not on the value of the estate, but on whether there is a federal credit, and if, whether it exceeds state death taxes paid.

Source: Standard 84

9.7 JOINDER BY SURVIVING SPOUSE

WHEN A CONVEYANCE IS TO BE MADE BY THE PERSONAL REPRESENTATIVE OF A DECEASED OWNER, THE JOINDER BY THE SURVIVING SPOUSE UNDER NEBRASKA PROBATE CODE SECTION 30-2313 IS NOT REQUIRED.

Approved October 19, 1995

COMMENT: Nebraska Probate Code Section 30-2476(23) (1994 Cum. Supp.) describes the power of a personal representative to sell and convey real property. The fact that an augmented election pursuant to Nebraska Probate Code Section 30-2313 may be made by a surviving spouse does not in any manner limit this power. The general protective statute for dealing with the personal representative, Nebraska Probate Code Section 30-2475, gives full protection to purchasers for value from the personal representative.

Source: Standard 87

9.8 CONVEYANCE BY DISTRIBUTEE

WHEN A DISTRIBUTEE CONVEYS REAL ESTATE TO A PURCHASER FOR VALUE, THE EXAMINER SHOULD REQUIRE THAT THE ESTATE MATTERS CONCERNING THE APPOINTMENT OF THE PERSONAL REPRESENTATIVE TOGETHER WITH THE DEED OF DISTRIBUTION BE SHOWN IN THE ABSTRACT. IT IS NOT NECESSARY TO DETERMINE WHETHER CLAIMS OR COSTS OF ADMINISTRATION HAVE BEEN PAID.

Approved October 19, 1995

COMMENT: A purchaser for value from a distributee (a person who has received a deed of distribution from the personal representative pursuant to Section 30-24,105) is protected under the provisions of Section 30-24,108. This protection applies whether the appointment proceeding is formal or informal, and whether the proceeding is closed formally or informally. The refusal to accept an informal proceeding and requirement of a formal proceeding to pass title is not meritorious.

Source: Standard 89

9.9 GENERAL ENCUMBRANCES & TAX LIENS

THE NEBRASKA PROBATE CODE PROVISIONS IN NO WAY ELIMINATE THE NECESSITY FOR DETERMINING THAT ALL LIENS, ENCUMBRANCES AND RESTRICTIONS OF RECORD, INCLUDING FEDERAL ESTATE, STATE ESTATE AND INHERITANCE TAX LIENS, HAVE BEEN EXTINGUISHED.

Approved October 19, 1995

Source: Standard 90

9.10 CONVEYANCE WHEN NO LOCAL ADMINISTRATION – FOREIGN PERSONAL REPRESENTATIVE

AFTER JANUARY 1, 1977, A DOMICILIARY FOREIGN PERSONAL REPRESENTATIVE HAS ALL THE POWERS OF A LOCAL PERSONAL REPRESENTATIVE IF THE PERSONAL REPRESENTATIVE HAS FILED WITH THE COUNTY COURT AUTHENTICATED COPIES OF APPOINTMENT AND OF ANY OFFICIAL BOND THE PERSONAL REPRESENTATIVE HAS GIVEN. NEBRASKA PROBATE CODE, SECTIONS 30-2505, 30-2506 AND 30-2507.

Approved October 19, 1995

COMMENT: The powers of the domiciliary foreign personal representative terminate as provided in Section 30-2507.

If the domiciliary foreign personal representative gives a deed of distribution and a conveyance is being made by the distributee, see Standard 9.8.

Under all circumstances, the title will be subject to death taxes. Standard 9.9.

Source: Standard 95

9.11 STATUS OF TITLE WHEN NO DEED OF DISTRIBUTION HAS BEEN ISSUED FROM PERSONAL REPRESENTATIVE

TITLE TO REAL ESTATE OWNED BY A DECEDENT EXISTS IN THE SUCCESSOR OF THE DECEDENT, EVEN THOUGH A DEED OF DISTRIBUTION HAS NOT BEEN ISSUED. NEBRASKA PROBATE CODE SECTION 30-2401. THE SPECIFIC REQUIREMENTS NECESSARY TO HAVE MARKETABLE TITLE VESTED IN SUCH SUCCESSORS, IN THE ABSENCE OF A DEED OF DISTRIBUTION, ARE SET FORTH BELOW.

Approved October 19, 1995

COMMENT: The purpose of a deed of distribution is to release the powers of a personal representative over the described real estate which was owned by the decedent. NPC Section 30-24,105. Proof that a distributee has received a deed of distribution is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed asset. NPC Section 30-24,106. If property
distributed in kind or a security interest therein is acquired by a purchaser or lender for value from a distributee who has received a deed of distribution, the purchaser or lender takes title free of any claims of the estate, whether or not the distribution was proper. NPC Section 30-24,108.

Notwithstanding the above provisions, there may be occasions when a deed of distribution has not been executed during an estate proceeding. Marketable title can still be vested in the *"successors"* of the decedent. Successors are defined in NPC Section 30-2209(46) as persons,other than creditors, who are entitled to property of a decedent under a will or the Probate Code. Title vests in successors under the provisions of NPC Section 30-2401.

The title of successors, however, is subject to all charges incident to administration, including the claims of creditors and allowances of surviving spouse and dependent children, and subject to the rights of others, resulting from abatement, retainer, advancement and ademption. NPC Section 30-2499. Title is also subject to the lien of Nebraska inheritance and estate taxes and federal estate tax.

The discussion below shows the requirements necessary for successor of an estate to have marketable title to the real estate owned by the decedent. It should be noted that if a personal representative has not been appointed, marketable title cannot be acquired as the rights to abatement, retainer, advancement and ademption, as well as the actual descent of property, will not have been dealt with during the administration of the estate. NPC Section 30-2499.

If property was not listed on the inventory, then, as long as 10 years have elapsed from the death of the decedent to extinguish the lien for federal and state death taxes, marketable title will be vested in the successors, providing the requirements set forth below have been met.

Specific Requirement:

The following discussion shows the specific requirements necessary for marketable title to be vested in successors of a decedent when no deed of distribution has been issued.

Requirements in all estates where personal representative has been appointed. This Includes testate and intestate situations and formal and informal probate of wills.

1. Personal representative has been properly appointed

    a. Formal proceeding

        i. Petition filed with court

        ii. Notice was published in accordance with NPC Section 2427

        iii. Mailing of the publication to all interested parties took place within five days of the first publication. NPC Section 30-2427(a) requires this mailing to be completed and proved by affidavit in accordance with Section 25-520.01.

    b. Informal proceeding

        i. Application filed with the court

        ii. Notice was published in accordance with NPC Section 30-2419

        iii. Mailing of the publication to all interested parties took place within five days of the first publication. NPC Section 30-2427(a) requires this mailing to be completed and proved by affidavit in accordance with Section 25-520.01.

2. Receipts are on file showing payment of all claims.

3. An inheritance tax determination has been completed and all inheritance taxes paid. In addition, if the estate indicates the probability of filing a federal estate tax return, the federal estate tax closing letter and cancelled checks evidencing payment of the tax must be filed, together with a certificate evidencing payment of Nebraska estate taxes.

4. Court costs are paid.

5. A schedule of distribution is on file showing descent of the property of the decedent. Even if the schedule of distribution has been omitted, title can still be marketable if the descent of property is clear from the court file, such as there being two children as the sole devisees or two children who are the sole heirs. The examiner should require deeds from any party named in a schedule of distribution as well as from all possible successors of the decedent. As no deed of distribution was filed, the schedule of distribution is nothing more than a statement of intention of what was going to take place.

In addition to the requirements set forth above, the following requirements must be met, depending upon the type of closing that is taking place:

Formal testacy or appointment proceeding (NPC Section 30-2426) or informal probate and appointment or informal appointment in intestacy (NPC Section 30-2414).

Formal Testacy Proceeding -- (Testate or Intestate)

1. Informal closing

   1.1 An informal closing statement has been filed pursuant to NPC Section 30-24,117, 12 months have elapsed from the filing of the informal closing statement and no proceeding described in Section 30-24,117(b) is pending.

2. Formal closing

   2.1 The appeal time has expired from entry of the order entered pursuant to NPC Section 30-24,115 approving final distribution.

   2.2 The personal representative has been discharged by the court.

3. Requirements for both formal and informal closings

   3.1 Receipts are on file from all parties receiving distributions from the estate.

Informal Probate or Appointment Proceeding --
(No formal determination of testacy - intestacy status)

1. Informal closing

    1.1 An informal closing statement has been filed pursuant to NPC Section 30-24,117, 12 months have elapsed from the filing of the informal closing statement and no proceeding described in Section 30-24,117(b) is pending.

2. Formal Closing

    2.1 The appeal time has expired from entry of the order entered pursuant to NPC Section 30-24,115 approving final distribution.
    2.2 The personal representative has been discharged by the court.

3. Requirements for both formal and informal closings

    3.1 Receipts are on file from all parties receiving distributions from the estate.

    3.2 If an informal admission of a will to probate took place, both 12 months from the informal probate and three years from the decedent's death must have elapsed. Section 30-2408(4).

    3.3 If an informal appointment of a personal representative took place in an intestacy situation, and the estate was closed informally, 3 years must elapse from the decedent's death before a proceeding to admit a will to probate would be barred. NPC Section 2408(4).

Additional discussion:

With the formal closing shown above, the personal representative will have been discharged by the court. In the informal closing situation, the appointment of the personal representative will automatically have terminated one year after the informal closing statement is filed if no proceedings involving the personal representative are pending. NPC Section 30-24,117(b).

The provisions of NPC Section 30-2436 which provide when a formal order of testacy may be set aside are considered in the time frame set forth above, *i.e.,* the petition for vacation must be filed within the earlier of the order approving final distribution or if the estate is closed by informal closing statement six months after the filing of the closing statement.

Although marketable title can be vested in successors if no deed of distribution is issued during an estate proceeding, the difficulties are such that there is no situation where an attorney should make a conscious choice not to issue a deed of distribution. This standard is designed to give examiners the requirements to find marketable title if a deed of distribution has not been issued, not to attempt to give safe harbors to attorneys who do not wish to issue deeds of distribution.

Source: Standard 103

9.12 SUCCESSION TO REAL PROPERTY BY AFFIDAVIT IN SMALL ESTATES

IN SMALL ESTATES THE FILING OF AN AFFIDAVIT PURSUANT TO THE REQUIREMENTS OF R.R.S. NEB. 30-24,129 SHALL TRANSFER TITLE OF DECEDENT IN REAL ESTATE TO THE HEIRS OR DEVISEES SHOWIN IN SUCH AFFIDAVIT.

Approved: 10/03/2013

COMMENT: R.R. S. Neb. 30-24,129, effective August 28, 1999, as amended by LB 35, (2009) at § 23, provides that the heirs or devisees of decedent who had real property, the total assessed value of which does not exceed $30,000.00 in the year of decedent's death, may file an Affidavit in the Register of Deeds Office, in the county where the property is located 30 days or more after decedent's death.

The statute requires the Affiant to state:

(1) the value of the decedent's interest in all real property in the decedent's estate located in this state does not exceed thirty thousand dollars. The value of the decedent's interest shall be determined from the value of the property as shown on the assessment rolls for the year in which the decedent died;

(2) thirty days have elapsed since the death of the decedent as shown in a certified or authenticated copy of the decedent's death certificate;

(3) no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction;

(4) the claiming successor is entitled to the real property by reason of the homestead allowance, exempt property allowance, or family allowance, by intestate succession, or by devise under the will of the decedent;

(5) the claiming successor has made an investigation and has been unable to determine any subsequent will;

(6) no other person has a right to the interest of the decedent in the described property;

(7) the claiming successor's relationship to the decedent and the value of the entire estate of the decedent; and

(8) the person or persons claiming as successors under the affidavit swear or affirm that all the statements in the affidavit are true and material and further acknowledge that any false statements may subject the person or persons to penalties relating to perjury under section 28-915.

An inheritance tax and federal and estate tax determination may still be required. As this statute is procedural and curative in nature, the Affidavit may be used to clear title to real estate for decedents dying before the effective date. Lynch v. Metropolitan Utilities Dist., 172 Neb. 17, 218 NW 2nd 596 (1974)

See also Section 30-2402 R.R.S. Neb.

CHAPTER X – STATUTES OF LIMITATION, REPOSE & CURATIVE ACTS

10.1 CONSTRUCTION LIENS - STATUTE OF LIMITATIONS

WHERE A CONSTRUCTION LIEN IS BARRED BY STATUTE OF LIMITATIONS, ITS APPEARANCE ON THE ABSTRACT IS NOT TO BE TREATED AS AN ENCUMBRANCE UPON THE TITLE. ACCORDINGLY, IT SHALL NOT BE NECESSARY TO SHOW IN THE ABSTRACT ANY CONSTRUCTION LIEN TWO YEARS AFTER THE TIME OF FILING, UNLESS SUIT THEREON HAS BEEN COMMENCED.

Approved October 19, 1995

COMMENTS: The bar of the statute on construction lien foreclosure is absolute two years after the filing of the lien. Section 52-140. *Calkins v. Miller*, 55 Neb. 601, 75 N.W. 1108 (1898). *May Plumbing Co. v. Shaver*, 182 Neb. 251, 53 NW 2d 911 (1967). *Green v. Sanford*, 34 Neb. 363, 51 N.W. 967 (1892).

Source: Standard 7

10.2 JUDGMENTS - LIEN - DORMANCY - REVIVOR

WHERE NO EXECUTION HAS ISSUED ON A JUDGMENT FOR FIVE YEARS, EXCEPT FOR JUDGMENTS FOR CHILD SUPPORT, SPOUSAL SUPPORT, ALIMONY OR PROPERTY SETTLEMENT, OR A DECREE OF FORECLOSURE, THE JUDGMENT CEASES TO BE A LIEN AND SHOULD NOT BE TREATED AS A DEFECT OF TITLE.

Approved October 19, 1995

COMMENT: See Section 25-1515; *Rich v. Cooper*, 136 Neb. 463, 286 N.W. 383 (1939); *Nowka v. Nowka*, 157 Neb. 57, 58 NW 2d 600 (1953); *Lippincott v. Lippincott*, 152 Neb. 374, 41 NW 2d 232 (1950).

A judgment may be revived within ten years under Section 25-1420, but the lien of the revived judgment commences only from the date of the order of revivor. *Glissmann v. Happy Hollow Club*, 132 Neb. 223, 271 N.W. 431 (1937). The abstracter or title insurer should certify that any dormant judgments appearing on the records have not been revived.

This Standard has no application to decrees of foreclosure. *St. Paul Harvester Works v. Hackfeldt*, 96 Neb. 552, 148 N.W. 153 (1914).

Child support and spousal support judgments cease to be liens and should not be treated as a defect in title 10 years from the date (a) the youngest child comes of age, or (b) the youngest child dies, or (c) the most recent execution was issued to collect the judgment, whichever occurs last.

Under Section 42-371 (1994 Cum. Supp.), child support and spousal support liens may not be reinstated or revived. Alimony and property settlement award judgments which do not constitute child support or spousal support judgments cease to be a lien and should not be treated as a defect in title 10 years from the date (a) the judgment was entered, or (b) the most recent payment was made, or (c) the most recent execution was issued to collect the judgment, whichever last occurs.

Alimony and property settlement judgment liens cannot be revived or reinstated. Payments made after the cessation of the judgment will not reinstate or revive the judgment.

Judgments for child support, spousal support, alimony and property settlement are extinguished at the end of the statutory period and cannot be revived.

Source: Standard 20

10.3 MORTGAGES – LAPSE OF TIME – ACTION BARRED – RECORD CEASES TO BE CONSTRUCTIVE NOTICE *(REVISED)*

AN UNRELEASED MORTGAGE OR *TRUST DEED* SHOULD NOT BE CONSIDERED AS A DEFECT IN TITLE WHERE:

(1) THE RECORD SHOWS THAT MORE THAN TEN YEARS HAVE ELAPSED SINCE ITS DUE DATE, *STATED IN OR ASCERTAINABLE FROM THE RECORD*, OR

(2) THE RECORD SHOWS THAT MORE THAN *30* YEARS HAVE ELAPSED SINCE ITS DATE OF EXECUTION IF THE MORTGAGE *OR TRUST DEED* DOES NOT DISCLOSE THE MATURITY DATE; UNLESS:

(a) AN AFFIDAVIT HAS BEEN FILED WITHIN THE PERIOD PRESCRIBED BY STATUTE STATING THAT THE MORTGAGE *OR TRUST DEED* IS UNPAID AND STILL A VALID AND EXISTING LIEN; OR

(b) A DULY EXECUTED EXTENSION AGREEMENT HAS BEEN FILED WITHIN THE PERIOD PRESCRIBED BY STATUTE.

(c) ***Subparagraph deleted in its entirety***

COMMENT: See Sections 25-202 and 76-239. For a history and discussion of the Nebraska statutes, see article by Herman Ginsberg, 17 Nebraska Law Bulletin, p. 137, pointing out the inadequacy of the then existing statutes from the point of view of the title examiner, *e.g.*, an uurecorded extension agreement would toll the Statute of Limitations against third persous. *See Steeves v. Nispel, 132 Neb. 597, 273 N.W. 50 (1937).* The 1941 legislation was drafted in accordance with Mr. Ginsberg's suggestions, and enables title examiners to pass n abstract of title in reliance on the principles set out in this Standard without going outside of the records.

Section 25-202 establishes a period of limitations for action upon a cause of action for foreclosure. Section 76-239 provides a notice section for the benefit of subsequent purchasers and encumbrancers for value. It should be noted that it is possible to have varying periods of time within which a mortgagee may bring an action for foreclosure as against a mortgagor, upon the actual accrual of a cause of action and the period of time within which the record of a mortgage constitutes notice as to subsequent purchasers and encumbrancers for value. The effect of Sections 25-202 and 76-239 is to accomplish this result. Providing a specified time within which record of a mortgage, where no maturity date is stated in or ascertainable from the mortgage, may be deemed notice of its currency, assists in providing certainty of titles and in simplifying conveyancing.

COMMENT: Laws 2005, LB 97, effective September 4, 2005 inserted "deed of trust" throughout Sec. 76-239 Neb. Rev. Stat., and substituted "thirty years" for "twenty years." The Section, as revised, also provides that the changes made shall not affect the status of any deed of trust, mortgage, or real estate contract rendered void prior to September 4, 2005.

10.6 REAL ESTATE CONTRACTS – LAPSE OF TIME – ACTION BARRED RECORD CEASES TO BE CONSTRUCTIVE NOTICE *(REVISED)*

AN UNRELEASED AND APPARENTLY UNPERFORMED REAL ESTATE CONTRACT SHOULD NOT BE CONSIDERED AS A DEFECT IN TITLE WHERE;

(1) THE RECORD SHOWS THAT MORE THAN 10 YEARS HAVE ELAPSED SINCE ITS DUE DATE OR THE DATE PROVIDED FOR PERFORMANCE, OR

(2) THE RECORD SHOWS THAT MORE THAN *30* YEARS HAVE ELAPSED SINCE ITS DATE OF EXECUTION IF THE CONTRACT DOES NOT SPECIFY A MATURITY OR PERFORMANCE DATE; UNLESS

(a) AN AFFIDAVIT HAS BEEN FILED WITHIN THE PERIOD PRESCRIBED BY STATUTE STATING THAT THE CONTRACT IS STILL VALID AND SUBSISTING, OR

(b) A DULY EXECUTED EXTENSION AGREEMENT HAS BEEN FILED WITHIN THE PERIOD PRESCRIBED BY STATUTE.

COMMENT: See Section 76-239, Standard 10.3

COMMENT: Laws 2005, LB 97, effective September 4, 2005 inserted "deed of trust" throughout Sec. 76-239 Neb. Rev. Stat., and substituted "thirty years" for "twenty years." The Section, as revised, also provides that the changes made shall not affect the status of any deed of trust, mortgage, or real estate contract rendered void prior to September 4, 2005.

76-239
Chapter 76. Real Property
2. Conveyances. 76-201 to 76-2,125.

76-239 Deed of trust, mortgage, or real estate sale contract; record; effect as notice; when expires; extension; exceptions.

(1) After the expiration of ten years from the date of maturity of any debt or other obligation secured by a deed of trust, mortgage, or real estate sale contract as stated in or ascertainable from the record of such deed of trust, mortgage, or contract and, in cases where the date of such maturity cannot be ascertained from such record, after the expiration of thirty years from the date of such deed of trust, mortgage, or contract, the record of any deed of trust, mortgage, or real estate contract that has been recorded shall cease to be notice of the existence and lien of such deed of trust, mortgage, or contract as to subsequent encumbrancers and purchasers for value whose deeds, deeds of trust, mortgages, or other instruments shall be thereafter executed and recorded. Such deed of trust, mortgage, or contract shall be conclusively presumed to have been fully paid and discharged and the record thereof shall thereupon cease to be or constitute notice of the existence or lien thereof and shall be wholly void and thereafter shall not be construed to be any part of the public records in the office of the register of deeds as against subsequent purchasers and encumbrancers for value.

(2) Prior to the termination of the record and notice pursuant to subsection (1) of this section, the owner and holder of the deed of trust, mortgage, or contract may file for record with the register of deeds an affidavit to the effect that the deed of trust, mortgage, or contract is unpaid and is still a valid and subsisting lien. Upon the filing of such affidavit the record of the deed of trust, mortgage, or contract shall continue to exist and be valid as notice of the existence of such deed of trust, mortgage, or contract and of any lien thereof, for an additional period of ten years from the date of the filing of such affidavit. The owner and holder of such deed of trust, mortgage, or contract may alternatively file for record with the register of deeds a duly executed written extension agreement thereof in which event the record of the deed of trust, mortgage, or contract shall continue to exist and be valid as notice of the existence of such deed of trust, mortgage, or contract and of any lien thereof, for an additional period of ten years from the maturity of the deed of trust, mortgage, or contract debt as shown by the recorded extension agreement.

(3) Such periods of notice may be successively extended for additional periods. However, this section shall not be construed as to extend the time within which an action on any deed of trust, mortgage, or contract may be instituted, or in any manner to alter or amend the time within which any action on a deed of trust, mortgage, or contract may be brought under the general laws of this state. This section also shall not apply to mortgages or deeds of trust and instruments supplementary or amendatory thereto covering real estate as well as personal property, such property constituting a portion of property used in carrying on the business of a public utility or a gas or oil pipeline system, and executed to secure the payment of money. The lien of mortgages or deeds of trust and supplements and amendments thereto shall continue in force and effect as to any interest of the mortgagor in the real estate described therein, together with personal property, without the necessity of such renewal affidavit or extension agreement being made and filed, and notwithstanding that the same may have been on file for the period of time set out in this section. The mortgage or deed of trust or instruments supplementary or amendatory thereto shall disclose that the mortgagor or grantor therein is then carrying on the business of a public utility or a gas or oil pipeline system or the mortgagor or grantor has filed an affidavit to that effect for record with the register of deeds.

(4) It is the intent of the Legislature that the changes made by Laws 2005, LB 97, shall not affect or alter the status of any deed of trust, mortgage, or real estate sales contract rendered void prior to September 4, 2005.

Source: Laws 1941, c. 154, § 2, p. 600; C.S. Supp., 1941, § 76-279; R.S. 1943, § 76-239; Laws 1957, c. 138, § 2, p. 461; Laws 2005, LB 97, § 1

Protection is afforded only to subsequent purchasers and encumbrancers. Alexanderson v. Wessman, 158 Neb. 614, 64 N.W. 2d 306 (1954).

Protection is not afforded by this section to parties who purchase with notice. Hadley v. Platte Valley Cattle Co., 143 Neb. 482, 10 N.W. 2d 249 (1943).

10.4 INHERITANCE TAX LIEN – STATUTE OF LIMITATIONS

DEATH PRIOR TO SEPTEMBER 14, 1953. WHEN THE DEATH OF A TITLE HOLDER OCCURRED PRIOR TO SEPTEMBER 14, 1953, AND FIVE YEARS HAVE ELAPSED SINCE THE DATE OF DEATH, NO DETERMINATION OF STATE INHERITANCE TAX SHALL BE REQUIRED.

DEATH OCCURRING AFTER SEPTEMBER 14, 1953. THE INHERITANCE TAX LIEN ON THE ASSETS OF THE ESTATE, OR ANY OTHER PROPERTY SUBJECT TO THE TAX, CEASES WHEN A PERIOD OF 10 YEARS HAS ELAPSED AFTER THE DATE OF DEATH AND THE INHERITANCE TAX HAS NOT BEEN DETERMINED BY THE COUNTY COURT HAVING JURISDICTION THEREOF.

IF, HOWEVER, A DETERMINATION OF INHERITANCE TAX HAS BEEN MADE BY THE COUNTY COURT HAVING JURISDICTION DURING THE PERIOD ENDING 10 YEARS AFTER DEATH, THE LIEN CONTINUES FOR FIVE YEARS FROM THE DATE OF SUCH DETERMINATION, REGARDLESS OF WHETHER THE FIVE-YEAR PERIOD ENDS BEFORE OR AFTER 10 YEARS FROM THE DATE OF DEATH, AND REGARDLESS OF ANY DEFECTS IN THE PROCEEDING.

Approved October 19, 1995.

Comment: For deaths occurring prior to September 14, 1953: Original Section 77-2037 provided that unless the tax was ascertained and assessed by the court within five years after the death of any decedent, decedent's estate shall not be liable for any inheritance tax. Section 77-2037 was repealed in 1953 and now provides that no liability for inheritance tax exists if not sued for within five years after the tax is ascertained and assessed.

The former Section 77-2037, which was enacted in 1943 applies to property of persons dying before its repeal (September 14, 1953).

For deaths occurring after September 14, 1953: Section 77-2037(1) contemplates two entirely separate situations:

In the first, where no determination of inheritance tax has been made by the county court having jurisdiction within 10 years after decedent's death, the lien ceases. In this situation, no evidence of any inheritance tax proceeding, payment, or discharge should be required.

In the second situation, where a determination has been made by the county court having jurisdiction within the 10-year period, the 10-year limitation does not apply, and a five-year limitation from the date of determination applies. At the end of this period, the lien is extinguished regardless of any defect in the proceeding.

If the five-year period has elapsed, no evidence of payment, release or discharge should be required.

(1) See Section 77-2039 (1994 Cum. Supp.) for the procedure to secure a release of an inheritance tax lien.
(2) See *In Re Estate of Reed,* 271 Neb. 653, 715 N.W. 2d 496 (2006).
(3) For interest passing to surviving spouse, see Standard 9.4.

Please note that § 77-2037 does not relate to the inheritance tax liability of a personal representative or recipient of property. As a result, the inheritance tax due by reason of the decedent's death is not barred by a limitation period. See *In Re Estate of Reed*, 271 Neb. 653, 715 N.W.2d 496 (2006).

Source: Standards 33 and 66

10.5 FEDERAL ESTATE TAX - LIENS

THERE MAY BE TWO SEPARATE AND DISTINCT LIENS THAT ARISE RELATING TO FEDERAL ESTATE TAX.

1. A GENERAL LIEN MAY BE IMPOSED UNDER SECTION 6321 OF THE INTERNAL REVENUE CODE OF 1986. THE GENERAL LIEN IS IMPOSED AT THE TIME OF ASSESSMENT AND GENERALLY BECOMES UNENFORCEABLE 10 YEARS AFTER THE DATE OF THE ASSESSMENT. THE 10-YEAR LIMITATION FOR ENFORCEMENT MAY BE EXTENDED, HOWEVER, BY CONSENT, SUPERVISION OR VARIOUS PROCEDURES. SEE SECTIONS 6502(a) 6503 OF THE INTERNAL REVENUE CODE.

2. A SPECIAL LIEN FOR FEDERAL ESTATE TAX IS AUTOMATICALLY IMPOSED UNDER SECTION 6324 OF THE INTERNAL REVENUE CODE AND IS IN ADDITION TO ANY LIEN IMPOSED UNDER SECTION 6321. THE SPECIAL LIEN IS CREATED WITHOUT ASSESSMENT AND COMMENCES IMMEDIATELY UPON DEATH AND ATTACHES TO ALL PROPERTY IN THE DECEDENT'S GROSS ESTATE. UNLESS A LIEN IS ELECTED BY THE PERSONAL REPRESENTATIVE OF AN ESTATE UNDER SECTION 6324A OR SECTION 6324B, THE SPECIAL LIEN UNDER SECTION 6324 EXPIRES 10 YEARS FROM THE DATE OF DEATH.

Approved October 19, 1995

Source: Standard 34, Revised 1995.

10.6 REAL ESTATE CONTRACTS - LAPSE OF TIME - ACTION BARRED - RECORD CEASES TO BE CONSTRUCTIVE NOTICE

AN UNRELEASED AND APPARENTLY UNPERFORMED REAL ESTATE CONTRACT SHOULD NOT BE CONSIDERED AS A DEFECT IN TITLE WHERE:

(1) THE RECORD SHOWS THAT MORE THAN 10 YEARS HAVE ELAPSED SINCE ITS DUE DATE OR THE DATE PROVIDED FOR PERFORMANCE, OR

(2) THE RECORD SHOWS THAT MORE THAN 20 YEARS HAVE ELAPSED SINCE ITS DATE OF EXECUTION IF THE CONTRACT DOES NOT SPECIFY A MATURITY OR PERFORMANCE DATE; UNLESS

(a) AN AFFIDAVIT HAS BEEN FILED WITHIN THE PERIOD PRESCRIBED BY STATUTE STATING THAT THE CONTRACT IS STILL VALID AND SUBSISTING, OR

(b) A DULY EXECUTED EXTENSION AGREEMENT HAS BEEN FILED WITHIN THE PERIOD PRESCRIBED BY STATUTE.

Approved October 19, 1995

COMMENT: See Section 76-239, Standard 10.3.

Source: Standard 47

10.7 DURATION OF LIEN - TAX FORECLOSURE DECREE

WHERE NO ORDER OF SALE HAS ISSUED ON A DECREE FOR FORECLOSURE OF REAL ESTATE TAXES WITHIN 10 YEARS FROM THE DATE OF DECREE, THE DECREE CEASES TO BE A LIEN AND SHOULD NOT BE TREATED AS A DEFECT OF TITLE.

Approved October 19, 1995

COMMENT: Section 77-1911 (1994 Cum. Supp.). There is no limitation of lien of a decree of foreclosure other than a decree for foreclosure of real estate taxes.

Source: Standard 50

10.8 REPEAL OF CURATIVE STATUTES

THE REPEAL OF A CURATIVE OR VALIDATING LAW DOES NOT IMPAIR OR DESTROY ANY CURE OR VALIDATION EFFECTED PRIOR TO ITS REPEAL. SECTION 49-802(11).

Approved October 19, 1995

COMMENT: Any title made marketable by the curative acts prior to their repeal remains marketable. Section 49-802(11).

The Nebraska Standards of Title Examination Act, Chapter 76, Article 6, was repealed at the request of the Nebraska Bar Association to eliminate the necessity of multiple legislative enactments as new standards, or modifications to old standards, were adopted by the Bar Association.

Further, the repeal of the curative acts did not affect the validity of the title standards promulgated by the Bar Association and such standards may continue to be relied upon. See Section 76-557.

Source: Standard 94

10.9 VALIDITY OF FIDUCIARY CONVEYANCES

SEE STANDARD 9.1, SECTION 76-269.

Approved October 19, 1995

10.10 VALIDITY OF PERSONAL REPRESENTATIVE CONVEYANCES

SEE STANDARD 1.7, SECTION 76-269.01 (1994 CUM. SUPP.).

Approved October 19, 1995

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CHAPTER XI -- MARKETABLE TITLE

11.1 MARKETABLE TITLE ACT: IN GENERAL

SECTIONS 76-288 TO 76-298, INCLUSIVE, ENACT A VALID STATUTE OF LIMITATIONS AND CONSTITUTE A BAR AGAINST ALL CLAIMS OF EVERY DESCRIPTION ARISING PRIOR TO THE DATE OF RECORDING OF THE CONVEYANCE OR TITLE TRANSACTION UNDER WHICH TITLE IS CLAIMED, WHERE SUCH CONVEYANCE OR TITLE TRANSACTION HAS BEEN OF RECORD FOR MORE THAN 23 YEARS, EXCEPT SUCH CLAIMS AS ARE ENUMERATED IN SECTION 76-298. AS A PREREQUISITE TO RELIANCE UPON THIS STATUTE, IT IS NECESSARY TO REQUIRE

(1) THE AFFIDAVIT OF POSSESSION (SECTION 76,294),

(2) ABSENCE OF A CLAIM UNDER SECTIONS 76-290 TO76-293, INCLUSIVE,

(3) ABSENCE OF DISQUALIFYING INTERESTS (SECTION 76-298), AND

(4) ABSENCE OF ANYTHING IN THE RECORD PURPORTING TO DIVEST THE INTEREST.

Approved October 19, 1995

COMMENT:

(1) The constitutionality of this act is not in question. See *Tesdell v. Hanes*, 82 NW 2d 119, an Iowa Supreme Court decision upholding that state's marketable title act.

(2) Matters *"purporting to divest"* the interest within the meaning of Section 76-289 are those matters appearing of record which, if taken at face value, warrant that the interest has, in truth, been divested.

(3) The affidavit is the means of establishing of record the fact of possession by the record title holder on the date of the affidavit, which fact makes the statute operative. It is not necessary that the affidavit contain facts sufficient to establish title by adverse possession, or recite the chain of title leading to the record owner or make any other allegation regarding ownership other than ownership of record under the 23-year chain of title. The possession of the property is normally an evident matter. Therefore, the affidavit may be executed by anyone having knowledge of the fact of possession.

(4) Abstracts of title, where still in use, must be prepared and examined from sovereignty in order to determine whether there is any evidence in the record that there exists an interest or condition barring the operation of the act (Sec. 76-298). Where a decedent has died in another county it is not necessary to examine the proceedings or show them on an abstract if the Marketable Title Act applies and has been complied with. If a decree, will, or certificate of proceedings is recorded and indicates the existence of a disqualifying interest or condition, proper requirements should be made. An abstract of title should show all conditions of the Marketable Title Act as being met before title is claimed should also be examined for purpose of issuing title insurance.

Source: Standard No. 44.

(5) Where a conveyance from the purported heirs at law of a deceased record title holder has been recorded more than 23 years, the fact that there has never been a judicial determination of heirship should not be considered a title defect if the record indicates by proper affidavit, recitals in the record, or partial or fragmentary judicial proceedings, that the decedent died and that the grantors in the conveyance were all of his heirs at law and the Marketable Title Act otherwise applies and has been complied with. It is possible that the decedent is not dead or died testate and that the devisees under the will may have been such as to bring them under Section 76-298 of the Marketable Title Act, particularly with respect to remainders. However, this is a possibility which, after the lapse of 23 years, would seem to be extremely remote (See Sec. 30-2408).

Source: Standard No. 43 and comments.

The following is a suggested form of Affidavit:

STATE OF NEBRASKA)
) ss
_____ COUNTY)

" _____, being duly sworn, deposes and says that
_____ is owner of record of the following described real estate:
_____ and that _____ is now in possession thereof."

11.2 MARKETABLE TITLE ACT: POSSESSION

THE TERM *"POSSESSION"* AS USED IN THE MARKETABLE TITLE ACT COMPREHENDS CONSTRUCTIVE AS WELL AS ACTUAL POSSESSION BY THE RECORD TITLE HOLDER. THE ACT SHOULD BE BROADLY CONSTRUED TO ACCOMPLISH ITS LIBERAL PURPOSES, AND, SO CONSTRUED, THE UNQUALIFIED TERM *"POSSESSION"* SHOULD BE ACCEPTED AS INCLUDING NOT ONLY ACTUAL PHYSICAL POSSESSION BY THE RECORD TITLE HOLDER, BUT ALSO THE RECORD OWNER'S POSSESSION THROUGH THIRD PARTIES.

Approved October 19, 1995

COMMENT: The Act should be applicable as to a record owner's possession through a tenant or agent. Similarly, a record owner can claim possession through a third-party purchaser under a recorded or unrecorded land contract. A personal representative, having power over title to real estate, prior to sale or distribution, can be the owner of record for purposes of the Act, if the decedent would have so qualified, and can be in actual or constructive possession of the real estate; and a foreign personal representative, having qualified under the provisions of Sections 30-2505 and 30-2506 as to real estate in this state, may be treated likewise.

Source: Standard 45

11.3 MARKETABLE TITLE ACT: COMMENCEMENT OF CHAIN

AN UNBROKEN CHAIN OF TITLE, WITHIN THE MEANING OF THE MARKETABLE TITLE ACT, MAY ORIGINATE IN A QUITCLAIM DEED UNDER LIMITED CIRCUMSTANCES.

Approved October 19, 1995

COMMENT: A quitclaim deed can be a *"conveyance or other title transaction"* which *"purports"* to create an interest in the grantee within the contemplation of Section 76-289. Under the more modern theory, quitclaim deeds may be used as primary conveyances to a stranger to the title and not merely as releases of disputed claims. A quitclaim deed has been held to be a *"conveyance"* protected by our recording acts. *Schott v. Dosh*, 49 Neb. 187, 68 N.W. 346 (1896); *Bannard v. Duncan*, 79 Neb. 189, 112 N.W. 353 (1907).

PATTON ON TITLES, 2d Ed., in discussing passage of after-acquired titles, states that it is now generally held that if a deed, expressly or by necessary implication, shows that the grantor intended to convey a particular estate or interest, the deed is a foundation for the doctrine of after-acquired title, even if it contains no covenants. Section 216, n. 99, citing *Hagensick v. Castor,* 53 Neb. 495, 73 N.W. 932 (1898). Hagensick further holds that a group of quitclaim deeds can be taken together to construct the particular estate or interest. See, however, Section 76-209. Compare *Smith v. Berberich*, 168 Neb. 142, 95 NW 2d 325 (1959), a decision under the Marketable Title Act, holding that a quitclaim deed did not commence a chain of title to the fee where (1) it purported to convey only the grantor's interest, and (2) it was clear from the record that the grantor's interest was a fractional portion of the fee. Therefore, any deed which will pass an after-acquired title will commence a chain of title under the act.

Source: Standard 52

CHAPTER XII -- BANKRUPTCY

12.1 BANKRUPTCY SEARCH - COUNTY WHERE LAND LOCATED

IT IS NOT NECESSARY TO REQUIRE A BANKRUPTCY SEARCH IN ANY COUNTY OTHER THAN THE COUNTY IN WHICH THE LAND IS LOCATED.

Approved October 19, 1995

COMMENT: See Section 23-1527; 11 U.S.C.A. 549(c); PATTON ON TITLES, (Second Ed.) Section 653.

Source: Standard 71

12.2 BANKRUPTCY TRUSTEE DEED REQUIREMENTS

WHEN REAL ESTATE WHICH HAS NOT BEEN ABANDONED AND WHICH REMAINS PROPERTY OF A BANKRUPTCY ESTATE, IS SOLD SUBJECT TO LIENS AND ENCUMBRANCES BY THE TRUSTEE IN A CHAPTER 7 CASE, THE SHOWING REQUIRED IN THE ABSTRACT OF THE PROCEEDINGS TO CLEAR THE REAL ESTATE FROM ALL MORTGAGES, LIENS AND ENCUMBRANCES IS:

1. **THAT A BANKRUPTCY CASE WAS COMMENCED BY THE FILING OF A PETITION WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEBRASKA, OR THAT A CASE HAS BEEN TRANSFERRED TO SAID COURT;**

2. **CERTIFICATE OF CLERK UNDER FED. R. BANKR. P. 2011(a) AS TO TRUSTEE QUALIFICATION OR DEBTOR-IN-POSSESSION STATUS (NOT APPLICABLE TO SALE IN CHAPTER 13 BANKRUPTCY CASES);**

3. **NOTICE OF INTENT TO SELL BY THE TRUSTEE, DEBTOR-IN-POSSESSION, OR DEBTOR, WHICH COMPLIES WITH THE PROVISIONS OF 11 U.S.C. SECTION 363 AND BANKRUPTCY RULES 2002 AND 6004;**

4. **CERTIFICATE OF MAILING NOTICE BY TRUSTEE, DEBTOR-IN-POSSESSION, OR DEBTOR;**

5. **ANY OBJECTION TO THE PROPOSED SALE AND ANY ORDER DISPOSING OF THE OBJECTION;**

6. **A TRUSTEE'S DEED OR DEED FROM THE DEBTOR OR DEBTOR-IN-POSSESSION CONVEYING THE REAL ESTATE TO THE BUYER.**

FED. R. BANKR. P. 6004(c) REQUIRES THAT A MOTION BE FILED WITH THE COURT BEFORE AUTHORITY FOR A SALE FREE AND CLEAR OF LIENS OR OTHER INTERESTS WILL BE GRANTED. IF THE SALE IS TO BE FREE AND CLEAR OF ALL LIENS UNDER FED. R. BANKR. P. 6004(c), THE NOTICE THAT THE TRUSTEE OR DEBTOR-IN-POSSESSION SENDS OUT PURSUANT TO FED. R. BANKR. P. 2002 MUST INCLUDE THE DATE FOR THE HEARING ON THE MOTION, AND THE TIME WITHIN WHICH OBJECTIONS TO THE PROPOSED SALE MUST BE FILED AND SERVED. THE MOTION ALSO MUST BE SERVED IN ACCORDANCE WITH FED. R. BANKR. P. 9014 AND NEB. R. BANKR. P. 9014. IF GRANTED, THE MOTION WILL RESULT IN A COURT ORDER APPROVING THE SALE.

THUS, THE FOLLOWING SHOWING IN THE ABSTRACT IS REQUIRED:

1. **THAT A BANKRUPTCY CASE WAS COMMENCED BY THE FILING OF A PETITION WITH THE CLERK OF THE UNITED STATE BANKRUPTCY COURT FOR THE DISTRICT OF NEBRASKA, OR THAT A CASE HAS BEEN TRANSFERRED TO SAID COURT;**

2. CERTIFICATE OF CLERK UNDER FED. R. BANKR. P. 2011(a) AS TO TRUSTEE QUALIFICATION OR DEBTOR-IN-POSSESSION STATUS (NOT APPLICABLE TO SALE IN CHAPTER 13 BANKRUPTCY CASES);

3. MOTION TO SELL FREE AND CLEAR OF ALL LIENS TOGETHER WITH CERTIFICATE OF SERVICE;

4. ANY OBJECTION TO THE SALE;

5. ORDER APPROVING THE MOTION.

Approved October 19, 1995

COMMENT: The above showings should be made by obtaining certified copies of the above requirements from the Bankruptcy Court and having them filed in the county where the real estate is located, unless the Bankruptcy Court is located in such county. Under Section 11 U.S.C 554, if real property has been abandoned, the trustee may not have the power to sell. It might be advisable to require a search by an abstracter that an abandonment by the trustee is not reflected by the bankruptcy file. The above title Standard does not apply to sale of real property pursuant to a confirmed plan of reorganization in Chapter 11 or Chapter 13 cases. In such a situation, the confirmed plan would control the disposition of the property.

Source: Standard 99, Revised 1995

TITLE STANDARD 12.3

A judgment lien that has attached to real estate prior to the filing of a Petition in Bankruptcy remains a lien following discharge of the Debtor, unless the lien itself has been avoided pursuant to a Bankruptcy Court Order avoiding the lien, following proper motion and notice in accordance with applicable Bankruptcy Rules.

Comment: **Various authorities can be cited in support of the Standard for the proposition that the Discharge affects only the Debtor's personal liability (liability *in personam)* for payment of the sums secured by the lien, and that the lien remains in full force and effect as a lien *in rem* against the real estate.**

See:

- ***11 USC 524 (a) (1)*** **A discharge in a case under this title voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived.**

- ***Dewsnup v. Timm,*** **502 US 410, 418, citing Farrey v. Sanderfoot, 500 US 291, 197 (1991: "Ordinarily, liens and other secured interests survive bankruptcy. . .Rather, a bankruptcy discharge extinguishes only one mode of enforcing a claim – namely, an action against the debtor *in personam* – while leaving intact another – namely, an action against the debtor *in rem."***

- ***Collier,*** **Bankruptcy, Par. 524.01(3)**

NOTE: Under 11 USC 524(a)(3), a discharge operates as an injunction against action to proceed against property acquired after commencement of the case in enforcement of a pre-bankruptcy judgment lien.

CHAPTER XIII -- AFFIDAVITS, ACKNOWLEDGMENTS, RECITALS & JURATS

13.1 AFFIDAVIT OF AN INTERESTED PARTY

AFFIDAVIT OF AN INTERESTED PARTY MAY BE ACCEPTED AS CURATIVE EVIDENCE WHEN AFFIANT'S CREDIBILITY AND KNOWLEDGE OF THE FACTS INVOLVED SEEM EVIDENT.

Approved October 19, 1995

COMMENT: In many instances, interested parties are the only ones capable of supplying the necessary information, and this evidence should not be rejected upon the sole ground of interest. Under the Nebraska Evidence Rules, Section 27-601, interest is not a ground for testimonial incompetence. This is the modern viewpoint and the one taken in nearly all American jurisdictions. See WIGMORE ON EVIDENCE (2d Ed.) Section 575ff. No reason appears why a title examiner should be more rigorous than courts or why a title examiner should proceed on theories long since discarded by courts and legislatures as resting on unsound foundations and never applied in ordinary business transactions.

Where the credibility of the affiant is doubtful for other reasons, of course, the fact that he is an interested party might call for other proof. An affidavit recorded is prima facie evidence of facts stated therein, Section 76-271. See *Schlake v. Healey*, 108 Neb. 35, 187 N.W. 427 (1922), and note that in that case, the affiant was a party who had an interest in the land.

Note that an affidavit given validity under Section 76-271 must be verified. It does not have to be acknowledged as a condition to qualify for recording.

Source: Standard 13

13.2 ACKNOWLEDGMENT - CERTIFICATE - NONRESIDENT OFFICER

A CERTIFICATE AS TO THE QUALIFICATION OF A NON-RESIDENT OFFICER AUTHORIZED BY STATUTE TO TAKE ACKNOWLEDGMENTS WHO HAS TAKEN AN ACKNOWLEDGMENT TO A CONVEYANCE OF LAND IN NEBRASKA AND WHO HAS AN OFFICIAL SEAL SHOULD NOT BE REQUIRED, EVEN THOUGH THE SEAL DOES NOT APPEAR ON RECORD, IF THE CERTIFICATE OF ACKNOWLEDGMENT STATES THAT THE SAME WAS MADE UNDER THE NOTARY'S HAND AND SEAL.

Approved October 19, 1995

COMMENT: Section 76-243 applies to all acknowledgments, whether taken in or out of the state. Some title examiners have failed to note the breadth of the statute.

Certificates should be required when the acknowledging officer of the foreign state or territory has no seal and the instrument has not been recorded 10 years. Special statutes deal with commissioners of deeds.

See FOSTER, EXECUTION AND ACKNOWLEDGEMENT OF DEEDS IN NEBRASKA, 2 Nebraska Law Bulletin No. 3, pp. 54, 60, and cases cited.

Source: Standard 16

13.3 NOTARIES - EXPIRATION OF COMMISSION

LACK OF SHOWING AS TO DATE OF EXPIRATION OF A NOTARIAL COMMISSION IN A CERTIFICATE CONTAINED IN A RECORDED CONVEYANCE SHOULD NOT BE TREATED AS A DEFECT IN TITLE WHERE MORE THAN 10 YEARS HAVE ELAPSED SINCE THE DATE OF RECORDATION.

Approved October 19, 1995

COMMENT: No such statement was required by statute prior to August l, 1893. All subsequent conveyances are covered by the Curative Act, Sections 76-258, 76-259 and 76-260. The lack of such a statement in certificates contained in conveyances executed within the last 10 years may be corrected by evidence of the qualification of the notary secured from the office of the Secretary of State if deemed necessary. See *Sheridan County v. McKinney*, 79 Neb. 223, 115 N.W. 548 (1908).

Source: Standard 21

13.4 RECITALS IN CONVEYANCE - PRIMA FACIE EVIDENCE

RECITALS WHICH ARE PROPERLY A PART OR EXPLANATORY OF A CONVEYANCE ARE INCLUDED IN THE PRIMA FACIE PROOF AFFORDED BY RECORD, AND NO AFFIDAVIT SHOULD BE REQUIRED CONCERNING FACTS CONTAINED IN SUCH RECITALS.

Approved October 19, 1995

COMMENT: See PATTON ON TITLES, 2d Ed., Section 21. See also Section 76-271 concerning use of explanatory affidavits.

Source: Standard 31

13.5 AFFIDAVITS MAY BE GIVEN ONLY BY COMPETENT INDIVIDUALS AND MUST BE LIMITED TO FACTS WITHIN THE ACTUAL KNOWLEDGE OF THE INDIVIDUAL.

Approved October 18, 2001

COMMENT: Testimony may be given only by competent individuals. Therefore an affidavit by an agent as to facts affecting a principal must be sworn to by the agent in his or her individual capacity and must be limited to facts within the actual knowledge of the agent. Similarly, an affidavit by a corporate officer or agent as to the corporation, by a manager or member as to a limited liability company, or by a partner as to a partnership, must be sworn to by the individual and must be limited to facts within the actual knowledge of the individual.

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CHAPTER XIV – TRUSTS

14.1 UNDISCLOSED TRUSTS - AUTHORITY OF TRUSTEE

IT SHOULD NOT BE CONSIDERED A DEFECT IN TITLE THAT A TRUSTEE OF AN UNDISCLOSED TRUST MAKES A CONVEYANCE OR RELEASE WITHOUT ANY RECORD EVIDENCE OF THE TRUSTEE'S AUTHORITY OR WITHOUT JOINDER IN THE CONVEYANCE OR RELEASE OF THE UNDISCLOSED BENEFICIARIES. POWER TO SELL IN THIS INSTANCE IS PRESUMED.

SECTIONS 76-266 THRU 76-268 DEFINE AN UNDISCLOSED TRUST AS ONE WHOSE BENEFICIARIES ARE NOT NAMED NOR TERMS DECLARED, EITHER IN THE CONVEYANCES OR IN A SEPARATELY RECORDED DOCUMENT. UNDER SECTION 30-2824, IT IS NOT NEGLIGENCE TO ACCEPT A CONVEYANCE FROM A TRUSTEE WHO HOLDS TITLE UNDER A DEED CONTAINING LANGUAGE SUCH AS *"JOHN DOE, TRUSTEE"* OR *"JANE DOE, TRUSTEE OF THE XYZ TRUST UNDER DECLARATION OF TRUST DATED _____"*, AS LONG AS THE NAMES OF THE BENEFICIARIES OR THE TERMS OF THE TRUST REMAIN UNRECORDED. NEITHER THE NAME OF THE TRUST NOR THE DATE OF ITS CREATION IS A TERM OF THE TRUST. IT IS NOT MERITORIOUS TO OBJECT TO A CONVEYANCE WHERE THE NAME OF THE TRUST OR THE DATE OF ITS CREATION, BUT NO TERMS OF THE TRUST, ARE DISCLOSED.

Approved October 18, 1995
Comment revised by committee October 23, 2003 to reflect the Nebraska Uniform Trust Code
Approved by House of Delegates November 3, 2006

COMMENT: See Neb. Rev. Stat. Sections 76-266 thru 76-268 and Section 30-2824. See Neb. Rev. Stat. Sections 30-3701 thru 30-3706 pertaining to certification of trusts in lieu of providing a copy of the trust instrument. *Perry v. Ritze,* 110 Neb. 193 N.W. 758 (1923); *Bauer v. Bauer,* 136 Neb. 329, 285 N.W. 565 (1939); Re-statement, Law of Trusts, Neb. Anno. Sections 190, 297; Title Standard 4.8.

Source: Standard 32

Nebraska Uniform Trust Code §30-38,101 which becomes effective January 1, 2005, strengthens this position by stating that:

> A person other than a beneficiary who, in good faith, assists a trustee, or who, in good faith or for value, deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the powers.

Comment revised by committee October 22, 2 003 to reflect the Nebraska Uniform Trust Code that became effective on January 1, 2005.

14.2 SALE BY TESTAMENTARY TRUSTEE, PRIOR TO THE NEBRASKA PROBATE CODE, JANUARY 1, 1977

IF THERE WAS A SALE PRIOR TO JANUARY 1, 1977, UNDER A POWER OF SALE IN A TRUSTEE UNDER A TESTAMENTARY TRUST, THE ESTATE SHOULD BE ADMINISTERED, INCLUDING APPROPRIATE REFLECTION OF NON-LIABILITY FOR OR SATISFACTION OF INHERITANCE TAXES AND FEDERAL ESTATE TAXES, THE PROPERTY SHOULD BE ORDERED DISTRIBUTED TO THE TRUSTEE, THE TRUSTEE SHOULD BE DULY APPOINTED AND QUALIFIED, AND THE TRUSTEE'S DEED SHOULD SHOW EXECUTION AND DELIVERY PRIOR TO THE TIME THAT THE TRUST TERMINATES UNDER ITS OWN PROVISIONS.

AN ATTEMPT BY A TRUSTEE TO CONVEY AFTER THE PERIOD OF THE TRUST SHOULD NOT BE ACCEPTED UNLESS THERE HAS BEEN NO FINAL SETTLEMENT OF THE TESTAMENTARY TRUST PURSUANT TO STATUTE AND THERE IS A PROPER ORDER OF THE COURT HAVING JURISDICTION OVER THE TRUST PURSUANT TO NOTICE OF ALL INTERESTED PARTIES, OR THE BENEFICIARIES OF THE TRUST JOIN IN THE CONVEYANCE.

Approved October 19, 1995

COMMENT: See Section 76-269.

Source: Standard 81

14.3 See Standard 4.8 - CONVEYANCES TO A FIDUCIARY

Approved October 19, 1995

CHAPTER XV -- MINERAL INTERESTS

15.1 UNRELEASED, FORFEITED OIL & GAS LEASES

WHERE THE POSITIVE AFFIDAVIT OF THE RECORD OWNERS OF THE MINERAL INTERESTS IN REAL ESTATE STATING THAT THE DELAY RENTALS UNDER AN OUTSTANDING OIL AND GAS LEASE HAVE NOT BEEN PAID AND THERE HAS BEEN NO DEVELOPMENT ON THE LAND IN ACCORDANCE WITH THE TERMS OF THE LEASE, TOGETHER WITH AN AFFIDAVIT OF AN EXECUTIVE OFFICER OF THE DEPOSITORY BANK NAMED IN SUCH LEASE OF THE NON-PAYMENT OF RENTALS, THE TITLE EXAMINER IS NOT JUSTIFIED IN REQUIRING THAT PROCEEDINGS UNDER SECTIONS 57-202 THRU 57-204 FOR THE CANCELLATION OF LEASE BE CONDUCTED.

Approved October 19, 1995

COMMENT: It is not necessary to follow the statutory provisions to eliminate the outstanding oil and gas lease on making the above showing. A purchaser or encumbrancer for value always acquires property with notice of possessory rights. Ordinary inquiry into possessory rights should reveal performance of oil, gas or other mineral lease requirements as to drilling and operation to keep a lease effective. This investigation, coupled with an affidavit of non-performance executed by an officer of the depository bank and by the owner of record of the land should be sufficient to establish forfeiture of the lease where there have been no operations sufficient to continue the lease and the lessee has defaulted in payment of delay rentals, thereby forfeiting the lease.

Source: Standard 54

15.2 OIL & GAS LEASES RELEASED BY ATTORNEY-IN-FACT

WHERE THE PRIMARY TERM OF AN OIL AND GAS LEASE HAS EXPIRED, A TITLE EXAMINER NEED NOT REQUIRE A COPY OR SYNOPSIS OF THE POWER OF ATTORNEY ISSUED TO THE ATTORNEY-IN-FACT OF SUCH OIL AND GAS LESSEE, UNLESS THE RECORD CONTAINS SOME INSTRUMENT SUBSEQUENT TO THE RECORDING OF THE RELEASE WHICH INDICATES THE LESSEE CONTINUED TO TREAT IT AS EFFECTIVE AFTER THE DATE OF THE PURPORTED RELEASE.

Approved October 19, 1995

C0MMENT: The policy which supports Standard 15.1, Unreleased, Forfeited Oil & Gas Leases, applies with equal force to recognizing the established practice of many firms active in oil and gas exploration to have releases of oil and gas leases executed by attorneys-in-fact.

Source: Standard 77

16.1. REQUIREMENTS FOR CONVEYANCE BY ATTORNEY-IN-FACT (AGENT)

WHEN REAL PROPERTY IS TO BE CONVEYED OR ENCUMBERED BY AN ATTORNEY-IN-FACT (AGENT) ACTING FORA PRINCIPAL UNDERADURABLE OR NON-DURABLE POWER OF ATTORNEY, THE SHOWING REQUIRED ON THE RECORD IS:

1. A POWER OF ATTORNEY:

a. PROPERLY ACKNOWLEDGED AND RECORDED; AND

b. AUTHORIZING THE ACT OR TRANSACTION WHICH THE AGENT INTENDS OR INTTENDED TO CONSUMMATE; AND

2. CONVEYANCE BY THE AGENT, PROPERLY EXECUTED .A\1]) ACKNOWLEDGED BY THE AGENT, DELIVERED AND RECORDED; AND

3. CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY, IN SUBSTANTIALLY THE FORM SET FORTH IN NEBRASKA REVISED STATUTES SECTION 30-4042, EXECUTED, ACKNOWLEDGED, AND RECORDED.

COMMENT:

I. NEBRASKA UNIFORM POWER OF ATTORNEY ACT, EFFECTIVE JANUARY 1, 2013:

A. Definition: The terms agent and attorney in fact are identical, as provided in Section 30- 4002(1) of the Act. The term agent is used herein for brevity.

B. Durability: Section 30-2004, a power of attorney executed after January 1,2013, is durable, unless it specifically provides that it is terminated by the incapacity of the principal.

C. Effectiveness: A power of attorney is effective upon execution and acknowledgment unless it provides that it becomes effective upon a contingency, such as incapacity of the principal. Section 30-4009 provides for the determination of how and when a power of attorney becomes effective upon the occurrence of a contingency.

D. Co-Agents: If aprincipal designates more than one agent, Section 30-4011 permits each agent acting alone to bind the principal unless the power of attorney provides otherwise.

E. Termination: A durable power of attorney is terminated by the death of the principal, or by a written revocation by the principal, and a revocation of a recorded power of attorney should be recorded in the same place where the power of attorney is recorded. A non-durable power of attorney, durable or non-durable, continues in force until the agent has actual knowledge of the termination and acts performed by the agent during the intervening period are binding.

F. Duration: A power of attorney remains effective until termination as provided in Section 30- 4010 regardless of the time elapsed since its execution.

G. Fiduciary duty: The duties of an agent are set forth in Section 30-4014, and include a duty to act in good faith within the authority granted, loyally and avoiding conflicts of interest. See Title Standard 16.3.

H. Reliance. A person dealing in good faith who accepts an acknowledged power of attorney without actual knowledge that the power of attorney, or the agent's authority, is void, invalid, or terminated, may rely upon the power of attorney as if it and the agent's authority were genuine, valid, and still in effect, and for this purpose may request and rely upon an agent's certification under penalty of perjury that the power of attorney and authority thereunder are in full force and effect, according to Section 30-4019. A form of certification is provided in Section 30-4042. Section 30-4020 provides other means of verifying the validity and authority of a power of attorney.

I. Powers:

(1) Real Property: Powers in dealing with real property are set forth in Section 30-4027 and are invoked by an adoption of real property power, or by a general grant of power to do all acts that a principal could do, or by a specific grant of power to conduct real property transactions, and if the latter, the power is strictly limited to the provisions of the power of attorney.

(2) Prohibited Powers: Creation or severance of rights of survivorship joint tenancies) is forbidden by Section 30-4024 unless the power of attorney specifically permits such an act, and if so, the power is strictly limited to the provisions of the power of attorney.

(3) Transfer on Death Deeds:

(a) The provisions of the Real Property Transfer on Death Act governing the execution of transfer on death deeds are similar to those governing wills, and therefore a transfer on death deed cannot be executed by an agent acting under a power of attorney.

(b) An agent acting under a power of attorney on behalf of a TOD transferor may not execute a conveyance that is inconsistent with a TOD deed by the principal as transferor, unless the power of attorney expressly grants the authority to change a beneficiary designation in a TOD deed (Uniform Power of Attorney Act Sec. 30-4024(l)(d)).

(4) Gifts: Section 30-4040 generally limits gifts to the federal gift tax exclusion amount. This power is NOT granted by a general grant of power to do all acts that a principal could do. If a power of attorney grants power to make gifts without further explanation it is limited by Section 30-4040. Otherwise a grant of specific power to make gifts grants such power but it is strictly limited to the provisions of the power of attorney.

II. POWERS OF ATTORNEY EXECUTED PRIOR TO JANUARY 1, 2013:

A. Scope of Nebraska Uniform Power of Attorney Act as to pre-existing powers of attorney: Except as provided in B and C below, the Nebraska Uniform Power of Attorney Act applies to all powers of attorney as of January 1, 2013. Acts performed prior to that date, under powers executed prior to that date, remain effective as provided by former Sections 30-2662 through 30- 2672, inclusive, or by the former Short Form Act, or by common law.

B. Durability: Under prior law, a durable power of attorney should contain the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal" or "This power of attorney shall become effective upon the disability or incapacity of the principal" or similar words of like effect. Former Section 30-2665.

C. Powers:

(1) Real Property: Requirement of a specific grant of power to sell and convey is set forth in Dworak v. More, 25 Neb. 735, 41 N.W. 777 (1889). This power must be spelled out in the power of attorney or by reference to the real property power in the former Short Form Act.

(2) Gifts: Power to make gifts existed only if specifically provided for in the power of attorney, and was strictly limited by the provisions of the power of attorney.

16.2 CONVEYANCE BY AGENT ACTING FOR A TRUSTEE OR OTHER FIDUCIARY

A TITLE EXAMINER SHOULD NOT APPROVE A CONVEYANCE BY AN AGENT OR ATTORNEY IN FACT WHO IS ACTING FOR A TRUSTEE OR OTHER FIDUCIARY ABSENT A SPECIFIC STATUTORY EXCEPTION OR A SPECIFIC AUTHORIZATION BY THE INSTRUMENT CREATING OR GOVERNING THE FIDUCIARY RELATIONSHIP

Approved October 18, 2001
Comment revised by Committee October 23, 2003 to reflect the Nebraska Uniform Trust Code
Approved by House of Delegates November 3, 2006

COMMENT:

1. Definitions.

A "fiduciary" includes guardians, conservators, personal representatives, trustees, officers of corporations, general partners of a general or limited partnerships, managers or members acting as managers of limited liability companies, or any other person exercising power to be used for the benefit of third parties.

2. Court-Appointed Fiduciaries.

There are specific Nebraska statutory exceptions that allow certain delegations of power:

A. As to guardians. See Neb. Rev. Stat. §30-2604.

B. As to conservators. See Neb. Rev. Stat. §30-2653 (23).

C. As to Powers of Attorney. See the Nebraska Short Form Act, Neb. Rev. Stat. §49-1550.

D. As to Personal Representatives. See Neb. Rev. Stat. §30-2476 (21).

3. Trustees.

Under Nebraska general law, a trustee "is under a duty to the beneficiary not to delegate to others the doings of acts which the trustee can reasonably be required to personally perform." In re Reynolds' Estate, 131 Neb. 557, 268 N.W. 480, 487 (1936) (Quoting Restatement, Trusts, Section 171.)

> "Because the Trustee's relationship with the trust beneficiaries is a personal one, the administration of the trust may not be delegated. If the trustee can avoid responsibility by delegating fundamental duties to a third party, then the settlor's intention in selecting a particular trustee will be thwarted. On the other hand, the trustee has a fiduciary obligation to seek whatever assistance necessary to execute the efficient and competent administration of the trust. As a general rule, the trustee may never delegate to others the responsibility to coordinate the trust's administration and to supervise agents. Moreover some specific functions are nondelegable no matter how intense the supervision, such as discretion as to how income and principal may be used in furtherance of the purposes of the trust." Loring, A Trustees Handbook, Section 6.1.4 (1994) (Citing Restatement (Third) of Trusts, Section 171).

The Nebraska Uniform Prudent Investor Act, Neb. Rev. Stat. §8-2201, et. seq. granted specific authority for delegation of investment and management functions in Neb. Rev. Stat. §8-2210. This section is repealed

by the Nebraska Uniform Trust Code (NUTC), which becomes effective January 1, 2005. Neb. Rev. Stat. §8-2210 is replaced in its entirety by §30-3888 of the NUTC. The lead-in statute to NUTC §30-3888, is NUTC §30-3872 that provides a trustee may delegate functions as provided in NUTC §30-3888.

4. Proof of Delegation

With respect to trusts Neb. Rev. Stat. §30-3701 provides for a certificate in the form of a recordable affidavit signed and acknowledged by all acting trustees, which may, inter alia, confirm or state the powers of the trustee and any restrictions imposed upon the trustee in dealing with the assets of the trust.

5. Persons Acting for Business Entities

Under Nebraska law, an officer or director of a corporation occupies a fiduciary relation to the corporation and is treated by a court of equity as a trustee. Peters v. Woodmen Accident & Life Co., 170 Neb. 861, 104 N.W.2d 490 (1960). Neb. Rev. Stat. §21-2078 provides that all corporate powers shall be exercised by "or under the authority of" the board of directors.

Whether an officer of a corporation, other than a director may delegate powers to other agents depends on whether the authority to do has been expressly conferred or can be implied:

> "An officer or agent has no authority to delegate special powers conferred upon him, and which involve the exercise of judgment or discretion, unless he is expressly authorized to do so, or unless the circumstances are such that the authority is necessarily implied." 2 Fletcher Cyclopedia Corporations, Section 503,at 512.

Presumably, similar considerations apply to members and managers of a limited liability company. See Neb. Rev. Stat. §21-2601 to 21-2653.

Adopted 2001

Revised Comment approved by Committee October 23, 2003 to reflect the Nebraska Uniform Trust Code that became effective on January 1, 2005.

16.3 **TRANSACTIONS IN WHICH AN ATTORNEY-IN-FACT IS ACTING FOR HIS OR HER OWN ACCOUNT AS WELL AS THAT OF THE PRINCIPAL.**

AS A FIDUCIARY, AN ATTORNEY-IN-FACT OWES THE DUTY OF LOYALTY TO THE PRINCIPAL TO ACT SOLELY IN THE INTEREST OF THE PRINCIPAL. UNLESS EXPRESSLY AUTHORIZED BY THE POWER OF ATTORNEY OR APPROVED BY A COURT OF COMPETENT JURISDICTION, IT IS IMPROPER FOR AN ATTORNEY-IN-FACT TO DEAL IN THE PRINCIPAL'S REAL ESTATE FOR THE AGENT'S OWN ACCOUNT, WHETHER AS BUYER, SELLER, DONOR OR DONEE.

Comment: Because of their advantages over common law powers, thousands of Durable Powers of Attorney are now in force- many in the hands of inexperienced and untrained laymen as agents. With more and more agents acting for principals who are incompetent in fact if not in law, there is an increased risk of self-dealing and it is necessary that care be taken to assure that the transactions are fair to the principaL

A Power of Attorney creates a fiduciary relationship between principal and agent such that the agent is required to act solely for the benefit of his or her principal in all matters associated with the agency. The agent is prohibited from profiting from the agency relationship to the detriment of the principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal. *Crosby v. Luehrs,* 266 Neb. 827, 669 N.W.2d 635 {2003).

The duty of loyalty that an attorney-in-fact owes to his or her principal is analogous to the duty owed by a trustee to the trust beneficiaries.

A trustee with power to sell trust property is under a duty not to sell to himself or herself either by private sale or at auction, whether the property has a market price or not, and whether or not the agent makes a profit thereby. It is immaterial that the trustee acts in good faith or pays a fair consideration, or that the agent does not make the sale, as in a foreclosure or execution sale. To permit this is to allow the agent's personal interest to conflict with that of the principal. The same principles apply to a sale by the agent of the agent's property to the principal. *Restatement of Trusts Second,* § 170.

In *In Re Trust Created by Inman,* 269 Neb. 376, 693 N.W.2d 514 (2005), the trustee sought permission to purchase trust property, which request was denied by the trial court. The Nebraska Supreme Court affirmed, stating at 385:

> Historically, the law has looked with disfavor upon a trustee selling trust assets to himself. e.g., *Lancaster County Bank v. Marshel,* 130 Neb. 141, 264 N.W. 470 (1936). While such transactions are not at:Jsolutely prohibited under current law, they are voidable by a beneficiary unless specifically authorized by the trust instrument, approved by a court, or consented to or ratifie.d by the beneficiary. See § 30-3867(c). It logically follows that a court should not approve such a transaction over the objection of a beneficiary unless it can be clearly demonstrated that the transaction is consistent with the trustee's duty to administer the trust solely in the interests of the beneficiaries.

These same principles of loyalty apply to an attorney-in-fact. Accordingly, unless the power of attorney specifically authorizes a transaction in which the agent has a personal interest, it is meritorious to require that any such self-dealing transaction be approved by a court of competent jurisdiction. This is particularly true when the principal is unable to object. See, *R.S.* § 30-2638. Of course, if the principal is competent, the principal may ratify the transaction but in such a case it would be preferable for the principal to ratify the transaction through a direct transfer without using the power of attorney.

The principle also applies where the fiduciary uses a stand-in to sanitize the transaction. A personal representative was required to account for a transaction in which the fiduciary's wife was the purchaser. *In Re Estate of Jurgensmeier,* 142 Neb. 188, 5 N.W.2d 243 (1942). Similarly, an agent under a common law power was required to account to the principal for a transaction in which the agent's wife was the purchaser. *Maddux v. Maddux,* 151 Neb. 656, 38 N.W.2d 547 (1949).

See Also,§ 30-3867(c), Nebraska Uniform Trust Act.

16.4. POWER OF ATTORNEY: ACCEPTANCE AND REJECTION

A PERSON WHO IS PRESENTED AN ACKNOWLEDGED POWER OF ATTORNEY IS GENERALLY OBLIGED TO ACCEPT IT.

IN ORDER THAT IT BE ACCEPTED, GENERALLY, IT MUST BE

A. IN ENGLISH, OR ANY LANGUAGE UNDERSTOOD BY THE PERSON(S) TO WHOM IT IS PRESENTED.

B. SIGNED BY THE PRINCIPAL AND DULY ACKNOWLEDGED BEFORE A NOTARY PUBLIC BY THE PRINCIPAL, WITH ALL SIGNATURES AND SEALS AFFIXED.

IT MAY NOT BE REJECTED BECAUSE IT IS NOT OF RECENT DATE, OR, IF DURABLE, BECAUSE THE PRINCIPAL IS KNOWN TO BE INCAPACITATED.
IT MAY NOT BE REJECTED IF IT IS ACCOMPANIED BY THE AGENT'S CERTIFICATION UNDER PENALTY OF PERJURY THAT THE POWER OF ATTORNEY IS EFFECTIVE; THAT THE PRINCIPAL IS ALIVE (AND IF THE POWER IS NONDURABLE, THAT THE PRINCIPAL IS COMPETENT), THAT THE POWER OF ATTORNEY HAS NOT BEEN REVOKED; AND IF THE AGENT IS A SUCCESSOR AGENT, THAT THE PRIOR AGENT IS NO LONGER WILLING OR ABLE TO SERVE.

IT MAY NOT BE REJECTED IF, IN THE OPINION OF COUNSEL, IT IS VALID AND GRANTS THE POWER NECESSARY FOR THE AGENT TO PERFORM THE ACT CONTEMPLATED BY THE AGENT.

A POWER OF ATTORNEY MAY BE REJECTED IF:

A. IT DOES NOT GRANT THE POWER TO PERFORM THE ACT CONTEMPLATED BY THE AGENT.

B. IT DOES NOT CONTAIN A COMPLETED ACKNOWLEDGMENT BY THE PRINCIPAL.

C. THE PERSON TO WHOM THE ACKNOWLEDGED POWER OF ATTORNEY IS PRESENTED IS NOT OBLIGED TO ENTER INTO A TRANSACTION WITH THE PRINCIPAL IN SIMILAR CIRCUMSTANCES, OR SUCH A TRANSACTION WOULD BE INCONSISTENT WITH STATE OR FEDERAL LAW.

D. IN THE OPINION OF COUNSEL OR OTHERWISE, USE OF THE POWER OF ATTORNEY WOULD BE A CONFLICT OF INTEREST BETWEEN PRINCIPAL AND AGENT (SEE TITLE STANDARD 16.3.).

E. THE PERSON TO WHOM THE ACKNOWLEDGED POWER OF ATTORNEY IS PRESENTED HAS ACTUAL KNOWLEDGE OF THE TERMINATION OF THE POWER OF ATTORNEY.

AN OPINION OF COUNSEL OR CERTIFICATION OF AGENT MUST BE REQUESTED WITHIN SEVEN DAYS OF THE PRESENTATION OF THE POWER OF ATTORNEY FOR ACCEPTANCE, AND UPON PRESENTATION OF SUCH OPINION OR CERTIFICATION, THE POWER OF ATTORNEY MUST BE ACCEPTED WITHIN FIVE DAYS THEREAFTER.

COMMENT:

Acknowledged means purportedly verified before a notary public or other individual authorized to take acknowledgments.

A person may rely on the signature in an acknowledged power of attorney.

A person who acts in good faith may rely on a power of attorney, if without knowledge that the power of attorney is invalid for any reason, or that the agent is exceeding or improperly exercising the agent's authority.

A person asked to accept an acknowledged power of attorney may request and rely upon an agent's certification.

A person asked to accept an acknowledged power of attorney may request and rely upon an English translation if the power of attorney or any part thereof is in another language.

A person asked to accept an acknowledged power of attorney may request and rely upon an opinion of counsel as to any matter of law concerning the power of attorney; the request must be in writing or other recorded form and set forth the reason for the request.

Such translation or opinion will be at the principal's expense if the request therefor is made within seven days after the power of attorney is presented for acceptance.

A person is not required to accept an acknowledged power of attorney if the person is not otherwise required to enter into a transaction with the principal in the same circumstances, or if the transaction is inconsistent with state or federal law; or if the person has actual knowledge of the termination of the power of attorney.

A person is not required to accept an acknowledged power of attorney if a request for certification or an opinion of counsel is refused; or if the person in good faith believes that the power is not valid or the agent does not have the authority to perform the act requested, even if certification or translation or opinion of counsel has been provided; or the person in good faith believes that an official complaint has been made of the agent for mistreatment of the principal.

A person is not required to accept an acknowledged power of attorney if the person has actual knowledge that there is a legal proceeding pending in which the construction of the power of attorney or of the agent's conduct is in question; or if the power of attorney becomes effective upon a contingency and no proof of the happening of the contingency is presented.

An acknowledged power of attorney cannot be rejected if the rejection is based solely upon the date of the power of attorney; or because the power is not on the proper form. NOTE: The Nebraska Uniform Power of Attorney Act does not apply to a power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.

Improper rejection of a power of attorney can result in litigation against the person refusing the same and may result in a court order mandating acceptance and levying reasonable attorney's fees and costs against such person.

Reference: Uniform Power of Attorney Act, Secs. 30-4019 and 30-4020.

PRACTICE NOTE:

Since the certification form does not refer to the delivery of an instrument, as the former affidavit did, the best practice would be to obtain a certification of agent as soon as the acknowledged power of attorney is presented, and another at closing. The certification obtained at closing would then be recorded together with the instrument(s) executed by the agent on behalf of the principal.

CHAPTER XVII - TRANSFER ON DEATH DEEDS TITLE STANDARD

17.1. TRANSFER ON DEATH DEEDS: TRANSFER ON DEATH DEED FOUND OF RECORD; NO REVOCATION OF RECORD. VALIDITY AND EFFECTIVENESS OF TRANSFER ON DEATH DEEDS.

A TRANSFER ON DEATH DEED HAS NO EFFECT DURING THE TRANSFEROR'S LIFETIME.

A TRANSFER ON DEATH DEED IS VALID ONLY IF IT IS RECORDED (1) BEFORE THE DEATH OF THE TRANSFEROR, AND (2) WITHIN 30 DAYS OF ITS EXECUTION AND (3) IN THE OFFICE OF THE REGISTER OF DEEDS OF THE COUNTY(IES) WHERE THE PROPERTY IS LOCATED.

A TRANSFER ON DEATH DEED IS EXECUTED BY THE TRANSFEROR IN A MANNER SIMILAR TO WILLS AND IS NOT VALID IF THE STATUTORY FORMALITIES ARE NOT PRESENT.

A TRANSFER ON DEATH DEED MUST CONTAIN WARNINGS AS SET FORTH IN THE STATUTE (R.S. NEB. 30-3410(b)), BUT A DEFECT IN THE WORDING OF THE WARNINGS DOES NOT VOID THE TRANSFER ON DEATH DEED.

REVOCATION OF TRANSFER ON DEATH -DEEDS IS DISCUSSED IN TITLE STANDARD 17.2

NOTE: TRANSFER ON DEATH DEEDS BY A TRANSFEROR WHOSE SPOUSE IS NOT IN TITLE TO THE INTEREST BEING TRANSFERRED ARE SUBJECT TO THE REQUIREMENTS FOR JOINDER OF SPOUSE RAISED BY R. S. NEB. SECTIONS 40- 104 (HOMESTEAD) AND 30-2314 (MARITAL RIGHTS OF SURVIVING SPOUSE), AND THEREFORE SHOULD CONTAIN WITHIN THE TOD DEED DOCUMENT A
WAIYER OF SUCH RIGHTS AND A CONSENT TO THE TOD TRANSFER BY THE SPOUSE.

COMMENTS:

The Nebraska Uniform Real Property Transfer on Death Act is codified as Article 34 of Chapter 76 of the Nebraska Revised Statutes.

A transfer on death deed must contain the essential elements and formalities of a properly recordable deed, and must state that the transfer to the designated beneficiary is to occur at the transferor's death.

A transfer on death deed is not effective unless the transferor dies on or after January 1, 2013.

Formalities of execution (see Neb. Rev. Stat. Sec. 76-3409): It should be determined that the TOD deed was executed by the transferor in the presence of two disinterested witnesses, and properly acknowledged before a notary public. A disinterested witness is a person who is NOT a designated beneficiary or an heir, a child, or a spouse of a designated beneficiary (Section 76- 3402(3), as amended by LB 345, Laws 2013, effective as of 1-1-13).

LB 345, Laws 2013, also amends Section 76-3410 by adding subsection (c), which provides that no action to set aside a TOD deed for failure to comply with the requirement of disinterested witnesses may be commenced more than 90 days after the death of the transferor, or, if there is more than one transferor, more than 90 days after the death of the last surviving transferor.

The TOD deed must be recorded within 30 days of execution and prior to the death of the transferor. Determination of the latter may require comparing the time of death on the death certificate with the time stamp on the recorded TOD deed. Determination of the 30 days should be according to the general law in such cases, but where recording may not have taken place for more than 30 days due to holidays or weekends, the 30-day requirement must be verified by reference to a calendar for the exact months in question.

If the TOD deed involves land in more than one county, recording must be done in each of the counties, and the 30-day requirement applies to each county separately.

A single transfer on death deed by joint tenant transferors is executed for the purposes of the act when the last of the joint transferors executes it; and the 30 day period begins at that time. If any joint tenant transferor dies before the TOD deed is recorded, but at least one joint tenant transferor survives until after it is properly recorded, the TOD deed will be valid. NOTE: It is preferred that a TOD deed by joint tenant transferors be recorded within thirty days of the first signature by a transferor.

A single transfer on death deed by joint tenant transferors is not effective until the death of the last to die of the joint tenant transferors.

If the transferor is a joint tenant in the subject property and is not joined in the TOD deed by the other joint tenants, then the TOD deed is effective only if the transferor is the last surviving joint tenant. The joint tenancy is not severed by such a TOD deed.

If the transferors are tenants in common executing a single TOD deed, then each interest should be treated separately as to date of execution and the TOD deed should be recorded within 30 days of the first execution; and if any tenant in common transferor dies before such recording, the TOD deed is invalid as to the interest of the deceased transferor.

A single TOD deed by multiple transferors who are tenants in common should become effective as to each interest when the owner of that interest dies, and that interest would then be subject to inheritance tax. The amendment to Section 76-3410 referred to herein does not make this clear, and it is not reasonable to hold that a TOD deed by tenants in common is not effective until all transferors have died because this may leave the estate proceeding, determination of augmented estate and allowances, creditor's rights and inheritance taxes of a deceased co- transferor in abeyance for an indefinite period (until 90 days after the death of the last transferor), a period during which the tax bears interest and penalties and during which the creditors' rights may expire. Nevertheless, because of the wording of the statute, the title to the subject property is not marketable until 90 days after the death of the last tenant in common transferor and the termination of the beneficiary's survival period, if longer, unless the cause of action to determine the disinterest of the witnesses arises at the death of the first transferor to die and in that case the action could be commenced at that time and up until 90 days after the death of the last transferor to die.

If the transferor is a married person, a waiver of marital rights and homestead rights or a consent to the transfer by the spouse should be present in the TOD deed.

To determine whether the TOD deed has been revoked, consult Title Standard No. 17.2.

If a mortgage lien has been placed on the subject property by the transferor or a predecessor in title, the lien is prior and superior to the interest of the TOD beneficiary(ies). If the mortgage lien is being foreclosed, the TOD beneficiary(ies) should be made parties to the action as owners of an interest junior to the mortgage lien and necessary to the action; and if the mortgage lien is represented by a deed of trust being foreclosed extra-judicially, the trustee's deed should recite that the notice of default was delivered to the TOD beneficiary(ies). If the transferor dies during the enforcement of the mortgage lien, the beneficiary(ies) will become the trustors after the survival period, subject to the 90-day period for filing a contest of the disinteredness of the witnesses.

During the life of the transferor; a TOD deed does not affect an interest or right of the transferor; does not affect an interest or right of a transferee; does not affect an interest or right of a secured or unsecured creditor or future creditor of the transferor; does not affect the transferor's or designated beneficiary's eligibility for any form of public assistance; does not create a legal or equitable interest in favor of the designated beneficiary; and does not subject the property to claims or process of a creditor of the designated beneficiary.

PRACTICE GUIDELINES FOR ATTORNEYS:

(1) Because of the interplay between Section 76-3410 and a transfer on death deed with multiple transferors who are tenants in common, TOD deeds for fractional interests held by tenancy in common without a right of survivorship should be prepared separately for each separate fractional interest.

(2) Issues involved with timely recording also militate against a TOD deed with multiple joint tenants as transferors, unless they can execute the TOD deed at one time and place.

17.2. TRANSFER ON DEATH DEEDS; REVOCATION

A. A TRANSFER ON DEATH DEED MAY BE REVOKED AS FOLLOWS:

1. BY A FORMAL REVOCATION DOCUMENT EXECUTED IN THE SAME MANNER AND WITH THE SAME FORMALITIES THAT ARE REQUIRED FOR THE TRANSFER ON DEATH DEED.

2. BY A SUBSEQUENT CONVEYANCE OF THE SUBJECT REAL PROPERTY CONTAINING A CLAUSE REVOKING THE TRANSFER ON DEATH DEED AND MAKING CLEAR THAT REVOCATION WAS INTENDED.

3. BY A SUBSEQUENT CONVEYANCE OF THE SUBJECT REAL PROPERTY WITHOUT A REVOCATION CLAUSE, WHICH OPERATES AS A REVOCATION BY INCONSISTENCY.

4. BY A SUBSEQUENT TRANSFER ON DEATH DEED THAT REVOKES THE PRIOR TOD DEED EXPRESSLY OR BY INCONSISTENCY.

5. BY THE DISSOLUTION OF THE MARRIAGE OF THE TRANSFEROR TO A BENEFICIARY OF A TOD DEED, TO THE EXTENT OF ANY DISPOSITION OR APPOINTMENT OF PROPERTY IN THE TOD DEED, UNLESS THE TOD DEED EXPRESSLY PROVIDES OTHERWISE. THE PROPERTY PASSES AS IF THE FORMER SPOUSE FAILED TO SURVIVE THE TRANSFEROR. LEGAL SEPARATION DOES NOT AFFECT THE TOD DEED. ANNULMENT IS TREATED SIMILARLY TO DISSOLUTION.

B. A REVOCATION OF A TRANSFER ON DEATH DEED, FORMALLY OR BY INCONSISTENCY, IS VALID ONLY IF RE.CORDED 1) BEFORE THE DEATH OF THE TRANSFEROR OF THE TOD DEED, AND 2) IN ANY EVENT, WITHIN 30 DAYS OF ITS EXECUTION.

C. A REVOCATION IS EFFECTIVE EVEN THOUGH THE TRANSFER ON DEATH DEED OR OTHER INSTRUMENT SAYS IT IS IRREVOCABLE.

D. REVOCATION BY ONE TRANSFEROR DOES NOT AFFECT A TOD DEED AS TO THE INTEREST OF ANY OTHER TRANSFEROR; BUT A TOD DEED OF JOINT TENANT OWNERS MUST BE REVOKED BY ALL LIVING JOINT TENANTS.

NOTE: A FORMAL REVOCATION DOES NOT REQUIRE JOINDER OF SPOUSE.

COMMENTS:

1. Formalities of execution.

It should be determined that a formal revocation was executed by the transferor in the presence of two disinterested witnesses, and properly acknowledged before a notary public. For discussion of disinterested witness, see Title Standard 17 .1.)

If the revoking transferor is a married person, a waiver of marital rights and homestead rights or a consent to the revocation by the spouse is not necessary.

2. Revocation by joint tenants.

Where the transferors are joint tenants, a revocation by all of the joint tenants is effective immediately. A revocation by one of the joint tenants is ineffective to revoke the TOD deed unless the joint tenant executing the revocation is the last surviving joint tenant.

3. Revocation by tenants in common.

Revocation by tenants in common: Where the transferors are tenants in common, a revocation by one of them revokes only as to the interest of that cotenant, and the remaining_ interests continue to be effective.

4. Closings where revocations are involved.

(a) It is imperative, when dealing with revocation of transfer on death deeds, to keep in mind that a written revocation, including a revocation by inconsistency where there is no reference to revocation, must be recorded before the death of the transferor, and in all events, within 30 days of its execution, in the county where the subject property is located. Therefore, when closing a transaction where an unrevoked TOD deed is recorded against the subject property, care must be taken that documents executed prior to closing and effecting a revocation of the TOD deed are not held past the deadlines stated above. Recording requirements are addressed in Title Standard 17.1.

(b) WARNING: If an inconsistent transfer of the real property affected is contemplated by the transferor, and the transferor dies before the closing, and the executed revocations are not recorded, it may be that the transaction cannot thereafter be consummated (subject to the survival requirement discussed in Title Standard 17.4.). Therefore, all executed revocations should be recorded as soon as possible, preferably before ·the sale contract or loan agreement is executed. This issue is further addressed in Title Standard 17.5. as to sales and encumbrances.

17.3. TRANSFER ON DEATH DEEDS; POWERS OF ATTORNEY.

BECAUSE OF THE STATUTORY PROVISIONS FOR EXECUTION OF A TRANSFER ON DEATH DEED AND OF A FORMAL REVOCATION THEREOF, AN AGENT ACTING UNDER POWER OF ATTORNEY MAY NOT EXECUTE A TOD DEED OR FORMAL REVOCATION OF A TOD DEED ON BEHALF OF THE PRINCIPAL AS TRANSFEROR.

AN AGENT ACTING UNDER A POWER OF ATTORNEY ON BEHALF OF A TRANSFER ON DEATH DEED TRANSFEROR MAY NOT EXECUTE A CONVEYANCE THAT IS INCONSISTENT WITH A TOD DEED BY THE PRINCIPAL AS TRANSFEROR, UNLESS THE POWER OF ATTORNEY EXPRESSLY GRANTS THE AGENT THAT AUTHORITY.

COMMENT:

Revised Statutes Section 30-4024 provides that an agent acting under a power of attorney may not create or change a beneficiary designation without express authority in the power of attorney. See also Sections 76-3409 and 76-3423. In ordinary circumstances an inconsistent deed is a change of beneficiary.

An agent acting under a power of attorney on behalf of a TOD deed transferor may execute an encumbrance of the subject property if specific authority is granted by the power of attorney. An encumbrance without such authority would, in effect, create a beneficiary in the person of the lender.

17.4. TRANSFER.ON DEATH DEED; TRANSFEROR LIVING; BENEFICIARY HAS PREDECEASED TRANSFEROR.

A TRANSFER ON DEATH DEED HAS NO EFFECT IF THE BENEFICIARY PREDECEASES THE TRANSFEROR, OR FAILS TO SURVIVE THE TRANSFEROR BY 120 HOURS, OR BY THE TIME SPECIFIED IN THE TOD DEED; OR IF THE BENEFICIARY DISCLAIMS OR RELINQUISHES THE INTEREST.

IF THE BENEFICIARY HAS PREDECEASED THE TRANSFEROR AS PROVIDED IN THE PREVIOUS PARAGRAPH, THE FACT SHOULD BE ESTABLISHED BY RECORDING A DEATH CERTIFICATE OF THE BENEFICIARY.

IF THE BENEFICIARY SURVIVES THE TRANSFEROR IN FACT, BUT DOES NOT SURVIVE THE TRANSFEROR FOR THE DESIGNATED TIME PERIOD, THE DEATH CERTIFICATE SHOULD BE SUPPORTED BY AN AFFIDAVIT.

IF THE BENEFICIARY HAS RECORDED A RENUNCIATION OR DISCLAIMER UNDER SECTION 30-2352 OF THE NEBRASKA UNIFORM PROBATE CODE, WITHIN NINE MONTHS OF THE DEATH OF THE TRANSFEROR, THE INTEREST OF THE BENEFICIARY IS TREATED AS THOUGH THE BENEFICIARY PREDECEASED THE TRANSFEROR.

THE EFFECT OF THE BENEFICIARY'S PREDECEASING THE TRANSFEROR IS THAT TITLE TO THE INTEREST REMAINS IN THE TRANSFEROR, IF THERE IS NO OTHER BENEFICIARY; IF THERE ARE OTHER BENEFICIARIES, THE INTEREST OF THE PREDECEASED BENEFICIARY IS APPORTIONED TO THE REMAINING BENEFICIARIES IN PROPORTION TO THEIR RESPECTIVE INTERESTS, OR AS PROVIDED IN THE TOD DEED.

COJ\1MENTS:

1. Beneficiary predeceases transferor(s).

Where there is one beneficiary, title remains in the transferor if the beneficiary predeceases the transferor(s).

If there are multiple transferors who are all joint tenants, title remains in the surviving joint tenants if the beneficiary predeceases one or more but not all of the transferors.

If there are multiple transferors who are tenants in common, and the sole beneficiary predeceases all transferors, title remains in the transferors.

If there are multiple transferors who are tenants in common, and the sole beneficiary survives some and not others, then the beneficiary succeeds to the interests of those the beneficiary survives, and title remains in those whom the beneficiary predeceased.

If there are multiple transferors who are tenants in common and multiple beneficiaries, the above principles apply as to each separate common interest.

The title is unmarketable if the beneficiary is alive but the survival period has not expired. It is also unmarketable during the 90-day period after the· transferor's death during which a suit can be filed to contest whether the witnesses to the TOD deed were disinterested.

Procedures in situations where beneficiaries survive the transferor(s) are discussed in Title Standard 17.6.

2. Multiple beneficiaries: One or more but not all predecease the transferor.

Section 76-3415 has default provisions for survival by multiple beneficiaries. These are that multiple beneficiaries of a TOD deed are not joint tenants, and when a beneficiary predeceases or is deemed to have predeceased a transferor the remaining beneficiaries take in equal shares as tenants in common, but if, as is permitted, the transferor has created unequal shares, then the predeceased beneficiary's interest is distributed pro rata to the other beneficiaries.

The statute allows the transferor in the TOD deed to alter the rules applying to multiple beneficiaries by providing for contingent beneficiaries, anti-lapse, joint tenancy, and other special provisions (including a different survival period). If these provisions exist, care must be taken to determine exactly the disposition of the predeceased beneficiary's interest.

3. Disclaimer (renunciation).

Section 30-2352 of the Nebraska Uniform Probate Code governs renunciation or disclaimer of interests by beneficiaries, and is incorporated by reference in the Nebraska Uniform Real Property Transfer on Death Act, Section 76-3416.

Under that section of the probate code a beneficiary may renounce an interest in writing, and if done within nine months of the death of the transferor, inheritance taxes and estate taxes will not be due from the beneficiary. The instrument of renunciation must describe the property or the interest therein which is renounced, be signed and acknowledged by the person renouncing in the manner of deeds of real estate, declare the renunciation, and declare that the renunciation is an irrevocable and unqualified refusal to accept the renounced interest.

The renunciation statute further requires that the instrument of renunciation be delivered to the owner of the property or to the personal representative of the deceased owner; and that it be filed in the County Court where proceedings concerning the estate of the decedent are pending or would be pending if commenced. It must also be recorded in the office of the register

of deeds in each county where the real estate lies. If there is no pending proceeding in which a personal representative has been appointed, then filing in the appropriate county court in the manner of a demand for notice, together with recording in the proper county, should be sufficient compliance.

The renunciation causes the renounced interest to pass according to law, which in the case of TOD deeds is that title would remain subject to administration in the transferor's estate until such time as proceedings to determine devolution of title were completed, unless there are other beneficiaries to the interest who would take by operation of Section 76-3415(a)(3) and (4).

Since a beneficiary has no interest in the subject property before surviving the transferor as provided by law, no inheritance lien is raised when a beneficiary fails to survive the transferor.

17.5. TRANSFER ON DEATH DEEDS: TRANSFER ON DEATH DEED FOUND OF RECORD; NO REVOCATION OF RECORD. TRANSFEROR INTENDS TO SELL OR ENCUMBER THE REAL PROPERTY DESCRIBED IN THE TOD DEED, OR SOME PART THEREOF.

SINCE THE TRANSFER ON DEATH DEED IS NOT AN EFFECTIVE TRANSFER UPON ITS EXECUTION OR RECORDING, THE TRANSFEROR MAY SUBSEQUENTLY SELL OR ENCUMBER THE REAL PROPERTY OR ANY PART THEREOF, OR ANY INTEREST THEREIN.

SUCH A CONVEYANCE OR ENCUMBRANCE REVOKES THE TRANSFER ON DEATH DEED BY INCONSISTENCY, AND WHERE THERE IS A SERIES OF INCONSISTENT TOD DEEDS, ONLY THE LAST TOD DEED IS EFFECTIVE.

AN INSTRUMENT REVOKING A TRANSFER ON DEATH DEED MUST BE RECORDED PRIOR TO THE DEATH OF THE TESTATOR AND WITHIN 30 DAYS OF EXECUTION IN EACH COUNTY WHERE SUBJECT PROPERTY LIES. REFER TO TITLE STANDARDS 17.1 AND 17.2

IT IS NOT UNREASONABLE TO REQUIRE THAT ANY PRIOR TOD DEED BE REVOKED BY A FORMAL REVOCATION, WHICH WOULD BE PREPARED BY THE TRANSFEROR'S ATTORNEY; NOR IS IT UNREASONABLE TO REQUIRE THAT THE CONVEYANCE OR ENCUMBRANCE BY THE TOD TRANSFEROR CONTAIN A SPECIFIC REVOCATION OF PRIOR TOD DEEDS IDENTIFIED BY SPECIFIC REFERENCES TO RECORDED DOCUMENTS.

WHERE NO REVOCATION OF THE TRANSFER ON DEATH DEED IS OF RECORD, AND THE TRANSFEROR DIES PRIOR TO CLOSING THE SALE, TITLE TO THE SUBJECT PROPERTY MAY, UNDER SOME CIRCUMSTANCES, BECOME UNMARKETABLE.

NOTE: TRANSFER ON DEATH DEEDS BY A TRANSFEROR WHOSE SPOUSE IS NOT IN TITLE TO THE INTEREST BEING TRANSFERRED ARE SUBJECT TO THE REQUIREMENTS FOR JOINDER OF SPOUSE RAISED BY R. S. NEB. SECTIONS 40- 104 (HOMESTEAD) AND 30-2314 (MARITAL RIGHTS OF SURVIVING SPOUSE), AND THEREFORE SHOULD CONTAIN WITHIN THE TOD DEED DOCUMENT A WAIVER OF SUCH RIGHTS AND A CONSENT TO THE TOD TRANSFER BY THE SPOUSE.

COMMENTS:

1. In general.

To determine the validity and effectiveness of a transfer on death deed, consult Title Standard 17 .1. To determine whether the TOD deed has been revoked, consult Title Standard No. 17.2.

Where the transferor is encumbering subject property with more than one prior TOD deed, it is reasonable, if satisfactory to the lender, to leave the latest TOD deed outstanding, if a ratification of the security instrument can be obtained from the designated beneficiary (and spouse, if married).

By statute, a conveyance or encumbrance which is inconsistent with a transfer on death deed is sufficient to revoke it, but a specific revocation by any method eliminates any question of inadvertence on the part of the transferor.

If a lien has been placed on the subject property by a security instrument executed by the transferor or a predecessor in title, the lien is prior and superior to the interest of the TOD beneficiary. Foreclosure of a security instrument when a transfer on death deed is present on the record is addressed in Title Standard 17.8.

During the life of the transferor, a TOD deed does not affect an interest or right of the transferor; does not affect an interest or right of a transferee; does not affect an interest or right of a secured or unsecured creditor or future creditor of the transferor; does not affect the transferor's or designated beneficiary's eligibility for any form of public assistance; does not create a legal or equitable interest in favor of the designated beneficiary; and does not subject the property to claims or process of a creditor of the designated beneficiary.

2. Death of transferor while sale or encumbrance is pending.

WARNING. If the transferor dies before the sale or encumbrance is closed and before the delivery of the documents consummating the sale ot encumbrance, an unrevoked transfer on death deed becomes effective (subject to the survival requirement and the 90-day period to contest the disinterest of the witnesses), and the contemplated transaction is at risk.

Section 76-3415(b) provides that a beneficiary takes subject to any contracts to which the property is subject at the transferor's death. Therefore a signed contract of sale is effective against a TODD beneficiary even if not recorded or consummated prior to the death of the transferor. However, the deed, when delivered, completes the contract, but the statute requires that a deed revoking a TOD deed must be recorded both before the death of the transferor and within 30 days of execution. Therefore, a gap period is created between delivery and recording.

A beneficiary who is subject to the transferor's contract of sale is obligated to close on the contract. In addition to execution of the deed by the beneficiary (and spouse, if any), the beneficiary must comply with the provisions of the statute with respect to recording

documentation of the transfer and completing inheritance tax proceedings. Consult Title Standard 17.7.

When a TOD deed is found of record and the transferor later intends to sell the property, a formal revocation document, prepared by the transferor's attorney, should be recorded immediately.

If the transferor dies during the pendency of a loan transaction with a contemplated encumbrance of the property subject to the TOD deed, the process would terminate. If the loan is consummated and the proceeds are transferred to the TOD deed transferor, then the loan and security should be valid even if the security instrument is recorded after the transferor's death, as long as recording is not unreasonably delayed. Since there is no timely recording issue for encumbrances under the Act, the law of delivery should protect the lender from the beneficiary and the beneficiary's existing creditors.

The reasoning of the preceding paragraph would also apply to easements, mineral and other leases, and other consensual matters. On the other hand, certain non-consensual liens such as judgments and tax liens will not attach to the property after the transferor's death, unless the beneficiary does not survive or is otherwise deemed to have predeceased the transferor. Construction liens are in rem and therefore would not be affected by the death of the transferor.

17.6. TRANSFER ON DEATH DEEDS: TRANSFEROR IS DECEASED; NO REVOCATION IS OF RECORD; BENEFICIARY'S DUTIES.

THE TRANSFER ON DEATH DEEDS ACT IS EFFECTIVE ON JANUARY 1, 2013, AND APPLIES ONLY TO TRANSFERORS DYING ON OR AFTER THAT DATE.

WHEN THE TRANSFEROR, OR THE LAST SURVIVING JOINT TENANT TRANSFEROR, IS DECEASED, THE TRANSFER ON DEATH DEED BECOMES EFFECTIVE AS FOLLOWS:

A DEATH CERTIFICATE OF THE TRANSFEROR, OR OF EACH OF THE JOINT TENANT TRANSFERORS, MUST BE RECORDED, EACH ACCOMPANIED BY A REAL ESTATE TRANSFER STATEMENT.

THE INHERITANCE TAX ARISING ON ACCOUNT OF THE DEATH OF THE TRANSFEROR, OR OF THE LAST SURVIVING JOINT TENANT TRANSFEROR, AS WELL AS ON ACCOUNT OF THE DEATH OF A PREVIOUSLY DECEASED JOINT TENANT TRANSFEROR OR ANY OTHER TRANSFEROR WHERE THERE ARE MULTIPLE TRANSFERORS, MUST BE DETERMINED AND PAID.

IF THE TRANSFERORS ARE TENANTS IN COMMON, THEN THE TRANSFER ON DEATH DEED SHOULD BECOME EFFECTIVE AS TO EACH DECEDENT'S SHARE AT THE TIME OF DEATH OF EACH COTENANT, AND EACH INTEREST BE SUBJECT TO THE REQUIREMENT OF A RECORDED DEATH CERTIFICATE, REAL ESTATE TRANSFER STATEMENT, AND DETERMINATION AND PAYMENT OF INHERITANCE TAX. IF SUCH TRANSFERORS EXECUTED ONE TRANSFER ON DEATH DEED, THE INTERESTS ARE AFFECTED BY THE PROVISION FOR A 90-DAY PERIOD TO CONTEST THE DISINTERESTEDNESS OF THE WITNESSES, AND THIS PROVISION MAKES THE TITLE UNMARKETABLE UNTIL 90 DAYS AFTER THE DEATH OF THE LAST SURVIVING TRANSFEROR (LB 345, LAWS 2013, AMENDING SEC. 76-3410).

NOTE: TRANSFER ON DEATH DEEDS BY A TRANSFEROR WHOSE SPOUSE IS NOT IN TITLE TO THE INTEREST BEING TRANSFERRED ARE SUBJECT TO THE REQUIREMENTS FOR JOINDER OF SPOUSE RAISED BY R. S. NEB. SECTIONS 40- 104 (HOMESTEAD) AND 30-2314 (MARITAL RIGHTS OF SURVIVING SPOUSE), AND THEREFORE SHOULD CONTAIN WITHIN THE TOD DEED DOCUMENT A WAIVER OF SUCH RIGHTS AND A CONSENT TO THE TOD TRANSFER BY THE SPOUSE.

COMMENTS:

1. Interest of beneficiary

A designated beneficiary of a transfer on death deed must survive the transferor by 120 hours, otherwise, such beneficiary will be considered to have predeceased the testator and will take nothing. The survival period may be altered by the provisions of the TOD deed.

A designated beneficiary of a transfer on death deed must not have relinquished his interest under Neb. Rev. Stat. Sec. 30-2352; a relinquishment of a subject real property interest must be recorded in the real estate records of the county where such real property is located.

The interest of a designated beneficiary is not perfected until the death certificate is properly recorded. An inheritance tax lien is raised by the death of the transferor, and the tax must be determined in a proper proceeding for that purpose.

The interest of a beneficiary :under a transfer on death deed may be affected by a contract to make a conflicting transfer on death deed or a contract not to revoke the subject transfer on death deed, but such contract must be in writing and signed by the transferor on or after January 1, 2013. A contract not to revoke a TOD deed cannot be enforced against the subject property under Section 76-3406, which provides that a TOD deed is never irrevocable.

2. Obligations of designated beneficiary.

The interest of a designated beneficiary in a transfer on death deed is subject to the claims against the estate of the deceased transferor, and the personal representative may require such beneficiary to account for the value of the real property in order to pay such claims.

The interest of a designated beneficiary in a transfer on death deed is subject to Medicaid reimbursement relative to the transferor.

The Department of Health and Human Services can require revocation of a transfer on death deed in order for the transferor to qualify for benefits, and it may be necessary to determine whether such a requirement was made.

These obligations are personal to the beneficiary and do not affect the real property unless they are reduced to judgment and attach to the real property as judgment liens.

3. Multiple transferors who are tenants in common.

A single TOD deed by multiple transferors who are tenants in common should become effective as to each interest when the owner of that interest dies, and that interest would then be subject to inheritance tax. The amendment to Section 76-3410 referred to herein does not make this clear and it is not reasonable to hold that a TOD deed by tenants in common is not effective until all transferors have died because this may leave the estate proceeding, determination of

augmented estate and allowances, creditor's rights and inheritance taxes of a deceased co- transferor in abeyance for an indefinite period (until 90 days after the death of the last transferor), a period during which the tax bears interest and penalties and during which the creditors' rights may expire. Nevertheless, because of the wording of the statute, the title *to* the subject property is not marketable until 90 days after the death of the last tenant in common transferor and the termination of the beneficiary's survival period, if longer, unless the cause of action to determine the disinterest of the witnesses arises at the death of the first transferor to ·die and in that case the action could be commenced at that time and up until 90 days after the death of the last transferor to die.

4. Validity and effectiveness of transfer on death deeds; revocation.

To determine the validity and effectiveness of a transfer on death deed, consult Title Standard 17.1. To determine whether the TOD deed has been revoked, consult Title Standard No. 17.2.

5. Prior security instrument found of record.

If a lien has been placed on the subject property by a security instrument executed by the transferor or a predecessor in title, the lien is prior and superior to the interest of the TOD beneficiary. Foreclosure of security instruments where a transfer on death deed is present on the record is addressed in Title Standard 17.8.

6. Warranties.

A transfer on death deed transfers the subject property without covenant or warranty, even if the TOD deed contains a contrary provision.

17.7. TRANSFER ON DEATH DEEDS: TRANSFER ON DEATH DEED OF RECORD; NO REVOCATION OF RECORD; PROOF OF DEATH OF TRANSFEROR(S) OF RECORD; SALE OR ENCUMBRANCE BY BENEFICIARY.

SUBJECT TO THE 90-DAY PERIOD FOR FILING ACTION TO CONTEST THE DISINTEREST OF WITNESSES, AND SUBJECT TO THE PROVISIONS FOR SURVIVAL OF THE BENEFICIARY, TITLE TO PROPERTY TRANSFERRED TO A BENEFICIARY BY A TRANSFER ON DEATH DEED, WHEN ACQUIRED BY A PURCHASER OR LENDER FOR VALUE, IS FREE OF ANY CLAIMS OF THE ESTATE, PERSONAL REPRESENTATIVE, SURVIVING SPOUSE, CREDITORS, AND ANY OTHER PERSON CLAIMING BY OR THROUGH THE TRANSFEROR OF THE TRANSFER ON DEATH DEED, INCLUDING ANY HEIR OR BENEFICIARY OF THE ESTATE OF THE TRANSFEROR, AND THE PURCHASER OR LENDER SHALL NOT INCUR ANY PERSONAL LIABILITY TO SUCH PERSONS OR ENTITIES, WHETHER OR NOT THE CONVEYANCE BY THE TOD DEED WAS PROPER.

A PURCHASER OR LENDER FOR VALUE FROM A BENEFICIARY OF A TRANSFER ON DEATH DEED DOES NOT TAKE TITLE FREE OF ANY LIEN FOR INHERITANCE TAX ARISING FROM THE DEATH OF THE TOD DEED TRANSFEROR OR ANY PRIOR OWNER IN THE CHAIN OF TITLE.

NOTE: TRANSFER ON DEATH DEEDS BY A TRANSFEROR WHOSE SPOUSE IS NOT IN TITLE TO THE INTEREST BEING TRANSFERRED ARE SUBJECT TO THE REQUIREMENTS FOR JOINDER OF SPOUSE RAISED BY R. S. NEB. SECTIONS 40-104 (HOMESTEAD) AND 30-2314 (MARITAL RIGHTS OF SURVIVING SPOUSE), AND THEREFORE SHOULD CONTAIN WITHIN THE TOD DEED DOCUMENT A WAIVER OF SUCH RIGHTS AND A CONSENT TO THE TOD TRANSFER BY THE SPOUSE.

COMMENTS:

1. Interest of beneficiary

A designated beneficiary of a transfer on death deed must survive the transferor by 120 hours, otherwise, such beneficiary will be considered to have predeceased the testator and will take nothing. The survival period may be altered by the provisions of the TOD deed. The title to the subject property is unmarketable during the survival period.

A designated beneficiary of a transfer on death deed must not have relinquished his interest under Neb. Rev. Stat. Sec. 30-2352; a relinquishment of a subject real property interest must be recorded in the real estate records of the county where such real property is located.

At the death of the last surviving transferor of a TOD deed, there is a 90-day period during which an action may be filed to contest that the witnesses to the TOD deed are disinterested. The language of the statute is such as to apply to TOD deeds wherein the transferors are tenants in common executing a single TOD deed. Therefore the title to the subject property where tenants in common execute a single TOD deed is unmarketable until 90 days after the death of the last surviving transferor, and if such a suit is filed, until the issue is finally resolved by the courts.

The interest of a designated beneficiary is not perfected until the a death certificate of the transferor is properly recorded (see Title Standard 17.6.). An inheritance lien is raised by the death of the transferor, unless the designated beneficiary is a surviving spouse.

The interest of a beneficiary under a transfer on death deed may be affected by a contract to make a conflicting transfer on death deed or a contract not to revoke the subject transfer on death deed, but such contract must be in writing and signed by the transferor on or after January 1, 2013. A contract not to revoke is ineffective against the real estate because Section 76-3406 provides for revocability in all circumstances.

2. Multiple beneficiaries of a transfer on death deed.

The default provision of the statute is that multiple beneficiaries of a transfer on death deed are not joint tenants, but if any beneficiary cannot take for any reason (such as predeceasing the transferor or failing to survive for 120 hours), then the remaining beneficiaries take in equal or proportionate shares as tenants in common. The TOD deed may provide for contingent beneficiaries, anti-lapse, joint tenancy, and other special provisions. Care must therefore be taken in examining a TOD deed when issues of survival by designated or contingent beneficiaries are involved.

3. Obligations of designated beneficiary.

The interest of a designated beneficiary in a transfer on death deed is subject to the claims against the estate of the deceased transferor, and the personal representative may require such beneficiary to account for the value of the real property in order to pay such claims.
The interest of a designated beneficiary in a transfer on death deed is subject to medicaid reimbursement relative to the transferor.

The Department of Health and Human Services can require revocation of a transfer on death deed in order for the transferor to qualify for benefits, and it may be necessary to determine whether such a requirement was made.

4. Validity and effectiveness of transfer on death deeds; revocation.

To determine the validity and effectiveness of a transfer on death deed, consult Title Standard 17.1To determine whether the TOD deed has been revoked, consult Title Standard No. 17.2.

5. Prior security instrument found of record.

If a lien has been placed on the subject property by a security instrument executed by the transferor or a predecessor in title, the lien is prior and superior to the interest of the TOD beneficiary. Foreclosure of security instruments where a transfer on death deed is present on the record is addressed in Title Standard 17.8.

6. Warranties.

A transfer on death deed transfers the subject property without covenant or warranty, even if the TOD deed contains a contrary provision.

17.8. TRANSFER ON DEATH DEEDS: LEGAL ENTITIES AS BENEFICIARIES.

THE NEBRASKA UNIFORM REAL PROPERTY TRANSFER ON DEATH ACT DEFINES A TRANSFEROR AS AN "INDIVIDUAL." IT DEFINES A BENEFICIARY OR DESIGNATED BENEFICIARY AS A "PERSON."

THE ACT DEFINES A "PERSON" AS 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.

COMMENTS:

Although the act does not address it, a legal entity should not be subject to any survival requirement. The TOD deed to a designated beneficiary which is a legal entity should be carefully examined to determine if a survival requirement is to be applied or eliminated. If no provision is made, the 120 hour survival requirement will apply.

Otherwise, a legal entity which is a beneficiary or designated beneficiary is treated in the same way as an individual beneficiary or designated beneficiary.

17.9. TRANSFER ON DEATH DEEDS: PROPERTY SUBJECT TO SECURITY INSTRUMENT OR OTHER LIEN OR ENCUMBRANCE OF RECORD.

A SECURITY INSTRUMENT SUCH AS A MORTGAGE OR DEED OF TRUST, WHETHER RECORDED BEFORE OR AFTER A TRANSFER ON DEATH DEED, IS PRIOR AND SUPERIOR TO THE INTEREST OF A TRANSFER ON DEATH DEED BENEFICIARY IF OTHERWISE VALID.

A BENEFICIARY TAKES THE PROPERTY SUBJECT TO ALL ·CONVEYANCES, ENCUMBRANCES, ASSIGNMENTS, CONTRACTS, MORTGAGES, LIENS, AND OTHER INTERESTS TO WHICH THE PROPERTY IS SUBJECT AT THE TRANSFEROR'S DEATH, AS WELL AS ANY LIENS WHICH ATTACH BY VIRTUE OF THE BENEFICIARY'S ACCESSION TO TITLE.

COMMENTS:

If a lien has been placed on the subject property by a security instrument, whether by the transferor or by a predecessor in title, the lien is prior and superior to the interest of the TOD deed beneficiary.

If the security instrument is being foreclosed, the TOD beneficiary(ies) should be made parties to the action as owners of an interest junior to the mortgage lien and necessary to the action; and if the mortgage lien is represented by a deed of trust being foreclosed extra-judicially, the trustee's deed should recite that the notice of default was delivered to the TOD beneficiary(ies). If the transferor dies during the enforcement of the mortgage lien, each beneficiary will become an owner/trustor after the applicable survival period and the action should continue in the names of the beneficiaries.

If the security is instrument is foreclosed after the death of the transferor and the applicable survival period, each TOD deed beneficiary is a real party in interest and the foreclosure should proceed in the usual manner.

If all beneficiaries have predeceased the transferor, then the subject property belongs to the transferor and foreclosure proceedings should be against the transferor or against the transferor's estate and successors in the usual manner.

After the beneficiary is in title, the security instrument remains the obligation of the beneficiary unless the transferor has exonerated the beneficiary from liability by a specific provision in the transferor's will.

After the beneficiary succeeds to title, the property is subject to all the liens, easements, and other burdens which existed at the transferor's death, and the transfer to the beneficiary is

without covenant or warranty even if the TOD deed recites otherwise.

The transferor's contract for a sale of the subject property, pending at transferor's death, is addressed in Title Standard 17 .5.

The same considerations apply to other types of liens against the transferor, as well as any liens which attach to the real property by virtue of passage of title to the beneficiary.

17.10 TRANSFER ON DEATH DEEDS; WHETHER SUBSEQUENT DEEDS IN CHAIN OF TITLE AFTER TRANSFER ON DEATH DEEDS ARE CONSISTENT OR INCONSISTENT WITH THE TRANSFER ON DEATH DEED AND WHETHER OR NOT THE TRANSFER ON DEATH DEED IS REVOKED THEREBY IF THERE IS NO SPECIFIC REVOCATION.

A SUBSEQUENT DEED OF CONVEYANCE IN THE CHAIN OF TITLE WHICH TRANSFERS ANY INTEREST OF A TRANSFEROR TO A THIRD PARTY IS INCONSISTENT WITH THE TRANSFER ON DEATH DEED AND REVOKES IT WITH RESPECT TO THAT INTEREST IF RECORDED IN THE MANNER ADDRESSED IN TITLE STANDARD 17.2.

A SUBSEQUENT DEED OF CONVEYANCE IN THE CHAIN OF TITLE WHICH TRANSFERS THE ENTIRE INTEREST OF THE SOLE TRANSFEROR TO THE SOLE DESIGNATED BENEFICIARY IS INCONSISTENT WITH THE TRANSFER ON DEATH DEED AND EXTINGUISHES THE TRANSFER ON DEATH DEED BY MERGER REGARDLESS OF THE RECORDING DATE BUT MUST BE DELIVERED AND RECORDED PRIOR TO THE DEATH OF THE TRANSFEROR.

A SUBSEQUENT DEED OF CONVEYANCE IN THE CHAIN OF TITLE REVESTING THE INTERESTS OF THE TRANSFERORS, WHERE MORE THAN ONE, EVEN IF IT INVOLVES INCHOATE INTERESTS IN THIRD PARTY SPOUSES, IS NOT INCONSISTENT WITH THE TRANSFER ON DEATH DEED, AND THEREAFTER THE DEVOLUTION OF THE INTERESTS OF THE TRANSFERORS IS GOVERNED BY THE STATUTORY RULES ACCORDING TO THE TYPE OF TENANCY IN WHICH IT IS HELD AS EACH TRANSFEROR DIES.

COMMENTS:

1. Revocation by inconsistency.

Revocation by inconsistency is addressed in Title Standard 17 .2.

A subsequent deed of conveyance in the chain of title which transfers the interest of a joint tenant transferor in the subject property to a third party severs the joint tenancy and is inconsistent with the TOD deed to the extent of the transferor's interest; therefore it revokes the TOD deed as to that interest if recorded in the manner addressed in Title Standard 17 .2.

Individuals among multiple transferors may make subsequent deeds affecting title. For example, a transferor owning an interest in the land might transfer the interest to self and spouse as joint tenants, or to a trustee. In this example, the subsequent deed would sever any joint tenancy with other transferors and would affect the interest of the designated beneficiary if the

original owner-spouse transferor preceded the original non-owner spouse in death. If the spouses created a tenancy in common, that subsequent deed is inconsistent without question. Therefore, any subsequent deed in which a new party receives a vested or contingent interest raises a revocation by inconsistency and, to be effective as a revocation, should be recorded in the manner addressed in Title Standard 17 .2.

2. Extinguishment of transfer on death deeds by merger.

A subsequent deed of conveyance in the chain of title which transfers the entire interest of the sole transferor to the sole designated beneficiary clearly extinguishes the TOD deed by merger. If there are other transferors as to whom the grantor transferor is a tenant in common the same rule applies to that interest. A deed from a transferor who is a joint tenant with other transferors severs the joint tenancy as to that interest and the result is the same, but only as to that interest. In these cases the 30 day recording rule is not an issue, but the deed should nevertheless be delivered and recorded prior to the death of the transferor. In all cases, the name of the designated beneficiary should be identical in both the deed of conveyance and the TOD deed. Even if the title does not merge, the subsequent deed is not inconsistent, so the TOD deed remains effective and title can be transferred to the designated beneficiary at the transferor's death (see Title Standard 17 .6.).

The issue of merger is complicated by the existence of multiple beneficiaries. 1) If there are multiple designated beneficiaries, the subsequent deed of conveyance from the transferor must place title in the exact names and in the exact shares stated in the TOD deed.. 2) If one or more of the designated beneficiaries is deceased, the subsequent deed of conveyance will be to the remaining designated beneficiaries and state the exact shares if the shares are not equal.
3) In all the above cases, if there are contingent beneficiaries, an anti-lapse clause, or other matters not determinable prior to the death of the transferor, then the subsequent deed of conveyance is inconsistent and must be recorded prior to the death of the transferor and within 30 days of its execution in all counties wherein the land lies.

3. Revesting of title among transferors.

If there are multiple transferors who wish to revest title (e.g., change tenancy in common to joint tenancy or vice versa), this can be done by a subsequent deed of conveyance which will be consistent with an existing TOD deed. Even if spouses are required to execute the revesting deed for reasons of waiver of homestead or augmented estate rights, this will be consistent so long as the transferors remain the only owners of the revested interest, without discrepancy in names. It will alter the subsequent consequences of the transferors' deaths under the TOD deed, but this is presumably not an inconsistency affecting a substantial right of the designated beneficiary, who has no substantial rights other than those granted by the transferors.

NOTES: 1) All of the above comments apply similarly to partial interests carved out by a transferor who retains the balance of the interest or conveys it to another person or persons.
2) The conclusions in these comments are subject to interpretation by the courts.

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Appendix

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NEBRASKA REAL ESTATE TITLE STANDARDS

APPENDIX

I. BACKGROUND OF NEBRASKA REAL ESTATE TITLE STANDARDS

Reportedly, the Dodge County Bar Association was the first group in Nebraska to formulate a set of standards in 1928. Gage County and other counties in eastern Nebraska followed suit. The Nebraska State Bar Association formed a title standards committee in about 1937. This committee promulgated its first list of standards in 1939 under the chairmanship of Richard O. Williams of Lincoln.

The initial committee stated a hope that the standards would *"have high persuasive value in instances where our Supreme Court may subsequently have occasion to rule on similar questions"*.

Professor Lewis M. Simes of the University of Michigan Law School wrote in his introduction to Simes and Taylor Model Title Standards, published in 1960:

> It would seem that a standard should represent the substantial unanimous opinion of the members of the bar who are experienced conveyancers, but it should involve a question upon which inexperienced conveyancers may be uninformed, or with respect to which over-meticulous conveyancers may take a position opposed to that of practically all competent, experienced conveyancers. In other words, it should not be a question which is controversial among competent, experienced conveyancers, but it should be one upon which the inexperienced may go wrong or *"fly specker"* may reach an unreasonable conclusion.

The forms of standards vary from state to state. The original model standards constituted a fairly comprehensive set of standards arranged by subject matter. Some states, such as Iowa, have standards posing a question and giving an answer with citations or commentary. Nebraska has used a *"brush fire"* approach attempting to address questions which seem to arise in several areas of the state.

As noted in the preface, Nebraska through 1993 had adopted 103 standards which were arranged in numerical order as adopted, without any effort to coordinate or codify standards by topic.

The Real Estate Practice Guidelines Committee members have felt that the Nebraska Standards would be much easier for the practitioner to use in determining procedures and propriety of real estate transactions if the standards were updated, geared more toward the factor of guidelines for handling real estate transactions with current commentary, and codified. The early Title Standards Committee considered its hope that standards would have high persuasive value in instances where the Supreme Court may subsequently have occasioned a rule on similar questions realized in 1942. Then, the Supreme Court at 141 Neb. 429, 3 NW 2d 750, (1942) reversed its 1941 decision in *Campagna v. Home Owners' Loan Corp.*, 140 Neb. 572, 300 N.W. 894. The court in 1941 held that a buyer was entitled to recover an earnest money deposit on an unperformed contract of sale where the contract provided that defendant would convey the property to plaintiff *"free and clear of all liens and encumbrances whatsoever"*. The court originally held that a dormant judgment *"standing on the public records unpaid and uncancelled, though unenforceable as a lien, nevertheless impedes the transfer as shown by uncontradicted evidence"*. On rehearing, the Nebraska Bar Association Title Standards Committee members (Richard O. Williams, Arthur C. Sidner, Franklin L. Pierce, Claude S. Wilson, Alexander McKie, Maurice S. Havelone and Lewis R. Rickets) appeared as *amici curiae*. The court ruled

> "in the instant case, the law clearly demonstrates that the judgment is unenforceable. ... the land was free from the lien thereof by virtue of its transfer during the dormancy of the judgment. ... we fail to see how a man of reasonable prudence, familiar with the facts and the questions of law involved in the situation before us, could seriously urge that the patently unenforceable federal judgment could impede the transfer of title."

The court did not cite the standard on dormant judgment, No. 20, now Standard 10.2, but that standard relating to dormant judgments clearly formed the basis for the decision of the court to reverse and dismiss the action instituted by Campagna.

Between the promulgation of the first set of standards in 1939 and 1947, a number of title examiners refused to accept the title standards adopted by the Bar Association Title Standards Committee. These reluctant lawyers were classed as *"hypertechnical, pettifogging, fly speckers"*. Many title examiners, as well as Title Standards Committee members, hoped that legislative enactment of the standards would gain the respect of those who had refused to observe them. The legislature adopted the *"Standards of Title Examination Act"* in Laws 1947, c. 249, as Article 6 of Chapter 76. At that time, there were 41 standards which appeared as Sections 76-604 thru 76-644.

Subsequently, members of the Title Standards Committee and the real estate practice bar recognized that the legislative enactment carried with it many disadvantages. These included lack of flexibility omission of comments and citations from the statutes, omission of newly adopted standards and distinction between the binding force of statutory standards, and optional observance of the non-legislative standards.

This caused the Bar Association to recommend the legislative standards be repealed. The legislature repealed the statutory standards in Laws 1973, LB 517. Concurrently, the legislature adopted Section 76-557 which provides *"in the compilation or examination of an abstract of title to real estate, it shall not be considered negligence for a registered abstracter or an attorney to follow the Title Standards promulgated by the Nebraska State Bar Association"*.

An additional factor supporting the repeal of the legislative enactment of the standards, is that such enactment seemed to give standards an improper suggestion of authority. Title standards are intended to reflect substantive law, and not to constitute substantive law.

Standard 10.8 provides that *"the repeal of a curative or validating law does not impair or destroy any cure or validation effected prior to its repeal"*, citing Section 49-802(11). Title examiners consider this as removing any risk that repeal of title standards previously adopted in 1947 by the Act of 1973, invalidated any of the 41 standards contained in the 1947 Law.

Although Section 76-557 and some of the older standards refer to an *"abstract of title"* or an abstract, the same principle would apply to the applicability of the standard to title insurance commitments or policies.

In some areas of the state, the local bar associations have established committees to mediate conflicts as to the quality of a real estate title or suggested procedures in handling title transactions. These committees frequently base their decisions or recommendations on title standards.

II. STANDARDS WHICH APPLY TO FORMER LAW.

The Title Standards Committee in the past adopted a number of standards which applied to laws affecting title to real estate which have been repealed or superseded.

Although title insurance has assumed a much larger share of the title market than was true as recently as the early 1980's, abstracts of title are not obsolete.

Further, in reviewing titles, frequently, an examiner will review probate files and other proceedings to verify the quality of a title.

Committee members believe that the re-codification of standards should preserve in this Appendix a number of those standards which were designed for law which has been re-pealed or amended.

This action will preserve the availability of such standards to assist parties in determining the propriety or the effectiveness of prior procedures as reflected on an abstract, in court or register of deed records.

A major portion of these standards relate to procedures and recordings or absence of recordings under the probate law as it existed prior to January l, 1977, when the Nebraska Probate Code became effective.

The provisions of Section 76-557 and of Standard 10.8, relating to repeal of curative statutes, indicate that these *"historical"* standards should be considered as authority as to proceedings with respect to which they were adopted.

These standards reflect their original standard number and caption. As to those which were among the first 41 standards adopted by the Nebraska State Bar Association, the editors have eliminated references to the respective section numbers in Chapter 6 of Article 76 of Nebraska Statutes.

STANDARD NO. 3: DESCRIPTION - ESTATES, INVENTORY OR FINAL DECREE

UNDER PROBATE LAW PRIOR TO JANUARY 2, 1977, THE EFFECTIVE DATE OF THE NEBRASKA PROBATE CODE, FAILURE TO INCLUDE OR THE ERRONEOUS DESCRIPTION OF REAL ESTATE IN AN INVENTORY OR A FINAL DECREE OF DISTRIBUTION IN AN ESTATE PROCEEDING SHOULD NOT BE TREATED AS A DEFECT OF TITLE.

COMMENT: Title to real estate on death of the owner passes either by statutes of descent or by will. For a title examiner, all that is necessary is that the record be such as to establish with reasonable certainty the identity of the record title owner and the decedent in the estate proceeding. See *Fischer v. Sklenar*, 101 Neb. 553, 561, 163 N.W. 861; *Tillson v. Holloway*, 90 Neb. 481, 134 N.W. 232. Where such reasonable certainty is not present, an affidavit or affidavits may be required.

STANDARD NO. 4: DESCRIPTIONS - SHORT FORM ADMINISTRATION

UNDER PROBATE LAW PRIOR TO JANUARY 1, 1977, THE EFFECTIVE DATE OF THE NEBRASKA PROBATE CODE, WHERE A DECREE OF HEIRSHIP IN A SHORT FORM ADMINISTRATION PROCEEDING IN WHICH ONE PARCEL OF REAL ESTATE OWNED BY THE DECEASED AT THE TIME OF DEATH IS DESCRIBED IN THE PETITION AND DUE NOTICE HAS BEEN GIVEN, THE TITLE EXAMINER SHOULD TREAT SUCH PROCEEDING AS EFFECTIVE TO DETERMINE THE DESCENT OF ALL REAL ESTATE OWNED BY THE DECEASED AT THE TIME OF DEATH.

COMMENT: The reasons supporting Standard No. 3 are equally applicable here. It is further submitted that the rule of res judicata applies.

STANDARD NO. 14: FOREIGN WILLS - PROBATE, EQUITABLE CONVERSION

WHERE A FOREIGN WILL HAS BEEN PROPERLY PROBATED IN NEBRASKA AND THE WILL DIRECTS OR AUTHORIZES THE EXECUTORS TO CONVEY REAL ESTATE AND THE EXECUTORS HAVE CONVEYED PRIOR TO JANUARY 1, 1977, THE EFFECTIVE DATE OF THE NEBRASKA PROBATE CODE, UNDER SUCH AUTHORITY, IT IS NOT A DEFECT IN THE TITLE THAT THE EXECUTORS WERE NOT APPOINTED OR QUALIFIED AS SUCH BY THE NEBRASKA COURT, IF THEY QUALIFIED IN THE ORIGINAL PROBATE PROCEEDING.

COMMENT: There are no Nebraska cases dealing with the subject of this Standard, but the decisions of other jurisdictions uniformly support it. See PATTON ON TITLES, 2d Ed. Section 414. This results from the fact that the authority of the executor is not derived from the probate court of another state, but from the terms of the will itself, which will the Nebraska court has probated.

For conveyances by a foreign personal representative after January l, 1977, see Title Standard 9.10.

STANDARD NO. 26: DECEDENTS' ESTATES – IRREGULARITIES MADE IMMATERIAL BY SPECIAL LIMITATIONS

FOR REASON OF SPECIAL STATUTES OF LIMITATION RELATING TO VARIOUS PHASES OF ESTATE PROCEEDINGS, THE FOLLOWING CIRCUMSTANCES DO NOT CONSTITUTE GROUNDS FOR MERITORIOUS OBJECTIONS TO TITLE AFFECTED BY SUCH PROCEEDINGS AND THE FACT OF THE REPEAL OF THESE STATUTES AT THE TIME OF THE ADOPTION OF THE NEBRASKA PROBATE CODE DOES NOT AFFECT THE VALIDITY OF THIS TITLE STANDARD.

(a) LACK OR IRREGULARITY OF PUBLISHED NOTICE OF A PETITION TO PROBATE A WILL WHERE, PRIOR TO JULY 29, 1921, A WILL WAS ADMITTED TO PROBATE AND NO PROCEEDINGS WERE INSTITUTED WITHIN ONE YEAR FROM JULY 29, 1921, BY ANY PERSON TO PROTECT AN ALLEGED INTEREST. SEE PROVISO CLAUSE OF SECTION 30-217, R.S. 1943.

(b) LACK OR IRREGULARITY OF PUBLISHED NOTICE OF A PETITION TO PROBATE A FOREIGN WILL IN NEBRASKA WHERE, PRIOR TO AUGUST 10, 1933, SUCH WILL WAS ADMITTED TO PROBATE IN NEBRASKA AND NO PR0CEEDINGS WERE INSTITUTED WITHIN ONE YEAR FROM AUGUST 10, 1933, BY ANY PERSON TO PROTECT AN ALLEGED INTEREST.

(c) LACK OR IRREGULARITY OF PUBLISHED NOTICE OF A PETITION TO PROBATE ANY WILL (DOMESTIC OR FOREIGN), WHERE, PRIOR TO AUGUST 25, 1935, SUCHWILL HAS BEEN ADMITTED TOPROBATE IN NEBRASKA, OR LACK OR IRREGULARITY OF PUBLISHED NOTICE OF A PETITION FOR APPOINTMENT OF ANY PERSONAL REPRESENTATIVE IN EITHER A TESTATE OR INTESTATATE ESTATE WHERE, PRIOR TO AUGUST 25, 1935, ANY PERSONAL REPRESENTATIVE HAS BEEN APPOINTED; AND WHERE, IN ANY SUCH CASES, NO PROCEEDINGS WERE INSTITUTED BEFORE AUGUST 25, 1936, BY ANY PERSON TO ASSERT OR PROTECT AN ALLEGED INTEREST.

(d) LACK OR IRREGULARITY OF PUBLISHED NOTICE OF A PETITION FOR APPOINTMENT OF A PERSONAL REPRESENTATIVE IN EITHER A TESTATE OR INTESTATE ESTATE WHERE, PRIOR TO AUGUST 25, 1935, A PERSONAL REPRESENTATIVE HAD BEEN APPOINTED AND NO PROCEEDINGS WERE INSTITUTED BEFORE AUGUST 25, 1936, BY ANY PERSON TO ASSERT OR PROTECT AN ALLEGED INTEREST.

(e) LACK OR IRREGULARITY OF ANY PROCEEDINGS WITH REFERENCE TO CREDITORS (INCLUDING THE ORDER FIXING TIME, NOTICE, PUBLICATION, AND DECREE BARRING CLAIMS) IN ANY ESTATE, EITHER TESTATE OR INTESTATE, PRIOR TO AUGUST 25, 1935, WHERE NO PERSON CLAIMING TO BE A CREDITOR HAS INSTITUTED PROCEEDINGS BEFORE AUGUST 25, 1936, TO ASSERT OR PROTECT AN ALLEGED INTEREST.

(f) LACK OR IRREGULARITY OF PUBLISHED NOTICE IN ANY PROCEEDING UNDER THE SMALL ESTATES ACT (SECTIONS 30-334 TO 30-338, R.S. 1943),WHERE SUCH PROCEEDING HAS BEEN OTHERWISE COMPLETED PRIOR TO AUGUST 10, 1933, AND NO PERSON HAS INSTITUTED ANY PROCEEDINGS TO ASSERT OR PROTECT AN ALLEGED INTEREST ADVERSELY THERETO BEFORE AUGUST 10, 1934.

(g) LACK OR IRREGULARITY OF PUBLISHED NOTICE WITH REFERENCE TO THE FINAL SETTLEMENT OF ANY ESTATE, TESTATE OR INTESTATE WHERE THE ACCOUNTS OF ANY ADMINISTRATOR OR EXECUTOR HAVE BEEN ALLOWED AND FINAL DECREE HAS BEEN ENTERED PRIOR TO AUGUST 25, 1935, AND NO PERSON HAS, BEFORE AUGUST 25, 1936, INSTITUTED ANY PROCEEDINGS TOASSERT AND PROTECT AN ALLEGED INTEREST *"INCONSISTENT WITH THE DECREE OR WITH THE ORDER ADMITTING THE WILL TO PROBATE"*.

(h) LACK OR IRREGULARITY OF ANY PROCEEDINGS FOLLOWING THE ADMISSION OF ANY WILL (DOMESTIC OR FOREIGN) TO PROBATE PRIOR TO AUGUST 25, 1935, WHEN NO PERSON HAS, BEFORE AUGUST 25, 1936, INSTITUTED ANY PROCEEDINGS TO ASSERT AND PROTECT AN ALLEGED INTEREST *"INCONSISTENT*WITH THE ORDER ADMITTING THE WILL TO PROBATE".***

COMMENT:

(a) Prior to July 29, 1921, the county court obtained jurisdiction to probate a will either by personal service upon *"all persons interested"* or by publication. The Supreme Court cast some doubt upon the propriety of personal service upon interested persons in the case of *In re Estate of Sieker*, 89 Neb. 216, 131 N.W. 204, 35 L.R.A. (NS) 1058; and to remove any question as to the validity of the probate in such cases, the legislature passed the above-cited special statute of limitation.

(b) See second proviso clause of Section 30-224, R. S. 1943.

(c) See R.S. 1943, Sections 30-332, 30-217, 30-224, and the comment appended to 26(a), (b) and (d).

(d) See Section 30-332, R.S. 1943. From July 29, 1921, until August 25, 1935, there was in force as a proviso clause on Section 30-331, R.S. 1943, (Section 1309, C.S. Neb. 1922) a limitation superficially similar to Section 30-332, R.S. 1943. Said Section 30-331, R.S. 1943, was amended by Act of 1935 so as to eliminate the proviso clause from it. Such Section 30-332 was new matter in the Act of 1935, and as such, stands on its own feet. The breadth of its application is not, therefore, to be considered as being in any way circumscribed by the previous inclusion of similar but more limited language in the body of Section 30-331, R.S. 1943.

(e) See Section 30-332, R.S. 1943. In the cited statute, the phrase referring to persons *"otherwise interested in"* the estate should be held to include creditors.

(f) See proviso clause of Section 30-337, R.S. 1943.

(g) See Section 30-332, R.S. 1943. Aside from this special statute of limitations, it should be noted that prior to the Act of 1929, which became effective July 29, 1929 (now Section 30-1415, R.S. 1943), there was no statutory provision which required published notice of the time and place of examining and allowing the accounts of administrators or executors. Prior to said effective date such accounts might be settled and final decree entered upon personal notice to such persons as the probate judge *"shall judge to be interested, or by public (not necessarily published) notice under the direction of the court"* or, under certain conditions, at the *"written request of the heirs"*, without any notice. Where any estate was closed by settlement of the account of the personal representative prior to July 25, 1929, without public notice, but otherwise in compliance with the law then in force, there was no defect or irregularity in the first place which would remain to be healed by the special statute of limitations. The legislative alteration of procedure in 1929 operated prospectively and did not render unmarketablea title which was marketable before the going-into-effect of the new procedure.

(h) See Section 30-332, R.S. 1943. As to foreign wills, see also Section 30-224, R.S. 1943.

STANDARD NO. 27: **DECEDENTS' ESTATES - NOTICE TO CREDITORS**

UNDER PROBATE LAW PRIOR TO JANUARY 1, 1977, THE EFFECTIVE DATE OF THE NEBRASKA PROBATE CODE, NO OBJECTION EXISTS AS TO LACK OF REGULAR NOTICE TO CREDITORS FOR A PERIOD OF ONE YEAR AFTER THE GRANTING OF LETTERS TESTAMENTARY, OR OF ADMINISTRATION, WHEN NO PERSON HAVING ANY CLAIM AGAINST THE DECEDENT HAS COMMENCED ACTION THEREON AGAINST *"THE EXECUTOR, ADMINISTRATOR, HEIRS, DEVISEES, OR LEGATEES"* WITHIN FIVE YEARS AFTER THE GRANTING OF LETTERS.

COMMENT: See Section 30-714, R.S. 1943.

(a) The words *"contingent or other lawful claim"* in the cited statute obviously apply to all claims.

(b) The statute is of continuing operation without reference to any fixed date except the date when letters were granted.

(c) The words *"regular notice"* are employed in the Standard because if substantially regular notice is given, the creditors are barred by the notice according to its terms; whereas, if some notice is given which is for any reason substantially imperfect or irregular, it is the same as a complete lack of notice, and this includes a situation where the irregularity consists of the lack of a precedent order for notice.

GENERAL COMMENT AS TO STANDARDS 26 AND 27:

Due particularly to the breadth of Section 30-332, R. S. 1943, frequently above-cited, there is obvious overlapping among some of the *"points"* above-stated. For example, such Section would apply to the situation covered by point 26(a), which point has been stated with particular reference to the proviso clause of Section 30-217. Similarly as to point 26(b). Also, compare points 26(e), 26(h) and Standard No. 27. This overlapping does not, of course, in any wise impair the force of any point as stated because more than one reason may, and frequently does, exist for any proposition. The points have been severally stated with the purpose of directing attention to the specific applications. Furthermore, there may be situations in a title where two or more of the points may apply.

STANDARD NO. 29: WILLS & DECREES OF DISTRIBUTION - NECESSITY OF FILING IN THE OFFICE OF THE REGISTER OF DEEDS

IT SHOULD NOT BE REGARDED AS A DEFECT IN TITLE THAT AN ATTESTED COPY OF A WILL OR A CERTIFIED COPY OF A FINAL DECREE OF DISTRIBUTION IN AN ESTATE PROCEEDINGS ARE NOT FILED FOR RECORD IN THE OFFICE OF THE REGISTER OF DEEDS OF THE COUNTY WHERE THE LAND IS SITUATED.

COMMENT: R. S. 1943, Section 76-248 provides that an attested copy of a will may be filed in the office of register of deeds where the land is situated, and Section 30-1302 prior to January l, 1977, directed the filing of a certified copy of the decree of distribution. However, the validity of the title is in no case dependent upon such filing. The original will is filed in the probate court and the recordation of the decree of distribution of the probate court in its own journal operates as constructive notice. The facts upon which jurisdiction depends appear in this record of the probate court. A second recordation in the office of the register of deeds may be of value as a check or cross-reference to the original, but no examiner should refuse to pass a title on the sole ground that the record has not been duplicated. The only beneficiaries of such an opinion would be those who secured fees for the work of duplication.

Likewise, Section 38-902, R. R. S. 1943, prior to January l, 1977, provided for recording a certified copy of the order of appointment of a conservator in the office of the register of deeds of each county in the State of Nebraska in which the person for whom the conservator is appointed is possessed of real estate. Such recording in the county in which the conservator proceedings have been had should not be required, as the original order of appointment in the journal of the probate court operates as constructive notice, upon the same analysis as in the case of recording as to copies of wills, certified copies of decrees of distribution.

NOTE: Standard 9.2 cites Standard No. 29 as authority.

STANDARD NO. 36: ORDER BARRING CLAIMS IN ESTATE PROCEEDINGS

UNDER PROBATE LAW PRIOR TO JANUARY 1, 1977, THE EFFECTIVE DATE OF THE NEBRASKA PROBATE CODE, THE FACT THAT A COUNTY COURT DID NOT MAKE AN ORDER BARRING CLAIMS IN ESTATE PROCEEDING IS NOT A TITLE DEFECT.

COMMENT: R.S. 1943, Section 30-609, is effective to bar claims against estates where notice has been given as required by R.S. 1943, Section 30-601. See also R. S. 1943, Section 30-714; *Luikart v. Quainn*, 138 Neb. 849, 295 N.W. 890.

STANDARD NO. 55: DETERMINATION OF HEIRS ON PROBATE OF WILL

UNDER PROBATE LAW PRIOR TO JANUARY 1, 1977, THE EFFECTIVE DATE OF THE NEBRASKA PROBATE CODE, IN PROCEEDINGS FOR THE PROBATE OF A WILL WHERE THERE HAS BEEN NO DETERMINATION OF THE HEIRS OF THE DECEASED TESTATOR, IF AN AFFIDAVIT APPEARS OF RECORD SHOWING THAT NO CHILD WAS BORN TO THE DECEASED TESTATOR AFTER THE MAKING OF THE WILL, OR SUCH FACT CAN BE DETERMINED FROM THE PLEADINGS IN THE PROCEEDINGS FOR THE PROBATE OF THE WILL OF THE DECEASED TESTATOR AND OTHER INSTRUMENTS OF RECORD, NO DETERMINATION OF HEIRSHIP WITH RESPECT TO THE DECEASED TESTATOR NEED BE REQUIRED.

COMMENT: Under Section 30-225, R.R.S. 1943, it is essential in each case of probate of a will to determine whether or not any children were born after the making of the will, unless the requirements of that section are otherwise met within the will. See *Gillespie v. Truka*, 104 Neb. 115, 175 N.W. 883; *C. B. & Q. R. Co. v. Wasserman*, 22 F. 872. In many cases, however, the proceedings for the probate of the will do not disclose whether or not there was an after-born child. In many proceedings for probate of wills, particu-larly in years gone by, there has been no determination of heirship.

Determination of the necessary facts appears essential in the examination of title to real estate. Where, however, there has been no determination of heirship, but the essential facts can be established through affidavit together with probate and other records appearing within the chain of title, no further showing that there were no after-born children should be required.

STANDARD NO. 60: POWERS OF CONSERVATOR

A CONSERVATOR HAD, PRIOR TO JANUARY 1, 1977, WHEN THE NEBRASKA PROBATE CODE BECAME EFFECTIVE, THE SAME POWER OF SALE AND MORTGAGING OF REAL ESTATE AS A GUARDIAN.

COMMENT: The above rule was derived from Sections 38-109, 38-203, 38-903, and related sections of Revised Statutes of Nebraska, Reissue of 1952.

STANDARD NO. 63: NOTICE TO CREDITORS

UNDER PROBATE LAW PRIOR TO JANUARY 1, 1977, THE EFFECTIVE DATE OF THE NEBRASKA PROBATE CODE, SECTIONS 30-601 AND 30-603, R.R.S. NEB. SHOULD BE CONSTRUED IN PARI MATERIA, AND, THE PUBLISHING OF THE NOTICE TO CREDITORS AND THE RUNNING OF THE TIME FOR CREDITORS TO PRESENT THEIR CLAIMS MAY RUN CONCURRENTLY.

COMMENT: Such sections of the revised statutes do not require a minimum of three months to present claims subsequent to the giving of statutory notices.

The significant requirement is that the notice must be published within forty days of the date of issuance of letters.

STANDARD NO. 68: MAILING OF PUBLISHED NOTICE

UNDER PROBATE LAW PRIOR TO JANUARY 1, 1977, THE EFFECTIVE DATE OF THE NEBRASKA PROBATE CODE, IT IS NOT NEGLIGENCE TO REFRAIN FROM OBJECTING TO NON-SHOWING OF MAILING OF A COPY OF PUBLISHED NOTICE TO A PARTICULAR CREDITOR IN A PROBATE PROCEEDING WHEN THE PROCEEDING OTHERWISE CONFORMS TO ALL APPLICABLE STATUTES AND WHEN THE TIME FOR APPEAL HAS EXPIRED OR A STATUTE OF LIMITATION IS OTHERWISE APPLICABLE.

COMMENT: Section 30-609, R.R. S. 1943, is a general statute of limitation barring claims and demands against the estates of deceased persons. See further Section 30-606.

See further Section 30-1415, R.R.S. 1943, and Section 30-603, R.R.S. Supp. 1961.

There is no presumption that a deceased person had creditors or claimants against his or her estate known to the petitioner or personal representative. There is no presumption of the existence of creditors or claimants against an estate entitled to notice by mail.

This standard is not to be construed as signifying that a neglect or failure to comply with Section 25-520.01 to 25-520.03 is a title defect where the two-year period fixed in Section 30-609 has not elapsed.

See further: *Farmers Co-op Mercantile Co. v. Sidner,* 175 Neb. 94, 120 NW 2d 537; *Lindgren v. School Dist. of Bridgeport*, 170 Neb. 279, 102 NW 2d 599.

STANDARD NO. 72: EXECUTOR'S DEED UNDER POWER OF SALE

UNDER PROBATE LAW PRIOR TO JANUARY 1, 1977, THE EFFECTIVE DATE OF THE NEBRASKA PROBATE CODE, IT IS NOT NEGLIGENCE TO APPROVE AN EXECUTOR'S DEED UNDER A POWER OF SALE CONTAINED IN A WILL IF THE EXECUTOR HAS GIVEN BOND IN DUE FORM WITH SURETY AND THE BOND IS APPROVED BY THE COURT EVEN THOUGH THE AMOUNT OF THE BOND IS LESS THAN THE AMOUNT OF THE CONSIDERATION FOR WHICH THE DEED IS GIVEN.

COMMENT: See Section 30-303, R.R.S. 1943.

The executor's authority comes from the will. If the testator has not seen fit to make any special requirements as to bond, the title examiner should not do so. Any bond which is sufficient to make the executor's appointment valid should likewise be sufficient for this purpose.

STANDARD NO. 88: CONVEYANCE BY A PERSONAL REPRESENTATIVE PURSUANT TO COURT ORDER

IF A CONVEYANCE IS TO BE MADE BY A PERSONAL REPRESENTATIVE PURSUANT TO COURT ORDER UNDER SECTION 30-2476(23) PRIOR TO SEPTEMBER 9, 1993, NO CONFIRMATION ORDER IS REQUIRED. IT IS NOT NECESSARY TO DETERMINE WHETHER CLAIMS OR COSTS OF ADMINISTRATION HAVE BEEN PAID.

COMMENT: If the court order has been obtained pursuant to Section 30-2476(23), the personal representative has full power and authority to convey real estate as provided in this section and also under Section 2476(6). Any power of the personal representative, may, however, be limited in a supervised administration under Section 30-2442, but the restriction must be endorsed on the letters of the personal representative to be effective. Section 30-2475.

The examiner should determine that the personal representative has been appointed. Section 30-2475.

STANDARD NO. 100: EFFECT OF SUBDIVISION OF CONVEYANCE

WHERE A CONVEYANCE CREATES PARCELS WHICH HAVE NOT RECEIVED SUBDIVISION APPROVAL FROM THE LOCAL ZONING JURISDICITON, THE EXAMINER SHOULD REQUIRE SUCH APPROVAL:

1. If the parcel is within the local zoning jurisdiction of a city of the metropolitan class and is:
   a. Located within the corporate limits of the city and the conveyance was made on or after April 20, 1921 or

   b. Located in the same county and within three miles of the corporate limits of the city, andis outside of any organizes city or village, and:

      i. The conveyance was made on or after April 20, 1921, but before October 9, 1961, or

      ii. The conveyance was made on or after October 9, 1961, but before February 22, 1980, and the smallest parcel created is five acres or less in size, or

      iii. The conveyance was made on or after February 22, 1980, and the smallest parcel createdis ten acres or less in size.

   c. See Sections 14-115 and 14-116.

2. If the parcel is within the zoning jurisdiction of a city of the primary class:

   a. The conveyance was made on or after September 28, 1959; and

   b. Any parcel is five years acres of less in size (September 28, 1959 to February 22, 1980); or

   c. Any parcel is ten acres or less in size (after February 22, 1980).

   d. Section 15-901.

3. If the parcel is within the zoning jurisdiction of a city of the first class exercising that authority; and

   a. Within the corporate limits; and

      i. The conveyance was made on or after May 22, 1967, and before September 2, 1973, regardless of the size of any parcel created by or remaining after the conveyance; or

      ii. The conveyance was made on or after September 2, 1973, and before May 27, 1975, and any parcel created by or remaining after the conveyance is five acres or less; or

      iii. The conveyance was made on or after May 27, 1975, and any parcel created by or remaining after the conveyance is ten acres or less; or

   b. Outside the corporate limits; and

      i. The conveyance was made on or after March 16, 1967, regardless of the size of any parcel created by or remaining after the conveyance, if the real property is located in the same county as the city of the first class; or

         (a) The conveyance was made before May 17, 1967, and the real property is located within one mile of the corporate limits of anycity of the first class; or

(b) The conveyance was made on or after May 17, 1967 and before June 7, 1967, and the real property is located within two miles of the corporate limits of any city of the first class; or

ii. The conveyance was made on or after June 7, 1967, regardless of whether the real property is located in the same county as the city of the first class, if the real property is located within two miles of the corporate limits of any city of the first class; and

(a) The conveyance was made before September 2, 1973, regardless of the size of any parcel created by or remaining after theconveyance; or

(b) The conveyance was made on or after September 2, 1973, and before May 27, 1975, and any parcel created by or remaining after the conveyance is five acres or less; or

(c) The conveyance was made after May 7, 1975, and any parcel created by or remaining after the conveyance is ten acres or less

c. See sections 16-901 thru 16-904 and 19-916 thru 19-921.

4. If the parcel is within the zoning jurisdiction of a city of the second class or a village exercising that authority:

a. Inside the corporate limits;

i. The conveyance was made on or after May 27, 1975; and

ii. Any parcel created by or remaining after the conveyance is ten acres or less in size.

b. Outside the corporate limits:

i. The conveyance was made on or after March 16, 1957, if within one-halfmile of the corporate limits, or, on or after June 7, 1967, if outside one-half mile but within one mile of the corporate limits; and

ii. Any parcel created by or remaining after the conveyance is:

(a). Any size (March 16, 1957, to September 1, 1973).

(b). Five acres or less in size (September 2, 1973 to May 26, 1975);

(c). Ten acres or less in size (on or after May 27, 1975).

c. See Sections 17-415, 17-424, 17-1002 and Sections 19-916 to 19-921.

5. If the parcel is within the zoning jurisdiction of a county:

a. The conveyance was made on or after October 9, 1961; and

b. Any parcel is five acres or less in size (October 9, 1961, to May 27, 1975), or

c. Any parcel is ten acres or less in size (after May 27, 1975).

d. The provisions of paragraph "5" do not apply in any county unless the county board of such county shall have first adopted a comprehensive development plan as defined in Section 33-115. 02, nor until the county board of such country has duly adopted comprehensive and uniform

platting and subdivision regulations governing the alignment of streets, maximum grade of streets, and minimum area of lots.

e. See Sections 23-372 to 23-377.

6. If the parcel is within the zoning jurisdiction of a county containing a primary class city, but outside of a city or village which is exercising subdivision jurisdiction which has been granted to it:

a. The conveyance was made on or after October 9, 1961; and

b. Any parcel is five acres or less in size (October 9, 1961, to February 22, 1980), or

c. Any parcel is ten acres or less in size (after February 22, 1980).

d. See Section 23-174.03.

NOTE: Former Standard 10 -- Banks and Loan Associations -- Escheat, is omitted because the law upon which it was based has not been in effect for some period of time.

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