Best Practices Guide:
Execution of Wills, Codicils, & Testamentary Trusts
Real Estate, Probate, & Trust Section
Nebraska State Bar Association

Contents

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Due to concerns practitioners are facing across the state as it relates to COVID-19, the Real Estate, Probate, & Trust Section of the Nebraska State Bar Association has compiled this best practice guide. The purpose of this guide is to provide information and examples as we all navigate the execution of wills, codicils, and testamentary trusts in uncertain times.

By Executive Order 20-13, Governor Pete Ricketts waived the July 1, 2020 operative date of the Online Notary Public Act[1] adopted by the Nebraska Legislature in 2019 to effectively make the Act operative April 2, 2020. However, an online notarial act performed in accordance with the Act does not address requirements for the creation and execution of wills, codicils, or testamentary trusts in accordance with NEB. REV. STAT. § 30-2327.

1. Wills and Codicils.

NEB. REV. STAT. § 30-2327 is part of the Nebraska Probate Code adopted in 1974. It is based on the 1969 version of the Uniform Probate Code ("UPC"). It sets forth the following requirements for execution of a will:

> Except as provided for holographic wills[2], writings within section 30-2338[3], and wills within section 30-2331[4], every will is required to be in writing signed by the testator or in the testator's name by some other individual in the testator's presence and by his direction, and is required to be signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

First, the will must be signed by the testator or by someone else in the testator's presence and at his or her direction. Second, a will is required to be signed by at least two individuals each of whom *witnessed* one of the following:

1. The signing;
2. The testator's acknowledgment of the signature; or
3. The testator's acknowledgment of the will.

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[1] NEB. REV. STAT. §§ 64-104 to 64-418.

[2] A holographic will is valid "whether or not witnessed, if the signature, the material provisions, and an indication of the date of signing are int eh handwriting of the testator and, in the absence of such indication of date, if such instrument is the only such instrument or contains no inconsistency with any like instrument or if such date is determinable from the contents of such instrument, from extrinsic circumstances, or from any other evidence." NEB. REV. STAT. § 30-2328.

[3] NEB. REV. STAT. § 30-2338 addresses separate writings identifying bequests of tangible personal property.

[4] NEB. REV. STAT. § 30-2331 addresses choice of law as to execution of wills.

The above requirements for the execution of a will are not as stringent when compared to NEB. REV. STAT. § 30-2329 setting forth the self-proving affidavit requirements. Specifically, that "he or she [testator] executes it as his or her free and voluntary act for the purpose therein expressed, and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing."

As a result, the question arises as to whether a valid will exists if witnessing the testator's acknowledgment of the signature or of the will is done in a manner that is less than witnessing the signing in person. This question has yet to be interpreted and such a determination made by Nebraska courts as it relates to NEB. REV. STAT. § 30-2327.

Close but not on point, the Nebraska Supreme Court addressed the issue of whether a will was properly executed in *Newill v. Flicker* ultimately finding that NEB. REV. STAT. § 30-2327 requires that the witnesses to a will must sign it before the testator's death.[5] As set forth in *Newill*, Section 30-2327 changed prior law requiring witnesses to sign in the presence of the testator.[6] The Nebraska Supreme Court referenced comments to Section 30-2327 stating: '"[t]he formalities for execution of a witnessed will have been reduced to a minimum. . . . There is no requirement that . . . the witnesses sign in the presence of the testator . . . ."[7]

Even though not dispositive, this decision sheds light on the possibility of witnessing the signing of the will out of the testator's presence.

Black's Law Dictionary (11th ed. 2019) defines witness n. (bef. 12c) 1. Someone who sees, knows, or vouches for something a witness to a testator's signature.

There are risks to witnessing a will when there is not a visual observation. Idaho had adopted the same UPC provision as Nebraska.[8] To effectuate these purposes, witnesses are said to perform two functions-an observatory function and a signatory function. The former consists of "direct and purposeful observation" of the testator's signature to, or acknowledgment of, the will. [Citation Omitted.] The latter consists of the witnesses' signing of the will, a task "complementary" to the observatory function.

However, in this case, the proponents of the "Rood will" would have us interpret I.C. § 15-2-502 differently. They contend that the statute has abolished any presence requirement. In their view, witnesses under the Uniform Probate Code perform little more than a signatory function. We think this argument flounders upon the plain meaning of the verb "witnessed" as used in the statute. But even if we did not believe the statute conveys such a plain meaning, we still would reach the same conclusion for the additional reasons explained below.

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[5] *Newill v. Flicker*, 215 Neb. 495, 339 N.W.2d 914 (1983).
[6] *Id.* at 496, 339 N.W.2d 914, 914 (citing *In re Estate of Cagle*, 132 Neb. 47, 270 N.W. 664 (1937); NEB. REV. STAT. § 30-204 (Reissue 1964)).
[7] *See Newill v. Flicker*, 215 Neb. 495, 339 N.W.2d 914 (1983).
[8] *See Matter of Estate of McGurrin*, 113 Idaho 341, 343, 743 P.2d 994, 996 (Ct. App. 1987).

This language converted a noun ("witnesses"), which had appeared in prior drafts, to a transitive verb ("witnessed"), expressed in the active voice and in the past tense. The direct objects of the new verb were the words "signing" and "acknowledgment," referring to acts by the testator. Such restructuring of the statute was more than an exercise in English grammar. It enabled the statute to specify what the witnesses would do. The new language made it clear that witnessing meant more than merely perceiving the existence of a document and signing it. Witnessing meant perceiving an act of the testator-signing or acknowledging the will-and memorializing this perception by subscribing the document.

By using the verb "witnessed," and by directing this verb toward certain antecedent acts of the testator, the drafters of section 2-502 plainly contemplated that at least one of these enumerated acts would occur where it could, in fact, be "witnessed." After such an act had been "witnessed," it became immaterial whether the witnesses added their signatures to the will in the testator's presence or elsewhere. Accordingly, the clause in earlier drafts, requiring the will to "be signed by [the] witnesses in the presence of the testator," was dropped.

By dropping this clause, the drafters manifested no intent to discontinue the in-person contact requirement entirely. Such a change from prior drafts and from existing law would have been profound. It undoubtedly would have generated much comment among the Commissioners. But in reporting the final draft of section 2-502 to the Committee of the Whole, the co-chairman of the drafting committee, Charles Horowitz, stated simply:

I have been asked to call your attention to the substantive changes. I call your attention to the following.

First, we have substituted for the word "witnesses" the word "persons." Secondly, we have identified the thing to which they are witness, the subject matter that is witnessed. They witness any one of three things: signing-that is, the actual process of signing by the testator-or the testator's acknowledgment of his signature, or the acknowledgment of the testator that this is his will. Any one of those three things will suffice.

There was no suggestion that the in-person contact requirement had been wholly abandoned.

The official comment to section 2-502 also conveys, albeit rather awkwardly, the idea that witnessing is an active function, directed toward certain observable conduct of the testator:

The formalities for execution of a witnessed will have been reduced to a minimum. Execution under this section normally would be accomplished by signature of the testator and of two witnesses; each of the persons signing as witnesses must "witness" any of the following: the signing of the will by the testator, an acknowledgment by the testator that the signature is his, or an acknowledgment by the testator that the document is his will.... There is no requirement that the testator publish the document as his will or that he requests the witnesses to sign, or that the witnesses sign in the presence of the testator or of each other. The testator may sign the will outside the presence of the witnesses if he later acknowledges to the witnesses that the signature is his or that the document is his will, and they sign as witnesses.... The intent is to validate wills which meet the minimal formalities of the statute. [Emphasis added.]

Thus, the comment recognizes that although it is no longer necessary for the testator and witnesses to sign in each other's presence, the testator is required to declare his acknowledgment "to the witnesses."[9] In sum, we think the evolution of U.P.C. § 2-502 reveals no intent to abolish the in-person contact requirement entirely. Rather, we think the requirement was narrowed. Witnesses are no longer required to sign the will in the presence of the testator. Conversely, the testator may sign outside the presence of the witnesses if he declares his acknowledgment to them. But in all instances, the witnesses must have "witnessed" one of the testator's acts before signing the will themselves. The signatory function of the witnesses remains linked to the observatory function.

However, several non-U.P.C. cases offer some guidance. The verb "witnessed" has been construed by the Iowa Supreme Court. The case of *In re Pike's Will*, 221 Iowa 1102, 267 N.W. 680 (1936), arose when a testatrix asked a potential witness to sign her will. The testatrix did not have the will with her at the time. Approximately two weeks later, a friend of the testatrix brought the will to the witness. The witness signed and, about a month thereafter, the testatrix thanked the witness for doing so. The Iowa Supreme Court held that the will had not been "witnessed" as required by the statute. The Court explained that the testatrix had not signed the will; neither had she, by her words or conduct, adopted the will as hers in the presence of the witness. Consequently, **the witness lacked first-hand knowledge that the testatrix had signed the will-an indispensable element of witnessing**.

That court indicated that a telephone call would not be sufficient.

a. Best Practice #1.

The best practice is to execute a will with qualified independent witnesses in accordance with NEB. REV. STAT. § 30-2327 and a notary present using a self-proving attestation affidavit under NEB. REV. STAT. § 30-2329. This requires the physical presence of the testator, two disinterested witnesses, and notary.

b. Best Practice #2.

However, though not as sound as Best Practice #1, during this time of COVID-19, a safer practice may be to sign with a line of sight and the ability to hear the declaration with audio communication technology, if needed. There could be a window in between the testator and the witnesses. This would be similar to wills signed in a parking lot as many of us have done.

This can be done by removing the self-proving provision of the will. The witnesses could stand on the porch and see the signing inside and could hear over the telephone. The attestation page could be on a separate sheet of paper.

Please consider either incorporating into the testamentary document an attestation clause setting forth the methods used for securing signatures by specifying the circumstances. Such attestation clause or affidavit will prove helpful in the event a demonstration as to the execution and validity

[9] *See also* R. Wellman, The Uniform Probate Code Practice Manual, pp. 132-33 (1977).

of the will is required to be given to the probate court during the administration process. The affidavits will be similar to the affidavits used with a non-self-proving will.

As discussed above there are concerns about using FaceTime or other audio-visual technology. If that is what you must use, perhaps it would be best to create a living trust, have it signed and do a pour-over will with the signatures and back it up with a holographic will.

c. Best Practice #3.

If there are no witnesses available for the execution of a will, the next best practice is a holographic will, which purports to be testamentary in nature, whether or not witnessed, if the signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator.[10]

Please consider that if simplified, the proposed holographic should be written in the testator's own handwriting, signed by the testator, and dated. Prior to recommending a holographic will, one should carefully read *Lovorn v. Brethouwer*, 25 Neb. App. 722, 912 N.W.2d 816 (2018). The Nebraska Court of Appeals affirmed the district court's finding that the document was not made with the requisite testamentary intent (that the document intended to be a will) to be a valid holographic will.[11]

The best practice is for the drafting attorney to draft the holographic will and provide the terms to be subsequently copied in the testator's handwriting, signed by the testator, and dated by the testator. If possible, the drafting attorney should take advantage of an opportunity to proofread the holographic will written by the testator. Both donative (words reflecting specific bequests to particular beneficiaries) and testamentary intent (whether the document was intended to be a will) must be found in the clear language in the holographic will.[12] It is important to note that this type of will may not be valid in other states. If there is real property in other states, it is important to check the appropriate state's laws to see if a holographic will is an option.

Example.

This is my will. I devise all I have to my wife if she survives me, otherwise, equally to my children. My daughter Holly Dingman shall be the PR without bond.

April 1, 2020 /s/Frank C. Heinisch

[10] NEB. REV. STAT. § 30-2328.
[11] *Id.*
[12] *See id*.

2. Trust Agreements.

NEB. REV. STAT. § 30-3827 sets forth the methods of creating trusts, specifically:

1. Transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;
2. Except as required by a statute other than the Nebraska Uniform Trust Code, declaration by the owner of property that the owner holds identifiable property as trustee; or
3. Exercise of a power of appointment in favor of a trustee.

NEB. REV. STAT. § 30-3827 sets forth the requirements for creation of a trust. A trust is created if the following are met:

1. The settlor has capacity to create a trust;
2. The settlor indicates an intention to create the trust;
3. The trust has a definite beneficiary or is:
   a. A charitable trust;
   b. A trust for the care of an animal, as provided in section 30-3834; or
   c. A trust for a noncharitable purpose, as provided in section 30-3835;
4. The trustee has duties to perform; and
5. The same person is not the sole trustee and sole beneficiary.

In the state of Nebraska, a trust need not be evidenced by a trust instrument. Instead, all that is needed is clear and convincing evidence of an oral trust and its terms in accordance with NEB. REV. STAT. § 30-3833. There are concerns over real estate with an oral trust.[13] Such a trust for real estate may not be valid. The transfer of land may require a written trust.

Also, a written trust is not required to be notarized. There are no statutory formalities that a trust must meet with regard to witnessing its execution. Audio-visual technology with two witnesses to the signing of the trust would add to the proof of its term. The written trust could be named as a devisee under a holographic pour-over will.

a. Best Practice.

If possible, the best practice is that there be a trust instrument and such trust agreement is signed by the grantor in the presence of a notary public. However, with concerns of COVID-19 an oral trust is an option to consider as well as a signed written trust which is signed without a notary.

One other possibility is an electronic signature under Uniform Electronic Transactions Act, Sections 86-612 to 86-643. Although wills and testamentary trust are excluded from UETA, inter vivos trusts are not excluded from the Act.[14]

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[13] *See* the statute of frauds. NEB. REV. STAT. § 36-103. Also see the homestead restrictions if the Settlor is married. NEB. REV. STAT. § 40-104.

[14] NEB. REV. STAT. § 86-630.

As for an oral trust, the best practice is for the drafting attorney to write the trust agreement and send it to the client. Upon receipt, the drafting attorney should advise the client to declare that the trust document is the settlor's desire over audio-video communication that is, if possible, recorded. Please also consider having the client execute a holographic will of which the oral trust serves as the beneficiary in accordance with the holographic will best practices set forth above. After the social distancing recommendations, in addition to all of the current regulations we are facing in light of COVID-19 are lifted, it is recommended to restate the oral trust at that time and execute it in written form.

b. Example of Pourover Holographic Will.

This is my last will and testament. I devise all my property to Dennis, Trustee of the Frank Trust dated April 1, 2020, which is an oral trust made before this will. The referenced trust may include an amendment or restatement of the trust. Dennis shall be the personal representative of this will to serve without bond.

April 1, 2020 /s/Frank C. Heinisch

3. Health Care Powers.

A power of attorney for health care must contain the following to be valid in accordance with NEB. REV. STAT. § 30-3404:

1. Be in writing;
2. Identify the principal, the attorney in fact, and the successor attorney in fact, if any;
3. Specifically authorize the attorney in fact to make health care decisions on behalf of the principal in the event the principal is incapable;
4. Show the date of its execution; and
5. Be witnessed and signed by at least two adults, each of whom witnesses either:
    a. The signing and dating of the power of attorney for health care by the principal; or
    b. The principal's acknowledgment of the signature and date; or
    c. Be signed and acknowledged by the principal before a notary public who shall not be in the attorney in fact or successor attorney in fact.

While best practice #1 is often a best practice under normal circumstances (to cover the possibility of a defective execution) under these circumstances, best practice #2 may be the best if you are doing a will at the same time. If only a health care power of attorney is involved, please review best practice #3. In any event, you will need to alter the health care power of attorney document in accordance with NEB. REV. STAT. § 30-3408 to reflect your method of execution.

a. Best Practice #1.

The best practice is to execute a health care power of attorney with witnesses in accordance with NEB. REV. STAT. § 30-3404 and a notary present who is not the attorney in fact or a successor attorney in fact. This is the normal procedure for many attorneys, but both the witnesses and the

notary are not required. NEB. REV. STAT. § 30-3404 uses the word "or."[15] One of the dictionary meanings of the word "or" is " a logical operator that requires at least one of two inputs to be present or conditions to be met for an output to be made or a statement be to executed." The use of the word "or" does not prohibit both methods of execution.

b. Best Practice #2.

The next best practice is to execute such a power of attorney in the presence of two witnesses. The word used in the statute is "witnessed." As discussed above, the meaning of the word "witness" must be determined. It is preferable to have line of sight on the witnessing.

The key is whether the family and the medical providers will recognize the document. If they will, then perhaps audio-visual technology may be used. During this time of COVID-19, a safer practice may be to utilize audio-video communication technology.[16] This can be done by removing the acknowledgment provision of the health care power of attorney and conducting the signing of the health care power of attorney over FaceTime or a similar audio-video communication technology with the following individuals in attendance: (1) drafting attorney; (2) the principal; and (3) two witnesses.

Please consider either incorporating into the power of attorney an attestation clause setting forth the methods used for remote appearance and for securing signatures by specifying the technology platform and electronic process used or requiring the witnesses to execute affidavits.

c. Best Practice #3.

If you prefer the document to be acknowledged, the principal must appear before a notary public. The word "acknowledged" has a statutory meaning under NEB. REV. STAT. § 64-205 in that the person appeared before a notary. An ordinary acknowledgement may be able to be done before a notary in the same manner as being witnessed or please review the online notary section below.

4. Power of Attorneys.

For a power of attorney to be valid, it must be signed by the principal or marked by the principal in accordance with section 64-105.02 or signed in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney.[17]

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[15] *See* NEB. REV. STAT. § 49-802(5) for the use of words for their common meaning.

[16] *Cruzan by Cruzan*, 497 U.S. 261 (1989) stated The United States Constitution does not forbid Missouri to require that evidence of an incompetent's wishes as to the withdrawal of life-sustaining treatment be proved by clear and convincing evidence. An attempt to comply with the statute, particularly if it is recorded would seem to supply clear and convincing evidence. Also, it stated that A competent person has a liberty interest under the Due Process Clause in refusing unwanted medical treatment.

[17] NEB. REV. STAT. § 30-4005.

A power of attorney under the Nebraska Uniform Power of Attorney Act is not valid unless it is acknowledged before a notary public or other individual authorized by law to take acknowledgments.[18]

a. Best Practice.

The best practice is to execute power of attorney in the presence of a notary public or other individual authorized by law to take acknowledgments. Can it be notarized in the same manner as described above for witnessing a will?[19] However, if this is not possible, please see the below information as this result can be achieved utilizing the Nebraska Online Notary Public Act.

5. Electronic Notarization.

Nebraska enacted the Electronic Notary Public Act ("ENPA") in 2016, effective July 1, 2017.[20] The ENPA establishes a process to allow an individual to become an electronic notary public (rather than a traditional notary public) after registration and instruction. The ENPA maintains the two key elements of traditional notarization, requiring physical presence and proper identification of the person signing the document.

An electronic notarial act requires the signer of the electronic document to be in the physical presence of the electronic notary at the time of notarization. Physical presence must be maintained throughout the entire electronic notarization process and the parties must be able to see, hear, communicate with, and give identification documents to one another. The parties must be able to interact "without the use of electronic devices such as telephones, computers, video cameras or facsimile machines."[21]

The technology necessary to achieve the electronic notarial act must be provided by certain vendors approved by the Secretary of State, known as "approved electronic notary solution providers."[22] An electronic certificate of authority evidencing the electronic notary's electronic signature and electronic seal must be included on the notarized document substantially in the form required by NEB. REV. STAT. § 64-313.

To register as an electronic notary, a person must already hold a valid commission as a traditional notary public. The electronic notary registration form is available at https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/enotary-reg.pdf. The registration fee is $100.

[18] *Id.*
[19] NEB. REV. STAT. §64-205 defines acknowledgment as appearing before the notary. Nothing in the statute says that there cannot be a transparent window between them.
[20] NEB. REV. STAT. §§ 64-301 to 64-317.
[21] 433 Neb. Admin. Code, Ch. 7, s. 008.
[22] NEB. REV. STAT. § 64-304.

6. Online Notarization.

Nebraska's Online Notary Public Act (the "ONPA"), which was originally operative July 1, 2020, eliminates the general requirement that the signer be in the physical presence of the notary when the notarial act is performed.[23] An online notarial act requires the signer of the electronic document and the online notary to see and speak to each other simultaneously through live, real time transmission.

Except for physical presence, the underlying requirements of the ONPA and ENPA are substantially similar. Like the ENPA, the technology necessary to achieve the online notarial act must be provided by pre-approved solution providers. An electronic certificate of authority evidencing the online notary's electronic signature and electronic seal must be included on the notarized document substantially in the form required by NEB. REV. STAT. § 64-415.

The ONPA requires evidence of the identity of an individual creating an electronic signature is verified as well as maintained as part of the electronic record.[24]

The emergency regulations published by the Nebraska Secretary of State's office lift some of the education and examination requirements through June 30, 2020 to allow for expedited processing, such as the requirement for the online notary public applicant to take the course of instruction prior to being approved. The online notary public, however, must take the course within thirty (30) days of it being made available.

To register as an online notary, a person must already hold a valid commission as a traditional notary public. The online notary registration form is available at https://sos.nebraska.gov/sites/sos.nebraska.gov/files/doc/OnlineNotaryApplication_0.pdf. The registration fee is $50.

[23] NEB. REV. STAT. §§ 64-401 to 64-418.
[24] *See* NEB. REV. STAT. §§ 64-409 and 94-411.