

## First Supplement to Memorandum 89-50

Subject: Study L-3019 - Statutory short form power of attorney

Attached are the comments of Team 4 concerning the staff proposal to substitute the Uniform Statutory Form Power of Attorney Act for the comparable California statute.

In general, the team approves the staff proposal, but suggests a few amendments to the Uniform Act. These are discussed below.

Designation of Co-Agents

The California statute, but not the Uniform Act, permits the designation of co-agents. Team 4 "believes that the flexibility currently embodied in California law is desirable, and therefore recommends that current California provisions permitting co-agents to act be adopted as part of the Uniform Act adopted in California."

The staff agrees that the ability to designate co-agents adds desirable flexibility. We already have the necessary provisions to accomplish this in our existing statute. The argument in opposition to adding these existing provisions to the Uniform Act would be that it would add complexity to the Uniform Act and would require a special form for use in California. We might want to add a provision that a statutory form is not invalid merely because it does not include a provision that permits the designation of co-agents.

"Springing" Power

Team 4 comments:

Neither the present California Short Form nor the Uniform Act contains a "springing" power, that is a power that only becomes effective upon the occurrence of certain events. The majority of Team 4 believes that most clients do not want the durable power to become immediately effective, although several Team 4 members strongly dissent from this view. In order to achieve maximum flexibility, Team 4 urges that the Uniform Act be amended in order to give the principal the option of making the durable power effective immediately or of defining those circumstances which will trigger the power.

The Uniform Act specifically recognizes the right of the principal to grant a "springing" power of attorney:

SPECIAL INSTRUCTIONS:  
ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS  
LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

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UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

Note that the user of the form is provided with a space write in language to delay the effective time of the power and is instructed that the power is effective immediately unless the user directs otherwise in the space provided. The staff believes that this is sufficient. We are not sure what more could be provided to deal with this matter, and we believe it would be a serious mistake to depart from the Uniform Act scheme for dealing with the matter.

Use of Language "Disabled, Incapacitated, or Incompetent"

The Uniform Act provides:

This power of attorney will continue to be effective even though I become disabled, incapacitated, or incompetent.

STRIKE OUT THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME DISABLED, INCAPACITATED, OR INCOMPETENT.

This is a good point. The California Uniform Durable Power of Attorney Act (Civil Code § 2400) provides:

A durable power of attorney is a power of attorney by which a principal designates another his or her attorney in fact in a writing and the writing contains the words "This power of attorney shall not be affected by subsequent incapacity of the principal," or "This power of attorney shall become effective upon the incapacity of the principal," or similar

words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity.

The staff recommends that "incapacitated" be substituted for "disabled, incapacitated, or incompetent" in the text of the form and in the instruction that follows the text. This will conform the form to the California Uniform Durable Power of Attorney Act and would be sufficient to comply with the law of a state having the official text of the Uniform Durable Power of Attorney Act.

After any revisions made by the Commission have been incorporated into the staff draft, the staff recommends that the resulting Tentative Recommendation be distributed to interested persons and organizations for review and comment. Our goal is to submit a recommendation on the Uniform Act to the 1990 session of the Legislature.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

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July 5, 1989

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BY FAX

Re: LRC Memo: 89-52<sup>9</sup>, Statutory Short Form Power of Attorney

Dear Jim:

One of Team 4's members is Harley Spitler, a recognized expert in the area of elder law and durable powers of attorney. Although Harley was not available for Team 4's June 27, 1989 telephone conference, he did share his comments with me prior to that conference call; I, in turn, conveyed his comments to Team 4. Team 4 agreed with Harley's comments and urges the Commission to adopt his specific suggestions as set forth in this letter.

In general, Team 4 approves of the Commission's recommendation, that the Uniform Statutory Form Power of Attorney Act ("Uniform Act") be enacted in California to replace the existing Statutory Short Form Power of Attorney ("California Short Form") statute.

However, Team 4 does suggest that the Uniform Act be amended as follows:

1. The California Short Form permits co-agents to act jointly; under the Uniform Act, multiple agents are not permitted to act. Team 4 believes that the flexibility currently embodied in California law is desirable, and therefore recommends that current California provisions permitting co-agents to act be adopted as part of the Uniform Act adopted by California.

2. Neither the present California Short Form nor the Uniform Act contains a "springing" power, that is a power that only becomes effective upon the occurrence of certain events. The majority of Team 4 believes that most clients do not want the durable power to become immediately effective, although several Team 4 members strongly dissent from this view. In order to achieve maximum flexibility, Team 4 urges that the Uniform Act be

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amended in order to give the principal the option of making the durable power effective immediately or of defining those circumstances which will trigger the power.

3. In several instances, the Uniform Act contains ambiguous or confusing language. In part, the confusion is attributable to California's conservatorship law which uses the term "incapacity" instead of "incompetence". Team 4 suggests that, to the extent appropriate, the Uniform Act be amended to incorporate California's conservatorship terms and to delete those terms which are inconsistent. Finally, Team 4 is uncertain as to the meaning of the word "disabled"; again, California's conservatorship law should provide guidance.

Thank you for your consideration. If Team 4 may be of further assistance, please do not hesitate to contact us.

Cordially,

*Kathryn A. Ballsun*

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