#L-500 2/8/80

Memorandum 80-24

Subject: Study L-500 - Uniform Durable Power of Attorney Act

In the course of its study of guardianship-conservatorship law, the Law Revision Commission considered whether it should recommend the enactment of a durable power of attorney act. (A person may execute a durable power of attorney which will remain effective notwithstanding subsequent incompetency--this is intended to provide an inexpensive alternative to the establishment of a conservatorship.) The Commission ultimately decided not to make such a recommendation because the matter was under study by the State Bar.

Legislation was enacted by the 1979 session to provide a limited durable power of attorney. See Civil Code § 2307.1 (attached as Exhibit 1). This legislation permits a power of attorney to exist (if the writing establishing the power so provides) "until one year after the disability or incapacity occurs." This limitation makes the power virtually useless because the power is always subject to attack on the ground that it was exercised more than one year after the disability or incapacity occurred. In this respect, the California statute differs from the uniform act and from legislation enacted in other states.

Because the new California statute is defective and because of the Commission's past interest in this subject, the Executive Secretary wrote to the State Bar Estate Planning, Trust, and Probate Law Section to determine whether that section was planning to review the matter or whether that section believed that a Law Revision Commission study of the matter would be desirable. We did not want to duplicate the efforts of the State Bar Section. We are advised that the Executive Committee of the State Bar Section believes that the Law Revision Commission should make a study and that the Estate Planning Committee of that section is willing to assist the Commission in the study.

Attached is a copy of the new Uniform Durable Power of Attorney Act. Exhibit 2 (attached) is an extract from UPC Notes (May 1978), reporting the conflicting views concerning the New York durable power of attorney statute. This exhibit presents the pros and cons on the policy issue involved in the question of whether a durable power of attorney act should be enacted.

Exhibit 3 (also from UPC Notes, May 1978) outlines the extent to which durable power of attorney legislation has been enacted by the various states and the deviations that the states have made from the Uniform Probate Code provisions.

The staff believes that there is need for uniformity of law on the validity of a durable power of attorney. The effect of the power should not change as the person creating it moves from state to state or in the case where the person has property in several states. For this reason, the staff recommends that the Commission propose the uniform act as drafted by the Commissioners on Uniform State Laws with one exception: Section 3 of the uniform act provides that a person may nominate his or her own conservator in the event one is needed in the future. This duplicates new Section 1810 of the Probate Code (enacted as part of the Commission's guardianship-conservatorship recommendation) which permits a person to nominate a conservator for himself or herself in any signed writing. Section 3 of the uniform act contains the undesirable limitation, however, that if such a nomination is made in a durable power of attorney, it is to be given effect in preference to a later nomination made in a writing which is not a durable power of attorney, absent good cause for not doing so.

A staff draft of a tentative recommendation also is attached to the memorandum. The staff suggests that this be distributed to interested persons and organizations for review and comment.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

EXHIBIT 1

Civil Code § 2307.1

2307.1.

When a principal designates another his attorney in fact or agent by a power of attorney in writing, signed by the principal and acknowledged, and the writing contains the words "This power of attorney shall not be affected by the subsequent disability or incapacity of the principal until one year after the disability or incapacity occurs, or such lesser period specified by the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his or her later disability or incapacity, then the authority of the attorney in fact or agent is exercisable by him or her as provided in the power on behalf of the principal until one year after the disability or incapacity occurs, or such lesser period specified by the principal, notwithstanding later disability or incapacity of the principal at law, provided, however, that the authority of the attorney in fact or agent under a power created pursuant to this section to engage in any transaction involving the sale, conveyance, exchange, transfer, partition, lease, or encumbrance of real property, or any rights or security interest therein, shall be limited to real property which comprises the principal place of residence of the principal. A principal may limit the time period that a power of attorney survives that disability or incapacity to a period less than one year.

All acts done by the attorney in fact or agent, pursuant to the power during any period of disability or incapacity, have the same effect and inure to the benefit of and bind the principal or his or her heirs, devisees, and personal representatives as if the principal were competent and not disabled. Any bona fide purchaser or encumbrancer for value may conclusively rely upon, and need not inquire into, the capacity of the principal at the time a durable power of attorney is created pursuant to this section.

If a conservator or guardian shall thereafter be appointed for the property or estate of the principal, the attorney in fact or agent shall, during the continuance of the appointment, account to the conservator or guardian rather than the principal. The conservator or guardian has the same power the principal would have had if he or she were not disabled or incapacitated to revoke, suspend, or terminate all or any part of the power of attorney or agency.

DURABLE POWER DEBATED IN NEW YORK

New York's durable power of attorney statute was the subject of an interesting exchange of articles that appeared some months ago in New York Law Journal. The first piece, by Sidney A. Fine, a retired associate justice of the Appellate Term of New York's Supreme Court, First Judicial Department, urged corrective legislation that would compel attorneys-in-fact under durable powers to account to court during periods of the principal's incompetence. Justice Fine's premise was that an agent under a durable power should be accountable at all times to some competent authority. He argued that there is an undesirable hiatus in accountability following incompetency, when the principal no longer can exert control, and preceding appointment of a court fiduciary.

Two responses followed. The first, an article submitted by Henry A. Lowet, Esq., of Nickerson, Kramer, Lowenstein, Nessen, Kanin and Stoll, New York, New York, and signed by Mr. Lowet and nine other lawyers appeared under the headline, "A 'Yea' for Law on Durable Power of Attorney" in the New York Law Journal of April 15, 1977. The second, by Stephen M. Newman, Esq., of Hodgson, Russ, Andrews, Woods and Goodyear, Buffalo, for the Committee on Estate Planning of the Trusts and Estates Law Section, New York State Bar Association, appeared as a Letter to the Editor, in the New York Law Journal of April 25. Each of these responses says a good deal about the interest of practicing attorneys in laws that expand the utility of non-court fiduciary relationships. Justice Fine's two responses, also published as letters to the editor, New York Law Journal, show him adhering to his original position and defending the efficiency and utility of mandatory accountings to a court. Portions of these materials are reprinted below, both to give *Notes* readers the benefit of the various points developed by the debate, and to again record a noteworthy illustration of how far apart lawyers and judges frequently find themselves when it comes to the utility of mandatory court accountings for fiduciaries.

A 'Yea' for Law on Durable Power of Attorney

In his article, "Flaw in Law on 'Durable' Power of Attorney," published in the New York Law Journal on March 28, retired Justice Sidney A. Fine argued that recent legislation does not afford "adequate protection" to a disabled or incompetent principal and recommends either direct court supervision of a durable power or a requirement that a conservator or committee be appointed for such a principal with attendant court supervision . . .

The main purpose of the durable power legislation was to provide an inexpensive, safe and expedient way of handling, without mandatory court supervision, the affairs of persons of questionable mental competence, particularly aged persons, whose affairs are relatively uncomplicated. Prior to this legislation, proper management of the affairs of such a person could be assured only in one of three ways: (1) under a "housekeeping trust"; (2) by judicially appointed committee; or (3) by a judicially appointed conservator under Article 77 of the New York Mental Hygiene Law.

The trust is a device generally confined to the affluent. It requires legal supervision and often the performance of administrative functions such as preparing and filing tax returns and maintaining records. Its use would be considered wasteful without sufficient assets to justify the expenses of administration.

The appointment of a committee or conservator requires a judicial proceeding and a judicial finding of incompetence or an inability to care for one's affairs. The stigma attached to any such judicial declaration is offensive to many, particularly the aged, and there is a natural reluctance to resort to these procedures except *in extremis*. Furthermore, both procedures impose burdensome requirements of annual accountings on the person appointed.

It became apparent in drafting the legislation that, as a practical matter, powers of attorney were frequently used to handle the affairs of persons with impaired faculties, notwithstanding that many actions performed by the attorney-in-fact would be voidable under then existing law. Section 5-1601 was designed to eliminate that uncertainty. Judge Fine implied that, since Section 5-1601 removes this uncertainty, a disabled or incompetent person is now more likely to be at the mercy of an "overreaching" or persuasive attorney-in-fact.

Judge Fine opted for a formal accounting mechanism despite the experience of many attorneys who have long doubted the value of required, routine, annual, *ex parte*, guardian accountings. He proposed a form of court-supervised accounting which would reimpose, in every instance of a disabled or incompetent principal, the costly, formalistic and time consuming procedures of doubtful utility associated with a committee or conservator — the very requirements which this legislation sought to bypass for routine situations. It should not be inferred that we advocate abolition of committee or conservatorship proceedings generally; only that such formal supervision should not be required in every situation where a power of attorney is invoked on behalf of a disabled principal.

Section 5-1601, in the portion quoted below, itself suggests that court supervision would be provided if needed in a given case:

"If a committee or conservator thereafter is appointed for such principal, such attorney-in-fact, during the continuance of the appointment, shall account to the committee or conservator rather than to such principal."

Thus, the attorney-in-fact is accountable to the committee or conservator as he would otherwise have been to the principal, or, to the court, on its own initiative or on the petition of a person interested.

This accountability stems from the well-established principle that an attorney-in-fact owes a fiduciary duty to his principal. (See, 2A C.J.S. Agency Sections 5, 23). In fact it is the same fiduciary duty owed by a trustee under an express deed of trust. This conclusion was recently affirmed by Surrogate Brewster of Westchester County in Estate of Raphael Hudis (NYLJ, Feb. 3, 1977, p. 25, col. 2; motion to reargue denied, NYLJ, April 6, 1977, p. 15, col. 4). Hudis was a discovery proceeding pursuant to SCPA 2103 where the executor sought recovery of the proceeds of a savings account of the decedent which had allegedly come into the possession of another son of the decedent while acting under a power of attorney given to him by the decedent during his lifetime. Although the decedent had died in 1969, his will was not admitted to probate until 1972, after apparent procedural difficulties, and the instant proceeding was not initiated until 1976.

The respondent argued that the petition merely charged that he had received money owned by the decedent prior to his death and that, assuming the money was received under a power of attorney for which he might be chargeable with a constructive trust, no fraud had been charged. He further argued that the statute of limitations ran from the time the alleged wrong was committed, which was when the respondent had received the money in 1968, and that the six-year period prescribed under CPLR 213 had long since expired.

The Court held that the attorney-in-fact was a fiduciary and that unless the respondent was found to have openly repudiated his obligation as attorney-in-fact, he remained liable to account to the estate of the deceased principal. The Court held further that the statute of limitations does not begin to run unless there is an act of open repudiation by the attorney-in-fact known to the principal or to his representative. That presented an issue of fact to be determined and was sufficient to cause the motion of dismissal to be denied.

Surrogate Brewster supports his holding in Hudis by the decision and reasoning of former Surrogate DiFalco in Estate of Milton Schilbach (NYLJ, Oct. 10, 1976, p. 7, col. 2), where the New York Surrogate states that although SCPA 2205 and 2206 do not specifically provide for compulsory accounting by an attorney-in-fact, EPTL 13-2.3 "clearly manifests the authority of the Surrogate to regulate powers of attorney in regard to a decedent's estate." Surrogate DiFalco held that an attorney-in-fact for the surviving spouse (who had since died) was accountable for the assets of the decedent, which the spouse, as his executrix and sole beneficiary, had transferred to herself and which were now in the possession of the attorney-in-fact.

Surrogate DiFalco supports his holding with a review of decisions underscoring the New York rule that a court of equity had broad jurisdiction and powers, absent a specific remedy at law, to compel an accounting whenever there is a question of a breach of a fiduciary duty. (See, Fur & Wool Trading Co., Ltd. v. Fox, Inc., 245 N.W. 215 (1927)). The Surrogate cites with approval several cases holding that equitable remedies are available when disabled individuals are victimized by unscrupulous fiduciaries, regardless of whether the fiduciary relationship is express or implied by law. (See Allen v. La Vaud, 213 N.Y. 323 (1915); Schantz v. Oakman, 163 N.Y. 148 (1900)).

It can hardly be said, then, that New York law would not provide "adequate protection" for the disabled or incompetent principal.

Moreover, Judge Fine acknowledges that the principal himself makes the designation of an attorney-in-fact and thereby has the opportunity of naming a trusted individual or bank; but instead of acknowledging that this affords adequate protection to the principal, he suggests that the attorney-in-fact be judicially appointed as the conservator of the principal and made subject to the accounting provisions of the Mental Hygiene Law.

We are of the opinion that such a revision of the statute would be analogous to constituting the custodian under the Uniform Gifts to Minors Act as a trustee with the requirement that he account to the minor under the Surrogate's Court Procedure Act.

At least ten jurisdictions other than New York have adopted the durable power of attorney which appears as a section of the Uniform Probate Code. We maintain that Section 5-1601 in its present form has clearly proven to be a safe, flexible and inexpensive way of handling the affairs of disabled, primarily elderly persons, and, absent a convincing reason, should not be amended.

Signed: Mal L. Barasch, George DeSipio, Jacob Ebeling-Kening, Morton Freilicher, Philip J. Hirsch, Henry A. Lowet, Anders R. Sterner, James P. Tannian, Douglas P. Williamson, Jr. and Harvey F. Zamand.

Letter to the Editor . . . "Durable Power of Attorney 'Useful Tool' "

. . . The Committee on Estate Planning of the Trusts and Estates Law Section of the New York State Bar Association issued a report which was published in the October, 1976 issue of the New York State Bar Journal. The report takes the general position that the durable power of attorney is a welcome addition to and useful planning tool in the estate planning field.

. . . While not denying Justice Fine's statement that without supervised accountability, "there exists a potential for abuse by designing culprits," the committee feels that adoption of Justice Fine's recommendations would in large measure negate the advantages now offered by the durable power. The very reason for executing a durable power of attorney is in many cases to avoid the necessity for the appointment of a conservator or committee. Were the statute to require such an appointment, the utility of the durable power would be restricted to providing of a temporary caretaker with authority to act for the disabled principal until the appointment were secured. The time and expense entailed in securing the appointment and in producing the necessary annual accountings would no longer be avoided. It is therefore submitted that the requirement suggested by Justice Fine would eliminate the *raison d'etre* of the durable power.

The fundamental question raised by Justice Fine is really not whether the durable power should be coupled with a mandatory appointment of a committee or conservator for a disabled principal, but whether the existence of the durable power without the requirement of such an appointment affords adequate protection to the disabled principal. As indicated in the committee's report, the attorney-in-fact is under existing law accountable to any conservator or committee who is appointed for the principal; or if there is none, to the principal himself if the legal disability ceases; or if it does not, then upon the principal's death to the legal representative of his estate.

Of course, such accountability is ultimate rather than annual. However, this type of accountability is hardly different from that of an executor of a decedent's will or a trustee of an inter vivos trust. Furthermore, any interested party who at any time suspects the attorney-in-fact of improper conduct may petition for his own appointment, or for the appointment of another, as committee or conservator. Any such appointee assumes the power to revoke the authority of the attorney-in-fact, and even if such authority is not revoked, the attorney-in-fact becomes accountable to the appointee.

Furthermore, the Mental Hygiene Law permits an extremely broad class of petitioners. Section 78.03 provides that any person may petition for the appointment of a committee. Section 77.03 provides that a petition for the appointment of a conservator may be commenced by the proposed conservatee, a relative of the proposed conservatee, a friend having a concern for the financial and personal well being of the proposed conservatee or the officer in charge of a hospital or school in which the proposed conservatee is a patient or from which he receives services. It is therefore submitted that within this statutory framework lies ample opportunity of any interested person to take appropriate action to protect the interests of the disabled principal.

It may be argued that in certain cases no interested person will be sufficiently aware of the facts or will have sufficient inclination to petition for appointment of a conservator or committee. In such an event, the attorney-in-fact would nevertheless still be ultimately accountable to the legal representative of the principal's estate, or to the principal himself if he regains legal competence. Furthermore, assuming the lack of any interested party, then one must wonder about the effectiveness of the annual accounting procedure required under the Mental Hygiene Law to check abuses, assuming the lack of any interested party to object to any such accounting.

Were the statute to require the appointment of a conservator or committee in the event of the principal's disability, as suggested by Justice Fine, the question might then arise as to the authority of the attorney-in-fact to act on behalf of the principal pending such appointment, or pending diligent effort to commence and complete a proceeding leading to such appointment. Thus, the certainty of the durable power would be eliminated, and practitioners and those wishing to rely on powers of attorney would be once again faced with the requirement of ascertaining the competence of the principal. The very uncertainty concerning the effectiveness of a given power and the widespread misuse of powers on behalf of principals whose mental status was entirely unknown to those accepting the power would once again become part and parcel of use of the power.

In conclusion, it is submitted that the Legislature acted wisely in creating a simple and expedient alternative to the statutory procedures for the appointment of a committee or a conservator, and that the utility of the durable power of attorney as an estate planning tool would be severely curtailed were its use to be burdened by statutory amendment along the lines suggested by Justice Fine.

Stephen M. Newman
For the Committee

Buffalo, N.Y.

Letter to the Editor . . . "Durable Power of Attorney—Reply to State Bar Panel"

. . . The State Bar Committee's letter is a thoughtful, persuasive argument in support of Section 5-1601 but it misses the point of my proposal because its major premise is that my proposal will require in every case of a disabled principal the appointment of a conservator or committee.

The nub of my proposal is accounting which can be performed by the attorney-in-fact. No appointment of a conservator or committee is, or should be, required, barring misbehavior by the attorney-in-fact. I am not at all persuaded that annual accounting by the attorney-in-fact would entail such time or expense as to negate the advantage now offered by durable power.

Sidney A. Fine

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Durable Power Debate

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Letter to the Editor . . . "Durable Power of Attorney—Gap Still Unfilled"

. . . the accountability to the principal required by General Obligations Law 5-1601(2) is meaningless during a period of disability. The principal's competency having been impaired, he or she would have little, if any, understanding of the contents of an accounting. An accounting only to the principal would therefore be a nullity. Court protection in such situations is, therefore, necessary.

It is certainly anomalous that while the statute compels an attorney-in-fact to be accountable to his principal or to a conservator or committee, if one is appointed, it is silent when the donor of the power becomes disabled and no conservator or committee is appointed — the circumstance when the principal would be most in need of such protection.

. . . Certainly, there are equitable remedies available when disabled individuals are victimized by unscrupulous fiduciaries. But what is overlooked in the reply is the obvious desirability of adopting suitable mechanisms to avoid such victimization in the first place. What good are such after-the-fact remedies if the perpetrator, who, unlike a conservator or committee, is unbonded, cannot pay the damages assessed against him?

Finally, I do not share the view that supervised accountings under the guidance of the Appellate Division are merely "costly, formalistic and time-consuming procedures of doubtful utility." Under the compulsory accounting procedure a failure to account, or the rendering of a deficient account, is punishable by an order of the court — a significant sanction. Nor do I consider burdensome the requirements of annual accountings.

I am more than ever convinced that the Legislature should amend the General Obligations Law to provide full control over the activities of attorneys-in-fact during the hiatus period of disability.

The gap in the present law persists. The reply by Mr. Lowet, et al, does not fill it.

Sidney A. Fine

New York, N.Y.

Editor's Corner

Hurrah for the durable power of attorney! What could be more welcome on the family law scene than a new statute based on familiar concepts that is short, simple and sufficient to give lawyers a reliable office answer for clients who need senility insurance? And think of trust settlors and trustees who now can have a device for assuring last minute funding of probate avoiding trusts, and bankers who have been concerned about liability for withdrawals under agency powers made after a principal's loss of competence? But what of the cloud on the horizon? Will those who believe in mandatory court accountings for fiduciaries be able to persuade legislators that the new device should be surrounded with statutory requirements for periodic reports and accountings to a court? Legislators sometimes appear to give undue weight to the presumably impartial recommendations of judges and former judges. And, as reflected by Judge Fine's views in the New York debate over court accounting requirements for agents under durable powers reported elsewhere in these pages, judges tend strongly to favor required court accountings by fiduciaries. The question is closely related to the continuing discussion of whether the procedures recommended by the Uniform Probate Code for decedents' estates and trusts should be accepted in states where tradition has favored probate court supervision of executors, administrators and testamentary trustees.

In historic context it appears that the tide is running strongly against new court accounting obligations for fiduciaries. The 1937 Uniform Trustees Accounting Act, withdrawn in 1966 from the list of recommended uniform acts, marked an apparent move toward more court accountings as it required periodic filings of both testamentary and inter vivos trustees. At the same time, however, it gave trust draftsmen the power to counter the filing requirement by appropriate provision in trust instruments. In retrospect, the latter provision appears to have been the more significant. Certainly practice in the few states that accepted this act and others where required court accountings for trustees and executors can be excused by appropriate language in controlling instruments has been to excuse fiduciaries from accounting requirements as a matter of routine. Thus lawyer-drawn wills in Georgia, Texas and Washington invariably include whatever language is necessary to permit executors to escape probate court supervision including required reports and accounts. The Uniform Probate Code, which extended the concept of unsupervised administration to administrators in intestacy, has been emulated in this regard in Indiana, Maryland, Texas and Wisconsin in addition to the ten states that have accepted the rest of the Code. Also proposals for legislation that would permit most probate estates in Illinois and Missouri to escape mandatory court accountings appear to be gaining strength. And, as noted in the letter by Mr. Lowet and others, the very popular Uniform Gifts to Minors Act has given us another very large category of informal fiduciary relationships that escape statutory requirements for routine court accountings.

Arguably, agents for incompetent principals are different in that they may be operating free of effective scrutiny by anyone with enough information and self-interest to deter them from illegal conduct. But practitioners know full well that statutes mandating court accountings do not necessarily hold a solution, though inevitably they tend to increase costs for all fiduciary relationships within their ambit. Conventional court accountings charge the fiduciary with amounts acknowledged to have been received, reduced by sums expended as shown by vouchers or receipts. Court personnel, knowing no more about the relationship than is shown by what is reported, can do little more than accept the amounts for which an accounting fiduciary charges himself, check receipts submitted against expenditures claimed and determine that all addition and subtraction is accurate. As noted by the New York attorneys responding to Judge Fine, unless someone representing the beneficiary of a fiduciary's duty enters an objection to a court accounting, there is no assurance that the procedure will alert anyone to possible breaches of duty by the accounting fiduciary.

One thing that is certain about required court accountings by fiduciaries is that it entails more work for court personnel and those so employed are usually the principal proponents of continuing and extending the system that supports them. One of the most difficult aspects of winning acceptance of the Uniform Probate Code has been to persuade legislators to look beneath the claims of their fellows on the public payroll that probate court supervision of fiduciaries is a good, if not vital, function. The popularity of durable power legislation does not mean that legislatures will move promptly to junk all remnants of the old supervisory function of probate courts. But this important addition to various existing systems for probate court avoidance may accelerate the day when probate court personnel, having nothing to supervise, will begin to look for other responsibilities.

DURABLE POWER LAWS POPULAR; VARIED*

In framing Article V of the Uniform Probate Code dealing with the field of Guardian and Ward, the draftsmen sought to provide devices that could be used to avoid court proceedings for persons unable to manage their affairs. One, pertinent to a traditional need for a court appointed guardian of a minor to give a valid discharge for sums paid to or for the benefit of the minor, is the facility of payment provision in Section 5-103. Another, strengthening the ability of decedents to establish guardianships by will, is reflected in Sections 5-202 and 5-301. Finally, the draftsmen included Sections 5-501 and 5-202 which made two rather simple changes in the agency rules applicable to written powers of attorney. By the first, one is empowered to create an agency which becomes or remains effective in spite of the principal's later conceded loss of mental capacity to engage in any transaction. The second, applicable to all written powers, extends validity to the agent's authorized transactions occurring after the principal's death but before the agent learns of the death.

The UPC provisions on powers of attorney, creating what has come to be referred to as a "durable power of attorney," or a "block-buster power" in some quarters, came from four sources. The idea of empowering a principal to include language in his agent's authority that effectively sustains the power in spite of the principal's later incompetence was derived from a provision added in 1954 to Virginia statutes as Code of Va. (1950) section 11-9.1. The notion that an agent's authority to execute a power should not vanish upon the principal's death until the agent learns of the death, derives from French law and a Virginia statute enacted in 1962. Also the draftsmen and their advisors knew from experience in practice that much of the business world tends to rely on written powers of attorney without great concern for whether the principal is fully competent at the moment of exercise. After all, prior to a court adjudication, who can determine the precise moment in time that marks the end of one's legal capacity? It is undenied that an agent's authority continues during times when the principal is unconscious because asleep; short of an adjudication, what more would mark the end of capacity and what are the risks that a court adjudication will roll the time of incompetency back to the detriment of an agent and third person who participated in an otherwise legitimate exercise of the principal's authority? In making these questions irrelevant, the draftsmen felt that they were not changing the law so much as they were eliminating doubts that occasionally and unpredictably blocked desirable transactions.

Finally, the draftsmen believed that the time had come when clear authority, like that available over property to its trustee, should be made available to agents who might be selected to manage untransferred assets of a principal. Elderly persons of all wealth levels rather than just those with enough wealth to justify creation of trusts need a simple, non-court device for enabling others to act for them in the event of later incapacity. The draftsmen wanted to provide a simple form of insurance against the costs and complexity of guardianships for persons who might anticipate some later loss of business capacity.

The widespread reception by state legislatures of the concepts urged by UPC 5-501 and 5-502 shows this portion of the Code to be the most popular of all UPC features. Thirty-six states plus Virginia now have statutes that move old power concepts toward the UPC model. By contrast, another popular UPC provision, Section 2-504 on self-proved wills, has been implemented by comparable legislation in twenty-six states. The balance of this article is devoted to a discussion of the variations from UPC recommendations that are reflected in the several new power of attorney statutes.

Eighteen states, consisting of the ten UPC states of Alaska, Arizona, Colorado, Idaho, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah, plus Hawaii, Indiana, Iowa, Maine, Maryland, New Jersey, Vermont and Washington, have enacted statutes that are practically identical with Sections 5-501 and 5-502.

The durable power legislation in another fourteen states omits UPC language specifying that a power may be framed to become effective on future disability of the principal. This adjustment may indicate a belief that no special statutory dispensation is needed to permit powers to be drawn so as to be conditional on future events. It seems equally likely, however, that local legislative advisors questioned the utility of an authority that might require an adjudication of incompetency to become effective. The point affects the statutes in Arkansas, Connecticut, Delaware, Florida, Georgia, Michigan, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, Virginia and Wyoming.

The statutes in all of the states just listed above except Pennsylvania plus Oregon, omit UPC language authorizing exercise of a durable power when the attorney-in-fact is uncertain whether the principal is alive or dead. This omission appears to be of no consequence in two of these states, Oregon and Virginia, where statutes also specify that a power is terminated, not merely by the principal's death as at common law, but by death and

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*Carol Ellis, 2d year student at University of Georgia School of Law, provided the statutory research and analysis on which this article is based.

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the agent's knowledge of the principal's death, as under French law. Ohio, oddly, has accepted the French law point for powers that have not been made expressly durable; durable powers appear to be ended in Ohio by the principal's death irrespective of the agent's lack of information about the death. Thus, Arkansas, Connecticut, Delaware, Florida, Georgia, Michigan, New York, North Carolina, Ohio, Oklahoma, Texas and Wyoming handicap an agent holding a durable power by making him, in effect, a guarantor of the fact of the principal's continuing life at the moment of a transaction under the power.

Arkansas, Connecticut, Delaware, Florida, Georgia, Kentucky, Michigan, North Carolina, Oklahoma, Texas and Wyoming provide that appointment of a guardian for the principal terminates a durable power. Arkansas, Delaware, Michigan, Oklahoma and Wyoming temper this by providing that the court may order to the contrary when it appoints the guardian. Both variants are in contrast to the UPC model which provides that a conservator (UPC's replacement term for guardian of the estate) may revoke a durable power.

Durable power legislation as enacted in states that have not picked up the rest of UPC Article V tends to substitute the word "guardian" for "conservator" in language enabling a court appointed fiduciary to revoke a durable power, or in describing the effect of the court proceeding on pre-existing powers. Consequently, several of the new statutes appeared to have stepped away from the UPC model which permits a durable power to be affected by one appointed to handle property matters of a person needing court protection, and denies this authority to a guardian of the person.

The statutes in Arkansas, Delaware, Oklahoma and Wyoming describe a durable power as one executed "in anticipation or because of" some infirmity. It is unclear what is intended by this innovation. Hopefully, it will be construed to be meaningless, rather than held to invalidate an agent's post-incompetency exercise of a durable power executed when principal was in the best of health and that language making the power durable was added merely to maximize the value of a standard power of attorney. If the latter result is reached, durable powers will be burdened in these four states with an intention test that seems unnecessary and undesirable.

A more serious variant from the national model has cropped up in Florida and Michigan where the statutes limit those to whom durable powers may be given. In Florida, durable powers may be conferred only on the principal's spouse, parent or child; in

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Michigan, those eligible are the principal's spouse, parent, child, grandparent, sibling or a bank exercising trust powers. Each state's enactment deprives principals of the ability to choose persons they deem most suitable to handle their affairs, and excludes business associates, attorneys and others who might be most obviously qualified. Further, both states make durable powers non-delegable, presumably to prevent avoidance of the restrictions imposed on those qualified to be attorneys in fact. The result is a distinctly less flexible managerial device than is available in other states having durable power legislation.

The legislative draftsmen in Arkansas, Connecticut, Delaware, Oklahoma and Wyoming saw fit to impose formal requirements on the execution of durable powers that appear to serve little purpose other than to increase the likelihood that lawyers will be involved in the preparation of these instruments. Delaware, Oklahoma and Wyoming require that durable powers be executed before and with the approval of a district court judge. The Arkansas legislation describes a similar requirement but offers alternatives of execution before two attesting witnesses or a notary public. Connecticut requires execution with the formalities required for a will.

A final significant variant on the recent durable power legislation can be found in Georgia and Oregon where the legislation makes all powers of attorney durable unless provided otherwise in the writing creating the authority. Though it appears to throw caution to the winds, this approach merely reflects and validates the practice of lawyers and others who rely on powers of attorney without particular concern for whether the principal may have lost legal capacity since creating the power.

UPC's Section 5-502 accepting the Civil Law view that an agent's authority under any power of attorney continues until the agent learns of the principal's death, has been accepted without significant change in eighteen states: Alaska, Arizona, Idaho, Indiana, Iowa, Maine, Maryland, Minnesota, Montana, New Jersey, Nebraska, New Mexico, North Dakota, Oregon, Pennsylvania, Utah, Vermont and Washington. An identical provision is the law of Virginia just as it was when it was copied by UPC draftsmen. The comparable provision enacted as a part of Colorado's version of UPC validates exercise of written powers that have not been made durable following any disability or incompetence of the principal of which the parties lacked actual knowledge. It is unclear whether the principal's death would be considered a form of incompetence or disability. Even if it is so considered, the provision does not apply to durable powers so that an agent exercising a Colorado durable power may be in trouble if the principal has died a moment or two earlier. On the other hand, Colorado's copy of UPC 5-501 contains language making a durable power exercisable notwithstanding "later uncertainty as to whether the principal is dead or alive." Hence, it seems likely that the situation *vis a vis* the exercise of a durable power after the principal's unknown death is the same in Colorado as in the eighteen states previously listed.

As noted earlier, Arkansas, Connecticut, Delaware, Florida, Georgia, Michigan, New York, North Carolina, Oklahoma, Texas and Wyoming omit reference in their counterparts of UPC 5-501 to instances of a durable power's exercise when the agent is uncertain whether the principal is alive. Since none of these states has enacted legislation resembling UPC 5-502, agents in these states and those with whom they deal must act in peril of the unknown death of the principal. The same appears true of durable powers only in Ohio where the legislation both limits the counterpart of UPC 5-502 to non-durable powers and omits mention of uncertainty about the principal's life from the counterpart of UPC 5-501. The Ohio pattern makes no sense; evidently it is the result of some drafting error. In Hawaii, the legislation explicitly terminates durable and non-durable powers on the principal's death irrespective of the agent's knowledge of the event.

Three states, Massachusetts, Mississippi and South Carolina, have limited their legislative adjustments of powers of attorney law to variations of 5-502, omitting any attempt to permit a principal to create an authority that will continue in spite of the principal's conceded incompetence. All extend the authority of an agent in fact until he learns of the principal's death; Massachusetts extends this protection to acts occurring before the agent's knowledge of the principal's mental illness or other disability. None authorize creation of a power that lasts beyond known incompetency of the principal.

Other deviations from the UPC model appear to be of little consequence. The statutes in a few states require the agent under a durable power to account to a guardian who may be appointed for the principal. The same requirement is implicit in the UPC provision enabling a conservator to revoke a durable power, and in the time honored ability of a guardian of the estate to possess the assets of his ward. Several of the statutes in non-UPC states substitute "incompetency" for "disability" since the latter is a defined term in the national code. In others, the term "disability" has been retained but defined, sometimes in slightly different words than in UPC. The nuances of these differences in language may or may not prove important in later litigation.

In summary, thirty-seven states have now passed legislation that either permits some written powers of attorney to be worded so as to remain effective in spite of the principal's later incompetence, protects agents and third persons who act in reliance on a

(Continued on Page 15)

Durable Power Laws Popular

(Continued from Page 14)

power of attorney before learning of the principal's incapacity or death, or both. The jurisdictions that appear not to have acted on these matters to date are Alabama, California, District of Columbia, Illinois, Kansas, Louisiana, Missouri, Nevada, New Hampshire, Rhode Island, South Dakota, Tennessee, West Virginia and Wisconsin.

The major variations in the thirty-four statutes creating powers that endure conceded incompetence appear to weaken the device as recommended in UPC or complicate it unnecessarily.

Those statutes that have omitted language explicitly authorizing durable powers to be framed to become effective on some specified, future event may discourage the preparation of instruments that are tailored most closely to the needs and wishes of the principal. In consequence, these laws may lead to the use of escrow devices that will permit instruments conferring present powers to be delivered to the attorney in fact only when some specified future court occurs. No obvious statutory purpose is served by discouraging inclusion of conditions in instruments of authority to attorneys in fact. One arrangement that might make sense in many cases would be to condition a power on receipt by the attorney in fact of a document signed by the principal's spouse, attorney and physician directing that management under the power should commence. It should be possible to frame this and other conditions on powers either as instructions to an escrow agent in possession of an unqualified power, or as a part of the instrument of authority to the attorney in fact.

Durable power legislation that fails to protect an agent who acts after the principal has died but before learning of the death poses perils for an attorney-in-fact that do not apply to a trustee. This shortcoming frustrates the legislative purpose of providing persons who are unable or unwilling to transfer assets to a trustee with a wholly useful device to protect their affairs from the risks of later incompetency. Further, it is not clear that any worthwhile legislative purpose is served by denying all authority to an agent who is unaware of the principal's death. Perhaps there is some fear that agents with knowledge of the principal's death will be able to deny what they know and act improperly. But who will be harmed if the result is in accordance with the principal's purpose? Self-dealing by the attorney-in-fact and acts that deviate from the authority conferred would be improper in any event.

Since the principal purpose of a durable power is to make guardianships unnecessary, it is especially unfortunate that some of the durable power legislation specifies that appointment of a guardian terminates a power. There is no correlation between the grounds for appointment of a guardian and any need to terminate a power of attorney. If anything, the need for reliable authority under a power becomes most obvious at the time when the principal's incompetency is established beyond doubt by an adjudication. Rather than a device for avoiding guardianships, this durable power legislation tends to assure resort to guardianships by persons who perceive that they may have something to gain by causing the principal's authority to end and be replaced by that of the traditionally powerless guardian. The UPC provision that permits a durable power to be revoked by a conservator (guardian of the estate) provides ample protection against an attorney-in-fact who uses the incompetency of the principal as a shield for unnecessary or improper conduct under a power. Note also that the grounds for appointment of a conservator under UPC include a finding that property management for the person to be protected is necessary to avoid waste or to provide financial support for the respondent or his dependents. Unless one assumes that all durable powers will be abused once the principal becomes incompetent, the UPC framework makes the presence of a durable power a deterrent rather than an inducement to those who might resort to court proceedings to undercut the authority of an attorney-in-fact.

Recently, a suggestion has been made in the National Conference of Commissioners on Uniform State Laws that UPC Sections 5-501 and 5-502 be recast as a free standing uniform act. If this proposal is accepted and implemented, the uniform law commissioners and advisory committees from the American Bar Association will have another opportunity to consider the ideal purposes and details of durable power of attorney legislation. *Notes* readers who have thoughts about the matters discussed in this article or others relating to durable powers of attorney are invited to put them in letters to the Editor. All responses will be made available to any NCCUSL project for a new Uniform Durable Power of Attorney Act that may be started.

#L-500

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

THE UNIFORM DURABLE POWER OF ATTORNEY ACT

In 1979, the Legislature enacted legislation to permit a person executing a written power of attorney to provide in the writing that the power of attorney would remain effective notwithstanding the subsequent disability or incapacity of the person giving the power.[1] However, the legislation also provided that the power could be exercised by the attorney in fact only until one year after the disability or incapacity of the principal occurs or such lesser period specified by the principal. This limitation of the "durable" power of attorney makes it virtually valueless to those who wish to use this device as an inexpensive alternative to a court-supervised conservatorship, both because the one-year period is too short and because it is impossible to know the precise moment when the principal becomes incompetent.

The Uniform Probate Code contains provisions for a durable power of attorney.[2] In reviewing these provisions, the State Bar reported that the concept of the durable power of attorney has a great deal of merit.[3] The purpose of the durable power of attorney was to enable elderly people of modest means to protect themselves against the possibility of their later incompetency which wealthier people might accomplish with a funded revocable trust.[4] A durable power of attorney also provides a simple and efficient way for a person to anticipate and obviate the need

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1. 1979 Cal. Stats. ch. 234 (codified as Civil Code § 2307.1). Prior to this legislation, it was the rule that an agency not coupled with an interest would terminate upon the incapacity of the principal to contract. See 1972 Cal. Stats. ch. 988, § 2 (codified as Civil Code § 2356); 1 B. Witkin, Summary of California Law Agency and Employment § 192, at 785 (8th ed. 1973).

2. Uniform Probate Code §§ 5-501, 5-502.

3. State Bar of California, The Uniform Probate Code: Analysis and Critique § 5.35, at 182 (1973).

4. See prefatory note to Uniform Durable Power of Attorney Act.

for costly court-supervised conservatorship proceedings in the event of future incompetence.

Although the durable power of attorney affords fewer protections against abuse than a court-supervised conservatorship since periodic accountings are not required, the periodic accountings required in conservatorship proceedings afford a practical safeguard only if there is a third person who receives and scrutinizes the accounting and will object if there are apparent improprieties. If the person who created the durable power of attorney is competent, that person can generally revoke the power if it is not being exercised properly.[5] If the person is incompetent, a friend or relative can seek the appointment of a conservator of the estate[6] and, under the Uniform Probate Code, the conservator may revoke the power.[7] Thus, although there is no court supervision over the exercise of a durable power of attorney, the person who created the power is not left wholly unprotected.

Because of the usefulness of the durable power of attorney for people of modest means, well over half of the states in the United States have enacted some form of legislation giving effect to durable powers of attorney. Acting at its annual conference in 1979, the National Conference of Commissioners on Uniform State Laws revised the

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5. See generally 1 B. Witkin, Summary of California Law Agency and Employment §§ 191-231, at 785-818 (8th ed. 1973).

6. Under newly-enacted California law, a conservatorship of the estate can be established on petition of the proposed conservatee, the spouse or a relative of the proposed conservatee, any interested state or local agency or officer or employee thereof, or any other interested person or friend (other than a creditor) of the proposed conservatee. Prob. Code § 1820 (operative January 1, 1981).

7. Uniform Probate Code § 5-501. The provision authorizing a conservator to revoke a durable power of attorney is also contained in the Uniform Durable Power of Attorney Act (Section 3). See discussion in text accompanying notes 8-9 infra.

Uniform Probate Code provisions relating to durable powers of attorney,[8] approved a new free-standing Uniform Durable Power of Attorney Act, and recommended the new act for enactment in all the states. Like the new California law, the uniform act permits a person to create a durable power of attorney by providing in the instrument that the power shall not be affected by the subsequent disability or incapacity of the maker, that the power shall become effective upon such disability or incapacity, or words of similar import.[9] Unlike the new California law, the uniform act does not provide a maximum time limit on the effectiveness of a durable power of attorney.

The Law Revision Commission has reviewed the new Uniform Durable Power of Attorney Act and some of the background materials used in its formulation. The Commission is of the view that the durable power of attorney is a useful estate planning tool. The durable power of attorney appears to have been well received in the many states that have enacted legislation authorizing its use. Although California has adopted the durable power in concept, the severe time limitation on its effectiveness[10] renders the durable power useless in California from a practical standpoint.

The Commission recommends the adoption of the new Uniform Durable Power of Attorney Act in California. The provision in the uniform act which permits a person to use a durable power of attorney to nominate a conservator for himself or herself in the event one is needed in the future, but renders void a later nomination made by the person in an instrument which is not a durable power,[11] should not be adopted in

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8. See note 2 supra.

9. Uniform Durable Power of Attorney Act § 1.

10. See Civil Code § 2307.1.

11. See Uniform Durable Power of Attorney Act § 3(b).

California since it would be an undesirable limitation on new and liberalized provisions of the Probate Code relating to nomination of a conservator.[12] The remainder of the uniform act should be adopted as nearly verbatim as possible. Because of the mobility of people in contemporary society, the durable power of attorney is a matter particularly appropriate for uniform legislation among the various states. The need for uniformity in this area of law outweighs any advantage to be gained by substantive tinkering with the uniform act.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Article 3 (commencing with Section 2400) to Chapter 2 of Title 9 of Part 4 of Division 3 of, to amend Section 2356 of, and to repeal Section 2307.1 of, the Civil Code, relating to agency.

The people of the State of California do enact as follows:

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12. See Prob. Code § 1810 (operative January 1, 1981).

Civil Code § 2307.1 (repealed). Durable power of attorney

SECTION 1. Section 2307.1 of the Civil Code is repealed.

~~2307.1. When a principal designates another his attorney in fact or agent by a power of attorney in writing, signed by the principal and acknowledged, and the writing contains the words "This power of attorney shall not be affected by the subsequent disability or incapacity of the principal until one year after the disability or incapacity occurs, or such lesser period specified by the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his or her later disability or incapacity, then the authority of the attorney in fact or agent is exercisable by him or her as provided in the power on behalf of the principal until one year after the disability or incapacity occurs, or such lesser period specified by the principal, notwithstanding later disability or incapacity of the principal at law, provided, however, that the authority of the attorney in fact or agent under a power created pursuant to this section to engage in any transaction involving the sale, conveyance, exchange, transfer, partition, lease, or encumbrance of real property, or any rights or security interest therein, shall be limited to real property which comprises the principal place of residence of the principal. A principal may limit the time period that a power of attorney survives that disability or incapacity to a period less than one year.~~

~~All acts done by the attorney in fact or agent, pursuant to the power during any period of disability or incapacity, have the same effect and inure to the benefit of and bind the principal or his or her heirs, devisees, and personal representatives as if the principal were competent and not disabled. Any bona fide purchaser or encumbrancer for value may conclusively rely upon, and need not inquire into, the capacity of the principal at the time a durable power of attorney is created pursuant to this section.~~

~~If a conservator or guardian shall thereafter be appointed for the property or estate of the principal, the attorney in fact or agent shall, during the continuance of the appointment, account to the conservator or guardian rather than the principal. The conservator or guardian has the same power the principal would have had if he or she were~~

~~not disabled or incapacitated to revoke, suspend, or terminate all or any part of the power of attorney or agency.~~

Comment. Former Section 2307.1 is superseded by Article 3 (commencing with Section 2400) of Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code.

15328

Civil Code § 2356 (amended). Termination of agency; binding effect of certain transactions

SEC. 2. Section 2356 of the Civil Code is amended to read:

2356. (a) ~~Unless~~ Subject to Article 3 (commencing with Section 2400) of Chapter 2 of this title, unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by: (1) its revocation by the principal; (2) his death; or, (3) his incapacity to contract ~~, except for a power of attorney created pursuant to Section 2307.1, which power terminates upon the expiration of one year from the occurrence of disability or incapacity of the principal, or of such lesser period specified by the principal~~ .

(b) However, any bona fide transaction entered into with such agent by any person acting without actual knowledge of such revocation, death, or incapacity shall be binding upon the principal, his heirs, devisees, legatees, and other successors in interest.

Under this subdivision, in the case of an agent of a principal who is an absentee as defined in Section 1751.5 of the Probate Code, while the absentee continues in his missing status, and until receipt by the parties of notice from the secretary of the department or head of the agency concerned, or his delegate, of the termination of such missing status by the making of a finding of the death of the absentee, the parties shall be deemed to be without actual knowledge of any such revocation, death, or incapacity of the principal.

(c) Nothing in this section shall affect the provisions of Section 1216.

Comment. Section 2356 is amended to delete the former reference to Section 2307.1 which has been repealed, and to make the rules relating to termination of an agency provided by this section subject to the special rules provided by Sections 2400-2407 applicable to a durable power of attorney.

27814

Civil Code §§ 2400-2407 (added). Uniform Durable Power of Attorney Act

SEC. 3. Article 3 (commencing with Section 2400) is added to Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code, to read:

Article 3. Uniform Durable Power of Attorney Act

Comment. Sections 2400-2407 supersede former Section 2307.1. Under former Section 2307.1, a durable power of attorney (i.e., one which remains effective notwithstanding the disability or incapacity of the principal) was limited to a maximum of one year after the principal's disability or incapacity occurred. Sections 2400-2407 are drawn from the Uniform Durable Power of Attorney Act as approved and recommended in 1979 by the National Conference of Commissioners on Uniform State Laws. Under the uniform act, there is no maximum time limit on the effectiveness of a durable power of attorney. Except for Section 2402 which omits a provision found in the uniform act relating to nomination of a guardian or conservator (see the Comment to Section 2402), this article is the same as the official text of the uniform act as it was approved and recommended by the NCCUSL.

Although the title of this article refers to durable powers of attorney, two sections of this article apply to powers of attorney whether durable or nondurable. See Sections 2403, 2404.

28457

§ 2400. Definition

2400. A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains 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 showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity.

Comment. Section 2400 is the same as the official text of Section 1 of the Uniform Durable Power of Attorney Act as approved and recommended by the National Conference of Commissioners on Uniform State Laws, and supersedes a portion of the first sentence of former Civil Code Section 2307.1.

28464

§ 2401. Durable power of attorney not affected by disability or incapacity

2401. All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled.

Comment. Section 2401 is the same as the official text of Section 2 of the Uniform Durable Power of Attorney Act as approved and recommended by the National Confernece of Commissioners on Uniform State Laws, and supersedes the third sentence of former Civil Code Section 2307.1. See also Section 2400 ("durable power of attorney" defined).

29204

§ 2402. Relation of attorney in fact to court-appointed fiduciary

2402. If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated.

Comment. Section 2402 is the same as the official text of subdivision (a) of Section 3 of the Uniform Durable Power of Attorney Act as approved and recommended by the National Conference of Commissioners on Uniform State Laws, and supersedes the last two sentences of former Civil Code Section 2307.1. Subdivision (b) of Section 3 of the uniform act (principal may nominate guardian or conservator and court shall appoint in accordance with most recent nomination in a durable power of attorney except for good cause or disqualification) has been omitted from Section 2402. Under Section 1810 of the Probate Code, a proposed conservatee may nominate a conservator for himself or herself in any writing; subdivision (b) of Section 3 would be an undesirable limitation of the power conferred by Section 1810 of the Probate Code. See also Section 2400 ("durable power of attorney" defined).

§ 2403. Power of attorney not revoked until notice

2403. (a) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(b) The disability or incapacity of a principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his successors in interest.

Comment. Section 2403 is the same as the official text of Section 4 of the Uniform Durable Power of Attorney Act as approved and recommended by the National Conference of Commissioners on Uniform State Laws. See also Section 2356(b) (effect of transaction after principal's revocation of agency, death, or incapacity where agent acts without knowledge) and Section 2400 ("durable power of attorney" defined).

29214

§ 2404. Proof of continuance of durable and other powers of attorney by affidavit

2404. As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he did not have at the time of the exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death, disability, or incapacity, is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

Comment. Section 2404 is the same as the official text of Section 5 of the Uniform Durable Power of Attorney Act as approved and recommended by the National Conference of Commissioners on Unform State Laws. See also Section 2400 ("durable power of attorney" defined).

968/910

§ 2405. Uniformity of application and construction

2405. This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

Comment. Section 2405 is the same as the official text of Section 6 of the Uniform Durable Power of Attorney Act as approved and recommended by the National Conference of Commissioners on Uniform State Laws.

968/911

§ 2406. Short title

2406. This article may be cited as the Uniform Durable Power of Attorney Act.

Comment. Section 2406 is the same as the official text of Section 7 of the Uniform Durable Power of Attorney Act as approved and recommended by the National Conference of Commissioners on Uniform State Laws.

968/912

§ 2407. Severability

2407. If any provision of this article or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

Comment. Section 2407 is the same as the official text of Section 8 of the Uniform Durable Power of Attorney Act as approved and recommended by the National Conference of Commissioners on Uniform State Laws.

[UNIFORM DURABLE POWER OF ATTORNEY ACT]

[UNIFORM PROBATE CODE ARTICLE V, PART 5 AMENDMENTS]

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

and by it

Approved and Recommended for Enactment

in All the States

At its

ANNUAL CONFERENCE

MEETING IN ITS EIGHTY-EIGHTH YEAR

IN SAN DIEGO, CALIFORNIA

AUGUST 3-10, 1979

[UNIFORM DURABLE POWER OF ATTORNEY ACT]

[UNIFORM PROBATE CODE ARTICLE V, PART 5 AMENDMENTS]

With Prefatory Note and Comments

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[DURABLE POWER OF ATTORNEY PART 5]

[UNIFORM DURABLE POWER OF ATTORNEY ACT]

Prefatory Note

The National Conference included Sections 5-501 and 5-502 in Uniform Probate Code (1969)(1975) concerning powers of attorney to assist persons interested in establishing non-court regimes for the management of their affairs in the event of later incompetency or disability. The purpose was to recognize a form of senility insurance comparable to that available to relatively wealthy persons who use funded, revocable trusts for persons who are unwilling or unable to transfer assets as required to establish a trust.

The provisions included in the original UPC modify two principles that have controlled written powers of attorney. Section 5-501 (UPC (1969)(1975)), creating what has come to be known as a "durable power of attorney," permits a principal to create an agency in another that continues in spite of the principal's later loss of capacity to contract. The only requirement is that an instrument creating a durable power contain language showing that the principal intends the agency to remain effective in spite of his later incompetency.

Section 5-502 (UPC (1969)(1975)) alters the common law rule that a principal's death ends the authority of his agents and voids all acts occurring thereafter including any done in complete ignorance of the death. The new view, applicable to durable and non-durable, written powers of attorney, validates post-mortem exercise of authority by agents who act in good faith and without actual knowledge of the principal's death. The idea here was to encourage use of powers of attorney by removing a potential trap for agents in fact and third persons who decide to rely on a power at a time when they cannot be certain that the principal is then alive.

To the knowledge of the Joint Editorial Board for the Uniform Probate Code, the only statutes resembling the power of attorney sections of the UPC (1969)(1975) that had been enacted prior to the approval and promulgation of the Code were Sections 11-9.1 and 11-9.2 of Code of Virginia [1950]. Since then, a variety of UPC inspired statutes adjusting agency rules have been enacted in more than thirty states.

This [Act] [Section] originated in 1977 with a suggestion from within the National Conference that a new free-standing uniform act, designed to make powers of attorney more useful, would be welcome in many states. For states that have yet to adopt durable power

legislation, this new National Conference product represents a respected, collective judgment, identifying the best of the ideas reflected in the recent flurry of new state laws on the subject; additional enactments of a new and improved uniform act should result. For other states that have acted already, this new act offers a reason to consider amendments, including elimination of restrictions that no longer appear necessary.

In the course of preparing this [Act] [Section], the Joint Editorial Board for the Uniform Probate Code, acting as a Special Committee on the new project, evolved what it considers to be improvements in §§ 5-501 and 5-502 of the 1969 and 1975 versions of the Code. In the main, the changes reflect stylistic matters. However, the idea reflected in Section 3(a) - that draftsmen of powers of attorney may wish to anticipate the appointment of a conservator or guardian for the principal - is new, and a brief explanation is in order.

When the Code was originally drafted, the dominant idea was that durable powers would be used as alternatives to court-oriented, protective procedures. Hence, the draftsmen merely provided that appointment of a conservator for a principal who had granted a durable power to another did not automatically revoke the agency; rather, it would be up to the court's appointee to determine whether revocation was appropriate. The provision was designed to discourage the institution of court proceedings by persons interested solely in ending an agent's authority. It later appeared sensible to adjust the durable power concept so that it may be used either as an alternative to a protective procedure, or as a designed supplement enabling nomination of the principal's choice for guardian to an appointing court and continuing to authorize efficient estate management under the direction of a court appointee.

The sponsoring committee considered and rejected the suggestion that the word "durable" be omitted from the title. While it is true that the act describes "durable" and "non-durable" powers of attorney, this is merely the result of use of language to accomplish a purpose of making both categories of power more reliable for use than formerly. In the case of non-durable powers, the act extends validity by the provisions in Section [4] [5-504] protecting agents in fact and third persons who rely in good faith on a power of attorney when, unknown to them, the principal is incompetent or deceased. The general purpose of the act is to alter common law rules that created traps for the unwary by voiding powers on the principal's incompetency or death. The act does not purport to deal with other aspects of powers of attorney, and a label that would result from dropping "durable" would be misleading to the extent that it suggested otherwise.

[UNIFORM DURABLE POWER OF ATTORNEY ACT]

[UNIFORM PROBATE CODE ARTICLE V, PART 5, AMENDMENTS]

SECTION [1.] [5-501.] [Definition.] A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains 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 showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity.

Comment

This section, derived from the first sentence of UPC 5-501 (1969)(1975), is a definitional section that supports use of the term "durable power of attorney" in the sections that follow. The second quoted expression was designed to emphasize that a durable power with postponed effectiveness is permitted. Some UPC critics have been bothered by the reference here to a later condition of "disability or incapacity," a circumstance that may be difficult to ascertain if it can be established without a court order. The answer, of course, is that draftsmen of durable powers are not limited in their choice of words to describe the later time when the principal wishes the authority of the agent in fact to become operative. For example, a durable power might be framed to confer authority commencing when two or more named persons, possibly including the principal's lawyer, physician or spouse, concur that the principal has become incapable of managing his affairs in a sensible and efficient manner and deliver a signed statement to that effect to the attorney in fact.

In this and following sections, it is assumed that the principal is competent when the power of attorney is signed. If this is not the case, nothing in this Act is intended to alter the result that would be reached under general principles of law.

SECTION [2.] [5-502.] [Durable Power of Attorney Not Affected By Disability or Incapacity.] All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled.

Comment

This section is derived from the second sentence of UPC 5-501 (1969)(1975) modified by deleting reference to the effect on a durable power of the principal's death, a matter that is now covered in Section [4] [5-504] which provides a single standard for durable and non-durable powers.

The words "any period of disability or incapacity of the principal" are intended to include periods during which the principal is legally incompetent, but are not intended to be limited to such periods. In the Uniform Probate Code, the word "disability" is defined, and the term "incapacitated person" is defined. In the context of this section, however, the important point is that the terms embrace "legal incompetence," as well as less grievous disadvantages.

SECTION [3.] [5-503.] [Relation of Attorney in Fact to Court-appointed Fiduciary.]

(a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the

power of attorney that the principal would have had if he were not disabled or incapacitated.

(b) A principal may nominate, by a durable power of attorney, the conservator, guardian of his estate, or guardian of his person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

Comment

Subsection (a) closely resembles the last two sentences of UPC § 5-501 (1969)(1975); most of the changes are stylistic. One change going beyond style states that an agent in fact is accountable both to the principal and a conservator or guardian if a court has appointed a fiduciary; the earlier version described accountability only to the fiduciary.

As explained in the introductory comment, the purpose of subsection (b) is to emphasize that agencies under durable powers and guardians or conservators may co-exist. It is not the purpose of the act to encourage resort to court for a fiduciary appointment that should be largely unnecessary when an alternative regime has been provided via a durable power. Indeed, the best reason for permitting a principal to use a durable power to express his preference regarding any future court appointee charged with the care and protection of his person or estate may be to secure the authority of the attorney in fact against upset by arranging matters so that the likely appointee in any future protective proceedings will be the attorney in fact or another equally congenial to the principal and his plans. However, the evolution of a free-standing durable power act increases the prospects that UPC-type statutes covering protective proceedings will not apply when a protective proceeding is commenced for one who has created a durable power. This means that a court receiving a petition for a guardian or conservator may not be governed by standards like those in UPC § 5-304 (personal guardians) and § 5-401(2) and related sections which are designed to deter unnecessary protective proceedings. Finally, attorneys and others

may find various good uses for a regime in which a conservator directs exercise of an agent's authority under a durable power. For example, the combination would confer jurisdiction on the court handling the protective proceeding to approve or ratify a desirable transaction that might not be possible without the protection of a court order. The alternative of a declaratory judgment proceeding might be difficult or impossible in some states.

It is to be noted that the "fiduciary" described in subsection (a), to whom an attorney in fact under a durable power is accountable and who may revoke or amend the durable power, does not include a guardian of the person only. In subsection (b), however, the authority of a principal to nominate extends to a guardian of the person as well as to conservators and guardians of estates.

Discussion of this section in NCCUSL's Committee of the Whole involved the question of whether an agent's accountability, as described here, might be effectively countermanded by appropriate language in a power of attorney. The response was negative. The reference is to basic accountability like that owed by every fiduciary to his beneficiary and that distinguishes a fiduciary relationship from those involving gifts or general powers of appointment. The section is not intended to describe a particular form of accounting. Hence, the context differs from those involving statutory duties to account in court, or with specified frequency, where draftsmen of controlling instruments may be able to excuse statutory details relating to accountings without affecting the general principle of accountability.

SECTION [4.] [5-504.] [Power of Attorney Not Revoked Until Notice.]

(a) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(b) The disability or incapacity of a principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his successors in interest.

Comment

UPC §§ 5-501 and 5-502 (1969)(1975) are flawed by different standards for durable and non-durable powers vis a vis the protection of an attorney in fact who purports to exercise a power after the principal has died. Section 5-501 (1969)(1975), applicable only to durable powers, expresses a most unsatisfactory standard; i.e. the attorney in fact is protected if the exercise occurs "during any period of uncertainty as to whether the principal is dead or alive...." Section 5-502 (1969)(1975), applicable only to non-durable powers, protects the agent who "without actual knowledge of the death....of the principal, acts in good faith under the power of attorney..." Section [4] [5-504](a) expresses as a single test the standard now contained in § 5-502 (1969)(1975).

Subsection (b), applicable only to non-durable powers that are controlled by the traditional view that a principal's loss of capacity ends the authority of his agents, embodies the substance of UPC § 5-502 (1969)(1975).

The discussion in the Committee of the Whole established that the language "or other person" in subsections (a) and (b) is intended to refer to persons who transact business with the attorney in fact under the authority conferred by the power. Consequently, persons in this category who act in good faith and without the actual knowledge described in the subsections are protected by the statute.

Also, there was discussion of possible conflict between the actual knowledge test here prescribed for protection of persons relying on the continuance of a power and constructive notice concepts under statutes governing the recording of instruments affecting real estate. The view was expressed in the Committee of the Whole that the recording statutes would continue to control since those statutes are specifically designed to encourage public recording of documents affecting land titles. It was also suggested that "good faith," as required by this section, might be lacking in the unlikely case of one who, without actual knowledge of the principal's death or incompetency, accepted a conveyance executed by an attorney in fact without checking the public record where he would have found an instrument disclosing the principal's death or incompetency. If so, there would be no conflict between this act and recording statutes.

It is to be noted, also, that this section deals only with the effect of a principal's death or incompetency as a revocation of a power of attorney; it does not relate to an express revocation of a power or to the expiration of a power according to its terms. Further, since a durable power is not revoked by incapacity, the section's coverage of revocation of powers of attorney by the principal's incapacity is restricted to powers that are not durable. The only effect of the Act on rules governing express revocations of powers of attorney is as described in Section [5] [5-505].

SECTION [5.] [5-505.] [Proof of Continuance of Durable and Other Powers of Attorney by Affidavit.] As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death, disability, or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the

affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

Comment

This section, embodying the substance and form of UPC 5-502(b) (1969)(1975), has been extended to apply to durable powers. It is unclear whether UPC 5-502(b) (1969)(1975) applies to durable powers. Affidavits protecting persons dealing with attorneys in fact extend the utility of powers of attorney and plainly should be available for use by all attorneys in fact.

The matters stated in an affidavit that are strengthened by this section are limited to the revocation of a power by the principal's voluntary act, his death, or, in the case of non-durable power, by his incompetence. With one possible exception, other matters, including circumstances made relevant by the terms of the instrument to the commencement of the agency or to its termination by other circumstances, are not covered. The exception concerns the case of a power created to begin on "incapacity." The affidavit of the agent in fact that all conditions necessary to the valid exercise of the power might be aided by the statute in relation to the fact of incapacity. An affidavit as to the existence or non-existence of facts and circumstances not covered by this section nonetheless may be useful in establishing good faith reliance.

[SECTION 6. [Uniformity of Application and Construction.] This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.]

[SECTION 7. [Short Title.] This Act may be cited as the Uniform Durable Power of Attorney Act.]

[SECTION 8. [Severability.] If any provision of this Act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.]

[SECTION 9. [Time of Taking Effect.] This Act takes effect . . . . .]

[SECTION 10. [Repeal.] The following acts and parts of acts are repealed:

(1)

(2)

(3)]