

Memorandum 85-58

Subject: Study L-500 - Durable Powers of Attorney (State Bar Comments on Senate Bill 1270)

Attached to this Memorandum is a letter from Harley Spitler of the State Bar Estate Planning, Trust and Probate Law Section with proposed drafting revisions for SB 1270. These are discussed below.

Giving of Proxy by Attorney in Fact

A durable power of attorney may give the attorney in fact the power to exercise corporate voting rights. The attorney in fact may wish to execute a proxy authorizing a third person to vote in place of the attorney in fact. Such a proxy should be subject to the Corporations Code and Financial Code provisions governing proxies. See, e.g., Corp. Code §§ 178, 702, 5069, 5613, 7613, 9417, 12405, 13242; Fin. Code §§ 5701, 5702, 5710, 6005. SB 1270 would make this clear by adding a new Section 2400.5 to the Civil Code to read:

2400.5. Where a durable power of attorney gives an attorney in fact the power to exercise voting rights, a proxy given by the attorney in fact to another to exercise the voting rights is subject to all the provisions of law applicable to such proxy and is not a durable power of attorney subject to this article.

The State Bar would revise this language as follows:

2400.5. Where a durable power of attorney gives an attorney in fact the power to exercise voting rights, a proxy instrument given by the attorney in fact to another to exercise ~~the~~ voting rights is subject to all the same provisions of law applicable to such proxy and the Corporations Code that apply to other proxy instruments to exercise voting rights; and the proxy instrument is not a durable power of attorney that would otherwise be subject to the provisions of this article.

The staff has a problem with the proposed revisions. First, the revisions would make proxies subject to the Corporations Code but not the Financial Code, thus excluding the proxy rules for savings and

loan associations. The reference to a proxy "instrument" is superfluous because "proxy" is a defined term under the Corporations Code and means a written instrument. Corp. Code § 178. Section 6005 of the Financial Code also requires that proxies be in writing. The formal requirements for a proxy, including whether a proxy should be in writing, are regulatory in nature and should be governed by the Corporations Code or Financial Code, not the Civil Code. The remaining proposed language seems superfluous and merely adds verbosity. For example, it is better to say "subject to this article" than to say "subject to the provisions of this article." See Legislative Counsel of California, Legislative Drafting Manual, at 32 (1975).

The staff recommends keeping Section 2400.5 in its present form in the bill. The Comment to Section 2400.5 should read as follows:

Comment. Section 2400.5 supersedes language formerly found in subdivision (a) of Section 2400. This revision is clarifying, and more accurately states the original intent of the superseded language.

For the rules applicable to proxy voting in business corporations, see Corp. Code Section 705. For other statutes dealing with proxies, see Corp. Code §§ 178, 702, 5069, 5613, 7613, 9417, 12405, 13242; Fin. Code §§ 5701, 5702, 5710, 6005.

Evidence of Identity of Principal

Existing law governing short form durable powers of attorney for health care and short form powers of attorney require that the witnesses attest to the identity of the principal on the basis of convincing evidence. Civil Code §§ 2450, 2500. SB 1270 specifies what constitutes convincing evidence for this purpose (proposed Section 2511). The State Bar thinks the proposed section will be "very difficult to construe" because it is cast partly in the negative: Under the bill, convincing evidence is specified documentary evidence (driver's license, passport, etc.) and the absence of controverting information.

The staff has no difficulty with this provision. Negative evidence has long been routinely received by the courts. B. Witkin, California Evidence § 315, at 279 (2d ed. 1966). The classic problem

with negative evidence is the question of what may be inferred from the absence of evidence. For example, if a person has not been heard from for some time, may it be inferred that the person is dead?

But Section 2511 does not present a pure negative evidence problem. It specifies what documentary evidence may be relied on, and quite properly requires that there not be information that would cast doubt on the documentary evidence. Section 2511 is drawn from the existing provision governing notaries public (Civil Code Section 1185) and the drafting is closely parallel. For these reasons, the staff wants to keep Section 2511 in its present form in the bill.

Durable Power for Health Care Prepared Out of State

If a durable power of attorney for health care is prepared by an attorney, it must contain the substance of the warning statement required for printed forms, but only if it is "prepared in this state." Civil Code § 2433(c). The State Bar would require the warning statement wherever the durable power is prepared. Although this view does have some appeal, it might have the undesirable effect of preventing an incompetent principal from being brought to California for needed treatment if the durable power does not contain California's required warning statement, even though the durable power is valid where prepared.

The staff thinks this question merits further study and consideration. The staff does not want to include this proposal in SB 1270 because it would make a significant change in existing law and thus present an important policy question, and should be considered by interested persons and organizations.

Respectfully submitted,

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Staff Counsel

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May 3, 1985

Mr. John H. DeMouilly
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

Re: S.B. 1270

Dear John:

This letter contains the above Section's present position on S. B. 1270 as amended April 15, 1985.

I. Policy Issues

The Section has some major policy concerns but will not present them at this time. We believe that the Durable Power of Attorney for Health Care should be afforded a reasonable exposure to use by the practicing bar before we "tinker" with some of the policy issues.

II. Non-Policy Issues; and Clarification Proposals

A. Proxy; Section 2400.5

The Section is fully supportive of the purpose of Section 2400.5. We believe, however, that the language of 2400.5 is somewhat unclear. Perhaps 2400.5 would be clearer if it is amended to read:

"2400.5. Where a durable power of attorney gives an attorney in fact the power to exercise voting rights, a proxy instrument given by the attorney in fact to another to exercise voting

rights is subject to the same provisions of the Corporations Code that apply to other proxy instruments to exercise voting rights; and the proxy instrument is not a durable power of attorney that would otherwise be subject to the provisions of this article."

B. "Convincing Evidence" Clarification

The Section has no desire to change its understanding of the proposed amendment to Section 2511. We believe, however, that 2511 can be made clearer, and more readily comprehensible, if it is stated in the positive rather than in the negative.

The definition of "convincing evidence" as "the absence of . . . and any one of the following" is very difficult to construe.

C. Section 2433(c): Place of Preparation of Durable Power of Attorney

The Estate Planning Section strongly believes that the provisions of 2433(c) should be amended to make clear that the place of preparation of the durable power of attorney has no legal significance whatsoever. We believe the California legislature is concerned only in having all California statutory requirements satisfied as to every durable power that is used in California. We believe that the California legislature is not concerned, at all, in the place of preparation of the durable power. That is to say, a durable power of attorney for Health Care can certainly be prepared in any state by anyone, attorney or layman, for use in the State of California; and should qualify for use in the State of California so long as the State of California statutory requirements are satisfied.

While we believe the intendment of Section 2433(c) is as set forth above, the present wording is unclear. The Section proposes, accordingly, that Section 2433(c) be amended to read:

"(c) A durable power of attorney that permits the attorney in fact to make health care decisions and that is not a printed form shall include one of the following:

(1) The substance of the statements provided for in subdivision (a) in capital letters, if the durable power of attorney is used in the State of California."

Please note that the certificate of the principal's lawyer set forth in Civil Code 2433 (c)(2) provides that the attorney is "authorized to practice law in the State while this power of attorney was executed". That provision makes clear the Estate Planning Section's understanding that an attorney at law authorized to practice law in any state can make the certificate so long as the attorney is authorized to practice law in the state where the power is executed. For example, an attorney authorized to practice law in the state of North Carolina can give the certificate, and have the power of attorney executed in North Carolina; and that power of attorney to make health care decisions in California will be valid in California as long as it meets the statutory requirements of California law.

If the foregoing is not the intendment of the California Law Revision Commission, then the Estate Planning Section will strongly oppose the present provisions of Section 2433(c).

Sincerely,



Harley J. Spitler

HJS:wp

cc: Stanley M. Wieg
Charles Collier
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Sen. Bill Lockyer