#L-3013

jd933
09/27/89

First Supplement to Memorandum 89-91

Subject: Study L-3013 - Statutory Form Power of Attorney

Attached are additional comments from interested persons on the Commission's *Tentative Recommendation Relating to Uniform Statutory Form Power of Attorney Act* (August 1989). The additional comments are attached as exhibits to this supplement.

COMMENTATORS IN GENERAL SUPPORT TENTATIVE RECOMMENDATION

The Commentators (listed below) support the Commission's recommendation to enact the Uniform Statutory Short Form Power of Attorney Act in California:

Larry M. Kaminsky (Chairman, Special Subcommittee on California Law Revision Commission Legislation of the California Land Title Association Forms & Practices Committee) (Exhibit 35) ("in general we support the enactment of the Uniform Act, with [one clarification discussed below]")

Linda A. Moody (Exhibit 36) (supports only if retain current California statutory form as an alternative as proposed in the Tentative Recommendation)

Howard Serbin (Exhibit 37) ("I strongly support the proposal to replace the California statutory short form power of attorney with the Uniform Statutory Form." [But he would further limit the power under the Uniform Act form.])

Judge Thomas M. Jenkins (Exhibit 38) ("I am fully supportive of the adoption of the Uniform Statutory Form Power of Attorney Act, with the addition of designation of coagents as recommended. . . . this is one [matter] where uniformity has very substantial merit.")

ANALYSIS OF COMMENTS RECEIVED

Requirement That Action be Prosecuted in Name of the Real Party in Interest.

Larry M. Kaminsky (Exhibit 35) states that the authority granted to the agent by Section 2486 to enforce "by litigation or otherwise" certain rights of the principal appears to be contrary to Section 367 of the Code of Civil Procedure which requires that every action be prosecuted in the name of the real party in interest. Numerous other provisions granting the agent specific powers give the agent the power to enforce rights "by litigation or otherwise" (see e.g., Sections 2487(d)(2), 2491(c), 2493(b)) or to "initiate . . . litigation" (see

e.g., Section 2493(c), (d)) or "[b]ring an action" (see Section 2494(b). These grants should not be construed as exceptions to the requirement that actions be prosecuted in the name of the real party in interest.

STAFF RECOMMENDATION. The staff recommends against changing the Uniform Act language. Instead, we would make clear in the Comments that the grants of authority to litigate do not affect the requirement that an action be prosecuted in the name of the real party in interest. Accordingly, we would add a paragraph to the Comment to Article 2 (Construction of Powers), to state:

> Provisions of this article grant the agent authority to enforce rights of the principal "by litigation or otherwise" or to initiate litigation or to bring an action. These grants of authority do not affect the Code of Civil Procedure Section 367 requirement that an action be prosecuted in the name of the real party in interest.

Warning on Form

Linda A. Moody (Exhibit 36) suggests that the warning on the uniform act form be revised to advise that the agent has a fiduciary obligation to act in the best interests of the principal. The warning is directed to the person executing the form, the principal. More important, we should not deviate from the language of the uniform form. Accordingly, the staff recommends against the suggested addition.

Comment to Section Setting Out the Statutory Form

Linda A. Moody (Exhibit 36) suggests that the Comment be printed along with the form or that something similar be written for the lay user of the form. The difficulty with this suggestion is that the form is a uniform form to be used nationally. For this reason, the staff recommends against adopting this suggestion.

Acceptability of Power of Attorney

Linda A. Moody (Exhibit 36) is one of several persons who commented on the need to deal with the matter of acceptability of a power of attorney by third persons to whom it is presented. She comments: "The matter of acceptability needs to be given much more serious attention by the Commission." In a separate memorandum prepared for the October meeting, the staff makes a proposal to make more acceptable a springing power of attorney. See also the discussion in Memorandum 89-91 (pages 8-10) under heading "Protection of third

person who rely on power." The staff believes that the indemnity provision in the uniform form, together with the California statutory provisions referred to in the discussion in Memorandum 89-91, are about all that can be done to make the power of attorney acceptable to third persons. If interested persons have any suggestions for additional means to make powers of attorney more acceptable, we believe the suggestions should be given serious consideration by the Commission.

Continued Use of Old Form

Although the existing California statutory form statute would be repealed when the Uniform Act is enacted, the recommended legislation permits continued use of the old form. Several commentators, including Linda A. Moody (Exhibit 36), believe that this scheme is essential. However, Ms. Moody questions whether the existing statutory form statute should be repealed, stating: "Wouldn't it be better to continue the old statutory form on the books, so that its wording continues to be readily accessible?" Lawyers, like Ms. Moody, who make extensive use of the existing statutory form may continue to do so under the tentative recommendation, even though the existing statutory form statute is repealed.

STAFF RECOMMENDATION. The repeal of the existing statutory form statute is not essential in order to adopt the uniform act in California. The existing statute could be continued in effect, thus giving the person who seeks to execute a power of attorney a choice as to which form to use. However, the staff believes it would cause confusion to lay persons if both the old form and the new uniform act form were included in the statute. Accordingly, the staff recommends that the old statutory form provisions be repealed. However, we would advise the law publishers that it would be desirable to print in the annotated statutes the text of the repealed statute in small type for the convenience of those who will have occasion to refer to it. As you no doubt are aware, printing repealed statutes in small type in the annotated codes is a common practice with respect to repealed Probate Code provisions.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Fidelity National Title
INSURANCE COMPANY

Larry M. Kaminsky
Vice President
Assistant General Counsel

CA LAW REV. COMM'N

SEP 2 1989

RECEIVED

September 22, 1989

John H. DeMoully, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

RE: Comments Regarding Tentative Recommendations

Dear Mr. DeMoully,

The California Land Title Association Forms and Practices Committee comments on the below-described Tentative Recommendations as follows:

1. As to the Repeal of Probate Code Section 6402.5 ("In-Law Inheritance"), we find nothing objectionable in the proposed repeal of this statute.

2. As to the Uniform Statutory Short Form Power of Attorney Act, in general we support the enactment of the Uniform Act, with the following suggestion:

> Sections 2486 (c) and (d)2 purport to give the agent the ability to bring an action in his own name, as agent for the principal, which would appear to be contrary to existing law (e.g., Code of Civil Procedure Section 367, which states, "Every action must be prosecuted in the name of the real party in interest, except as provided in Sections 369 and 374 of this code.") It would appear that either the proposed Uniform Act be clarified that the agent may bring the action in the name of the principal, or existing law be amended to allow the agent action.

Thank you for the opportunity to comment on the above matters, and if you have any questions or comments for us, please don't hesitate to contact us.

Sincerely,

Larry M. Kaminsky

Larry M. Kaminsky
Chairman, Special Subcommittee on
California Law Revision Commission
Legislation of the California Land
Title Association Forms & Practices
Committee

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September 21, 1989

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Re: Uniform Statutory Form Power of Attorney Act

Ladies and Gentlemen:

Thank you for the opportunity to comment on the above proposed legislation.

In my estate planning practice, I often use the statutory short form durable power of attorney. I keep it in the computer, formated to look like the printed form, and simply fill in the names and appropriate special provisions. This approach offers the flexibility of an "attorney drafted form," but also affords the greater "acceptability" of the statutory form. It is also quick and cost efficient.

Your proposed "UNIFORM STATUTORY FORM PWOER OF ATTORNEY" will offer a shorter more limited alternative. The advantages will be its brevity, greater simplicity, and uniformity, as well as the elimination of some snares for the unwary (e.g., powers relating to estate planning and trusts). The major disadvantage will be that lay people will now be even more confused about which form to use. That is probably a disadvantage worth living with, however, as retention of the current "STATUTORY SHORT FORM POWER OF ATTORNEY" is clearly desirable.

What follows are some random thoughts jotted down as I read through your proposal.

1. Warnings. The agent should be told that he has a fiduciary obligation to act in the best interests of the principal.

2. Comment. Is the "Comment" beginning on page 16 intended to be printed along with the form? It would be a good idea to do that, or something similar especially written for the lay user of the form. Perhaps an explanation could be included warning against "stationery store" forms that are

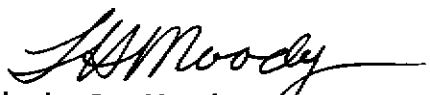
neither statutory nor durable. Discussion of issues relating to capacity should be included, particularly addressed to family members seeking "to have someone sign" despite questionable capacity.

3. Last paragraph of the text. The matter of acceptability of the DPA is one of the most serious questions relating to its use. This paragraph addresses it, but I wonder whether adequately. It is a bootstrap if the principal lacked capacity at the time of execution. Lack of capacity is a common problem with family members who are urged to sign these documents. In marginal cases, our office requires an examination and letter by the personal physician, and in some cases by a neurologist or psychiatrist. Even then, we make the final judgment, believing that capacity is a legal question as well as a medical one. We all know, moreover, that banks, stock brokers, and the like, dislike DPAs and most require their own short forms to be used. Having seen too many instances of abuse, we sympathize with these institutions. Their position, however, creates another large trap for the unwary (and one that should be warned against in the instructions for the use of the forms). The matter of acceptability needs to be given much more serious attention by the Commission.

4. Continued Use of Old Form. You propose to repeal the sections relating to the current "STATUTORY SHORT FORM POWER OF ATTORNEY," but will continue to allow its use. (§ 2450). Why remove the old language? Wouldn't it be better to continue the old statutory form on the books, so that its wording continues to be readily accessible? And in any event, it would be a great convenience if you would eliminate the requirement of (two) witnesses from that form, as you have with the new form.

5. Typos Noted in Passing. Page 39, Comment line 8: "original" should be "originally".

Very truly yours,



Linda A. Moody

SEP 25 1989

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August 31, 1989

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Ladies and Gentlemen:

Thank you for sending me your tentative recommendations relating to Probate Code Section 6402.5 and to the uniform statutory form power of attorney act.

Although I am a Deputy County Counsel for the County of Orange, please note that the opinions expressed here are my individual views, and I do not write as a representative of the County of Orange, the Orange County Counsel, or the Public Administrator/Public Guardian.

Your recommendation relating to repeal of Probate Code Section 6402.5 ("in-law inheritance") raises difficult issues. I agree the current statute is too complex and difficult to apply, causes delays in probate proceedings, and sometimes produces inequitable results. Yet, in some other cases, it seems to produce equitable results. An example is a case administered by the Orange County Public Administrator, Estate of Hermoine Loud. Ms. Loud died in 1981. Her spouse of 34 years predeceased her by 15 days. Neither spouse had issue, surviving parents, or surviving siblings. Mrs. Loud was survived by aunts. Mr. Loud was survived by children of his pre-deceased sister. One-half of the community property went to the aunts, and one-half to Mr. Loud's nieces.

Theoretically, the heirs of the first spouse to die would just as likely have been supportive and close to the decedents as would the heirs of the surviving spouse. Without the in-law inheritance law, it is fortuitous in such a case as to which side of the family inherits community assets. (I recognize that the result is not exactly "fortuitous" if one considers that the spouses could have provided for their "chosen" side by their wills. But in analyzing what the law of succession should be, we must, of course, only consider cases where we assume there would be no wills.)

I agree the law would be better served if in-law inheritance were repealed, provided there were some mitigating measure to prevent unfairness. In a case where the spouses were close to the family of the first to die, the survivor should have some opportunity to evaluate his/her estate plan in light of the death and to provide for in-laws if that had been the spouses' expectation and the survivor desires that result. There would be no such opportunity in cases such as where both spouses are killed by an accident, although one survives in a coma for a few days. Recently passed Assembly Bill 158, deeming spouses who died within 120 hours of each other as having died simultaneously, goes a long way toward mitigating my concerns. I understand the Governor has not yet signed that bill. Provided he does so, or a similar measure becomes law, I would support the repeal of 6402.5.

I strongly support the proposal to replace the California statutory short form power of attorney with the Uniform Statutory Form. As attorney for a Public Guardian, I see situations where an attorney in fact has abused his trust, and a conservator must be appointed to resolve the problems. Therefore, while recognizing the need for a statutory form, I think it preferable that the form give only those powers for which the principal initials his consent, rather than require the principal to delete powers he does not wish to grant. The new form is better at warning principals and should be better at protecting them from abuse, by requiring affirmative action (apart from just a signature) to grant powers.

I have some concerns about proposed Sections 2492(d) and 2497. In the former, perhaps the restrictions against an agent making himself the beneficiary of an insurance or annuity contract should also apply to the agent's spouse and children, at least to the extent that such persons should not be beneficiaries of substitute contracts for those canceled by the agent that named other beneficiaries, or otherwise benefit in lieu of beneficiaries named by the principal. Regarding 2497(b), I think the agent should be restricted from changing beneficiaries of existing retirement plans in favor of the agent himself, and perhaps also restricted from making a change to his spouse or children. I also am not sure if the power in 2497(g) may be too broad to grant outside the benefit of a court-supervised conservatorship, since it appears to

constitute something like a gift that would not normally benefit the principal (although there may be estate planning reasons to justify use of the power).

Thank you.

Very truly yours,

Howard Serbin

HS:jp

cc: William A. Baker, Public Administrator/Public Guardian
Carol Gandy, Assistant Public Guardian
James F. Meade, Deputy County Counsel
Hope E. Snyder, Deputy County Counsel

Thomas M. Jenkins
Judge

Hall of Justice
Redwood City, California 94063

September 25, 1989

California Law Revision Commission
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Gentlemen:

I am in receipt of tentative recommendations relating to repeal of Probate Code Section 6402.5 and the Uniform Statutory Form Power of Attorney Act.

With respect to the former, although I'm not sure that the equities with respect to distribution are in fact worked out better under Uniform Code, it seems that the complexities, expense and validity of uniformity would warrant this State not being one of the few exceptions.

I am fully supportive of the adoption of the Uniform Statutory Form Power of Attorney Act, with the addition of designation of coagents as recommended. The present form is unnecessarily complex, and at times confusing. Even more than in the Law and Inheritance matter above, this is one where uniformity has very substantial merit.

Please keep me on the list for tentative recommendations.

Sincerely,

Thomas M. Jenkins