

## Second 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:

James C. Hoag (Vice President and Senior Associate Title Counsel, Ticor Title Insurance (Exhibit 39) ("The . . . tentative recommendation is well drafted and from a real property transaction and title viewpoint, presents no difficulties. . . . When the two recommendations become law, I will re-write my title practices material on each subject covered by the recommendations to reflect reliance upon them.")

Michael Patiky Miller (Exhibit 40)

Andrew Landay (Exhibit 41)

ANALYSIS OF COMMENTS RECEIVED

Execution Requirements

Andrew Landay (Exhibit 41) approves the simplification of the execution requirements for the statutory form, but suggests that the form allow "a witness to swear to the necessary facts before a notary" as an optional form of execution. He is particularly concerned about the use of the statutory form in the UK and Canada. The staff recommends against complicating the uniform act form by including an optional alternative method of execution. If a durable power of attorney is to be used in a jurisdiction that has special execution requirements, a specially drafted power of attorney that satisfies the requirements for that jurisdiction should be prepared.

Sample Special Instruction Provisions

The Comment to Section 2475 includes various sample provisions that a user of the statutory form may select to include in the Special

Instructions portion of the form. To a large extent, the sample provisions are taken from provisions of the existing statutory short form statute. Andrew Landay (Exhibit 41) suggests that these sample provision be include in a statute section, stating: "Many users of the form may not be good draftsmen (even many attorneys are not) and this is an area where poor drafting could cause horrendous litigation." The staff recommends against this suggestion. We believe that the person should consult a lawyer if the person believes that specially drafted additional provisions should be included in the form. And a California lawyer will have the Comment available for examination and can tailor the particular provision to the precise needs of the client.

**Providing Clear Statutory Standard for Drafting and Implementing a "Springing Power"**

Michael Patiky Miller (Exhibit 40) states "the statutory form (and full length ones for that matter) will lack usefulness unless the Legislature enacts a law which would compel title companies, transfer agents, and other third parties to recognize validly executed powers of attorney." In addition, he believes that "there should be a clear statutory standard for defining and for implementing a "springing power", i.e. a power of attorney which does not become effective until the disability of the principal." In Memorandum 89-87, the staff recommends enactment of a statutory provision that would protect a third person who relies on a springing power provision that is drafted to comply with the requirements of the recommended statutory provision. This provision should satisfy the concern of Mr. Miller that third persons will not act in reliance on a power of attorney that includes a springing power provision.

**Omission of Express Provision for "Springing Power"**

In Memorandum 89-91, one letter suggested that the printed form include a provision for a "springing power" (a provision that provides that the power of attorney does not go into effect until a specified event occurs, such as the incompetency of the principal). Another letter in Memorandum 89-91 expressed approval that the printed form did not contain a provision for a "springing power," stating "I and many other attorneys would go a bit further and say that [a springing power] should never be used." The Commission considered a report from Team 4

at the time the Tentative Recommendation was prepared and, notwithstanding a recommendation from that Team, decided not to include a provision for a springing power because third persons would be reluctant to act in reliance upon the form if such a provision were included absent clear proof that the event that triggered the power to become effective had actually occurred.

In preparing Memorandum 89-91, the staff overlooked several letters from Harley Spitler (Exhibit 42) as well as the letter from Michael Patiky Miller (Exhibit 40). In the letters attached as Exhibit 42, Mr. Spitler urges that the preprinted form include a springing power provision.

Francis J. Collin (Exhibit 43) also urges that the uniform act form be revised to give the user of the form the "springing power" option.

Also, we have just received a letter from the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar (attached as Exhibit 44) stating that the "Executive Committee has unanimously endorsed the opinions expressed by Harley Spitler in his several letters to you" (attached as Exhibit 40).

The staff continues to recommend against the inclusion of a "springing power" provision in the California version of the uniform act for the following reasons:

(1) Attorneys are not in agreement that a springing power provision should be included in a durable power of attorney. A majority of Team 4 recommended that such a provision be included in the uniform act form, but there was a strong dissent by some members of the Team to this recommendation.

(2) The standard uniform act form does not contain a springing power provision, and California should not preclude use of the standard uniform act form in this state.

(3) Even assuming enactment of the staff recommended provision to protect third persons who rely on a springing power (as proposed by the staff in Memorandum 89-91), the staff would not recommend that a springing power provision be added to the uniform act form. To add a provision in the uniform act form that would satisfy the requirements of the staff recommended provision would require that lengthy

instructions be added to the form and greatly complicate the form. These instructions would be necessary to make sure the user understands the implications of giving a springing power and effect of selecting a person who can conclusively determine that the power of attorney has gone into effect.

(4) The omission of a preprinted option to grant only a springing power does not preclude addition of a springing power provision to the uniform act form by the user of the form. Although there is no preprinted provision giving the option to grant a springing power, the uniform act form includes a portion where the form user can insert a springing power provision if that is desired. This permit the lawyer to include a carefully drafted springing power provision in the statutory form he is preparing for the client.

Mr. Spitler suggests that the following provision be added to the uniform act form to permit the user to select a springing power:

This power of attorney shall become effective upon my incapacity.

Suppose the power of attorney that includes this provision is presented to a title company or a stock transfer agent. Stock transfer agents will be familiar with the uniform act form which does not include the springing power provision. Will the title company or stock transfer agent accept any less than a court order determining incapacity? The staff believes that inclusion of the provision will make the power of attorney practically ineffective when dealing with financial institutions, title companies, stock transfer agents, and other institutional holders of property. Accordingly, despite the views expressed by the Executive Committee of Estate Planning, Trust and Probate Law Section, the staff strongly recommends against inclusion of the suggested provision in the statutory form.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

SEP 23 1989  
RECEIVED

**John C. Hoag**  
Vice President and  
Senior Associate Title Counsel

September 19, 1989

Mr. John H. DeMouilly, Esquire  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Re: Tentative Recommendations Relating to  
Repeal of Probate Code Section 64025 and  
Relating to Uniform Statutory Form Power  
of Attorney Act

Dear Mr. DeMouilly:

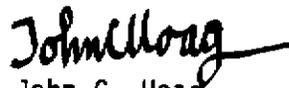
Thank you for providing the two tentative recommendations I have referred to above.

The first tentative recommendation is Repeal of Probate Code Section 6402.5 and is useful as drafted.

The second tentative recommendation is well drafted and from a real property transaction and title viewpoint, presents no difficulties.

Thank you for providing me with the opportunity to comment on the two tentative recommendations. When the two recommendations become law, I will re-write my title practices material on each subject covered by the recommendations to reflect reliance upon them.

Very truly yours,



John C. Hoag  
Vice President and  
Senior Associate Title Counsel

JCH/jdk

-108-

MAY 18 1989

WEINBERG, ZIFF & MILLER

RECEIVED

ATTORNEYS AT LAW

DAVID C. WEINBERG  
HARVEY L. ZIFF  
MICHAEL PATIKY MILLER

400 Cambridge Avenue, Suite A  
P.O. Box 60700  
Palo Alto, California 94306-0700  
(415) 329-0851  
May 16, 1989

OF COUNSEL  
DAN MUEHLFELDER  
DAVID G. HARVEY

FAX # (415) 324-2822

Law Revision Commission  
Attn: N. Sterling, Esq.  
4000 Middlefield Rd. #D-2  
Palo Alto, CA 94303-4739

RE: L-3019 "Statutory Short Form Power of Attorney"

Dear Nat:

I agree that replacing the current California version with the Uniform Act's format will reduce confusion, especially regarding the proper method of execution. Also, the form may be more useful in inter-state transactions.

However, the statutory form (and full length ones for that matter) will lack usefulness unless the legislature enacts a law which would compel title companies, transfer agents, and other third parties to recognize validly executed powers of attorney. I have heard from colleagues that such entities will often refuse to recognize such documents which are more than six months old, and in at least one case, more than 60 days old! In addition, there should be a clear statutory standard for defining and for implementing a "springing power", i.e. a power of attorney which does not become effective until the disability of the principal. Unless these problems of real life use are addressed, practitioners and families will still have to resort to cumbersome and expensive conservatorships, thus defeating the entire concept of having durable powers in the first place.

Sincerely,



Michael Patiky Miller

MPM:kh

SEP 29 1989

LAW OFFICES

ANDREW LANDAY

RECEIVED

322 TWELFTH STREET  
SANTA MONICA, CALIFORNIA 90402-2098  
(213) 393-3631

9601 WILSHIRE BOULEVARD, SUITE 744  
BEVERLY HILLS, CALIFORNIA 90210-5295  
(213) 273-3221

1980 WOODSIDE AVENUE, SUITE 6  
LAKESIDE, CALIFORNIA 92040-2924  
(619) 561-5222

REPLY TO **SANTA MONICA**

September 23, 1989

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Subject: Uniform Statutory Form Power of Attorney Act

Gentlemen:

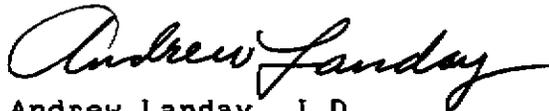
I believe the Uniform Act, with the proposed amendment referring to co-agents, is an improvement on the present provisions of Civil Code sections 2450-2473.

Furthermore, I agree that the present California form of execution is unnecessarily difficult and that in most cases acknowledgement before a notary is sufficient as a guaranty of authenticity. However, acknowledgement is not found in all common-law jurisdictions; instead a witness swears to the necessary facts before a notary. Because principals may hold property with situs in such jurisdictions, particularly since California has the largest UK and Canadian populations outside the UK and Canada, I suggest that the California version allow for this practice as an optional addition to acknowledgement.

Moreover, in order to avoid inept drafting of estate provisions in "Special Instructions", I would recommend that the sample provisions from the present statutory form, which you have reprinted on pages 17 and 18, be included in a section 2498a relating to "Special Instructions", to follow proposed section 2498. Many users of the form may not be good draftsmen (even many attorneys are not) and this is an area where poor drafting could cause horrendous litigation.

Thank you for soliciting my comments.

Sincerely yours,



Andrew Landay, J.D.

*Cooley Godward Castro Huddleson & Tatum*

EA LAW REV. COMM'N

JUL 17 1989

R E C E I V E D

*Attorneys at Law  
Northern California*

*One Maritime Plaza  
20th Floor  
San Francisco  
CA 94111-3580  
(415) 981-5252  
Telex: 380815  
COOLEY SFO  
FAX: (415) 951-3699*

*Palo Alto CA 94306  
(415) 494-7622*

*Menlo Park CA 94025  
(415) 494-7622*

*Southern California*

*Newport Beach CA 92660  
(714) 476-5252*

July 13, 1989

John H. DeMouilly  
California Law Revision  
Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303

Re: First Supplement To Memorandum 89-50  
Dated July 7, 1989 Statutory Short Forms  
Power of Attorney

Dear John:

On my own behalf, and not on behalf of Team 4 nor the Committee on Health Care of the Executive Committee, I want to comment on the "First Supplement to Memorandum 89-50" dated July 7, 1989 (herein called "First Supplement"). In particular, my major concern is: The Uniform Act is deficient in not providing, in the form, an express option for the springing power.

Please let me restate and elaborate on my concerns:

1. The problem is not whether the immediate power or the springing power is more desirable for the principal. That is a highly personal decision for the client (the principal). My clients want springing powers. While they have capacity, they want to handle their own health care and

John H. DeMouilly  
Page 2

property matters; and simply want a document that becomes effective upon their incapacity.

2. The Uniform Durable Power of Attorney Act (herein "UDPA") and all state acts patterned upon that act provide, very simply, for two types of a durable power:

a. Immediate: "This power of attorney shall not be affected by subsequent incapacity of the principal."  
C.C. 2400

b. Springing: "This power of attorney shall become effective upon the incapacity of the principal."  
C.C. 2400

Two separate and distinct types of durable powers:

(1) immediate; (2) springing.

The California proposal for the statutory short form power of attorney is deficient in not expressly providing, in the form, an express option for the springing power.

John H. DeMouilly  
Page 3

3. It is a very weak, and misleading, response to say, as does the "First Supplement" that:

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

That is simply untrue and is misleading! The basic statute is the UDPA, and C.C. 2400, both of which expressly afford the principal two clear options: (1) immediate durable power; or (2) springing durable power.

It is patently inconsistent with the basic UDPA to have a statutory form which does not specifically, and expressly, give the principal the option, in the form, of selecting which type of durable power the principal desires.

4. Furnishing the above suggested option, in the form, quite obviously favors uniformity. The form simply follows the two basic choices in the UDPA and C.C. 2400.

5. The proposed form is misleading. Most lay persons, and many attorneys who do not have an extensive

John H. DeMouilly  
Page 4

estate planning practice, will not even know about "springing" powers and will not know how to create a springing power.

Textual Addition: The California statutory form could accommodate the above suggestions in a couple of ways:

A. Box Option:

- This power of attorney shall not be affected by my subsequent incapacity;
- This power of attorney shall become effective upon my incapacity.

(Note to principal: check only one box)

B. Express Statement Under "Special Instructions:

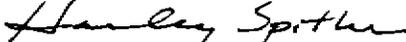
- This power of attorney shall become effective upon my incapacity.

*Cooley Godward Castro Huddleson & Tatum*

John H. DeMouilly  
Page 5

(Note to principal: check this box if you want the power to become effective only upon your incapacity.)

Sincerely,

  
Harley Spitler

cc: Irwin D. Goldring  
James V. Quillinan  
Matthew S. Rae, Jr.  
Members of Team 4

20070166

JUL 24 1989

R E C E I V E D

Attorneys at Law  
Northern California

One Maritime Plaza  
20th Floor  
San Francisco  
CA 94111-3580  
(415) 981-5252  
Telex: 380815

COOLEY SFO  
FAX: (415) 951-3699

Palo Alto CA 94306  
(415) 494-7622

Menlo Park CA 94025  
(415) 494-7622

Southern California

Newport Beach CA 92660  
(714) 476-5252

July 20, 1989

John H. DeMouilly  
Executive Secretary  
CLRC  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: Statutory Short Form Power of Attorney

Dear John,

First, please accept my thanks and appreciation for the time you took to reply to my July 13, 1989 letter.

Second, I want to make clearer that my principal grievance is with the drafting committee that prepared the uniform form on behalf of the National Conference of Commissioners on Uniform State Laws. That is where the problem started; and will spread to all states that simply adopt a "me too" attitude in enacting that uniform act without even considering the defect!

Please let me respond to your concerns and suggestions:

A. Proof of Incapacity: Sure, "incapacity", absent a way to determine it, can, on occasion, present a problem. That problem is addressed, in the durable power, by setting forth a procedure upon which the third person may rely. In our practice, we present these alternatives:

1. Date of Court decree adjudicating incapacity;

or

John H. DeMouilly  
Page 2

2. Date of decree appointing conservator for principal; or
3. Date of doctor's certificate stating that principal is physically or mentally incapable of handling his/her property affairs.

We then provide, in the durable power, that the third person may rely upon any of the foregoing; and is relieved from liability for so doing.

Proving "incapacity" is no more difficult to prove than trying to prove a principal, on a round-the-world trip by himself, is still alive when his California agent tries to use an ordinary, garden variety, stationery store form of non durable power of attorney! In the "incapacity" case: you have a body that is present and visible! In the wandering tourist principal case, the agent simply doesn't know if the principal is living or dead!

B. Uniformity: There is no uniformity problem here. You haven't responded to the comments on pages 3 and 4 of my letter. You must never slip into the error of the drafting committee on the national form: the basic, fundamental, rock bottom uniform statute is the Uniform Durable Power of Attorney Act ("UDPA") which expressly affords the principal two clear options: (1) immediate power; or (2) springing

John H. DeMouilly  
Page 3

power. California, very properly, does the same. C.C. 2400. I do not recall that either you, or CLRC, raised any objection, while CLRC and the California legislature were considering adopting the "UDPA" that "incapacity" was hard to prove and that only the immediate power should be provided!

C. How Many States: the number of states expressly authorizing the "springing" power is not a significant statistic, for several reasons:

1. Most legislatures - and, indeed, most attorneys, did not focus on the problem. The whole concept of a durable power was new in our jurisprudence.

2. Most attorneys had not had much experience with durable powers. Their clients - if they are like our clients - want a document that becomes effective upon the client;s incapacity - not before the client;s incapacity!

3. A more meaningful statistic would be: how many states, if any, expressly prohibit springing powers.

4. Your letter (1st complete paragraph on p. 2) seems to assume that unless a state that has adopted the UDPA expressly authorizes the springing power, it cannot exist in that state! If that is your belief, I would like to see a case so holding. My opinion is: a principal can

John H. DeMouilly  
Page 4

condition his/her durable power upon any event that is not contrary to that state's statutory or decisional law or public policy.

Ex: "This power of attorney shall become effective upon the date of the first full moon in February, 1990." Seems perfectly valid - though somewhat strange!

D. New York and/or British Columbia Legislation.

I would certainly urge you to pursue the work of the New York Law Revision Commission and the British Columbia law revision commission.

1. New York

You are certainly correct in noting that New York Law Revision Commission suggestion may limit the flexibility of the attorney who is drafting the springing power. However, that defect (if it is there) could be cured by language making the statutory suggestion optional and not mandatory.

2. British Columbia

Much better and more flexible than New York.

Personally, I favor:

(a) Having the CLRC consider the "springing power" problem now, in connection with its work on Memorandum 89-50 - rather than approving the California form

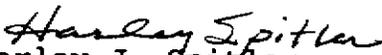
*Cooley Godward Castro Huddleson & Tatum*

John H. DeMouilly  
Page 5

without a springing power and addressing that problem separately and/or later. Thus, and with regrets, I cannot accept your conclusions (first paragraph on page 3 of your letter) that it would not be desirable "to add an optional provision for a springing power to the Uniform Act Form."

(b) Simply using one of my two suggestions (p. 4 of my letter); and leaving it open for the principal/attorney to draft the concept of "incapacity" that will trigger the "springing" power. Thus, the principal/attorney can select any method of determining "incapacity," perhaps one of the methods mentioned in paragraph "A" of this letter; or some other entirely different method.

Sincerely,

  
Harley J. Spitler

cc: Irwin D. Goldring  
James V. Quillinan  
Matthew S. Rae Jr.  
Members of Team 4

20072376

SEP 29 1989

HOWARD G. DICKENSON  
JOSEPH G. PEATMAN  
WALTER J. FOGARTY, JR.  
DAVID W. MEYERS  
C. RICHARD LEMON  
FRANCIS J. COLLIN, JR.  
DAVID B. GILBRETH  
CHARLES H. DICKENSON  
ANNE M. KIRLIN  
PAUL G. CAREY  
RICHARD P. MENDELSON  
PAUL A. NEUMILLER  
XAVIER A.M. LAVOPIERRE  
CATHY A. ROCHE

DICKENSON, PEATMAN & FOGARTY  
A PROFESSIONAL LAW CORPORATION  
809 COOMBS STREET  
NAPA, CALIFORNIA 94559-2977  
TELEPHONE 707 252-7122

OF COUNSEL  
REC'D BY JAMES D. BOITANO  
ROGER D. PETERSON

TELECOPIER  
707 255-6876

September 28, 1989

California Law Revision Commission  
400 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Re: CLC Memo 89-91, Dated 9/20/89

Gentlemen:

In your tentative recommendation relating to the Uniform Statutory Form Power of Attorney Act (Memo 89-91) you recommend against the use of a so-called "springing power" and your recommended form does not provide the user of the form with that option.

I have practiced law since 1967 and my practice has been limited exclusively to estate planning. In my practice I use Durable Powers of Attorney extensively. I would estimate that 90% of my estate planning clients want Durable Powers of Attorney. In discussing these documents with my clients I tell them that California law permits the use of powers that are either immediately effective or powers that spring into effect if and when incapacity actually occurs. After discussing the pros and cons of each of these options with my clients, the vast majority of them prefer a springing Durable Power of Attorney when it comes to the management of their assets. They do not want an agent to have authority to transact business affairs for them so long as they are fully capable of managing their assets themselves. To the contrary, many of them are fearful that an agent having such a power could do harm. Moreover, I do not think that individuals who are nominated as agents resist being named under Durable Powers of Attorney that spring into effect in the future. In fact, I believe that many agents are relieved to know that their responsibilities may never actually come into effect. In most cases, the agent is a member of the principal's family and he or she is well aware of the competency of the principal and therefore knows if and when the power becomes effective.

California Law Revision Committee  
September 28, 1989  
Page Two

I urge you to reconsider your position and to make the statutory form consistent with existing California law, i.e., that Durable Powers of Attorney may be either immediately effective or may come into effect at some future date.

Very truly yours,



Francis J. Collin, Jr.  
of Dickenson, Peatman & Fogarty

FJC:jj

ESTATE PLANNING, TRUST AND PROBATE LAW SECTION THE STATE BAR OF CALIFORNIA

Chair D. KEITH BILTER, San Francisco Vice-Chair IRWIN D. GOLDRING, Los Angeles

Advisors KATHRYN A. BALLSUN, Los Angeles HERMIONE K. BROWN, Los Angeles THEODORE J. CRANSTON, La Jolla LLOYD W. HOMER, Campbell KENNETH M. KLUG, Fresno JAMES C. OPEL, Los Angeles LEONARD W. POLLARD, II, San Diego JAMES V. QUILLINAN, Mountain View WILLIAM V. SCHMIDT, Costa Mesa HUGH NEAL WELLS, III, Los Angeles JAMES A. WILLETT, Sacramento

Section Administrator PRES ZABLAN-SOBERON, San Francisco



556 FRANKLIN STREET SAN FRANCISCO, CA 94102 (415) 561-8200

Executive Committee D. KEITH BILTER, San Francisco IRWIN D. GOLDRING, Los Angeles JOHN A. GROMALA, Eureka LYNN F. HART, San Francisco ANNE K. HILKER, Los Angeles WILLIAM L. HOISINGTON, San Francisco BEATRICE LAIDLEY-LAWSON, Los Angeles JAY ROSS MacMAHON, San Rafael VALERIE J. MERRITT, Los Angeles BARBARA J. MILLER, Oakland BRUCE S. ROSS, Los Angeles STERLING L. ROSS, JR., Mill Valley ANN E. STODDEN, Los Angeles MICHAEL V. VOLLMER, Irvine JANET L. WRIGHT, Fresno BAR. 360

September 29, 1989

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

FEDERAL EXPRESS

RE: Memorandum 89-91; Dated September 20, 1989

Dear John:

I am writing to you on behalf of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California.

The Executive Committee has reviewed the proposed Uniform Statutory Form Power of Attorney ("Statutory Form") and Harley Spitler's comments and recommendations about the Statutory Form. The Executive Committee has unanimously endorsed the opinions expressed by Harley Spitler in his several letters to you. As requested in the enclosed copy of Harley Spitler's September 26, 1989 letter to you, please attach his July 13, 1989 and July 20, 1989 letters to the Tentative Recommendation currently being circulated about the Statutory Form.

Thank you.

Cordially,

Kathryn A. Ballsun

KATHRYN A. BALLSUN A Member of STANTON and BALLSUN A Law Corporation

KAB/aat

cc: Team 4

Valerie Merritt, Esq. Irwin Goldring, Esq.