Third Supplement to Memorandum 89-91

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

A letter from **Richard E. Llewellyn II** and **Arthur Steven Brown** indicates several concerns regarding the Commission's *Tentative Recommendation Relating to Uniform Statutory Form Power of Attorney Act* (August 1989). The letter is attached to this Supplement as Exhibit 45.

The letter expresses concern about the approach of the uniform act. That approach is to have various general descriptions of the powers granted on a short form and to have statutory provisions that spells out the details of each of the powers granted. The concern is that the principal may not be aware of the nature and full extent of powers granted unless the principal examines and understands the details of the statutory provisions that describe in detail the powers granted. The writers of the letter fear that there will be "a tremendous potential for abuse" if the uniform act is adopted in California. However, the writers apparently are unaware that California already has a statute that adopts the scheme of the uniform act and, in fact, grants much broader powers to the agent. The staff is not aware of abuses under our statute or the comparable New York statute which was adopted around 1945.

The letter notes that the tax powers granted by the uniform act form may not be sufficient to allow the agent to represent the taxpayer with regard to tax matters. The staff has sent a copy of the letter to the National Conference of Commissioners on Uniform State Laws with the suggestion that they work with IRS to make the uniform act form acceptable with respect to tax matters if indeed the form is not now acceptable.

Finally, the letter notes that financial institutions are often reluctant to accept a broad durable power of attorney and gives an example where the Bank of America recently refused to act in reliance upon a broad durable power of attorney. The particular problem involved in the example given was that the power of attorney did not make specific reference to the real property in question. This problem

is dealt with in Section 2499 (after-acquired property) of the uniform act and in Section 2513 (no need to describe each item or parcel of property). Although other commentators have expressed the same concern, the staff is now aware of anything more that can be done to make general powers of attorney more acceptable. Hopefully, the uniform act form will be widely used and will become familiar and acceptable to institutional holders of property.

Respectfully submitted,

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Re: Comments to Tentative Recommendation Regarding the Repeal of Probate Code §6402.5; and to the Uniformed Statutory Form Power of Attorney Act

To Whom It May Concern:

We appreciate the opportunity to comment on the above-referenced Tentative Recommendations of the Commission.

We concur with the recommendation made to repeal Probate Code §6402.5 ("in-law inheritance"). Although under certain circumstances in-law inheritance might be equitable, the practical difficulties created by the statute are too substantial to ignore. These problems come up frequently; on the other hand, we have yet to see the statute have any effect on the distribution of an estate. For these reasons, we concur.

We have several concerns with regard to the Uniform Statutory Form Power of Attorney Act.

To begin with, we do not believe that the tax powers incorporated by reference by checking paragraph (M) will be sufficient to allow the agent to represent a taxpayer with regard to tax matters. Internal Revenue Service has its own Power of Attorney form, Form 2848 which requires certain minimum information (pursuant to IRS EP and EO Southeast Bulletin, Publication No. 85-1, July 1985) requiring the taxpayers full name, address, social security number, the specific type of tax involved (reference to "all taxes" is not acceptable), the specific tax year or years involved ("all years" is not acceptable), and a declaration regarding the representative's qualifications.

An additional concern is that the headings listed next to the

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paragraphs are not descriptive enough to allow the principal to be aware of the nature and full extent of the powers which he or she has grants to the agent. Because uniform forms are often used without the advise of counsel, there appears to be a tremendous potential for abuse. Possibly the agent should be required to obtain the principal's signature on a separate document more thoroughly delineating the powers as granted. Maybe the power of attorney could be a two part form, one part that the agent keeps and the other part that the principal keeps. Signatures could also be exchanged.

Lastly, we have a comment about which the commission may not be able to do anything, but of which it should be made aware. Not everybody will accept a broad form Durable Power of Attorney if it does not have the "magic language" in it. For example, we recently were involved in an escrow involving Bank of America in which they refused to permit the power holder to purchase a new retirement condominium for the power giver since the durable general power of attorney (given years ago) did not make specific reference to the real property in question. Despite our attempts to overcome the absurdity of their requirement, we were unsuccessful. The bank would have preferred to have the signature of the power giver an amendment to the escrow, even though the power giver was clearly incompetent. The only advise we could give our client, was to deal with some other lender besides the Bank of America.

Therefore we are concerned about the increasing use of the General Durable Power of Attorney without the advise of counsel and about cases where institutions cannot be compelled to honor it.

Very truly yours,

HOLLEY & GALEN

By
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By
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