

Memorandum 90-30

Subject: Study L-3031 - Acceptance of Fiduciary Responsibility by
Attorney in Fact

One may appoint an attorney in fact using a statutory form power of attorney. Civ. Code § 2450. The form does not require the attorney in fact to acknowledge or accept the appointment. The Commission-recommended bill to repeal Section 2450 and enact the new uniform statutory form power of attorney (SB 1777) deals with the acceptance question with the following statement in the form: "BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT."

At the November-December 1989 meeting, the Commission wanted to know whether one unilaterally appointed as attorney in fact has any duty to do anything under the power of attorney, and what acts constitute acceptance of fiduciary responsibility. The Commission also wanted to know the rule under trust law.

According to Harley Spitler, before there were durable powers of attorney, a power of attorney was usually a unilateral gratuitous appointment, authorizing but not requiring the agent to do designated acts such as paying bills and depositing checks. The advent of durable powers of attorney created a new situation: The principal needs assurance that the attorney in fact will be bound by the appointment and agree to assume its duties, especially in the health care area. The principal needs to know that his or her wishes concerning withdrawal or withholding of life support and artificial nutrition and hydration will be carried out. For this reason, in his practice Mr. Spitler insists that the attorney in fact sign a written acceptance.

Express or Implied Consent of Attorney in Fact Required

A power of attorney creates an agency. 2 B. Witkin, Summary of California Law Agency and Employment § 80, at 82 (9th ed. 1987). With respect to the duty the agent owes to the principal, the agency relationship is created by agreement of principal and agent (*id.*); consent of the agent is a necessary prerequisite. 3 Am. Jur. 2d Agency § 17, at 521 (1986). The agent must intend to accept the authority;

this intention must be expressed in words or conduct. 3 Am. Jur. 2d, *supra*. Thus, even though a power of attorney does not contain written acceptance by the person named as attorney in fact, an agency agreement may be implied from the circumstances and conduct of the parties. 2 B. Witkin, *supra*, § 36, at 50.

When the agency is gratuitous, there is another limitation: There may be agreement and therefore actual agency, but if the agent has not begun to perform, there is a question whether liability will be imposed. Restatement (Second) of Agency § 378 caveat (1958). According to Witkin, a gratuitous agent cannot be compelled to perform, but if the agent actually enters upon performance, the agent assumes fiduciary duties. 2 B. Witkin, *supra*, § 62, at 68.

It follows that if there is no express or implied agency agreement, the person named as attorney in fact has no duty to do anything under the power of attorney. If the person named does begin to perform the duties of attorney in fact under the power of attorney, he or she will be deemed to have accepted the appointment and its fiduciary responsibilities.

Acceptance by Trustee Under Trust Law

A trustee undertakes fiduciary obligations by accepting the trust. See 7 B. Witkin, *Summary of California Law Trusts* § 31, at 5393 (8th ed. 1974). California trust law (Prob. Code § 15600) spells out what constitutes acceptance by a trustee:

15600. (a) The person named as trustee may accept the trust, or a modification of the trust, by one of the following methods:

(1) Signing the trust instrument or the trust instrument as modified, or signing a separate written acceptance.

(2) Knowingly exercising powers or performing duties under the trust instrument or the trust instrument as modified, except as provided in subdivision (b).

(b) In a case where there is an immediate risk of damage to the trust property, the person named as trustee may act to preserve the trust property without accepting the trust or a modification of the trust, if within a reasonable time after acting the person delivers a written rejection of the trust or the modification of the trust to the settlor or, if the settlor is dead or incompetent, to a beneficiary. This subdivision does not impose a duty on the person named as trustee to act.

Staff Recommendation

We could add a provision to the Civil Code to read:

Civil Code § 2515. Acceptance of duties of attorney in fact

2515. (a) A person named as attorney in fact in a power of attorney, whether or not a durable power of attorney, may accept the duties of attorney in fact by any of the following methods:

(1) Signing the power of attorney or signing a separate written acceptance.

(2) Knowingly exercising powers or performing duties under the power of attorney.

(b) If the person named as attorney in fact receives consideration for agreeing to serve and the agreement is not required by law to be in writing, the person may accept the duties of attorney in fact as provided in subdivision (a) or by orally agreeing or otherwise manifesting acceptance by words or conduct.

Comment. Section 2515 is new. Subdivision (a) makes two changes in what appears to have been prior law. First, a gratuitous attorney in fact is bound by written acceptance, whether or not actually entering upon performance. See 2 B. Witkin, *Summary of California Law Agency and Employment* § 62, at 68 (9th ed. 1987). Second, a gratuitous attorney in fact is no longer bound by oral acceptance, nor is acceptance implied from circumstances and conduct. *Id.* § 36, at 49-50.

Subdivision (b), concerning an attorney in fact who is compensated, is consistent with prior law. See *id.*; *cf.* Civ. Code § 2309 (when written authority required).

Proposed Section 2515 would eliminate uncertainty about whether a gratuitous attorney in fact has any duty to perform before actually entering upon performance. This seems to be a desirable clarification, particularly for a durable power of attorney where the principal needs assurance that the named attorney in fact will perform if the principal becomes incompetent.

Respectfully submitted,

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