

## Memorandum 90-34

Subject: Study L-3002 - Moving Civil Code Provisions to the Probate Code

BACKGROUND

From time to time the Commission has discussed the possibility of moving the statutes governing powers of appointment and powers of attorney from the Civil Code to the Probate Code. A decision on this idea was postponed until the major work of revising the Probate Code was completed. We recently received a letter from Rawlins Coffman suggesting that the Civil Code provisions relating to powers of appointment be transferred to the Probate Code. See Exhibit 1 attached.

Currently, the 35 sections of the powers of appointment statute (Civil Code §§ 1380.1-1392.1) are located in the "Acquisition of Property" part of Division 2 of the Civil Code. Preceding the title on powers of appointment are provisions relating to common interest developments, transfer of ships, gifts, recording, and unlawful transfers; following powers of appointment is a title on water rights.

There are approximately 80 sections of power of attorney statutes (Civil Code §§ 2400-2513). Some of these are located in the "Particular Agencies" chapter of the title governing agency law. This chapter consists of articles dealing with the following:

- (1) Auctioneers
- (2) Factors
- (3) Agency relationships in residential real property transactions
- (4) Uniform Durable Power of Attorney Act
- (5) Court enforcement of duties of attorney in fact
- (6) Durable power of attorney for health care

Following the "Particular Agencies" chapter are the following chapters:

- (1) Statutory Short Form Power of Attorney (to be superseded by the Uniform Statutory Form Power of Attorney Act)
- (2) Statutory Form Durable Power of Attorney for Health Care
- (3) Miscellaneous Provisions Relating to Powers of Attorney

Preceding the agency statutes is the title on involuntary trusts --

what remains of the old trust provisions in the Civil Code; following are titles on pharmaceutical services, indemnity, and suretyship.

#### HISTORY

The Civil Code now resembles a catch-all, a place of refuge for statutes that cannot find a home in a more specific code. This is the result of its history and the proliferation of specialized codes over the years since its creation. In 1872, when the Civil Code was last recodified, there were only four codes, the others being the Code of Civil Procedure, the Penal Code, and the Political Code. Most of the substantive civil law was in the Civil Code. This one volume covered insurance, labor relations, partnerships, contracts, water, wills, homesteads, property, corporations, guardianship, family law, trusts, agency, liens, mortgages, security interests, negotiable instruments, remedies, damages, assignments for benefit of creditors, fraudulent transfers, nuisances, maxims of jurisprudence, and more -- all in a mere 555 pages. Now, of course, we have an Insurance Code, a Labor Code, a Water Code, a Commercial Code, a Corporations Code, a Financial Code, and a Probate Code, and most of this law has been moved out. Many of the gaps are have been filled by other statutes, some of them more felicitously located than others.

#### ORGANIZATION OF PROVISIONS RELATING TO POWERS IN THE PROBATE CODE

It makes sense to group closely related statutes together. Two unifying concepts govern inclusion of material in the Probate Code: the substantive law of estate planning and the traditional jurisdiction of the probate court. Powers of appointment are an estate planning tool, and are entangled with wills, trusts, disclaimers, and related matters in the Probate Code. Powers of attorney are also estate planning tools. The general durable power of attorney and the durable power of attorney for health care are substitutes for conservatorships, and so are also appropriately within the Probate Code.

The staff believes that the best place for these statutes would be in a new division following the existing divisions of the Probate Code. The new division might be organized as follows:

DIVISION 12. POWERS

PART 1. POWERS OF APPOINTMENT (now Civil Code §§ 1380.1-1392.1)

- Chapter 1. General Provisions
- Chapter 2. Definitions; Classification of Powers of Appointment
- Chapter 3. Creation of Power of Appointment
- Chapter 4. Exercise of Power of Appointment
- Chapter 5. Effect of Failure to Make Effective Appointment
- Chapter 6. Rights of Creditors
- Chapter 7. Rule Against Perpetuities
- Chapter 8. Revocability of Creation, Exercise, or Release of Power of Appointment

PART 2. POWERS OF ATTORNEY

- Chapter 1. General Provisions
  - Article 1. Standard of Care of Attorney in Fact (to be drafted)
  - Article 2. Protection of Third Person Acting in Reliance Upon Power of Attorney (Civil Code § 2512 with perhaps some additional provisions to be drafted)
  - Article 3. Court Enforcement of Duties of Attorney in Fact (Civil Code §§ 2410-2423)
  - Article 4. Miscellaneous Provisions (Civil Code §§ 2510, 2510.5, 2511, 2513)
- Chapter 2. Uniform Durable Power of Attorney Act (Civil Code §§ 2400-2407)
- Chapter 3. Durable Power of Attorney for Health Care (Civil Code §§ 2430-2444)
- Chapter 4. Statutory Short Form Power of Attorney (Civil Code § 2450) (SB 1777)
- Chapter 5. Uniform Statutory Form Power of Attorney (Civil Code §§ 2475-2499.5)
- Chapter 6. Statutory Form Durable Power of Attorney for Health Care (Civil Code §§ 2500-2508)

### Advantages

The main advantage of the suggested reorganization is that the law would be far better organized and that estate planners would have a far more convenient set of statutes to work with.

The powers of appointment statute was squeezed into a small space, so use of decimal section numbers was necessary. In the new Probate Code, there is plenty of room.

Inconsistencies in definitions, notice, procedure, and general provisions would be eliminated to the extent practicable.

Moving anything out of the Civil Code at this point is an improvement and provides others with needed space to insert new statutes in the future.

### Disadvantages

The disadvantages of moving these statutes include the usual ones involved in reorganizing and renumbering statutes. People are familiar with the existing location, presumably. Some may even have developed an unnatural attachment to certain section numbers.

There are some annoying transitional problems that would have to be dealt with since instruments that are drafted, but not yet effective, may cite the old numbers. This is not an uncommon problem, particularly in the probate area.

A modest amount of staff time would be required to accomplish this reorganization. Little Commission time would be required, however, since we do not contemplate any significant substantive revisions. The staff believes that the benefits in organization, convenience, and consistency outweigh the time involved.

The drafting of a new provision governing the standard of care of the attorney in fact would require some staff and Commission time, but the staff believes that such a provision would be a useful addition to the law.

### MOVING PROVISIONS RELATING TO GIFTS IN VIEW OF DEATH TO PROBATE CODE

The staff also recommends that the provisions relating to gifts in view of death be moved to the Probate Code. We would compile those provisions in Division 5 which relates to nonprobate transfers. Division 5 would then be organized as follows:

**DIVISION 5. NONPROBATE TRANSFERS**

- Part 1. Provisions Relating to Effect of Death (§ 5000)
- Part 2. Multiple-Party Accounts (§§ 5100-5407)
- Part 3. Uniform TOD Security Registration Act (§§ 5500-5512)  
(SB 1870)
- Part 4. Gifts in View of Death (§ 5600 et seq.)**

The staff has already prepared a memorandum that sets out the revisions that staff believes are needed in the provisions relating to gifts in view of death. See Memorandum 90-31 (scheduled for consideration at the March 1990 meeting). Once the substance of the revised provisions is determined by the Commission, it should be a fairly easy task to move those provisions into the Probate Code.

Respectfully submitted,

Stan G. Ulrich  
Staff Counsel

Memo 90-34

EXHIBIT 1

Study L-3002

FEB 15 1990

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RECEIVED  
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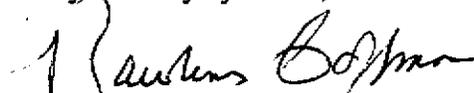
February 13, 1990

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
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Ladies and Gentlemen:

May I suggest that with respect to the Civil Code, Division #2, Property (§654), TITLE 7, Powers of Appointment (§1380.1), be transferred to the Probate Code, presumably as a new and additional Division #12.

Very truly yours,



RAWLINS COFFMAN

RC:mb