

## First Supplement to Memorandum 90-51

Subject: Study L-3038 - Technical Revisions of Uniform Durable Power of Attorney Act

The official text of the Uniform Durable Power of Attorney Act was revised by changes approved by the National Conference of Commissioners on Uniform State Laws in 1984 and 1987. The staff believes that these revisions should be reviewed by the Commission for possible inclusion in the California version of the Uniform Act. The Uniform Commissioners considered the revisions to be clarifying, technical revisions.

**Civil Code Section 2401**

The staff recommends that Civil Code Section 2401 be amended to add a sentence added in 1987 to the official text of Section 5-502 of the Uniform Probate Code (Uniform Durable Power of Attorney Act):

**Civil Code § 2401. Durable power of attorney not affected by lapse of time or incapacity of principal**

SEC. Section 2401 of the Civil Code is amended to read:

2401. All acts done by an attorney in fact pursuant to a durable power of attorney during any period of incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his or her successors in interest as if the principal were competent. Unless the instrument states a time of termination, the power is exercisable notwithstanding the lapse of time since the execution of the instrument.

Comment. The second sentence is added to Section 2401 to conform the section to the official text of the Uniform Durable Power of Attorney Act. The addition of the second sentence to the Uniform Act section was approved by the National Conference of Commissioners on Uniform State Laws in 1987. See Uniform Probate Code § 5-502 (1989 text).

**Civil Code Section 2400**

The official text of Section 5-501 of the Uniform Probate Code (Uniform Durable Power of Attorney Act) was revised by the Uniform Commissioners in 1984.

The revision to Section 5-501 should be considered by the Commission, but is not recommended by the staff. Section 2400 of the Civil Code would be conformed to the official text of Section 5-501 of the Uniform Act by revising it as indicated below.

**Civil Code § 2400. Durable power of attorney**

SEC. Section 2400 of the Civil Code is amended to read:

2400. A durable power of attorney is a power of attorney by which a principal designates another his or her attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent incapacity of the principal, or lapse of time," or "This power of attorney shall become effective upon the incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity, and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.

Comment. The changes in Section 2400 conform the California version of the Uniform Act to the official version by incorporating the technical changes in the Uniform Act that were approved by the National Conference of Commissioners on Uniform State Laws in 1984. See Uniform Probate Code § 5-501 (1989 text).

The staff does not recommend this revision because we do not believe that it should be necessary to state in the durable power of attorney that it shall not be affected by the lapse of time. Should the durable power be void because it fails to so state? What about existing durable powers that do not contain such a statement? The revision made in Section 2401 makes the law clear that the lapse of time does not affect the durable power of attorney unless the durable power of attorney states a time of termination. We believe that this is sufficient.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary