

## Memorandum 90-85

Subject: Study L-3044 - Comprehensive Power of Attorney Statute (Scope of Study and Policy Issues)

At the April meeting, the Commission decided to commence work on a comprehensive statute governing powers of attorney. The major concern of this study is anticipated to be the codification of general rules concerning the duties and powers of an attorney in fact under a durable power of attorney, but many other issues will also need to be considered. The staff does not anticipate reviewing either the Uniform Statutory Form Power of Attorney (which is the subject of SB 1777) or the durable power of attorney for health care, except to the extent that conforming revisions may be desirable. However, new general rules would presumably be applicable to these specialized powers of attorney, except as otherwise provided.

Of particular interest are the relatively new statutes in Illinois (1987), Minnesota (1984), Missouri (1989), Nebraska (1988), and Pennsylvania (1982). See Ill. Ann. Stat. ch. 110½ §§ 802-1 to 802-11 (Smith-Hurd Supp. 1990); Minn. Stat. Ann. §§ 523.01-523.25 (West Supp. 1990); Mo. Ann. Stat. §§ 404.700-404.735 (Vernon 1990); Neb. Rev. Stat. 49-1501 to 49-1561 (1988); 20 Pa. Cons. Stat. Ann. §§ 5601-5607 (Purdon Supp. 1990).

### Background

The applicable law concerning powers of attorney in California has developed through several distinct steps. First, of course, was the common law of agency that became California law when the common law was adopted in 1850. The agency rules were enacted in 1872 as part of the new Civil Code prepared by the Revision Commission and based on the proposed New York Civil Code (Field Code). These agency statutes have remained unchanged for the most part, but new layers have been added in recent years. An effective durable power of attorney statute, providing an exception to the rule that agency terminated on the

incompetence of the principal, was adopted in the form of the Uniform Durable Power of Attorney Act enacted in 1981 (superseding a 1979 enactment that permitted a durable power lasting for only one year after incapacity). The durable power of attorney for health care was the next development, enacted in 1983. Statutory forms for property and for health care, enacted in 1984. A revision of the statutory form for property is the subject of SB 1777 in the current session. The legislation from 1981 to the present has been enacted on recommendation of the Commission.

The basic law applicable to powers of attorney -- agency law -- is out of step with the developments over the last decade. The national trend is to provide more statutory detail for the guidance of agents under powers of attorney and to make powers of attorney more effective by protecting (or sometimes compelling) third party reliance. In some respects, power of attorney law is being affected by developments in the law relating to trusts, transfers to minors, and other custodial arrangements.

California's agency sections, 90% of which remain unchanged since their enactment in 1872, provide insufficient guidance, and are written in an artificial, stilted manner. Field and his fellow commissioners' effort to create a complete set of rules understandable by the nonlawyer must be considered a failure. The general agency rules lack clarity, are incomplete, and do not provide sufficient practical guidance. Nor have these rules achieved the goal of avoiding litigation, as an examination of the annotated code will show. The Field Civil Code was adopted in only five states, the last being Montana in 1895. It was never adopted in New York.

#### Terminology

The question of terminology strikes one at the outset when working in this area of the law. The general agency statutes in California use the terms "agent" and "agency." The Uniform Durable Power of Attorney Act, the durable power of attorney for health care statute, and the provisions on court enforcement of duties use "attorney in fact." The existing statutory short form power of attorney generally uses "agent," but in one place refers to "my attorney(s) in fact (agent)." Civ. Code

§ 2450. The Uniform Statutory Form Power of Attorney Act (SB 1777) uses "agent" with one parenthetical "attorney in fact." These statutes use "power of attorney" consistently, rather than "agency."

"Attorney in fact" is an awkward and uninformative term, and may mislead or confuse a layperson. "Agent" is easier to use, but may be objectionable to some as being overly general. The Commission's Comment to Section 2475 in SB 1777, following the Uniform Commissioners' prefatory note, recognizes that "attorney in fact" is the less familiar term. The staff believes that "agent" is by far the preferable term and, when used in conjunction with "power of attorney," is sufficiently specific and concrete. The common use of "agent" in statutory forms is evidence of the relative clarity and directness when compared to "attorney in fact." From a drafting standpoint, "agent" is vastly preferable since it is easier to use in complex sentences and takes a plural or possessive with ease. (Compare "agents" and "agent's" to "attorneys in fact" and "attorney in fact's.")

Historically, it appears that an attorney in fact tended to be a special agent, i.e., an agent for one or a limited number of tasks or for a short time, whereas an agent had more general authority. We detect a remnant of this in the Field Code which defines a "special agent" as an agent "for a particular act or transaction" and designates all other agents as general agents. Civ. Code § 2297. But whatever reason there may once have been for using "attorney in fact," we do not believe it is still justified.

Research indicates that about half of the states enacting the Uniform Durable Power of Attorney Act have included a reference to "agent" in addition to "attorney in fact" in the principal durable power section. Many states which have enacted power of attorney statutes broader than the Uniform Durable Power of Attorney Act have abandoned exclusive usage of "attorney in fact," particularly states that have adopted a statutory form. Some states define one term to include the other. For example, Illinois defines agent as "the attorney-in-fact or other person designated to act for the principal in the agency" and then uses "agent" and "agency" throughout. See Ill. ¶ 802-3(b); see also Neb. § 49-1508 in Exhibit 2. As noted, the Commissioners on Uniform State Laws recognized the preferability of "agent" in the new Uniform Statutory Form Power of Attorney Act.

Witkin writes that a "power of attorney is a written instrument giving authority to an agent" (citing no authority). 2 B. Witkin, *Summary of California Law Agency and Employment* § 80, at 82 (9th ed. 1987). Civil Code Section 2400 adopts the Uniform Durable Power of Attorney language requiring a durable power of attorney to be in writing, but Section 2403 refers to a "written power of attorney, durable or otherwise," which can be read to permit the existence of an oral nondurable power of attorney. Illinois defines "agency" in relevant part as "the written power of attorney or other instrument of agency governing the relationship." See Ill. ¶ 802-3(a) in Exhibit 2. See also Neb. § 49-1517 (defining power of attorney as the specified short form or "other document of like import") and Pa. § 5601 (powers granted in writing), in Exhibit 2.

The staff recommends using the terms "agent" (defined to include person called an attorney in fact) and "power of attorney" (defined as a written agency agreement executed by a natural person). This appears to be the most practical and informative approach and would also make the general provisions consistent with the statutory form. We leave open the question whether the durable power of attorney for health care should be revised to eliminate use of "attorney in fact."

#### Requirements for Creation of Durable Power of Attorney

In writing. As noted, Civil Code Section 2400 requires a durable power of attorney to be in writing. This requirement is indisputable. But it is also worth noting that oral instructions may play a part in determining the duties and powers of an agent under a written power of attorney.

Statement of durability. Civil Code Section 2400 adopts the Uniform Durable Power of Attorney approach of requiring a written statement that the power is not affected by the subsequent incapacity of the principal or similar words showing the intent of the principal that incapacity does not terminate the power. Missouri requires also that the power be "denominated" a "Durable Power of Attorney." See Mo. § 404.705 para. 1 in Exhibit 2. This seems excessively technical; what if the title is omitted, but the durability provision is included?

A much simpler approach has been adopted in at least two states. Oregon has made all agencies durable since 1973. See Or. Rev. Stat.

Ann. § 127.005(1) (Supp. 1990) (replacing former § 126.407 enacted in 1973). Illinois abandoned the common law rule that incompetence terminates agencies in 1977. See, now, Ill. ¶ 802-5 in Exhibit 2. Thus, in Illinois and Oregon, no special words are needed to create a durable power of attorney; the duration of a particular agency is determined by the written power of attorney without the need for any "magic" language.

Should we give further consideration to the Illinois-Oregon approach making all powers of attorney durable? It makes sense, if we assume that most powers of attorney are intended to be durable. An advantage of continuing the requirement that durability be specifically stated is that it makes durability clear on the face of the instrument. This in turn may make the instrument more acceptable to third persons. On the other hand, if it is sufficiently understood in a jurisdiction that all powers are durable unless stated otherwise, perhaps it would aid in the general acceptability of the authority of agents.

Signature. A durable power of attorney need be signed only by the principal, since it is a grant of authority to the agent. In practice, it is reported that many practitioners also like to have the agent sign. 1990 California Durable Power of Attorney Handbook § 2.47 (Cal. Cont. Ed. Bar) [hereinafter cited as *CEB Handbook*]. We are not aware of any jurisdiction that requires the agent to sign a power of attorney. The staff sees no reason to alter this rule. It is possible to tie the agent's signature to some sort of acceptance of duties under the power, but we do not recommend this course. (Acceptance is discussed below.)

Date. Nothing in existing California law requires a power of attorney to be dated, but a date would seem to be an important fact to third persons who are asked to rely on the power. It would also be important in determining whether a revocation has taken place or whether the principal was competent with the power of attorney was signed. The existing statutory form requires a date (Civ. Code § 2450), as does the proposed uniform form (Civ. Code § 2475 in SB 1777). The *CEB Handbook* suggests that a power of attorney be dated. *CEB Handbook* § 2.47. Missouri requires the durable power of attorney

to be dated. Mo. § 404.705 para. 1(3). Minnesota law provides that a written, dated, and signed power of attorney is presumed to be valid and may be relied upon. Minn. § 523.04. Other detailed statutes, however, such as those of Illinois, Nebraska, and Pennsylvania, appear to omit any reference to dating the instrument. The staff believes that the statute should require dating of all powers of attorney.

Acknowledgment. California law does not require acknowledgement of a durable power of attorney, but practice manuals recommend notarization of any power that can be used in real property matters. See CEB Handbook § 2.47. The existing statutory form requires two witnesses and notarization. Civ. Code § 2452. The new Uniform Statutory Form Power of Attorney Act requires notarization, but not any witnesses. Civ. Code § 2476(c) in SB 1777. The Missouri statute requires notarization in all cases. See Mo. § 404.705 para. 1(3) in Exhibit 2. Other states with modern statutes take the same approach as existing California law by ignoring the issue (Illinois) or codifying the rule that the power needs to be acknowledged only if it is to be recorded (Minnesota and Pennsylvania). See Minn. § 523.05 & Pa. § 5602(c), in Exhibit 2. Should the general power of attorney statute also require notarization? The existing approach is acceptable since it is widely known that acknowledgment is needed for recordation purposes. The question can be viewed as a choice between the trap of executing a power that will not be effective for real property purposes because it is not notarized and the trap of executing a power that is not effective for any purpose because it is not notarized.

#### Acceptance of Power of Attorney and Duty to Act

Under the Trust Law, if a trustee accepts the trust, the trustee becomes subject to all applicable duties to administer the trust, cannot later refuse to act, and may resign only by following the procedures prescribed in the statute or the trust instrument. See Prob. Code §§ 15600 (acceptance), 15601 (rejection), 15640 (resignation), 16000 (duty to administer trust after acceptance).

The doctrine of acceptance does not apply to agents and so the agent appears to be generally free to act or not to act, may refuse to act in future transactions after having acted in some matters, and can

resign at will. This is consistent with the idea that a power of attorney in a private relationship typically is an accommodation between friends or relatives, a form of "senility insurance" (as the UPC Joint Editorial Board put it) for the principal, and is thus distinct from the more formal trust arrangement.

California statutes provide no clear rules governing the attorney in fact's acceptance of the power of attorney or any duty to act. The power of attorney is a grant of authority, not a contract, so the agent is not required to sign the instrument. As noted above, many practitioners reportedly have the attorney in fact sign the power as a routine matter "to establish the agent's acceptance of the authority granted by the principal and the concurrent responsibilities as an agent." CEB Handbook § 2.47. The significance of this "acceptance" is unknown. The Uniform Statutory Form Power of Attorney provides that "by accepting or acting under the appointment, the agent assumes the fiduciary and other legal responsibilities of an agent." See Civ. Code § 2475 in SB 1777. The full implication of this statement is also unknown.

The issue of acceptance by an agent under a power of attorney has been considered before. At the November-December 1989 meeting, the Commission asked whether a person unilaterally appointed as agent under a power of attorney has any duty to act and what acts might constitute acceptance of fiduciary responsibility. At the March 1990 meeting, the staff responded in Memorandum 90-30 with an analysis drawn from agency rules, and the Commission approved the substance of the following provision drawn from agency law:

Civil Code § 2515 [draft]. 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).

However, at the April 1990 meeting, the Commission deferred action on this provision, referring it back to the staff in light of the decision to make a comprehensive review of the general power of attorney statutes.

Statutes in some other states deal with this issue. The Illinois statute provides that the agent has no duty to exercise powers granted or to assume control of or responsibility for the principal's property, care, or affairs, regardless of the principal's physical or mental condition. See Ill. ¶ 802-7 in Exhibit 2. The Missouri statute is also more protective of the agent than the earlier draft considered by the Commission. Section 404.705 of the Missouri statute provides in relevant part as follows:

4. A person who is appointed an attorney in fact under a durable power of attorney has no duty to exercise the authority conferred in the power of attorney, whether or not the principal has become disabled or incapacitated, is missing or is held in a foreign country, unless the attorney in fact has agreed expressly in writing to act for the principal in such circumstances. An agreement to act on behalf of the principal is enforceable against the attorney in fact as a fiduciary without regard to whether there is any consideration to support a contractual obligation to do so. Acting for the principal in one or more transactions does not obligate an attorney in fact to act for the principal in subsequent transactions.

The Comment of the Missouri Bar to this provision explains it as follows:

[Subsection 4] makes clear that merely appointing a person as attorney in fact in a durable power of attorney imposes no duty on that person to act, even if the attorney in fact knows of the appointment and has received the written power of attorney. A duty to act under this law only arises by reason of an express agreement in writing and reliance is not sufficient to impose a legal duty to act. The subsection thus recognizes that many powers of attorney are given and accepted as a gratuitous accommodation for the principal by the attorney in fact. The principal wants someone to have the ability to act if something needs to be done, but rarely would the principal in a family or friend situation expect that he is imposing a duty to act if the attorney in fact chooses not to do so. Consequently, unless the attorney in fact has agreed to act, accepting a power of attorney appointment imposes no duty to act and he may resign. He may also merely wait until the situation arises and then determine whether to act. The attorney in fact may refuse to act because of the personal inconvenience at the time of becoming involved, or for any other reason and is not required to justify a decision not to act. The attorney in fact may believe that there are others in a better position to act for the principal or that the situation really warrants appointment of a court supervised guardian or conservator. However, once the attorney in fact undertakes to act under the power of attorney, the transaction is governed by the duties imposed in the law to act as a fiduciary.

California law should be clarified by statute, but we may wish to protect agents who have acted in one or more transactions from being subjected to the trust law rule that they now have an obligation to act in the future. It appears to be undesirable to impose on agents a general duty to act, since it might inhibit knowledgeable persons from agreeing to be named as agent in a power of attorney. The staff recommends adoption of the Missouri approach. We would not, however, apply the rule only to durable powers as the Missouri statute appears to do. Perhaps we should also consider applying one rule to individuals and another to corporate fiduciaries (and other professional fiduciaries) with a more trust-like acceptance rule applicable to the professional fiduciary.

#### General Powers

Civil Code Section 2318 provides that an agent has "actually such authority" as provided by the agency title unless "specifically

deprived thereof" by the principal. Section 2307 provides that authority may be conferred by "a precedent authorization or a subsequent ratification." Section 2315 provides that an "agent has such authority as the principal, actually or ostensibly, confers upon him." Actual authority is delineated in Section 2316 as that intentionally conferred on the agent or that the principal "intentionally, or by want of ordinary care, allows the agent to believe himself to possess." Ostensible authority, according to Section 2317, is what the principal "intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Section 2319 provides that the agent has authority to do "everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency." In addition, the agent has the power to disobey the instructions of the principal where it is "clearly for the interest of his principal that he should do so, and there is not time to communicate with the principal" under Section 2320. However, Section 2321 provides that if "authority is given partially in general and partially in specific terms, the general authority gives no higher powers than those specifically mentioned." General authority does not authorize the agent to act in his own name (unless it is in the usual course of business), to "define the scope of the agency," or to violate basic fiduciary principles concerning loyalty, conflict of interest, or commingling. We doubt that these broad generalities provide much useful guidance to individuals who attempt to draft and understand powers of attorney, and these rules probably also confuse a fair share of attorneys.

The statutory form powers of attorney provide for grants of general powers and provides highly detailed statements of specific types of powers. But if the principal sets out to draft his or her own power of attorney, the statute provides no real guidance. An attorney-drafted power of attorney should provide the necessary powers, but this will not necessarily be the case. By way of comparison, the settlor of a trust may rely on the general powers provided in the Trust Law. Prob. Code §§ 16200-16249. The Uniform Transfers to Minors Act provides that a custodian has all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property. Prob. Code § 3913(a).

What happens if a power of attorney is silent as to powers or grants "general powers"? The new Missouri statute provides a relatively detailed set of rules concerning the meaning of a grant of general powers, though less detailed than the powers in the new Uniform Statutory Form Power of Attorney (SB 1777). See Mo. § 404.710 in Exhibit 2. Nebraska has a scheme whereby use of the phrase "plenary powers" would incorporate all of the detailed general powers in that state's short form. See, e.g., Neb. §§ 49-1515 & 49-1524 in Exhibit 2.

In the abstract, it may seem appropriate to provide a set of general powers, but we are reluctant to recommend this course because of the repetition it would entail. There is no point in setting out the general trust powers again, nor in duplicating the detailed powers in the statutory form. Nor is there justification for drafting a new set of powers. Obviously, a person drafting a power of attorney could incorporate the statutory powers in the Trust Law or in the statutory form without the need of any additional statutory guidance. But we should also be concerned with the drafter who does not provide needed powers. Accordingly, the staff suggests including a general provision in the comprehensive power of attorney statute that would grant all powers that the principal could exercise (with some exceptions, such as for health care decisions, making a will, revoking a trust, etc.) and including the statutory form powers. It might also be helpful to include a provision specifically authorizing the incorporation of statutory powers in other laws.

Pennsylvania law fleshes out the meaning of particular phrases, as do the California statutory forms, but in more general language. See Pa. § 5603. We note this approach, but do not suggest it, since it would overlap with the statutory form adopted in California. An alternative, noted above, would be to adopt the Nebraska approach of treating language "more similar than not" to the language in the short form as having the same effect as the short form. Thus, a grant of power in "real property transactions" (which is the same as power "(A)" in the short form) would include the specific powers described in Civil Code Section 2486. And a grant of power as to "real property" would be more similar than dissimilar to the short form language, and would have the same effect. Judging the degree of similarity would become more

difficult as the language varies, but this scheme does not increase the complications inherent in a vaguely or imprecisely worded power of attorney.

The Commission may also wish to consider including a provision granting general necessary powers, such as that applicable to trustees under Probate Code Section 16200(c) which provides in effect that the trustee has the power to do any act for the purposes of the trust that complies with the standard of care, except as otherwise provided in the trust instrument.

#### Standard of Care

The Field Code agency provisions do not contain a positive statement of a standard of care. Before 1986, Civil Code Section 2322 in part provided that the agent was not authorized to "do any act which a trustee is forbidden to do" by Civil Code Sections 2228-2240 (now Probate Code Sections 16002, 16004, 16005, and 16009). This provision hardly imposes a fiduciary standard on the agent, but the section has been read broadly to apply trustee standards to agents. See cases cited in 2 B. Witkin, *Summary of California Law Agency and Employment* § 41 (9th ed. 1987); annotations following Civ. Code § 2322. Civil Code Section 2332 urges that the principal and agent "ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other."

The Trust Law standard of care, as provided in Probate Code Section 16040, is as follows:

16040. (a) The trustee shall administer the trust with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument.

(b) When investing, reinvesting, purchasing, acquiring, exchanging, selling, and managing trust property, the trustee shall act with the care, skill, prudence, and diligence under the circumstances then prevailing, including but not limited to the general economic conditions and the anticipated needs of the trust and its beneficiaries, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as

determined from the trust instrument. In the course of administering the trust pursuant to this standard, individual investments shall be considered as part of an overall investment strategy.

(c) The settlor may expand or restrict the standards provided in subdivisions (a) and (b) by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's good faith reliance on these express provisions.

The Trust Law standard is drafted with particular reference to the property management and investment duties that a trustee is likely to have. This type of detail may not be necessary in the power of attorney law.

The California Uniform Transfer to Minors Act adopts a standard designed with the nonprofessional fiduciary in mind in Probate Code Section 3912(b):

(b) In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries except that:

(1) If a custodian is not compensated for his or her services, the custodian is not liable for losses to custodial property unless they result from the custodian's bad faith, intentional wrongdoing, or gross negligence, or from the custodian's failure to maintain the standard of prudence in investing the custodial property provided in this section.

(2) A custodian, in the custodian's discretion and without liability to the minor or the minor's estate, may retain any custodial property received from a transferor.

(The compensation issue is considered separately below.) The UTMA standard is more consistent with the concept of a person who accepts the power of attorney as an accommodation for a friend or relative. While the Trust Law standard is aimed at both individuals and professional trustees, it makes more sense to the professional trustee.

There should be no doubt that the courts would apply a prudent person standard to attorneys in fact. The question is how to phrase the standard -- such as in terms of a prudent person dealing with his or her own property or with the property of another -- and how much detail to provide. Obviously there are a variety of ways of phrasing the basic standard of a prudent person.

Consider the following examples from other jurisdictions. The Missouri statute provides in Section 404.714(1) as follows:

Unless otherwise provided in the power of attorney or in a separate agreement between the principal and attorney in fact, an attorney in fact who elects to act shall exercise the authority granted in a power of attorney with that degree of care that would be observed by a prudent person dealing with the property and conducting the affairs of another.

The Illinois statute requires the agent to "use due care to act for the benefit of the principal" and provides that the agent is liable for negligent exercise. See Ill. ¶ 802-7 in Exhibit 2. The due care standard and liability rule were drafted in light of the typical family agency where the agent has no duty to act and is not viewed as taking on trustee-like responsibility and, in addition, may have an interest in the property or have "some sort of technical conflict of interest." See Zartman, *The New Illinois Power of Attorney Act*, 76 Ill. B.J. 546, 547 (1988).

Section 523.21 of the Minnesota statute provides:

In exercising any power conferred by the power of attorney, the attorney-in-fact shall exercise the power in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs and shall have the interests of the principal utmost in mind.

A separate issue is whether a higher standard should be applied to professional fiduciaries under a power of attorney. This is an issue we have encountered several times before, in the guardianship and conservatorship law, decedent's estate administration, trust law, and UTMA. Professional fiduciaries, represented by the banks, routinely object to codifying a higher standard for professional trustees, with the usual resolution being a statement, in specially negotiated language, in the relevant comment. See, e.g., the Comments to Prob. Code §§ 2401 (guardianships & conservatorships), 3912 (UTMA), 9600 (decedent's estate management), 16040 (trusts). It would be helpful to codify such a rule, but for the sake of consistency an appropriate statement may be included in the comment.

In this connection, it is interesting to note the Missouri statute which provides in Section 404.714(1) as follows:

If the attorney in fact has special skills or was appointed attorney in fact on the basis of representations of special skills or expertise, the attorney in fact has a duty to use those skills in the principal's behalf.

#### General Duties

An area of major concern is whether to provide a basic set of duties applicable to an agent under a power of attorney. Other fiduciary statutes typically provide a list of basic duties. See, e.g., Prob. Code §§ 2101, 2107, 2109, 2350 *et seq.* (guardians and conservators), 3912 (custodians under UTMA), 9600 *et seq.* (personal representatives), 16000 *et seq.* (trustees).

As noted above, the Field Code backs into the issue of duties, stating the general rule in negative terms in Civil Code Section 2322(c) (no authority to violate certain duties of trustee). Some specific duties are provided. Section 2019 expresses a variety of the fiduciary principle, but in negative terms: "An agent must not exceed the limits of his actual authority . . . ." Section 2020 provides that the agent "must use ordinary diligence to keep his principal informed of this acts in the course of the agency." Section 2021 requires a collecting agent to collect a negotiable instrument promptly. Section 2306 provides the important rule that the agent has no authority to do an act that is a fraud upon the principal. Section 2343 also provides some troublesome duties to third persons. These provisions do not provide much guidance to the person who agrees to be an attorney in fact for a friend or relative.

The agent's duties are fleshed out by commentators and the courts by reference to the Restatement on Agency and the duties of a trustee. See, e.g., 2 B. Witkin, *Summary of California Law Agency and Employment* §§ 41, 43, 48 (9th ed. 1987); CEB Handbook § 2.64-2.67. But, once again, these sources will not provide much guidance to the layperson. The question is whether the statute should provide better guidance, either by codifying the most important duties in the comprehensive power of attorney statute or by reference to other statutes, such as the Trust Law.

The new Missouri statute provides a more useful and detailed statement of the duties of an agent which is intended to provide practical guidance in practical situations. See Mo. § 404.714 in Exhibit 2. Among other things, this section sets forth the agent's duty to act in the principal's interest, to avoid conflicts of interest, to use special skills, to keep in regular contact by communicating with the principal and seeking instructions, to act in accordance with the power of attorney and the principal's oral and written instructions (or those of the principal's legal representative or a court), to consult with a missing or incompetent principal's family, friends, attorney, physician, accountant, or religious advisor, and to deliver possession or control of property and financial records to the principal's personal representative or successor after the principal's death.

Oklahoma simply provides that an "attorney-in-fact" under a durable or nondurable power is "bound by standards of conduct and liability applicable to other fiduciaries." Okla. Stat. Ann. tit. 58 § 1081 (West Supp. 1990).

The staff believes that a more detailed set of provisions, drawn from existing California agency and trust law and also from this Missouri statute, should be included in the comprehensive power of attorney statute.

#### Compensation

California statutory law does not provide any particular rule regarding an agent's right to compensation. The common law is that a principal is obligated to compensate an agent for services. 2 B. Witkin, *Summary of California Law Agency and Employment* § 66, at 71 (9th ed. 1987). However, it is not clear how this rule would be applied in the case of a durable power where the principal is incompetent. Does the agent have a right to compensation on the agent's own motion from the property of an incompetent principal?

In the normal family situation, it may be assumed that an agent under a power of attorney is not expected to receive compensation, the agency being in the nature of an accommodation of a friend or relative. The agent should not expect compensation in California

unless the power of attorney provides for it and it may be a violation of the self-dealing provisions of Probate Code Section 16004 to take compensation. See CEB Handbook § 2.51.

The Uniform Statutory Form Power of Attorney provides a power to reimburse the agent for expenditures properly made in exercising the powers granted, but does not mention compensation for the agent's time (or liability exposure). Civ. Code § 2485(i) in SB 1777.

The new Missouri statute takes a different approach, providing explicitly for reasonable compensation and reimbursement for expenses, subject to the provisions of the power of attorney and any separate agreement. Mo. § 404.725. The Missouri Bar Comment to Section 404.725 explains this provision as follows:

. . . . In many situations a relative acting as an attorney in fact under a durable power of attorney expects to act for the principal as an accommodation. Normally, while the principal is not disabled, such service will be infrequent and will not involve substantial time. However, with the prospect that if the principal becomes disabled or incapacitated, substantial time, effort and expense may be required of the attorney in fact and successors extending over a long period of time, it was felt important to include a provision respecting compensation. A definite understanding regarding compensation may be included in the power of attorney or in a separate agreement. Reimbursement of expenses would be expected to include the cost of bookkeeping, tax, and legal services incurred by the attorney in fact in performing his duties in the principal's behalf. It would also include the cost of preparing an accounting and any travel or personal expense incurred by the attorney in fact.

Another consideration is that an agent may not be willing to act under the power of attorney if it would involve substantial expenditures of time and effort without a clear right to compensation. If we want to make the principal's expectations effective, a right to compensation may be important.

The Missouri provision is similar to the rule applicable to trustees in California under Probate Code Sections 15681 (trustee entitled to reasonable compensation where trust does not provide compensation) and 16243 (power to pay trustee's compensation). The California Uniform Transfers to Minors Act (UTMA) provides a right to

reasonable compensation on an annual, noncumulative basis and for reimbursement from custodial property for reasonable expenses. Prob. Code § 3915.

The staff believes that a default rule is desirable in the comprehensive power of attorney statute. The default rule would also cover the statutory form. We suggest adopting the Missouri rule permitting reasonable compensation and reimbursement, subject to the annual, noncumulative limitation found in UTMA.

#### Effect of Compensation on Duties and Liabilities

Should the duties or liability of an agent be affected by whether or not the agent receives compensation? The existing agency statute provides only that consideration is not necessary to make an agent's authority binding on the principal. Civ. Code § 2308. A trustee is not excused from the normal duties once the trust is accepted nor is the standard of care affected by whether or not the trustee receives compensation. Prob. Code § 16041. The California version of the Uniform Transfers to Minors Act, by way of comparison, provides that an uncompensated custodian is "not liable for losses to custodial property unless they result from the custodian's bad faith, intentional wrongdoing, or gross negligence, or from the custodian's failure to maintain" the prudent person standard in making investments. Prob. Code § 3912(b)(1).

Perhaps, in order to encourage agents named in powers of attorney to act, it would be useful to adopt the custodianship rule.

#### Delegation of Powers

The Field Code agency statutes permit an agent to delegate powers if the act to be done is "purely mechanical," if the agent cannot perform the act, if it is the "usage of the place" to delegate the powers, or if the delegation is authorized by the principal. Civ. Code § 2349. An agent is not responsible to third persons for the acts of a "lawfully appointed" subagent. Civ. Code § 2351; see also Civ. Code §§ 2022, 2350, 2400.5. It is difficult to describe with precision the degree of permissible delegation, as our experience with the Trust Law confirms. See Prob. Code §§ 16012 (duty not to delegate "entire

administration" of trust or acts that trustee can "reasonably be required personally to perform"), 16247 (power to hire persons to assist in trust administration), 16041 (liability for acts of agents of trust).

The new Missouri statute permits an agent to revocably delegate powers, but the agent remains responsible to the principal. See Mo. § 404.723 in Exhibit 2.

#### Multiple Agents

The general power of attorney statutes in California do not deal with multiple agents. However, the new Uniform Statutory Form Power of Attorney (SB 1777) recognizes that multiple agents may be named and provides that they are to act jointly unless the principal states that the agents may act separately. See Civ. Code § 2475 (SB 1777). The form does not recognize the possibility of action by a majority of agents, nor does the existing statutory form that will be superseded by SB 1777. See Civ. Code §§ 2450, 2453.

The CEB Handbook notes the possibility of appointing multiple agents and discusses the need to clearly state whether they are to act jointly or may act alone and to deal with potential problems of disagreement and survival. CEB Handbook §§ 2.20-2.22.

Section 404.707 of the Missouri statute specifically authorizes multiple agents in one or more powers of attorney and provides that the authority conferred may be exercised either jointly or severally or otherwise as provided in the power of attorney. Missouri law does not provide a default rule where the power of attorney designates multiple agents but does not provide their manner of acting.

If the Commission wants to include a provision authorizing multiple agents in the comprehensive statute, it should go beyond the Missouri statute and provide a default rule concerning the manner of taking action that would apply where the power of attorney appoints more than one agent and does not state the manner of exercising authority. Either the trust law rule requiring unanimity (Prob. Code § 15620) or the decedent's estate administration rule providing for majority action (Prob. Code § 9630) could be adopted. The staff suggests the unanimity rule since the power of attorney is more akin to a trust than a probate estate.

Pennsylvania law requires joint action of multiple attorneys in fact if the power does not provide otherwise. See Pa. § 5602(b)(1) in Exhibit 2.

Of course, it would be possible to adopt as a default rule that any of the agents may act individually. Section 523.13 of the Minnesota statute provides that "any action taken by any one of the several attorneys-in-fact pursuant to the power of attorney, whether the other attorneys-in-fact consent or object to the action, binds the principal" unless the power of attorney provides otherwise.

Different agents may also be appointed for different tasks in the same instrument or in separate instruments. CEB Handbook § 2.21. The Missouri statute specifically authorizes this practice. See Mo. § 404.707 para. 1 in Exhibit 2. While it is not really necessary, it might be useful to include this type of provision in the comprehensive statute.

#### Successor Agents

A power of attorney may appoint successor agents to provide for the possibility that the first named agent may not be alive, or capable or willing to serve when the need arises. See CEB Handbook § 2.22. The existing statute does not provide any rules concerning successor agents. The danger of designating successor agents is that there may be a dispute between them concerning the succession and the existence of several successors may also make third persons reluctant to accept the authority.

At a minimum it would be useful to recognize the principal's authority to provide for successors, for the manner of succession as provided in the power of attorney, and to excuse a successor agent from any liability for actions or omissions of the predecessor. Compare Prob. Code § 16403 (liability of trustees for acts of predecessors). The statute could even provide a default succession procedure.

The Missouri statute recognizes the power to name successors and also permits delegates to name successors:

2. The principal in a durable power of attorney may revocably name one or more qualified persons as successor attorneys in fact to exercise the authority granted in the power of attorney in the order named in the event a prior

named attorney in fact resigns, dies, becomes disabled or incapacitated, is not qualified to act or refuses to act; and the principal in a durable power of attorney may revocably grant a power to another person, designated by name, by office, or by function, including the initial and any successor attorney in fact, whereby there may be revocably named at any time one or more successor attorneys in fact.

#### Termination and Modification

Civil Code Section 2355 provides that the "agency" is terminated "as to every person having notice thereof" by (1) expiration of its term, (2) extinction of its subject, (3) death of the agent, (4) the agent's renunciation of the agency, (5) the incapacity of the agent to act as such, (6) divorce, annulment, legal separation, between agent and principal, or the filing of an action to do so in the case of an "absentee" under Probate Code Section 1403. Section 2356 adds several more factors applicable where the power of the agent is not coupled with an interest: (7) revocation by the principal, (8) the principal's death, (9) the principal's incapacity to contract (subject to durable power exception). A good faith transaction of the agent without actual knowledge of items (7)-(9) is binding on the principal. Civ. Code § 2356(b). Section 2403 in the durable power law provides that the death of the principal who has executed a durable or nondurable power of attorney does not terminate the agency as to anyone acting in good faith without actual knowledge of the principal's death.

The Missouri statute provides for termination (and modification) (1) at a date provided in the power of attorney, (2) when the principal informs the agent, orally or in writing, (3) when the principal's legal representative informs the agent in writing, (4) at the principal's death, (5) when the agent under a durable power is not qualified to act, (6) on filing for divorce between principal and agent, unless power provides otherwise, and (7) when a written notice is filed with the county recorder at the principal's residence, last known residence of the agent, or at location of property referred to in power, depending on the circumstances. See Mo. § 404.717 para. 1 in Exhibit 2. The Missouri Bar comment notes that the provision for modification or termination by recording is provided for those concerned with the inability to find the agent. The agent is charged with constructive

knowledge of the filing, according to the comment. The agent is not liable to the principal for good faith actions taken without actual or constructive knowledge of a terminating circumstance. Mo. § 404.717 para. 3. Missouri law also distinguishes between the termination of a particular agent's authority and the termination of the agency itself. Mo. § 404.717 para. 2.

The new Minnesota statute provides for termination (1) on the principal's death, (2) expiration of a time provided in the instrument, (3) or incompetence (in the case of a nondurable power), and provides for revocation only by a signed written instrument of revocation. Revocation is not effective until actual notice. As to a particular parcel of real property, actual notice occurs when the revocation is recorded. Minn. §§ 523.08-523.09, 523.11. Minnesota law apparently does not recognize an oral revocation.

Illinois provides for termination on the principal's death or as provided in the instrument. Ill. § 802-5. The principal may amend or revoke the agency "at any time and in any manner communicated to the agent or to any other persons related to the subject matter of the agency." *Id.* Entry of a judgment of dissolution or legal separation between principal and agent is treated as if the agent died at the time of the judgment for purposes of the agency. Ill. § 802-6(b). The intent of this approach seems to be to eliminate the spouse as an agent without necessarily terminating the power of attorney, so that a successor could take over. Otherwise, why treat the spouse-agent as deceased instead of terminating the agency? The staff would not adopt this manner of drafting. It is better to provide directly that the authority of the spouse terminates.

North Carolina provides for revocation of a power of attorney by the death of the principal or by recording an instrument of revocation and proof of service on the attorney in fact in the manner of service of summons. N.C. Gen. Stat. § 32A-13 (Supp. 1990). A power ceases to be effective if "all attorneys-in-fact named in the instrument or substituted shall die, or cease to exist, or shall become incapable of acting, and all methods for substitution provided in the instrument have been exhausted." *Id.* § 32A-12(b).

The staff believes that a comprehensive set of termination and modification rules should be included in the new statute and that this

list should draw from existing California law as well as the other states as noted. For example, the California agency rule that the "agency" terminates when the agent dies, renounces the agency, or becomes incompetent does not take into account the possibility of successor agents under a power of attorney. The Missouri statute provides better rules in this regard. We may also want to consider the Missouri provision for recording termination in a case where the agent cannot be located.

We should also review the technical rules concerning the effect of a petition for dissolution. Civil Code Section 2355(f) refers to "divorce, dissolution, annulment, or adjudication of the nullity of marriage of, or the judicial or legal separation of, principal and attorney in fact." Perhaps a petition should have the same effect, or at least suspend the authority of the agent-spouse under a power of attorney.

#### Reliance by Third Persons

Much writing about powers of attorney focuses on the extent to which third persons may be encouraged or compelled to rely on or accept a power of attorney. The power of attorney will provide little real comfort if it cannot be made effective. We have not arrived at a final answer in this area, as the recent experience with the enforcement provisions in the Uniform Statutory Form Power of Attorney (SB 1777) teaches.

The CEB Handbook concludes:

Realistically the agent's biggest problem may be in convincing a third party to accept the [durable power of attorney for property matters]. No law compels one party to do business with another, so the question at the heart of all DPAP transactions is whether the third party (e.g., title officer[,], bank officer, transfer agent, or insurance broker) will accept it.

*Id.* § 2.56. The staff believes that it is not simply a matter of whether a third person wishes to do business. The issue can be refined: if the third person would be willing to do business with the principal, or has an ongoing relationship with the principal, the third person may properly be expected to do business with the authorized

agent of the principal under a power of attorney. Barring some legitimate, overriding interest of third persons, the comprehensive power of attorney statute should provide sufficient assurance to principals that their designated agents will be able to perform their duties in an efficient and responsible manner.

The new Missouri statute provides considerable detail in its description of the items a third person is not responsible for determining and has no duty to inquire about. At this point, we do not intend to discuss the details of this scheme; you should review the language of Missouri Section 404.719 set out in Exhibit 2.

California and some other states have placed reliance mainly on the affidavit procedure drawn from the Uniform Durable Power of Attorney Act. See Civ. Code § 2404 in Exhibit 1. Minnesota provides in a series of sections for reliance on the affidavit of the attorney in fact. See Minn. §§ 523.16-523.19 in Exhibit 2. Minnesota also imposes a liability for treble damages on an attorney in fact who knowingly executes a false affidavit. Minn. § 523.22. Illinois law provides a blanket rule protecting good faith reliance, provides for the agent's affidavit, and provides a presumption that the agency was validly executed, that the principal is alive, that the agent's acts comply with the statute, etc. See Ill. ¶ 802-8 in Exhibit 2.

The staff believes that a detailed provision like that provided in Missouri should be included in the comprehensive power of attorney statute. Coupled with a provision permitting third party reliance on the affidavit of the agent, such a scheme should go far toward making powers of attorney effective.

#### Use of Copies

Some states deal directly with the issue of the use of copies of the power of attorney, but California statutes are silent. The CEB Handbook suggests that photocopies might be sufficient if the power of attorney authorizes their use, but that access to an original durable power is needed, particularly when dealing with the county recorder. CEB Handbook § 2.53.

Illinois provides that a person who acts in good faith reliance on a "copy of the agency" is protected just as if dealing directly with a

competent principal. See Ill. ¶ 802-8 in Exhibit 2. The third person may rely on the copy or may require an affidavit from the agent. *Id.* Minnesota provides that a certified copy of the power of attorney has the same force and effect as a power of attorney bearing the signature of the principal. Minn. § 523.06. Missouri facilitates use of certified copies by providing that a third person is not responsible for determining and has no duty to inquire as to the authenticity of a certified true copy of the power furnished by an agent or successor. Mo. § 404.719. Pennsylvania permits filing of an executed copy of the power of attorney with the court clerk who may then issue certified copies having the same validity, force, and effect as the original. See Pa. § 5602(c) in Exhibit 2.

The staff recommends that the comprehensive statute include a provision validating the use of copies. Should we incorporate the Illinois type of rule which relies on an affidavit or the Minnesota-Missouri type which requires certification?

#### Judicial Proceedings

Civil Code Sections 2410-2423 provide a special procedure for enforcement of the duties of an attorney in fact, meaning an attorney in fact designated in a written power of attorney by a principal who is a natural person. This procedure applies to durable and nondurable powers, and powers for property matters or health matters. Permissible petitioners are listed in Section 2411 and include the attorney in fact, principal, and the principal's spouse, child, conservator, and potential heir. The court may determine whether the power is in effect or has terminated, may pass on the acts or proposed acts of the attorney in fact, and may compel the attorney in fact to account. Civ. Code § 2412. The remedies provided in this article are not exclusive (Civ. Code § 2420), but the right of certain petitioners may be expressly limited in the power of attorney (Civ. Code § 2421). These procedural provisions conclude with a statement of legislative intent to the effect that a power of attorney should be exercisable "free of judicial intervention subject to the jurisdiction of the courts" as invoked pursuant to law. Civ. Code § 2423.

We are not aware of any major problems in the operation of these sections. Any technical questions can be dealt with when we get to the

point of preparing a draft of the comprehensive statute for Commission consideration. It may be appropriate to examine the list of permissible petitioners. For example, the CEB Handbook queries why grandchildren are not listed. *Id.* § 5.4.

#### Validity of Foreign Powers of Attorney

California law does not provide any special rules for honoring or enforcing powers of attorney from other jurisdictions. Presumably the normal conflict of laws rules would be applied if a dispute reached the courts. But we should consider whether guidance should be provided to parties short of court adjudication.

Missouri defines durable power of attorney to include a power of attorney that is durable under the law of the place where executed, the law of the place of the principal's residence when executed, or the law of a place designated in the instrument if the place has a reasonable relationship to the purpose of the instrument. Mo. § 404.703 para. 4. The Missouri Bar comment states that this provision, along with the applicable conflict of law rules (Mo. § 404.730) are "intended to make the law widely available to present and former Missouri residents who may be living in another state." Of course, they also have the effect of validating durable powers of attorney executed under another state's laws.

Minnesota recognizes written powers of attorney validly created pursuant to the law of another state or country (Minn. § 523.02) and a copy certified by an appropriate official of another state has the same force and effect as the original power (Minn. § 523.06).

Illinois goes to great lengths to apply its statute with maximum scope. Ill. ¶ 802-4(b). Thus, the Illinois statute purports to apply to powers of attorney executed in other jurisdictions when sought to be acted on in Illinois and to the exercise of agencies anywhere else if the principal is an Illinois resident either when the agency is executed or acted upon, or if the power of attorney indicates that Illinois law is to apply. The intent of the Illinois statute is to apply as broadly as possible. It is recognized that other states will not apply Illinois law to the full extent possible under the terms of the Illinois statute, but the Illinois drafters did not want to impose

any of their own limits on the possible scope of their new statute. See Zartman, *Illinois Power of Attorney Act*, 13 S. Ill. U. L.J. 1, 10-11 (1988) ("All of this may seem presumptuous of Illinois."). It is not clear to us how all this will work given the default rule of durability applicable in Illinois versus the default rule of nondurability in effect almost everywhere else.

One of the major reasons for enactment of the Uniform Durable Power of Attorney Act and the Uniform Statutory Form Power of Attorney (in SB 1777) is to permit people in a mobile society to draw a power of attorney that would be effective in many jurisdictions. See *Recommendation Relating to Uniform Durable Power of Attorney Act*, 15 Cal. L. Revision Comm'n Reports 351, 361 (1980); *Recommendation Relating to Uniform Statutory Form Power of Attorney Act*, 20 Cal. L. Revision Comm'n Reports 415, 424 (1990). Inclusion of a provision validating foreign powers of attorney would assist in the national effort to make durable powers effective. The Commission may also be interested in following Illinois down the path of encouraging the widest possible scope for application of California law to foreign powers of attorney and to exercise of California powers in other jurisdictions.

#### Miscellaneous Provisions of Interest

As we prepare a comprehensive statute, we may want to consider including several useful provisions drawn from other states, such as the following:

Missing principal. Several states provide that a missing principal is presumed to be alive until adjudicated otherwise. See, e.g., Minn. § 523.10. This provision would fill a gap where the agent has a strong suspicion that the principal is dead and therefore is reluctant to act, even though the agent may be in the best position to act under the power. California law refers to federal "absentees" as defined in Probate Code Section 1403, but not to missing persons generally.

Duty to preserve estate plan. The Illinois provision concerning the duty of the agent to preserve the estate plan of the principal is appealing. See Ill. § 802-9 in Exhibit 2. California law has some

elements of this statute, such as the provision in the Trust Law to the effect that the trust cannot be modified under a power of attorney unless both the power of attorney and the trust so provide. Prob. Code § 15401(b). However, the Illinois provision is a more comprehensive and useful statement that would be more helpful to a typical attorney in fact.

Bond. South Carolina permits the court on motion of an interested person or on its own motion to require the attorney in fact to provide a bond. S.C. Code Ann. § 62-5-501(d) (Law. Co-op. 1987). South Carolina has a restrictive statute which requires the power to be executed and witnessed in the same manner as a will and "probated and recorded" in the same manner as a deed. Nevertheless, the bonding option might be worth considering in connection with judicial proceedings.

Separate treatment of professional fiduciaries. Pennsylvania applies certain general duties, powers, and liabilities to corporate fiduciaries who are named as agents under powers of attorney, whether by the principal or by another agent, See Pa. § 5607 in Exhibit 2.

Notice through employees. Missouri provides that a third person who operates through employees is not chargeable with actual knowledge of a fact relating to a power of attorney unless the information is received at a home office or location of an employee with responsibility to act and there is a reasonable time to act. See Mo. § 404.719 para. 3 in Exhibit 2. Missouri also permits the third person to prescribe the place and manner in which notice of a material fact will be given. *Id.* para. 4. Illinois chose not to attempt to deal with this issue on the grounds that "no simple, general rule could be devised that would apply fairly in all cases." Zartman, *Illinois Power of Attorney Act*, 13 S. Ill. U. L.J. 1, 20 (1988).

#### Disposition of General Agency Statutes

In preparing a comprehensive power of attorney statute, the Commission must confront the issue of what to do with the agency rules in Civil Code Sections 2019-2022 and 2295-2357. Of the 51 agency sections appearing in the Civil Code of 1872, only four have been revised in nearly 120 years. See Exhibit 1. This is an amazing record

suggesting either that the Field Code agency provisions approach perfection or are innocuous. It is also worth noting that the adoption of the Field Code was undertaken by revisers who "felt themselves under 'lash and spur'" to prepare a bill before the 1872 legislative session, and that they felt "embarrassment" in this revision. Revision Commission, *Final Note*, to [Proposed] Revised Laws of the State of California; in Four Codes: Civil Code 609 (1871). The point is that we should not feel any special reverence for these ancient rules. They were adopted because they were handy and because California was in the habit of borrowing New York law in the early years. The Revision Commissioners were looking for a convenient statement of civil law. Perhaps if they had had the various Restatements available in 1871, they would have recommended them to the 1872 Legislature.

The Civil Code of 1872 was the subject of an unrelenting attack by Professor Pomeroy over 100 years ago. In 1884, Pomeroy argued that the Revision Commission had created a great source of doubt, uncertainty, and error by the "constant, but wholly unnecessary practice, of abandoning well-known legal terms and phrases . . . and of adopting instead thereof an unknown and hitherto unused language and terminology." Quoted in Van Alstyne, *The California Civil Code*, in 6 West's Ann. Cal. Codes: Civil Code 1, 30 (1954). Pomeroy criticized the 1872 Code for its preoccupation with abstract doctrines to the exclusion of the special detailed rules needed in practical cases. He stated that there was "hardly a definition, or a statement of doctrine in the whole work, the full meaning, force and effect of which can be apprehended or understood without a previous accurate knowledge of the common law doctrines and rules on the same subject matter." *Id.* Pomeroy concluded that the public would be served only by a complete repeal or abandonment of the 1872 Code. *Id.* at 31.

Pomeroy's general conclusions are illustrated in the 1872 agency sections. Here we encounter general definitions that lead us nowhere. Ratification, surely a peripheral subject, takes up a disproportionate space. Civ. Code §§ 2307-2314. This is not a subject that needs to be included in a new comprehensive power of attorney statute. We also find several overlapping general provisions in the Field Code, such as Section 2019 (agent can't exceed authority) and Section 2315 (agent has

authority conferred). Some provisions are contradictory, such as Section 2319 (agent's necessary authority) and Section 2320 (agent's power to disobey). See also Civ. Code § 2322 (limits on general authority). The many provisions concerning actual agency, actual authority, ostensible authority, and ostensible authority are so abstract as to be pointless. See Civ. Code §§ 2298-2300, 2315-2320. The staff submits that these rules could be retained or repealed without any effect on the substance of the law. If the Commission approves a general powers scheme, Section 2321 will need to be repealed or revised. Section 2321 provides in effect that an agent's powers under a general authority are limited to any specific powers given with relation to a specific authority.

There are several possible dispositions of the general agency sections:

(1) The Field Code generalities could be preserved in a small hornbook chapter of a reorganized statute, with the more modern provisions of practical use set out elsewhere. Provisions that are entirely superseded should be repealed. Anyone using the power of attorney in a practical context would use the new provisions. The old provisions would serve mainly as a hook for the publishers to hang case notes on in the annotated codes. In fact, Professor Van Alstyne suggests in his assessment of the Civil Code that, largely through Pomeroy's influence, "the Code has, in many areas of the law, become little more than a convenient starting point for research into the case law, without which its provisions are often of little practical significance." Van Alstyne, *supra*, at 36. The Field Code agency rules are not even needed for this function, since the natural starting place for a researcher would be the power of attorney statutes themselves.

(2) We could do even less, and ignore the old agency provisions, making clear in the new comprehensive statute that it supersedes any contrary rules in the general agency statute. This hands off approach would be simple, and would avoid offending those with an attachment to the Field Code, which has not fared too well in recent decades. It should also be considered whether it goes against the Commission's charge to study and recommend revisions of anachronistic and antiquated statutes.

(3) There is no meaningful distinction between written agencies and powers of attorney, nor between attorneys in fact and agents. It would be a logical step to fold the old agency rules into the power of attorney statute, to the extent that any of the old rules are desired. In this process, it might be best if some of the broad rules of the Field Code were abandoned and left to case law. It is interesting to note that the Code Commission (the predecessor to the Law Revision Commission) in 1930 concluded that the attempt to state general rules in the form of the Civil Code was a "mistake" and recommended uncodification of much of the Civil Code, after the main task of organizing the codes was completed. Cal. Code Commission, *Report*, Appendix D, at 22 (1930). However, the staff does not recommend this course because it is not really necessary as part of the process of developing a comprehensive power of attorney statute and might create unnecessary controversy.

(4) Other lines can be drawn. Since the new statute would presumably apply only to written instruments, the old rules could be retained to cover oral agencies and authorizations. See, e.g., Civ. Code §§ 2309-2310. (Of course, the common law could also do that, so the old statutes would not be necessary even as to oral agencies.)

The staff is inclined toward either the first or second alternative approach.

Respectfully submitted,

Stan Ulrich  
Staff Counsel

#L-3044  
 Memorandum 90-85

su659  
 06/27/90

EXHIBIT 1

**CALIFORNIA GENERAL AGENCY and POWER OF ATTORNEY PROVISIONS  
 [Civ. Code §§ 2019-2022, 2295-2357, 2400-2423]**

*Note.* Sections 2019-2022 and 2295-2357 are the Field Code agency provisions from the 1872 California Civil Code, which have remained unchanged, with the exception of Sections 2322, 2334, 2355, and 2356, which have been amended, and Section 2357, which was added in 1981.

Sections 2400-2407 are the Uniform Durable Power of Attorney Act.

ARTICLE II.

AGENTS.

Agent to conform to his authority.

2019. An agent must not exceed the limits of his actual authority, as defined by the Title on Agency.

2020. An agent must use ordinary diligence to keep his principal informed of his acts in the course of the agency.

Must keep his principal informed.

2021. An agent employed to collect a negotiable instrument must collect it promptly, and take all measures necessary to charge the parties thereto, in case of its dishonor; and, if it is a bill of exchange, must present it for acceptance with reasonable diligence.

Collecting agent.

2022. A mere agent of an agent is not responsible as such to the principal of the latter.

Responsibility of sub-agent.

## TITLE IX.

## AGENCY.

CHAPTER I. *Agency in General.*II. *Particular Agencies.*

## CHAPTER I.

## AGENCY IN GENERAL.

## ARTICLE I. DEFINITION OF AGENCY.

## II. AUTHORITY OF AGENTS.

## III. MUTUAL OBLIGATIONS OF PRINCIPALS AND THIRD PERSONS.

## IV. OBLIGATIONS OF AGENTS TO THIRD PERSONS.

## V. DELEGATION OF AGENCY.

## VI. TERMINATION OF AGENCY.

## ARTICLE I.

## DEFINITION OF AGENCY.

Agency  
what

2295. An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency."

Who may  
appoint,  
and who  
may be an  
agent.

2296. Any person having capacity to contract may appoint an agent, and any person may be an agent.

2297. An agent for a particular act or transaction is called a special agent. All others are general agents.

Agents,  
general or  
special.

2298. An agency is either actual or ostensible.

Agency,  
actual or  
ostensible.

2299. An agency is actual when the agent is really employed by the principal.

Actual  
agency.

2300. An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.

Ostensible  
agency.

## ARTICLE II.

## AUTHORITY OF AGENTS.

2304. An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention.

What  
authority  
may be  
conferred.

Agent may perform acts required of principal by Code.

2305. Every act which, according to this Code, may be done by or to any person, may be done by or to the agent of such person for that purpose, unless a contrary intention clearly appears.

Agent cannot have authority to defraud principal.

2306. An agent can never have authority, either actual or ostensible, to do an act which is, and is known or suspected by the person with whom he deals, to be a fraud upon the principal.

Creation of agency.

2307. An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification.

Consideration unnecessary.

2308. A consideration is not necessary to make an authority, whether precedent or subsequent, binding upon the principal.

Form of authority.

2309. An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.

Ratification of agent's act.

2310. A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof.

Ratification of part of a transaction

2311. Ratification of part of an indivisible transaction is a ratification of the whole.

When ratification void.

2312. A ratification is not valid unless, at the time of ratifying the act done, the principal has power to confer authority for such an act.

Ratification not to work injury to third persons.

2313. No unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent.

2314. A ratification may be rescinded when made without such consent as is required in a contract, or with an imperfect knowledge of the material facts of the transaction ratified, but not otherwise.

Rescission of ratification.

2315. An agent has such authority as the principal, actually or ostensibly, confers upon him.

Measure of agent's authority.

2316. Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess.

Actual authority, what.

2317. Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.

Ostensible authority, what.

2318. Every agent has actually such authority as is defined by this Title, unless specially deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority.

Agent's authority as to persons having notice of restrictions upon it.

2319. An agent has authority:

1. To do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency; and,

Agent's necessary authority.

2. To make a representation respecting any matter of fact, not including the terms of his authority, but upon which his right to use his authority depends, and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made.

2320. An agent has power to disobey instructions in dealing with the subject of the agency, in cases where it is clearly for the interest of his principal that he should do so, and there is not time to communicate with the principal.

Agent's power to disobey instructions.

Authority to be construed by its specific, rather than by its general terms.

2321. When an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned.

§ 2322. Authority of agent

An authority expressed in general terms, however broad, does not authorize an agent to do any of the following:

- (a) Act in the agent's own name, unless it is the usual course of business to do so.
- (b) Define the scope of the agency.
- (c) Violate a duty to which a trustee is subject under \* \* \* Section 16002, 16004, 16005, or 16009 of the Probate Code.

(Amended by Stats.1986, c. 820, § 9, eff. Sept. 15, 1986, operative July 1, 1987; Stats.1988, c. 113, § 5, eff. May 25, 1988.)

What included in authority to sell personal property.

2323. An authority to sell personal property includes authority to warrant the title of the principal, and the quality and quantity of the property.

What included in authority to sell real property.

2324. An authority to sell and convey real property includes authority to give the usual covenants of warranty.

Authority of general agent to receive price of property.

2325. A general agent to sell, who is intrusted by the principal with the possession of the thing sold, has authority to receive the price.

Authority of special agent to receive price.

2326. A special agent to sell has authority to receive the price on delivery of the thing sold, but not afterwards.

ARTICLE III.

MUTUAL OBLIGATIONS OF PRINCIPALS AND THIRD PERSONS.

2330. An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.

Principal, how affected by acts of agent within the scope of his authority.

2331. A principal is bound by an incomplete execution of an authority, when it is consistent with the whole purpose and scope thereof, but not otherwise.

Principal, when bound by incomplete execution of authority.

2332. As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.

Notice to agent, when notice to principal.

2333. When an agent exceeds his authority, his principal is bound by his authorized acts so far only as they can be plainly separated from those which are unauthorized.

Obligation of principal when agent exceeds his authority.

§ 2334. Principal bound by acts under ostensible authority

A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof.

(Enacted 1872. Amended by Stats.1905, c. 457, p. 616, § 1.)

2335. If exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment or other satisfaction made by him to his agent in good faith, before receiving notice of the creditor's election to hold him responsible.

When exclusive credit is given to agent.

Rights of person who deals with agent without knowledge of agency.

2336. One who deals with an agent without knowing or having reason to believe that the agent acts as such in the transaction, may set off against any claim of the principal arising out of the same, all claims which he might have set off against the agent before notice of the agency.

Instrument intended to bind principal does bind him.

2337. An instrument within the scope of his authority by which an agent intends to bind his principal, does bind him if such intent is plainly inferable from the instrument itself.

Principal's responsibility for agent's negligence or omission.

2338. Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.

Principal's responsibility for wrongs willfully committed by the agent.

2339. A principal is responsible for no other wrongs committed by his agent than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service.

## ARTICLE IV.

## OBLIGATIONS OF AGENTS TO THIRD PERSONS.

2343. One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:

Agent's responsibility to third persons.

1. When, with his consent, credit is given to him personally in a transaction;
2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or,
3. When his acts are wrongful in their nature.

2344. If an agent receives anything for the benefit of his principal, to the possession of which another person is entitled, he must, on demand, surrender it to such person, or so much of it as he has under his control at the time of demand, on being indemnified for any advance which he has made to his principal, in good faith, on account of the same; and is responsible therefor, if, after notice from the owner, he delivers it to his principal.

Obligation of agent to surrender property to third person.

2345. The provisions of this Article are subject to the provisions of Part I, Division First, of this Code.

Agent not having capacity to contract.

## ARTICLE V.

## DELEGATION OF AGENCY.

2349. An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others:

Agent's delegation of his powers.

1. When the act to be done is purely mechanical;
2. When it is such as the agent cannot himself, and the sub-agent can lawfully perform;
3. When it is the usage of the place to delegate such powers; or,
4. When such delegation is specially authorized by the principal.

Agent's  
unauthor-  
ized  
employ-  
ment of  
sub-agent.

2350. If an agent employs a sub-agent without authority, the former is a principal and the latter his agent, and the principal of the former has no connection with the latter.

Sub-agent  
rightfully  
appointed  
represents  
principal.

2351. A sub-agent, lawfully appointed, represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the sub-agent.

## ARTICLE VI.

### TERMINATION OF AGENCY.

#### § 2355. Means of termination

An agency is terminated, as to every person having notice thereof, by any of the following:

- (a) The expiration of its term.
- (b) The extinction of its subject.
- (c) The death of the agent.
- (d) The agent's renunciation of the agency.
- (e) The incapacity of the agent to act as such.
- (f) The divorce, dissolution, annulment, or adjudication of the nullity of marriage of, or the judicial or legal separation of, principal and attorney in fact, or commencement by the attorney in fact of an action for such relief, in the case of a power of attorney, if the attorney in fact was the spouse of the principal, and the principal has become an absentee as defined in Section 1403 of the Probate Code, unless the power of attorney expressly provides otherwise in writing.

(Enacted 1872. Amended by Stats.1972, c. 988, p. 1799, § 1, eff. Aug. 16, 1972; Stats.1980, c. 246, p. 491, § 1; Stats.1983, c. 99, § 5.)

#### § 2356. Agency not coupled with an interest; bona fide transaction; proxies

(a) Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by any of the following:

- (1) Its revocation by the principal.
  - (2) The death of the principal.
  - (3) The incapacity of the principal to contract.
- (b) Notwithstanding subdivision (a), any bona fide transaction entered into with such agent by any person acting without actual knowledge of such revocation, death, or incapacity shall be binding upon the principal, his or her heirs, devisees, legatees, and other successors in interest.
- (c) Nothing in this section shall affect the provisions of Section 1216.

(d) With respect to a power of attorney, the provisions of this section are subject to the provisions of Articles 3 (commencing with Section 2400) and 5 (commencing with Section 2430) of Chapter 2.

(e) With respect to a proxy given by a person to another person relating to the exercise of voting rights, to the extent the provisions of this section conflict with or contravene any other provisions of the statutes of California pertaining to the proxy, the latter provisions shall prevail.

(Enacted 1872. Amended by Stats.1943, c. 413, p. 1951, § 1; Stats.1972, c. 988, p. 1799, § 2, eff. Aug. 16, 1972; Stats.1979, c. 234, p. 488, § 2; Stats.1980, c. 246, p. 491, § 2; Stats.1981, c. 511, p. 1867, § 2; Stats.1983, c. 1204, § 1.)

#### § 2357. Absentee principal; knowledge

For the purposes of subdivision (b) of Section 2356 and Sections 2403 and 2404, in the case of a principal who is an absentee as defined in Section 1403 of the Probate Code, a person shall be deemed to be without actual knowledge of:

(a) The principal's death or incapacity while the absentee continues in missing status and until the person receives notice of the determination of the death of the absentee by the secretary concerned or the head of the department or agency concerned or the delegate of the secretary or head.

(b) Revocation by the principal during the period described in subdivision (a).

(Added by Stats.1981, c. 511, p. 1867, § 3.)

#### § 2400. Durable power of attorney

\* \* \* 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 "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. \* \* \*

(Added by Stats.1981, c. 511, p. 1867, § 4. Amended by Stats.1985, c. 403, § 1.)

#### § 2400.5. Proxies given by attorney in fact to exercise voting rights

Where a durable power of attorney gives an attorney in fact the power to exercise voting rights, a proxy given by the attorney in fact to another to exercise the voting rights is subject to all the provisions of law applicable to such proxy and is not a durable power of attorney subject to this article.

(Added by Stats.1985, c. 403, § 2.)

#### § 2401. Effect of acts by attorney in fact during incapacity of principal

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.

(Added by Stats.1981, c. 511, p. 1867, § 4.)

**§ 2402. Fiduciary for incapacitated principal**

(a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his or her property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he or she were not incapacitated; but, if a conservator is appointed by a court of this state, the conservator can revoke or amend the power of attorney only if the court in which the conservatorship proceeding is pending has first made an order authorizing or requiring the fiduciary to revoke or amend the durable power of attorney and the revocation or amendment is in accord with the order. This subdivision does not apply to a durable power of attorney to the extent that the durable power of attorney authorizes the attorney in fact to make health care decisions, as defined in Section 2430, for the principal.

(b) A principal may nominate, by a durable power of attorney, a conservator of the person or estate or both, or a guardian of the person or estate or both, for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. If the protective proceedings are conservatorship proceedings in this state, the nomination shall have the effect provided in Section 1810 of the Probate Code, and the court shall give effect to the most recent writing executed in accordance with Section 1810 of the Probate Code, whether or not such writing is a durable power of attorney.

(Added by Stats.1981, c. 511, p. 1867, § 4. Amended by Stats.1983, c. 1204, § 2.)

**§ 2403. Death or incapacity of principal; knowledge; good faith acts**

(a) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(b) The incapacity of a principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his or her successors in interest.

(Added by Stats.1981, c. 511, p. 1867, § 4.)

**§ 2404. Affidavit of lack of knowledge of termination of power; recording**

As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he or she did not have at the time of the exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

(Added by Stats.1981, c. 511, p. 1867, § 4.)

**§ 2405. Construction and application of article**

This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

(Added by Stats.1981, c. 511, p. 1867, § 4.)

**§ 2406. Citation**

This article may be cited as the Uniform Durable Power of Attorney Act.

(Added by Stats.1981, c. 511, p. 1867, § 4.)

**§ 2407. Partial invalidity**

If any provision of this article or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

(Added by Stats.1981, c. 511, p. 1867, § 4.)

**§ 2410. Definitions**

As used in this article:

(a) "Attorney in fact" means an attorney in fact designated in a power of attorney.

(b) "Durable power of attorney for health care" means a durable power of attorney to the extent that it authorizes an attorney in fact to make health care decisions, as defined in Section 2430, for the principal.

(c) "Power of attorney" means a written power of attorney, durable or otherwise, which designates for a natural person an attorney in fact. For the purposes of this article, a power of attorney does not include a proxy given by a person to another person with respect to the exercise of voting rights that is governed by any other statute of California.

(d) "Principal" means the natural person who has designated another as his or her attorney in fact in a power of attorney.

(Added by Stats.1981, c. 511, p. 1869, § 4.5. Amended by Stats.1983, c. 1204, § 3; Stats.1984, c. 312, § 1.)

**§ 2411. Petitioners**

A petition may be filed under this article by any of the following:

(a) The attorney in fact.

(b) The principal.

(c) The spouse or any child of the principal.

(d) The conservator of the person or estate of the principal.

(e) Any person who would take property of the principal under the laws of intestate succession if the principal died at the time the petition is filed, whether or not the principal has a will.

(f) The court investigator, referred to in Section 1454 of the Probate Code, of the county where the power of attorney was executed or where the principal resides.

(g) The public guardian of the county where the power of attorney was executed or where the principal resides.

(h) A treating health care provider with respect to a durable power of attorney for health care.

(i) A parent of the principal with respect to a durable power of attorney for health care.

(Added by Stats.1981, c. 511, p. 1869, § 4.5. Amended by Stats.1983, c. 1204, § 4.)

**§ 2412. Petition; purposes**

Except as provided in Section 2412.5, a petition may be filed under this article for any one or more of the following purposes:

(a) Determining whether the power of attorney is in effect or has terminated.

(b) Passing on the acts or proposed acts of the attorney in fact.

(c) Compelling the attorney in fact to submit his or her accounts or report his or her acts as attorney in fact to the principal, the spouse of the principal, the conservator of the person or the estate of the principal, or to such other person as the court in its discretion may require, if the attorney in fact has failed to submit an accounting and report within 60 days after written request from the person filing the petition.

(d) Declaring that the power of attorney is terminated upon a determination by the court of all of the following:

(1) The attorney in fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

(2) At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney.

(3) The termination of the power of attorney is in the best interests of the principal or the principal's estate.

(Added by Stats.1981, c. 511, p. 1869, § 4.5. Amended by Stats.1983, c. 1204, § 5.)

**§ 2412.5. Durable power of attorney for health care; purposes of petition**

With respect to a durable power of attorney for health care, a petition may be filed under this article for any one or more of the following purposes:

(a) Determining whether the durable power of attorney for health care is in effect or has terminated.

(b) Determining whether the acts or proposed acts of the attorney in fact are consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the court or, where the desires of the principal are unknown or unclear, whether the acts or proposed acts of the attorney in fact are in the best interests of the principal.

(c) Compelling the attorney in fact to report his or her acts as attorney in fact to the principal, the spouse of the principal, the conservator of the person of the principal, or to any other person as the court in its discretion may require, if the attorney in fact has failed to submit such a report within 10 days after written request from the person filing the petition.

(d) Declaring that the durable power of attorney for health care is terminated upon a determination by the court that the attorney in fact has made a health care decision for the principal that authorized anything illegal or upon a determination by the court of both of the following:

(1) The attorney in fact has violated, has failed to perform, or is unfit to perform, the duty under the durable power of attorney for health care to act consistent with the desires of the principal or, where the desires of the principal are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the best interests of the principal.

(2) At the time of the determination by the court, the principal lacks the capacity to give or to revoke a durable power of attorney for health care.

(Added by Stats. 1983, c. 1204, § 6.)

**§ 2413. Powers of court**

The court may make all orders and decrees and take all other action necessary or proper to dispose of the matters presented by the petition.

(Added by Stats. 1981, c. 511, p. 1869, § 4.5.)

**§ 2414. Venue**

Proceedings under this article shall be commenced in the superior court of the county in which the attorney in fact is resident or, if the attorney in fact is not resident in this state, in any county of this state.

(Added by Stats. 1981, c. 511, p. 1869, § 4.5.)

**§ 2415. Petition; contents**

Each proceeding under this article shall be commenced by filing a verified petition in the superior court which shall state facts showing that the petition is authorized by this article and, if known to the petitioner, the terms of the power of attorney.

(Added by Stats. 1981, c. 511, p. 1869, § 4.5.)

**§ 2416. Dismissal of petition; stay or dismissal of proceeding**

The court may dismiss a petition when it appears that the proceeding is not necessary for the protection of the interests of the principal or the principal's estate and shall stay or dismiss the proceeding in whole or in part when required by Section 410.30 of the Code of Civil Procedure.

(Added by Stats. 1981, c. 511, p. 1869, § 4.5. Amended by Stats. 1984, c. 312, § 2.)

**§ 2417. Hearing; service of notice; proof of service; laws applicable; attorney fees; durable power of attorney for health care**

(a) Upon the filing of a petition under this article, the clerk shall set the petition for hearing.

(b) At least 30 days before the time set for hearing, the petitioner shall serve notice of time and place of the hearing, together with a copy of the petition, on all of the following:

(1) The attorney in fact if not the petitioner.

(2) The principal if not the petitioner.

(3) Any other persons the court in its discretion requires.

(c) Service shall be made by mailing to the last known address of the person required to be served unless the court in its discretion requires that notice be served in some other manner. Personal delivery is the equivalent of mailing.

(d) Proof of compliance with subdivisions (b) and (c) shall be made at or before the hearing. If it appears to the satisfaction of the court that the notice has been given as required, the court shall so find in its order, and the order, when it becomes final, is conclusive on all persons.

(e) Proceedings under this article shall be governed, whenever possible, by the provisions of this article, and where the provisions of this article do not appear applicable, the provisions of Division 7 (commencing with Section 7000) of the Probate Code shall apply.

(f) The court for good cause may shorten the time required for the performance of any act required by this section.

(g) In a proceeding under this article commenced by the filing of a petition by a person other than the attorney in fact, the court may in its discretion award reasonable attorney's fees to:

(1) The attorney in fact if the court determines that the proceeding was commenced without any reasonable cause.

(2) The person commencing the proceeding if the court determines that the attorney in fact has clearly violated the fiduciary duties under the power of attorney or has failed without any reasonable cause or justification to submit accounts or report acts to the principal or conservator of the estate or of the person, as the case may be, after written request from the principal or conservator.

(h) With respect to a durable power of attorney for health care, the court in its discretion, upon a showing of good cause, may issue a temporary order prescribing the health care of the principal until the disposition of the petition filed under Section 2412.5. If a durable power of attorney for health care is in effect and a conservator (including a temporary conservator) of the person is appointed for the principal, the court that appoints the conservator in its discretion, upon a showing of good cause, may issue a temporary order prescribing the health care of the principal, that order to continue in effect for such time as is ordered by the court but in no case longer than the time necessary to permit the filing and determination of a petition filed under Section 2412.5.

(Added by Stats.1981, c. 511, p. 1869, § 4.5. Amended by Stats.1983, c. 1204, § 7; Stats.1988, c. 1199, § 1, operative July 1, 1989.)

#### § 2418. Guardian ad litem

At any stage of a proceeding under this article, the court may appoint a guardian ad litem to represent the interests of a missing or incapacitated principal. Sections 373 and 373.5 of the Code of Civil Procedure do not apply to the appointment of a guardian ad litem under the provisions of this article.

(Added by Stats.1981, c. 511, p. 1869, § 4.5.)

#### § 2419. Appeal

An appeal may be taken from any of the following:

(a) Any final order or decree made pursuant to subdivision (a), (b), or (d) of Section 2412 or subdivision (a), (b), or (d) of Section 2412.5.

(b) An order dismissing the petition or denying a motion to dismiss under Section 2416.

(Added by Stats.1981, c. 511, p. 1869, § 4.5. Amended by Stats.1983, c. 1204, § 8.)

#### § 2420. Cumulative remedies; inapplicability to reciprocal or interinsurance exchanges

(a) The remedies provided under this article are cumulative and nonexclusive.

(b) This article is not applicable to reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys in fact, agents, and representatives.

(Added by Stats.1981, c. 511, p. 1869, § 4.5.)

#### § 2421. Elimination in power of attorney of authority to petition; exception; durable power of attorney for health care

(a) Except as provided in subdivisions (b), (c), and (d), a power of attorney may expressly eliminate the authority of any person listed in Section 2411 to petition the court under this article for any one or more of the purposes enumerated in Section 2412 or 2412.5 if both of the following requirements are met:

(1) The power of attorney is executed by the principal at a time when the principal has the advice of a lawyer authorized to practice law in the state where the power of attorney is executed.

(2) The principal's lawyer signs a certificate stating in substance: "I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

(b) Notwithstanding any provision of the power of attorney, except as provided in subdivision (c), the conservator of the estate of the principal may petition the court under this article for any one or more of the purposes enumerated in Section 2412.

(c) Notwithstanding any provision of the power of attorney, in the case of a durable power of attorney for health care, the conservator of the person of the principal may petition the court under this article for any of the purposes enumerated in subdivisions (a), (c), and (d) of Section 2412.5.

(d) Notwithstanding any provision of the power of attorney, in the case of a durable power of attorney for health care, the attorney in fact may petition the court under this article for any of the purposes enumerated in subdivisions (a) and (b) of Section 2412.5.

(Added by Stats.1981, c. 511, p. 1869, § 4.5. Amended by Stats.1983, c. 1204, § 9; Stats.1984, c. 312, § 3.)

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**§ 2422. Application of article**

Subject to Sections 2420 and 2421, this article applies notwithstanding any provision of the power of attorney to the contrary.

(Added by Stats.1981, c. 511, p. 1869, § 4.5.)

**§ 2423. Legislative intent**

It is the intent of the Legislature in enacting this article that a power of attorney be exercisable free of judicial intervention subject to the jurisdiction of the courts of this state as invoked pursuant to this article or otherwise invoked pursuant to law.

(Added by Stats.1981, c. 511, p. 1869, § 4.5.)

#L-3044  
Memorandum 90-85

su659  
06/27/90

EXHIBIT 2

**SELECTED POWER OF ATTORNEY PROVISIONS FROM OTHER STATES**

ILLINOIS

[from Ill. Ann. Stat. ch. 110½ ¶ 802-1 *et seq.* (Smith-Hurd Supp. 1990)]

Ill. ¶ 802-3. Definitions

§ 2-3. Definitions. As used in this Act:

(a) "Agency" means the written power of attorney or other instrument of agency governing the relationship between the principal and agent or the relationship, itself, as appropriate to the context, and includes agencies dealing with personal or health care as well as property. An agency is subject to this Act to the extent it may be controlled by the principal, excluding agencies and powers for the benefit of the agent.

(b) "Agent" means the attorney-in-fact or other person designated to act for the principal in the agency.

. . . .  
(e) "Principal" means an individual (including, without limitation, an individual acting as trustee, representative or other fiduciary) who signs a power of attorney or other instrument of agency granting powers to an agent.

Ill. ¶ 802-4. Control by instrument

§ 2-4. Applicability. (a) The principal may specify in the agency the event or time when the agency will begin and terminate, the mode of revocation or amendment and the rights, powers, duties, limitations, immunities and other terms applicable to the agent and to all persons dealing with the agent, and the provisions of the agency will control notwithstanding this Act, except [special health care agency rules].

Ill. ¶ 802-5. Duration of agency

§ 2-5. Duration of agency--amendment and revocation. Unless the agency states an earlier termination date, the agency continues until the death of the principal, notwithstanding any lapse of time, the principal's disability or incapacity or appointment of a guardian for the principal after the agency is signed. Every agency may be amended or revoked by the principal at any time and in any manner communicated to the agent or to any other person related to the subject matter of the agency, except [special health care agency rules].

Ill. ¶ 802-7. Duties, standard of care, liabilities

§ 2-7. Duty--standard of care--record-keeping--exoneration. The agent shall be under no duty to exercise the powers granted by the agency or to assume control of or responsibility for any of the principal's property, care or affairs, regardless of the principal's physical or mental condition. Whenever a power is exercised, the agent shall use due care to act for the benefit of the principal in

accordance with the terms of the agency and shall be liable for negligent exercise. An agent who acts with due care for the benefit of the principal shall not be liable or limited merely because the agent also benefits from the act, has individual or conflicting interests in relation to the property, care or affairs of the principal or acts in a different manner with respect to the agency and the agent's individual interests. The agent shall keep a record of all receipts, disbursements, and significant actions taken under the agency. The agent shall not be affected by any amendment or termination of the agency until the agent has actual knowledge thereof. The agent shall not be liable for any loss due to error of judgment nor for the act or default of any other person.

Ill. ¶ 802-8. Reliance on agency

§ 2-8. Reliance on agency. Any person who acts in good faith reliance on a copy of the agency will be fully protected and released to the same extent as though the reliant had dealt directly with the principal as a fully-competent person. The agent shall furnish an affidavit to the reliant on demand stating that the instrument relied on is a true copy of the agency and that, to the best of the agent's knowledge, the principal is alive and the relevant powers of the agent have not been altered or terminated; but good faith reliance on the agency will protect the reliant without the affidavit. Any person dealing with the agent may presume, in the absence of actual knowledge to the contrary, that the agency was validly executed, that the principal was competent at the time of execution, and that, at the time of reliance, the principal is alive, the agency and the relevant powers of the agent have not terminated or been amended, and the acts of the agent conform to the standards of this Act. No person relying on the agency shall be required to see to the application of any property delivered to or controlled by the agent or to question the authority of the agent. Each person to whom a direction by the agent in accordance with the terms of the agency is communicated shall comply with that direction, and any person who fails to comply arbitrarily or without reasonable cause shall be subject to civil liability for any damages resulting from noncompliance. . . . .

Ill. ¶ 802-9. Preservation of estate plan and trusts

§ 2-9. Preservation of estate plan and trusts. In exercising powers granted under the agency, including powers of amendment or revocation and powers to expend or withdraw property passing by trust, contract or beneficiary designation at the principal's death (such as, without limitation, specifically bequeathed property, joint accounts, life insurance, trusts and retirement plans), the agent shall take the principal's estate plan into account insofar as it is known to the agent and shall attempt to preserve the plan, but the agent shall not be liable to any plan beneficiary under this Section unless the agent acts in bad faith. An agent may not revoke or amend a trust revocable or amendable by the principal or require the trustee of any trust for the benefit of the principal to pay income or principal to the agent without specific authority and specific reference to the trust in the agency. The agent shall have access to and the right to copy (but not to hold) the principal's will, trusts and other personal papers and records to the extent the agent deems relevant for purposes of this Section.

**MINNESOTA**

[from Minn. Stat. Ann. § 523.01 et seq. (West Supp. 1990)]

**Minn. § 523.01. Authorization**

A person who is a competent adult may, as principal, designate another person or an authorized corporation as the person's attorney-in-fact by a written power of attorney. The power of attorney is validly executed when it is dated and signed by the principal and, in the case of a signature on behalf of the principal, by another, or by a mark, acknowledged by a notary public. Only powers of attorney validly created pursuant to section 523.10 or 623.02 are validly executed powers of attorney for the purposes of sections 523.01 to 523.25.

**Minn. § 523.02. Common law, preexisting and foreign powers of attorney**

A written power of attorney is a validly executed power of attorney for the purposes of sections 523.01 to 523.25, and is subject to the provisions of sections 523.01 to 523.25, if it is validly created pursuant to: (1) the law of Minnesota as it existed prior to the enactment of sections 523.01 to 523.25 if it was executed prior to the effective date of sections 523.01 to 523.25; (2) the common law; or (3) the law of another state or country.

**Minn. § 523.03. Interpretation**

Unless the context requires otherwise, all references in sections 523.01 to 523.25 to the "principal" include any guardian or conservator of the estate appointed for the principal at any time and all references to a "power of attorney" mean a validly executed power of attorney.

**Minn. § 523.04. Power of attorney presumed to be validly executed**

A written power of attorney that is dated and purports to be signed by the principal named in it is presumed to be valid. All parties may rely on this presumption except those who have actual knowledge that the power was not validly executed.

**Minn. § 523.05. Recording of power of attorney**

If the exercise of the power of attorney requires execution and delivery of any instrument which is recordable, the power of attorney and any affidavit authorized under section 523.01 to 523.25 when authenticated for record in conformity with section 507.24, are also recordable.

**Minn. § 523.06. Certification of power of attorney**

A certified copy of a power of attorney has the same force and effect as a power of attorney bearing the signature of the principal. A copy of a power of attorney may be certified by an official of a state or of a political subdivision of a state who is authorized to make certifications. The certification shall state that the certifying official has examined an original power of attorney and the copy and that the copy is a true and correct copy of the original power of attorney.

Minn. § 523.07. Durable power of attorney

A power of attorney is durable if it contains language such as "This power of attorney shall not be affected by disability of the principal" or "This power of attorney shall become effective upon the disability of the principal," or similar words showing the intent of the principal that the authority conferred is exercisable notwithstanding the principal's later disability or incapacity.

Minn. § 523.08. Termination of a durable power

A durable power of attorney terminates on the death of the principal or upon the expiration of a period of time specified in the power of attorney if the period ends prior to the death of the principal.

Minn. § 523.09. Termination of a nondurable power

A nondurable power of attorney terminates on the death of the principal, on the incompetency of the principal, or upon the expiration of a period of time specified in the power of attorney if the period ends prior to the death or incompetency of the principal.

Minn. § 523.10. Missing persons presumed living

For purposes of this chapter, a missing person is presumed to be living until actual proof of death or legal adjudication of death occurs.

Minn. § 523.11. Revocation of a power

Subdivision 1. Manner. An executed power of attorney may be revoked only by a written instrument of revocation signed by the principal and, in the case of a signature on behalf of the principal by another or a signature by a mark, acknowledged by a notary public. The conservator or guardian of the principal has the same power the principal would have if the principal were not disabled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney.

Subd. 2. Effect. Revocation of an executed power of attorney is not effective as to any party unless that party has actual notice of the revocation. As used in this chapter, "actual notice of revocation" means that a written instrument of revocation has been received by the party or, in a real property transaction, that a written instrument of revocation containing the legal description of the real property has been recorded in the office of the county recorder or filed in the office of the registrar of titles. Recorded or filed revocation is actual notice of revocation of a power of attorney only as to any interest in real property described in the revocation and located in the county where it is recorded.

Subd. 3. Presumptions. A written instrument of revocation that purports to be signed by the principal named in the power of attorney is presumed to be valid. Any party receiving the written instrument of revocation may rely on this presumption and is not liable for later refusing to accept the authority of the attorney-in-fact.

Subd. 4. Transferee affidavit of nonrevocation. In the case of a conveyance of an interest in property, an affidavit signed by an initial transferee of the interest of the principal stating that the initial transferee had not received, at the time of the conveyance, a

written instrument of revocation of the power of attorney, constitutes conclusive proof as to all subsequent transferees that no written instrument of revocation was received by the initial transferee, except as to a subsequent transferee who commits an intentional fraud.

Minn. § 523.12. Power of attorney--in-fact to bind principal

Any action taken by the attorney-in-fact pursuant to the power of attorney binds the principal, the principal's heir and assigns, and the representative of the estate of the principal in the same manner as though the action was taken by the principal, and, during any time while a guardian or conservator has been appointed for the principal and only the guardian or conservator has the power to take relevant action, as though the action was taken by the guardian or conservator.

Minn. § 523.13. Multiple attorneys-in-fact

Unless it is provided to the contrary in a power of attorney which authorizes two or more attorneys-in-fact to act on behalf of a principal, any action taken by any one of the several attorneys-in-fact pursuant to the power of attorney, whether the other attorneys-in-fact consent or object to the action, binds the principal, the principal's heirs and assigns, and the representative of the estate of the principal in the same manner as though the action was taken by the principal, and, during any time while a guardian or conservator has been appointed for the principal and only the guardian or conservator has the power to take the relevant action, as though the action was taken by the guardian or conservator.

Minn. § 523.14. Successor attorney-in-fact not liable for acts of predecessor

An attorney-in-fact who is named in a power of attorney to succeed an attorney-in-fact who dies, resigns, or otherwise is unable to serve, is not liable for any action taken by the predecessor attorney-in-fact.

Minn. § 523.15. Co-attorneys-in-fact not liable for acts of each other

When two or more attorneys-in-fact are authorized to act on behalf of a principal, an attorney-in-fact who did not join in or consent to the action of one or more co-attorneys-in-fact is not liable for that action. Failure to object to an action is not consent.

Minn. § 523.16. Affidavit as proof of authority of attorney-in-fact

If the attorney-in-fact exercising a power pursuant to a power of attorney has authority to act as a result of the death, incompetency, or resignation of one or more attorneys-in-fact named in the power of attorney, an affidavit executed by the attorney-in-fact setting forth the conditions precedent to the attorney-in-fact's authority to act under the power of attorney and stating that those conditions have occurred is conclusive proof as to any party relying on the affidavit of the occurrence of those conditions.

Minn. § 523.17. Affidavit of attorney-in-fact as conclusive proof of nontermination and nonrevocation in real property transactions

If the exercise of a power granted by a power of attorney relating to real property requires execution or delivery of any instrument which is recordable, an affidavit, signed by the attorney-in-fact, stating

that the attorney-in-fact did not have, at the time of exercising a power pursuant to the power of attorney, actual knowledge of the termination of the power of attorney by the death of the principal, or, if the power of attorney is one which terminates upon the incompetence of the principal, actual knowledge of the principal's incompetence, or actual notice of the revocation of the power of attorney, is conclusive proof that the power of attorney had not terminated or been revoked at the time of the exercise of the power as to any party relying on the affidavit except any party dealing directly with the attorney-in-fact who has actual knowledge that the power of attorney had terminated prior to the exercise of the power or actual notice of the revocation of the power of attorney.

Minn. § 523.18. Signature of attorney-in-fact as conclusive proof of nontermination

In the exercise of a power granted by a power of attorney, other than in a transaction relating to real property described in section 523.17, a signature by a person as "attorney-in-fact for (Name of the principal)" or "(Name of the principal) by (Name of the attorney-in-fact) the principal's attorney-in-fact" or any similar written disclosure of the principal and attorney-in-fact relationship constitutes an attestation by the attorney-in-fact that the attorney-in-fact did not have, at the time of signing, actual knowledge of the termination of the power of attorney by the death of the principal or, if the power is one which terminates upon incompetence of the principal, actual knowledge of the principal's incompetence, or actual notice of the revocation of the power of attorney, and is conclusive proof as to any party relying on the attestation that the power of attorney had not terminated or been revoked at the time of the signature by the attorney-in-fact on behalf of the principal except as to any party who has actual knowledge that the power of attorney had terminated prior to the signature or actual notice of the revocation of the power of attorney.

Minn. § 523.19. Third parties held harmless

Any party accepting the authority of an attorney-in-fact to exercise a power granted by a power of attorney is not liable to the principal, to the heirs and assigns of the principal, or to any representative of the estate of the principal if: (1) the applicable provisions of sections 523.17 and 523.18 have been satisfied; (2) the provisions of section 523.16 have been satisfied, if applicable; (3) the party has no actual notice of the revocation of the power of attorney prior to the transactions; (4) the party has no actual knowledge of the death of the principal and, if the power of attorney is not a durable power of attorney, has not received actual notice of a judicial determination that the principal is legally incompetent; and (5) the duration of the power of attorney specified in the power of attorney itself, if any, has not expired. A good faith purchaser from any party who has obtained an interest in property from an attorney-in-fact is not liable to the principal, the heirs or assigns of the principal, or the representative of the state of the principal.

Minn. § 523.20. Liability of parties refusing authority of attorney-in-fact to act on principal's behalf

Any party refusing to accept the authority of an attorney-in-fact to exercise a power granted by a power of attorney which (1) is executed in conformity with section 523.23; (2) contains a specimen signature of the attorney-in-fact authorized to act; (3) with regard to the execution or delivery of any recordable instrument relating to real property, is accompanied by affidavits that satisfy the provisions of section 523.17; (4) with regard to any other transaction, is signed by the attorney-in-fact in a manner conforming to section 523.18; and (5) when applicable, is accompanied by an affidavit and any other document required by section 523.16, is liable to the principal and to the principal's heirs, assigns, and representative of the estate of the principal in the same manner as the party would be liable had the party refused to accept the authority of the principal to act on the principal's own behalf unless: (1) the party has actual notice of the revocation of the power of attorney prior to the exercise of the power; (2) the duration of the power of attorney specified in the power of attorney itself has expired; or (3) the party has actual knowledge of the death of the principal or, if the power of attorney is not a durable power of attorney, actual notice of a judicial determination that the principal is legally incompetent. This provision does not negate any liability which a party would have to the principal or to the attorney-in-fact under any other form of power of attorney under the common law or otherwise.

Minn. § 523.21. Duties of an attorney-in-fact

The attorney-in-fact shall keep complete records of all transactions entered into by the attorney-in-fact on behalf of the principal. The attorney-in-fact has no duty to render an accounting of those transactions unless: (1) requested to do so at any time by the principal; or (2) the instrument conferring the power of attorney requires that the attorney-in-fact render accountings and specifies to whom the accounting must be delivered. The persons entitled to examine and copy the records of the attorney-in-fact are the principal and the guardian or conservator of the estate of the principal while the principal is living and the personal representative of the estate of the principal after the death of the principal. The attorney-in-fact has no affirmative duty to exercise any power conferred upon the attorney-in-fact under the power of attorney. In exercising any power conferred by the power of attorney, the attorney-in-fact shall exercise the power in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs and shall have the interests of the principal utmost in mind. The attorney-in-fact is personally liable to any person, including the principal, who is injured by an action taken by the attorney-in-fact in bad faith under the power of attorney.

Minn. § 523.22. Liability of attorney-in-fact for improper execution of affidavits and signature

Nothing in sections 523.01 to 523.25 limits any rights the principal may have against the attorney-in-fact for any fraudulent or negligent actions in executing affidavits or signing or acting on behalf of the principal as an attorney-in-fact. An attorney-in-fact

who knowingly executes a false affidavit or, knowing that the conditions of section 523.18 are not satisfied, signs on behalf of the principal is liable for treble the amount of damages suffered by the principal.

**MISSOURI**

[from Mo. Ann. Stat. § 404.700 et seq. (Vernon 1990)]

*Note.* The Missouri statute set out below includes comments prepared by the Missouri Bar from Missouri Probate and Trust Update -- 1989.

**404.700. Law, how cited**

Sections 404.700 to 404.735 may be cited as the "Durable Power of Attorney Law of Missouri".

(L.1989, H.B. No. 145, § A(§ 1).)

**COMMENT**

Sections 1 to 16 are considered to comprise the Durable Power of Attorney Law of Missouri (DPAL-MO). Sections 194.115, 194.220 and 475.050, of the act are not considered a part of the proposed statute although they relate to the subject of durable powers of attorney.

**404.703. Definitions**

As used in sections 404.700 to 404.735 the following terms mean:

- (1) "**Attorney in fact**", an individual or corporation appointed to act as agent of a principal in a written power of attorney;
- (2) "**Court**", the circuit court including the probate division of the circuit court;
- (3) "**Disabled or incapacitated**", a person who is wholly or partially disabled or incapacitated as defined in section 475.010, RSMo, or in a similar law of the place having jurisdiction of the person whose capacity is in question;
- (4) "**Durable power of attorney**", a written power of attorney in which the authority of the attorney in fact does not terminate in the event the principal becomes disabled or incapacitated and which complies with subsection 1 of section 404.705 or is durable under the laws of any of the following places:
  - (a) The law of the place where executed;
  - (b) The law of the place of the residence of the principal when executed; or
  - (c) The law of a place designated in the written power of attorney if that place has a reasonable relationship to the purpose of the instrument;
- (5) "**Legal representative**", a decedent's personal representative, a guardian of a person or the conservator of the estate of a person, whether denominated as general, limited or temporary, or a person legally authorized to perform substantially the same functions;
- (6) "**Person**", an individual, corporation, or other legal entity;
- (7) "**Personal representative**", a legal representative of a decedent's estate as defined in section 472.010, RSMo;
- (8) "**Power of attorney**", a written power of attorney, either durable or not durable;

(9) "Principal's family", the principal's parent, grandparent, uncle, aunt, brother, sister, son, daughter, grandson, granddaughter and their descendants, whether of the whole blood or the half blood, or by adoption, and the principal's spouse, stepparent and stepchild;

(10) "Third person", any individual, corporation or legal entity that acts on a request from, contracts with, relies on or otherwise deals with an attorney in fact pursuant to authority granted by a principal in a power of attorney and includes a partnership, either general or limited, governmental agency, financial institution, issuer of securities, transfer agent, securities or commodities broker, real estate broker, title insurance company, insurance company, benefit plan, legal representative, custodian or trustee.

(L.1989, H.B. No. 145, § A(§ 2).)

#### COMMENT

Provides a definition of terms that generally follows the definitions in general usage. "Durable power of attorney" is expressly defined as a power of attorney that complies with the requirements of the act for creating a durable power of attorney. When the term is used in the act, the provision has reference only to durable powers of attorney that comply with the act's requirements for a title denomination, notice provision and execution requirements or which are durable under the law of another state. When the term "power of attorney" is used in the act, the term refers to any written power of attorney, durable and not durable. Some of the definitions are taken from the Personal Custodian Law, such as "principal's family."

The definition of durable power of attorney has some provisions which, when combined with the conflicts of law provisions in Section 14, are intended to make the law widely available to present and former Missouri residents who may be living in another state. Some Missourians take up residence in another state on retirement but do not intend to sever their contacts with Missouri because of property interests, professional and business relationships, and family and friends in Missouri. Over time legal residency may change for tax and voting reasons, however, when the onset of the difficulties of age occur, they often return to their former home in Missouri. These two sections are intended to give Missouri attorneys, and attorneys in other states, wide latitude in adopting this law for these persons and others who have sufficient contacts to permit Missouri law to be applicable.

#### **404.705. Durable power of attorney procedure to create, requirements, effect, recording not required, exception—person appointed has no duty to exercise authority conferred, exception**

1. The authority granted by a principal to an attorney in fact in a written power of attorney is not terminated in the event the principal becomes wholly or partially disabled or incapacitated or in the event of later uncertainty as to whether the principal is dead or alive if:

(1) The power of attorney is denominated a "Durable Power of Attorney";

(2) The power of attorney includes a provision that states in substance as follows: "THIS IS A DURABLE POWER OF ATTORNEY AND THE AUTHORITY OF MY ATTORNEY IN FACT SHALL NOT TERMINATE IF I BECOME DISABLED OR INCAPACITATED"; and

(3) The power of attorney is subscribed by the principal, and dated and acknowledged in the manner prescribed by law for conveyances of real estate.

2. All acts done by an attorney in fact pursuant to a durable power of attorney shall inure to the benefit of and bind the principal and the principal's successors in interest, notwithstanding any disability or incapacity of the principal or any uncertainty as to whether the principal is dead or alive.

3. A durable power of attorney does not have to be recorded to be valid and binding between the principal and attorney in fact or between the principal and third persons, except to the extent that recording may be required for transactions affecting real estate under sections 442.360 and 442.370, RSMo.

4. A person who is appointed an attorney in fact under a durable power of attorney has no duty to exercise the authority conferred in the power of attorney, whether or not the principal has become disabled or incapacitated, is missing or is held in a foreign country, unless the attorney in fact has agreed expressly in writing to act for the principal in such circumstances. An agreement to act on behalf of the principal is enforceable against the attorney in fact as a fiduciary without regard to whether there is any consideration to support a contractual obligation to do so. Acting for the principal in one or more transactions does not obligate an attorney in fact to act for the principal in subsequent transactions.

(L.1989, H.B. No. 145, § A(§ 3).)

#### COMMENT

A durable power of attorney may only be created in Missouri if it (1) is in writing, (2) carries the title of durable power of attorney, (3) contains a notice of its continuing effect during incapacity, (4) is signed by the principal, (5) dated and (6) is acknowledged before a notary. A power of attorney that does not meet these requirements may still confer authority on the attorney in fact but the authority of the attorney in fact to act during a period of incapacity would be suspended by the disability under section 7.6. The notice of continuing effect does not need to be in special type or in a particular place in the document. Good practice would suggest that it be highlighted in some manner, (underlining, bolding or caps) and that it be prominently placed in the power of attorney, at the beginning or at the end above the signature line.

Section 3.2 states the effect of acts done under a durable power of attorney as being binding on the principal in the event the principal becomes disabled or incapacitated. Section 3.3 makes clear that recording is not required for durability.

Section 3.4 makes clear that merely appointing a person as attorney in fact in a durable power of attorney imposes no duty on that person to act, even if the attorney in fact knows of the appointment and has received the written power of attorney. A duty to act under this law only arises by reason of an express agreement in writing and reliance is not sufficient to impose a legal duty to act. The subsection thus recognizes that many powers of attorney are given and accepted as a gratuitous accommodation for the principal by the attorney in fact. The principal wants someone to have the ability to act if something needs to be done, but rarely would the principal in a family or friend situation expect that he is imposing a duty to act if the attorney in fact chooses not to do so. Consequently, unless the attorney in fact has agreed to act, accepting a power of attorney appointment imposes no duty to act and he may resign. He may also merely wait until the situation arises and then determine whether to act. The attorney in fact may refuse to act because of the personal

inconvenience at the time of becoming involved, or for any other reason and is not required to justify a decision not to act. The attorney in fact may believe that there are others in a better position to act for the principal or that the situation really warrants appointment of a court supervised guardian or conservator. However, once the attorney in fact undertakes to act under the power of attorney, the transaction is governed by the duties imposed in the law to act as a fiduciary.

**404.707. Principal may appoint multiple attorneys in fact—authority may be joint or several—qualifications—persons disqualified**

1. A principal may appoint more than one attorney in fact in one or more powers of attorney and may provide that the authority conferred on two or more attorneys in fact shall or may be exercised either jointly or severally or in a manner, with such priority and with respect to such subjects as is provided in the power of attorney.

2. Any person, other than a person who is disqualified from being appointed a guardian or conservator of the principal under subsection 2 of section 475.055, RSMo, shall be qualified to be designated an attorney in fact under a durable power of attorney.

3. The designation of a person not qualified to act as an attorney in fact for a principal under a durable power of attorney subjects the person to removal as attorney in fact but does not affect the immunities of third persons nor relieve the unqualified person of any duties or responsibilities to the principal or the principal's successors.

(L.1989, H.B. No. 145, § A(§ 4).)

COMMENT

Section 4.1 affirms that a principal may appoint more than one attorney in fact in a power of attorney or in separate powers of attorney and make provision for the multiple attorneys to act jointly or severally, and provide for their priority to act.

Section 4.2 precludes in effect nursing home operators and employees and certain other persons from being an attorney in fact under a durable power of attorney unless closely related to the principal.

Generally, no special qualifications are required for attorneys in fact who are given authority to act for the principal in property, tax and litigation matters. A wide variety of persons and corporations can be envisioned, such as financial institutions, securities and commodities brokers, patent and copyright agents, customs house agents, shipping agents, warehousemen, CPAs, attorneys at law, real estate brokers, real estate management companies and persons or corporations involved in many other occupations and endeavors.

Section 4.3 is similar to § 404.035, RSMo 1986, of the Missouri Transfers to Minors Law and § 404.530, RSMo 1986, of the Missouri Personal Custodian Law.

**404.710. Powers of attorney with general powers**

1. A principal may delegate to an attorney in fact in a power of attorney general powers to act in a fiduciary capacity on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes. A power of attorney with general powers may be durable or not durable.

2. If the power of attorney states that general powers are granted to the attorney in fact and does not enumerate one or more express subjects or purposes for which general powers are conferred, then the authority of the attorney in fact acting under the power of attorney shall extend to and include each and every action or power which an adult who is nondisabled and nonincapacitated may carry out through an agent specifically authorized in the premises, with respect to any and all matters whatsoever, except as provided in subsections 6 and 7 of this section.

3. If the power of attorney states that general powers are granted to an attorney in fact with respect to one or more express subjects or purposes for which general powers are conferred, then the authority of the attorney in fact acting under the power of attorney shall extend to and include each and every action or power, but only with respect to the specific subjects or purposes expressed in the power of attorney that an adult who is nondisabled and nonincapacitated may carry out through an agent specifically authorized in the premise, with respect to any and all matters whatsoever, except as provided in subsections 6 and 7 of this section.

4. Except as provided in subsections 6 and 7 of this section, an attorney in fact with general powers has, with respect to the subjects or purposes for which the powers are conferred, all rights, power and authority to act for the principal that the principal would have with respect to his or her own person or property as a nondisabled and nonincapacitated adult; and without limiting the foregoing has with respect to the subjects or purposes of the power complete discretion to make a decision for the principal, to act or not act, to consent or not consent to, or withdraw consent for, any act, and to execute and deliver or accept any deed, bill of sale, bill of lading, assignment, contract, note, security instrument, consent, receipt, release, proof of claim, petition or other pleading, tax document, notice, application, acknowledgment or other document necessary or convenient to implement or confirm any act, transaction or decision. In addition, the attorney in fact has complete discretion to employ and compensate real estate agents, brokers, attorneys, accountants and subagents of all types to represent and act for the principal in any and all matters, including tax matters involving the United States government or any other government or taxing entity, and to deal with any or all third parties in the name of the principal without limitation.

5. An attorney in fact, who is granted general powers for all subjects and purposes or with respect to any express subjects or purposes, shall exercise the powers conferred according to the principal's instructions, in the principal's best interest, in good faith, prudently and in accordance with sections 404.712 and 404.714.

6. No power of attorney, whether durable or not durable, and whether it grants general powers for all subjects and purposes or with respect to express subjects or purposes, shall be construed to grant power or authority to an attorney in fact to carry out any of the following actions unless the actions are expressly enumerated and authorized in the power of attorney:

- (1) To execute, amend or revoke any trust agreement;
- (2) To fund with the principal's assets any trust not created by the principal;
- (3) To make or revoke a gift of the principal's property in trust or otherwise;

- (4) To disclaim a gift or devise of property to or for the benefit of the principal;
- (5) To create or change survivorship interests in the principal's property or in property in which the principal may have an interest;
- (6) To designate or change the designation of beneficiaries to receive any property, benefit or contract right on the principal's death;
- (7) To give consent to an autopsy or postmortem examination;
- (8) To make a gift of the principal's body parts under the Uniform Anatomical Gift Act; or
- (9) To nominate a guardian or conservator for the principal.

7. No power of attorney, whether durable or not durable and whether or not it delegates general powers, may delegate or grant power or authority to an attorney in fact do or carry out any of the following actions for the principal:

- (1) To make, publish, declare, amend or revoke a will for the principal;
- (2) To make, execute, modify or revoke a living will declaration for the principal;
- (3) To require the principal, against his or her will, to take any action or to refrain from taking any action; or
- (4) To carry out any actions specifically forbidden by the principal while not under any disability or incapacity.

8. A third person may freely rely on, contract and deal with an attorney in fact delegated general powers with respect to the subjects and purposes encompassed or expressed in the power of attorney without regard to whether the power of attorney expressly identifies the specific property, account, security, storage facility or matter as being within the scope of a subject or purpose contained in the power of attorney, and without regard to whether the power of attorney expressly authorizes the specific act, transaction or decision by the attorney in fact.

9. It is the policy of this state that an attorney in fact acting pursuant to the provisions of a power of attorney granting general powers shall be accorded the same rights and privileges with respect to the personal welfare, property and business interests of the principal, and if the power of attorney enumerates some express subjects or purposes, with respect to those subjects or purposes, as if the principal himself or herself were personally present and acting or seeking to act; and any provision of law and any purported waiver, consent or agreement executed or granted by the principal to the contrary shall be void and unenforceable, unless any deed, bill of sale, bill of lading, assignment, contract, note, security instrument, consent, receipt, release, proof of claim, petition or other pleading, tax document, notice, application, acknowledgment or other document necessary or convenient to implement or confirm any act, transaction or decision, expressly modifies the provisions of the power of attorney pursuant to section 404.717.

10. Sections 404.700 to 404.735 shall not be construed to preclude any person or business enterprise from providing in a contract with the principal as to the procedure that thereafter must be followed by the principal or the principal's attorney in fact in order to give a valid notice to the person or business enterprise of any modification or termination of the appointment of an attorney in fact by the principal; and any such contractual provision for notice shall be valid and binding on the principal and the principal's successors so long as such provision is reasonably capable of being carried out. (L.1989, H.B. No. 145, § A(§ 5).)

## COMMENT

Section 5 has been included to rehabilitate and make practical the use of a general power of attorney. In general, if an attorney in fact is given "general powers" to deal either generally or specially with a subject of the power, third parties need not concern themselves that the particular act of the attorney in fact is authorized. However, as between the principal and attorney in fact, the attorney in fact is accountable for all transactions to the principal and the principal's successors. For example, if an attorney in fact is given general powers to manage the principal's farm, the attorney in fact has authority to do those acts normally associated with running that business. This would include the power to hire persons to plant and harvest the crops and to borrow and give a security interest in the farm for sufficient money to purchase the seed, fertilizer and weed control chemicals necessary for the farm's operations. See § 404.550.7, MPCL, RSMo 1986.

General powers to deal with property in most cases should be tied to a particular object, subject or purpose to be accomplished or dealt with by the power. The power to sell and convey a farm is not authority to make a gift of the proceeds, unless that is the object to be accomplished and for which the power to sell and convey had been given. However, granting an attorney in fact authority to effect transactions for the principal with regard to stock, financial accounts or a safety deposit box does not require that the specific stock, account or box be identified. See section 5.8. A person with a durable general power of attorney should be treated the same as the principal would be treated. If a safe depository institution does not inventory a safety deposit box when a customer asks for access, it should not require an inventory when the principal's attorney in fact acting under a durable general power of attorney requests access.

This provision would not change the result in cases like Mercantile Trust Co. NA v. Harper, 622 SW2d 345 (Mo App 1981), where a broker relied on a general power of attorney to permit a stepdaughter to place stock that was in the sole name of the principal, her stepfather, in an account in joint names with herself and her stepfather. The broker was held liable to the stepfather's estate because the general power of attorney to sell securities was not tied to a purpose of giving the proceeds away by opening a joint or survivorship account.

To avoid such cases, section 5.6 was included to provide that specific authority must be given to an attorney in fact to disclaim property, to fund a trust not created by the principal or to make, change or revoke inter vivos and at death gifts of the principal's property. If such authority is intended, it must be clearly expressed. See similar limitation in § 404.550.7, MPCL, RSMo 1986.

There is a general consensus that there are certain acts that an individual should do personally and some that, if done through an agent, should be expressly authorized. Section 5.6 sets out those functions that must be expressly authorized. Section 5.7 sets out those functions that may not be delegated at all to an agent. They include making a will, making a living will declaration or to act contrary to the expressed wishes of the principal.

Attorneys in fact under section 6 of this law are required to clearly indicate their capacity as an attorney in fact and keep the principal's property and accounts separately identified as belonging to the principal. Section 6 applies with the same force to attorneys in fact with general powers as to other attorneys in fact. General powers do not give the attorneys in fact carte blanche authority to treat the principal's property as their own, but rather it gives an

attorney in fact acting in a fiduciary capacity the widest possible discretion in determining what needs to be done to accomplish the principal's stated purpose.

The existing law, enacted in 1983, imposed many harsh consequences on third persons dealing with attorneys in fact. The law relating to constructive notice was completely changed and third persons bore the risk of the principal's chosen agent. As a consequence, financial institutions and other third persons adopted very restrictive rules regarding when they would act at the request of an attorney in fact and some refused to act at all. These reactions made ineffective the whole concept of durable powers of attorney. The new law protects third persons who rely on a principal's attorney in fact and there is no longer any justification for refusing to deal with a principal's attorney in fact. Section 5.9 requires third persons to honor directions of duly appointed attorneys in fact. The provision is similar in concept to § 400.9-318(4), UCC, RSMo 1986, which made void contract provisions that prohibited assignments of accounts receivable without the contracting party's consent.

**1989 LEGISLATIVE NOTE:** It is not known what was intended by the provision added to the end of section 5.9. Inasmuch as it refers to section eight it refers only to modifications made by express agreement of the principal and attorney in fact. If it were to have dealt with the relationship of the principal and third parties, such as banks, it would have referred to section 10 of the act. Section 10.3 expressly prohibits third parties from preventing an individual from acting through an attorney in fact. All they may do is to satisfy their reasonable concerns on their liability to the principal as a result of entering into a transaction at the request of the principal's agent. This section was intended to do away with financial institution drawn durable powers of attorney, some of which required the principal to agree that the attorney in fact could give the principal's property away before the bank would honor the instructions of the principal's agent. While there is no penalty in the statute for refusing to deal with the principal's agent, refusing to deal with an attorney in fact acting under color of authority from the principal could result in the third party incurring civil liability to the principal or the principal's estate.

**404.712. Name in which acts are performed and property held—property and accounts of principal to be kept separate—how identified**

1. An attorney in fact acting for the principal under a power of attorney shall clearly indicate his capacity and shall keep the principal's property and accounts separate and distinct from all other property and accounts in a manner to identify the property and accounts clearly as belonging to the principal.

2. An attorney in fact holding property for a principal complies with subsection 1 of this section if the property is held in the name of the principal, in the name of the attorney in fact as attorney in fact for the principal or in the name of the attorney in fact as personal custodian for the principal under the Missouri personal custodian law, uniform custodial trust law or similar law of any state.

(L.1989, H.B. No. 145, § A(§ 6).)

## COMMENT

Section 6 when coupled with section 7, addresses the manner in which an attorney in fact should act under a power of attorney and behave toward his principal. Agents have always had a duty of loyalty, fidelity and honesty toward their employers. With the advent of the comprehensive general powers of attorney used as a substitute for guardianship and conservatorship it is apparent that in many cases they have become fullfledged fiduciaries, just as a trustee or custodian.

Recognizing this fact and the fact that the persons designated as attorneys in fact are often laymen with no experience in performing their duties, section 6 sets forth the rule that they should keep the principal's property and accounts clearly identified as belonging to the principal and not commingle them with their personal funds or assets. Holding property for the principal under the Personal Custodian Law or Uniform Custodial Trust Act would satisfy the requirement for keeping the principal's property separately identified. The provision is similar to § 404.550.8, RSMo 1986, of the Personal Custodian Law and § 404.051.9, RSMo 1986, of the Transfers To Minors Law.

**404.714. Duties of attorney in fact**

1. An attorney in fact who elects to act under a power of attorney is under a duty to act in the interest of the principal and to avoid conflicts of interest that impair the ability of the attorney in fact so to act. Unless otherwise provided in the power of attorney or in a separate agreement between the principal and attorney in fact, an attorney in fact who elects to act shall exercise the authority granted in a power of attorney with that degree of care that would be observed by a prudent person dealing with the property and conducting the affairs of another. If the attorney in fact has special skills or was appointed attorney in fact on the basis of representations of special skills or expertise, the attorney in fact has a duty to use those skills in the principal's behalf.

2. On matters undertaken or to be undertaken in the principal's behalf and to the extent reasonably possible under the circumstances, an attorney in fact has a duty to keep in regular contact with the principal, to communicate with the principal and to obtain and follow the instructions of the principal.

3. If the principal is not available to communicate in person with the attorney in fact because:

(1) The principal is missing under such circumstances that it is not known whether the principal is alive or dead; or

(2) The principal is captured, interned, besieged or held hostage or prisoner in a foreign country;

the authority of the attorney in fact under a power of attorney, whether durable or not, shall not terminate and the attorney in fact may continue to exercise the authority conferred, faithfully and in the best interests of the principal, until the principal returns or is publicly declared dead by a governmental agency, domestic or foreign, or is presumed dead because of continuous absence of five years as provided in section 472.290, RSMo 1986, or a similar law of the place of the last known domicile of the person whose absence is in question.

4. If, following execution of a power of attorney, the principal is absent or becomes wholly or partially disabled or incapacitated, or if there is a question with regard to the ability or capacity of the principal to give instructions to and supervise the acts and transactions of the attorney in fact, an attorney in fact exercising authority under a power of attorney, either durable or not durable, may consult with any person or persons previously designated by the principal for such purpose, and may also consult with and obtain information from the principal's spouse, physician, attorney, accountant, any member of the principal's family or other person, corporation or government agency with respect to matters to be undertaken in the principal's behalf and affecting the principal's personal affairs, welfare, family, property and business interests.

5. If, following execution of a durable power of attorney, a court appoints a legal representative for the principal, the attorney in fact shall follow the instructions of the court or of the legal representative, and shall communicate with and be accountable to the principal's guardian on matters affecting the principal's personal welfare and to the principal's conservator on matters affecting the principal's property and business interests, to the extent that the responsibilities of the guardian or conservator and the authority of the attorney in fact involve the same subject matter.

6. The authority of an attorney in fact, under a power of attorney that is not durable, is suspended during any period that the principal is disabled or incapacitated to the extent that the principal is unable to receive or evaluate information or to communicate decisions with respect to the subject of the power of attorney; and an attorney in fact exercising authority under a power of attorney that is not durable shall not act in the principal's behalf during any period that the attorney in fact knows the principal is so disabled or incapacitated.

7. An attorney in fact shall exercise authority granted by the principal in accordance with the instrument setting forth the power of attorney, any modification made therein by the principal or the principal's legal representative or a court, and the oral and written instructions of the principal, or the written instructions of the principal's legal representative or a court.

8. An attorney in fact may be instructed in a power of attorney that the authority granted shall not be exercised until, or shall terminate on, the happening of a future event, condition or contingency, as determined in a manner prescribed in the instrument.

9. On the death of the principal, the attorney in fact shall follow the instructions of the court, if any, having jurisdiction over the estate of the principal, or any part thereof, and shall communicate with and be accountable to the principal's personal representative, or if none, the principal's successors; and the attorney in fact shall promptly deliver to and put in the possession and control of the principal's personal representative or successors, any property of the principal and copies of any records of the attorney in fact relating to transactions undertaken in the principal's behalf that are deemed by the personal representative or the court to be necessary or helpful in the administration of the decedent's estate.

10. If an attorney in fact has a property or contract<sup>1</sup> interest in the subject of the power of attorney or the authority of the attorney in fact is otherwise coupled with an interest in a person other than the principal, this section does not impose any duties on the attorney in fact that would conflict or be inconsistent with that interest.

(L.1989, H.B. No. 145, § A(§ 7).)

<sup>1</sup> Revisor's note—1989: Word "contact" appears in original rolls. Apparent typographical error.

#### COMMENT

Section 7 states the duties of an attorney in fact under both durable and non-durable powers of attorney. He has a duty to act in the best interest of the principal, avoid conflicts with the principal and conduct his business in a prudent manner. Section 7.1 follows very closely similar provisions in the trust, conservator and custodian laws. See § 404.550.5, MPCL, RSMo 1986.

Section 7.2 states the obvious, that the attorney in fact should keep in contact with the principal, know his situation, and he should seek and follow the principal's directions. So much adverse criticism of DPAs has centered around the allegation that an attorney in fact is being given a blank check to do whatever he wants, that it was felt that such implication should be addressed. Like any employee or agent, an attorney in fact must and should communicate with his boss, the principal. The power to convey real estate is not approval to do so unless the principal has so directed or the condition of the principal is such that the attorney in fact in a fiduciary capacity must assume a decision making role and determine that the transaction is appropriate in accomplishing the object of the agency.

Section 7.3 provides for a continuation of the attorney in fact's powers when the principal is absent and his whereabouts are unknown or because he is being held hostage or prisoner and his advice cannot be obtained. It is similar to Public Law 92-54, 50 U.S.C. App. §591, which extended authority of attorneys in fact under powers of attorney granted by military personnel who were missing or captured during the Vietnam War era. Recognizing the realities of the world today, this section applies to any person, military or civilian. Further, powers of attorney are extended under this section regardless of a specific provision that clearly indicates the power will expire on a date specified. Of course, if the particular object of the power has been accomplished, there may be nothing further to do under the power, otherwise the attorney in fact may continue to act, faithfully and in the best interest of the missing principal.

Section 7.4 suggests that an attorney in fact for a missing principal or one who has become incapacitated should and may consult with family members, friends and the principal's physician, attorney, accountant, pastor or priest, respecting the principal's personal welfare, property and business interests. This provision anticipates that an attorney in fact may have been given power to arrange for the principal's housing, meals, nursing care, medical treatment and to approve surgical and other health care procedures. Consultation with family and friends may be needed by the attorney in fact in order to make an appropriate decision for the principal. The provision is for the benefit of third parties and makes clear that consultation with an attorney in fact acting under a durable power of attorney does not contravene the privacy rights of the principal.

If a legal representative is appointed, the attorney in fact, under section 7.5, becomes accountable to the legal representative but only to the extent that the authority of the legal representative and attorney in fact overlap. Under section 15.3 the court in its order appointing a legal representative may set forth the manner in which the legal representative and attorney in fact will coordinate their responsibilities. An attorney in fact under a power of attorney that is not durable would be told to wind up his affairs, but if the power is durable, he may continue to be used by the legal representative to assist in managing the principal's affairs. With the preference in the law for appointing limited guardians and limited conservators, there is a real possibility that these fiduciaries may serve side by side or be the same person acting in different legal capacities.

Section 7.6 states the general law that the authority of an attorney in fact under a non-durable power of attorney is suspended during any period when the principal lacks capacity to manage his affairs. Suspension was used rather than termination so that the attorney in fact may resume his duties if the principal recovers.

Section 7.7 makes clear that an attorney in fact not only must follow the provisions in the written power of attorney, he must also follow any oral or written directions of the principal, or any written directions of the principal's legal representative or a court. Section 7 does not impose a specific duty on the attorney in fact to keep records or make periodic reports to the principal. If the nature of the duties to be performed would suggest that this should be required, the matter should be addressed in specific provisions in the power of attorney.

Section 7.8 provides for a springing power of attorney whereby the attorney in fact is instructed not to exercise the powers conferred until the happening of an event and the power of attorney may make provision for how it will be determined that the event occurred. Often in a durable power of attorney it is desirable to make clear that the authority conferred should not be used until the principal becomes disabled or incapacitated.

At death of the principal, the attorney in fact becomes accountable to the principal's estate and section 7.9 directs the attorney in fact to promptly turn over the property and copies of his records to the principal's personal representative or the principal's successors.

Section 7.10 makes clear that the fiduciary duties imposed on an attorney in fact generally do not apply if the power of attorney is coupled with an interest. In such instances the attorney in fact's duties may be owed to a third party. For example, if A has sold property to B and gives B's employee C a power of attorney to sign all deeds and conveyances respecting the property, C's duties are owed mainly to B. The separate interest may reside in the attorney in fact or some person other than the principal.

#### **404.717. Modification and termination of power of attorney and liability between principal and attorney in fact**

1. As between the principal and attorney in fact or successor attorney in fact, and any agents appointed by either of them, unless the power of attorney is coupled with an interest, the authority granted in a power of attorney shall be modified or terminated as follows:

(1) On the date shown in the power of attorney and in accordance with the express provisions of the power of attorney;

(2) When the principal, orally or in writing, or the principal's legal representative with approval of the court in writing informs the attorney in fact or successor that the power of attorney is modified or terminated, or when and under what circumstances it is modified or terminated;

(3) When a written notice of modification or termination of the power of attorney is filed by the principal or the principal's legal representative for record in the office of the recorder of deeds in the city or county of the principal's residence or, if the principal is a nonresident of the state, in the city or county of the residence of the attorney in fact last known to the principal, or in the city or county in which is located any property specifically referred to in the power of attorney;

(4) On the death of the principal;

(5) When the attorney in fact under a durable power of attorney is not qualified to act for the principal;

(6) On the filing of any action for divorce or dissolution of the marriage of the principal and the principal's attorney in fact who were married to each other at or subsequent to the time the power of attorney was created, unless the power of attorney provides otherwise.

2. Whenever any of the events described in subsection 1 of this section operate merely to terminate the authority of the particular person designated as the attorney in fact, rather than terminating the power of attorney, if the power of attorney designates a successor or contingent attorney in fact or prescribes a procedure whereby a successor or contingent attorney in fact may be designated, then the authority provided in the power of attorney shall extend to and vest in the successor or contingent attorney in fact in lieu of the attorney in fact whose power and authority was terminated under any of the circumstances referred to in subsection 1 of this section.

3. As between the principal and attorney in fact or successor, acts and transactions of the attorney in fact or successor undertaken in good faith, in accordance with section 404.714, and without actual or constructive knowledge of the death, disability or incapacity of the principal or that the authority granted in the power of attorney has been suspended, modified or terminated, relieves the attorney in fact or successor from liability to the principal and the principal's successors in interest.

4. This section does not prohibit the principal, acting individually, and the person designated as the attorney in fact from entering into a written agreement that sets forth their duties and liabilities as between themselves and their successors, and which expands or limits the application of sections 404.700 to 404.735, with the exception of those acts enumerated in subsection 7 of section 404.710.

(L.1989, H.B. No. 145, § A(§ 8).)

#### COMMENT

Section 8 provides how a power of attorney is terminated or modified and the liability of the attorney in fact for acts undertaken after the power has been modified or terminated. Discussion as to the difficulty of terminating a power of attorney has really centered on proof of termination and how to impose on third parties the risk of an errant attorney in fact. The act separates these subjects and has separate provisions that set forth the relationship of the attorney in fact and principal and the principal and third parties. Since it is the

principal who is asking other people to accommodate his personal situation and who desires that they act on the representations of his agent, the risk of a bad acting attorney in fact is placed on the principal and third parties are relieved of liability.

Section 8.1 provides that a power of attorney terminates on the date provided in the instrument and on the oral or written advice to the attorney in fact that his powers are terminated. An attorney in fact can be simply fired as with any other employee or agent or he can be told that his authority has been changed, and no writing is required. For those concerned with the inability to find the attorney in fact for the communication, the section provides for filing a notice of modification or termination with the recorder of deeds. The act imposes constructive knowledge on the attorney in fact for all documents recorded by the principal that relate to the power and for knowing whether the principal is alive. This corresponds with the previous duty imposed on attorneys in fact to keep in contact with their principal. Death of the principal terminates a power of attorney. Also, the authority of a spouse who holds a power of attorney terminates on filing a petition for dissolution of the marriage, unless the power of attorney provides otherwise. See § 475.110, RSMo 1986, for a similar provision applying to guardians and conservators.

If the authority of a particular attorney in fact is terminated because of a disqualification, rather than the power of attorney, section 8.2 provides that the authority conferred vests in a successor.

Under section 8.3, in accordance with general law on the subject, attorneys in fact are relieved of liability if they act in good faith and without actual or constructive knowledge of the principal's death, disability or incapacity, or that their powers have been modified or terminated. Section 8.4 allows a principal and attorney in fact to set forth their duties and liabilities as between themselves in a separate written agreement.

#### **404.719. Exemption of third persons from liability**

1. A third person, who is acting in good faith, without liability to the principal or the principal's successors in interest, may rely and act on any power of attorney executed by the principal; and, with respect to the subjects and purposes encompassed by or separately expressed in the power of attorney, may rely and act on the instructions of or otherwise contract and deal with the principal's attorney in fact or successor attorney in fact and, in the absence of actual knowledge, as defined in subsection 3 of this section, is not responsible for determining and has no duty to inquire as to any of the following:

- (1) The authenticity of a certified true copy of a power of attorney furnished by the principal's attorney in fact or successor;
- (2) The validity of the designation of the attorney in fact or successor;
- (3) Whether the attorney in fact or successor is qualified to act as an attorney in fact for the principal;
- (4) The propriety of any act of the attorney in fact or successor in the principal's behalf;
- (5) Whether any future event, condition or contingency making effective or terminating the authority conferred in a power of attorney has occurred;
- (6) Whether the principal is disabled or incapacitated or has been adjudicated disabled or incapacitated;

(7) Whether the principal, the principal's legal representative or a court has given the attorney in fact any instructions or the content of any instructions, or whether the attorney in fact is following any instructions received;

(8) Whether the authority granted in a power of attorney has been modified by the principal, a legal representative of the principal or a court;

(9) Whether the authority of the attorney in fact has been terminated, except by an express provision in the power of attorney showing the date on which the power of attorney terminates;

(10) Whether the power of attorney, or any modification or termination thereof, has been recorded, except as to transactions affecting real estate;

(11) Whether the principal had legal capacity to execute the power of attorney at the time the power of attorney was executed;

(12) Whether, at the time the principal executed the power of attorney, the principal was subjected to duress, undue influence or fraud, or the power of attorney was for any other reason void or voidable, if the power of attorney appears to be regular on its face;

(13) Whether the principal is alive;

(14) Whether the principal and attorney in fact were married at or subsequent to the time the power of attorney was created and whether the marriage has been dissolved; or

(15) The truth or validity of any facts or statements made in an affidavit of the attorney in fact or successor with regard to the ability or capacity of the principal, the authority of the attorney in fact or successor under the power of attorney, the happening of any event or events vesting authority in any successor or contingent attorney in fact, the identity or authority of a person designated in the power of attorney to appoint a substitute or successor attorney in fact or that the principal is alive.

2. A third person, in good faith and without liability to the principal or the principal's successors in interest, even with knowledge that the principal is disabled or incapacitated, may rely and act on the instructions of or otherwise contract and deal with the principal's attorney in fact or successor attorney in fact acting pursuant to authority granted in a durable power of attorney.

3. A third person that conducts activities through employees shall not be charged under sections 400.700 to 400.735 with actual knowledge of any fact relating to a power of attorney, nor of a change in the authority of an attorney in fact, unless the information is received at a home office or a place where there is an employee with responsibility to act on the information, and the employee has a reasonable time in which to act on the information using the procedures and facilities that are available to the third person in the regular course of its operations.

4. A third person, when being requested to engage in transactions with a principal through the principal's attorney in fact, may require the attorney in fact to provide specimens of his or her signature and any other information reasonably necessary or appropriate in order to facilitate the actions of the third party in transacting business through the attorney in fact; and may prescribe the place and manner in which the third person will be given any notice respecting the principal's power of attorney and the time in which the third person has to comply with any notice.

(L.1989, H.B. No. 145, § A(§ 9).)

## COMMENT

A third person is exempt from liability to the principal if the third person acts in good faith reliance on the power of attorney and has no actual knowledge that the power has been modified or terminated. A long list of specific situations in which the third person may rely is included. This section applies to all types of powers of attorney, and a third person is protected who has no knowledge that the attorney in fact's authority has been terminated or suspended because of the principal's death or recent incapacity. A third person with knowledge of the principal's disability or incapacity may act at the direction of an attorney in fact appointed under a power of attorney that is durable.

Actual notice takes on a specialized meaning under sections 9 and 10, and really means notice that reasonably affords a third person an opportunity to protect itself in acting at the request of an attorney in fact. Centralized accounting systems for branch offices of financial institutions and computer check cashing machines, as presently developed, do not all have the ability to effectively disseminate information that will enable the financial institution to protect itself immediately after receiving the notice of a change in the authority of an attorney in fact. As written the time allowed after receiving notice will vary from institution to institution and within an institution it may vary depending upon the person who receives the notice, the place at which the notice is received and the technical means available to disseminate the notice through the third person's organization. Section 9.4 expressly recognizes that an enterprise may desire to set out in their customer contracts the manner in which notice relating to powers of attorney will be given and other procedures respecting transaction of business through an attorney in fact. Although sections 5.9 and 10.3 provides that third persons may not refuse to deal with a customer's attorney in fact, the act does not prohibit a third person from adopting reasonable procedures for dealing with attorneys in fact that accommodate its own business needs.

**404.721. Liability as between principal and third person**

1. As between the principal and third persons, the authority granted in a power of attorney shall terminate on the date of termination, if any, set out in the power of attorney or on the date when the third person acquires actual knowledge of the death of the principal or that the authority granted in the power of attorney has been suspended, modified or terminated.

2. As between the principal and third persons, the acts and transactions of an attorney in fact are binding on the principal and the principal's successors in interest in any situation in which a third person is entitled to rely under section 404.719.

3. This section does not prohibit the principal, acting individually, and a third person from entering into a written agreement that sets forth their duties and liabilities as between themselves and their successors, and which expands or limits the application of sections 404.700 to 404.735, except that no agreement shall limit or restrict the right of the principal to act with respect to the third person through an attorney in fact appointed in a durable power of attorney.

(L.1989, H.B. No. 145, § A(§ 10).)

## COMMENT

As between a principal and a third person, the authority granted in a power of attorney terminates on the date provided in the written power of attorney or on the date the third person learns that it has been terminated. Actual notice under this section, as provided in section 9.3, for parties such as banks and corporations, requires that the notice be received by a responsible person who is in a position to reasonably act on the information and who has the time to reasonably act. This applies to both durable powers and powers which are not durable. It is declaratory of existing law and actual knowledge of the principal's death or incapacity is required. Dick v. Page, 17 Mo 234 (1852); Carriger v. Whittington, 26 Mo 311 (1858). Constructive knowledge is not imposed on third persons even for recorded terminations, except as to real estate. See section 9(10). The principal and third persons under section 10.3 may enter into a separate agreement that varies their liabilities and duties as between themselves. Reenforcing the limitation in section 5.9, the agreement may not prohibit the principal from dealing with the third person through an attorney in fact acting under a durable power of attorney.

**404.723. Delegation of powers, successor attorneys in fact**

1. An attorney in fact or successor from time to time may revocably delegate any or all of the powers granted in a durable power of attorney to one or more qualified persons, subject to any directions or limitations of the principal expressed in the power of attorney, but the attorney in fact making the delegation shall remain responsible to the principal for the exercise or nonexercise of the powers delegated.

2. The principal in a durable power of attorney may revocably name one or more qualified persons as successor attorneys in fact to exercise the authority granted in the power of attorney in the order named in the event a prior named attorney in fact resigns, dies, becomes disabled or incapacitated, is not qualified to act or refuses to act; and the principal in a durable power of attorney may revocably grant a power to another person, designated by name, by office, or by function, including the initial and any successor attorney in fact, whereby there may be revocably named at any time one or more successor attorneys in fact.

3. A delegated or successor attorney in fact need not indicate his or her capacity as a delegated or successor attorney in fact.  
(L.1989, H.B. No. 145, § A(§ 11).)

## COMMENT

Unless prohibited by the power of attorney, the law expressly authorizes an attorney in fact acting under a durable power of attorney to delegate some or all of his powers and duties but the named attorney in fact remains responsible for the acts of subagents. If the principal is available and has capacity it would be expected that the principal would be consulted about the delegation. If the principal is not available or is incapacitated, the attorney in fact may delegate all or part of his duties during a planned absence. The law also authorizes the concept of appointing and making provision for successor attorneys in fact, including granting a power to a third person to name the successor.

**404.725. Compensation of attorney in fact**

Subject to the provisions of the power of attorney and any separate agreement, an attorney in fact is entitled to reasonable compensation for services rendered to the principal as attorney in fact and reimbursement for reasonable expenses incurred as a result of acting as attorney in fact for the principal.

(L.1989, H.B. No. 145, § A(§ 12).)

**COMMENT**

This provision is similar to the compensation provisions of the minors and adult custodian laws. See §§ 404.054, MTML and 404.580, MPCL, RSMo 1986. In many situations a relative acting as an attorney in fact under a durable power of attorney expects to act for the principal as an accommodation. Normally, while the principal is not disabled, such service will be infrequent and will not involve substantial time. However, with the prospect that if the principal becomes disabled or incapacitated, substantial time, effort and expense may be required of the attorney in fact and successors extending over a long period of time, it was felt important to include a provision respecting compensation. A definite understanding regarding compensation may be included in the power of attorney or in a separate agreement. Reimbursement for expenses would be expected to include the cost of bookkeeping, tax, and legal services incurred by the attorney in fact in performing his duties in the principal's behalf. It would also include the cost of preparing an accounting and any travel or personal expense incurred by the attorney in fact.

**404.727. Accounting, determination of disability, modification and termination, removal of attorney in fact and limitations for principal to bring actions**

1. The principal may petition the court for an accounting by the principal's attorney in fact or the legal representative of the attorney in fact. If the principal is disabled, incapacitated or deceased, a petition for accounting may be filed by the principal's legal representative, an adult member of the principal's family or any person interested in the welfare of the principal.

2. Any requirement for an accounting may be waived or an accounting may be approved by the court without hearing, if the accounting is waived or approved by a principal who is not disabled, or by a principal whose legal capacity has been restored, or by all creditors and distributees of a deceased principal's estate whose claims or distributions theretofore have not been satisfied in full. The approval or waiver shall be in writing, signed by the affected persons and filed with the court.

3. For the purposes of subsection 2 of this section, a legal representative or a person providing services to the principal's estate shall not be considered a creditor of the principal's estate; and no express approval or waiver shall be required from the legal representative of a disabled or incapacitated principal if the principal's legal capacity has been restored, or from the personal representative of a deceased principal's estate, or from any other person entitled to compensation or expense for services rendered to a disabled, incapacitated or deceased principal's estate, unless the principal or the principal's estate is unable to pay in full the compensation and expense to which the person rendering the services may be entitled.

4. The principal, the principal's attorney in fact, an adult member of the principal's family or any person interested in the welfare of the principal may petition the probate division of the circuit court in the county or city where the principal is then residing to determine and declare whether a principal, who has executed a power of attorney, is a disabled or incapacitated person.

5. If the principal is a disabled or incapacitated person, on petition of the principal's legal representative, an adult member of the principal's family or any interested person, including a person interested in the welfare of the principal, for good cause shown the court, may:

(1) Order the attorney in fact to exercise or refrain from exercising authority in a durable power of attorney in a particular manner or for a particular purpose;

(2) Modify the authority of an attorney in fact under a durable power of attorney;

(3) Declare suspended a power of attorney that is not durable;

(4) Terminate a durable power of attorney;

(5) Remove the attorney in fact under a durable power of attorney;

(6) Confirm the authority of an attorney in fact or a successor attorney in fact to act under a durable power of attorney; and

(7) Issue such other orders as the court finds will be in the best interest of the disabled or incapacitated principal, including appointment of a guardian or conservator for the principal.

6. If a power of attorney is suspended or terminated by the court or the attorney in fact is removed by the court, the court may require an accounting from the attorney in fact and order delivery of any property belonging to the principal and copies of any necessary records of the attorney in fact concerning the principal's property and affairs to a successor attorney in fact or the principal's legal representative.

7. In a proceeding under sections 404.700 to 404.735 or in any other proceeding, or upon petition of an attorney in fact or successor, the court may:

(1) Require or permit an attorney in fact under a durable power of attorney to account;

(2) Authorize the attorney in fact under a durable power of attorney to enter into any transaction, or approve, ratify, confirm and validate any transaction entered into by the attorney in fact that the court finds is, was or will be beneficial to the principal and which the court has power to authorize for a guardian or conservator under chapter 475, RSMo; and

(3) Relieve the attorney in fact of any obligation to exercise authority for a disabled or incapacitated principal under a durable power of attorney.

8. Unless previously barred by adjudication, consent or limitation, any cause of action against an attorney in fact or successor for breach of duty to the principal shall be barred as to any principal who has received an account or other statement fully disclosing the matter unless a proceeding to assert the cause of action is commenced within two years after receipt of the account or statement by him or, if the principal is a disabled or incapacitated person, by a guardian or conservator of his estate; provided that, if a disabled or incapacitated person has no guardian or conservator of his estate at the time an account or statement is presented, then the cause of action shall not be barred until one year after the removal of the principal's disability or

incapacity, one year after the appointment of a conservator for the principal, or one year after the death of the principal. The cause of action thus barred does not include any action to recover from an attorney in fact or successor for fraud, misrepresentation or concealment related to the settlement of any transaction involving the agency relationship of the attorney in fact with the principal.

(L.1989, H.B. No. 145, § A(§ 13).)

#### COMMENT

The act provides for a number of proceedings similar to that authorized in the Transfers to Minors Law and Personal Custodian Law. The accounting section is similar and permits an attorney in fact to account, seek guidance from a court for acts proposed to be taken or to relieve the attorney in fact from any duty to act. Any requirement for an accounting may be waived by affected parties but a legal representative is not an affected party unless the principal or the principal's estate is unable to pay any compensation or expense that may be owing to the legal representative.

For good cause shown the court may terminate the power of attorney or remove an attorney in fact. There is no provision for a court appointing a successor attorney in fact and it is assumed that if similar services are needed, a conservatorship would be ordered. Of course, if an attorney in fact is removed and the court does not appoint a conservator, a successor attorney in fact provided for in the power of attorney could then undertake to act.

As a power of attorney may cover subjects other than financial and property matters, an accounting proceeding under this section may extend to personal welfare decisions of the attorney in fact. For example, an attorney in fact with the authority to arrange for the principal's housing might be challenged in a proceeding under this section that the housing or nursing home selected is inadequate or not in keeping with the principal's resources or accustomed standard of living. This section more than any other brings in to focus the merger that is occurring among guardianship, conservatorship, trust, custodianship and durable agency law. For some questions little guidance is provided in the statute to the courts by way of procedures or standards for their determinations. Instead, reliance is placed on the court to arrive at a proper result by applying traditional legal, equitable and surrogate principles that are appropriate for the situation.

A proceeding to determine whether a principal is incapacitated may be initiated and the court's determination will have significance for powers of attorney that are durable and not durable. A determination of disability or incapacity does not require the court to appoint a legal representative. The limitations provision is similar to that provided in the trust law, § 456.220, RSMo 1986, and in the adult and minors custodian laws. See §§ 404.071, MTML, and 404.620, MPCL, RSMo 1986.

#### **404.730. Scope and application of law—application of law to nondurable powers of attorney**

1. Sections 404.700 to 404.735 apply to the acts and transactions in this state of attorneys in fact under powers of attorney executed in this state or by residents of this state; and also apply to acts and transactions of attorneys in fact in this state or outside this state under powers of attorney that refer to the durable power of attorney law of Missouri in the instrument creating the power of attorney, if any of the following conditions are met:

- (1) The principal or attorney in fact was a resident of this state at the time the power of attorney was executed;
- (2) The powers and authority conferred relate to property, acts or transactions in this state;
- (3) The acts and transactions of the attorney in fact or successor occurred or were to occur in this state;
- (4) The power of attorney was executed in this state; or
- (5) There is otherwise a reasonable relationship between this state and the subject matters of the power of attorney.

The power of attorney so created remains subject to sections 404.700 to 404.735 despite a subsequent change in residence of the principal or the attorney in fact and any successor, or the removal from this state of property which was the subject of the power of attorney.

2. A person who acts as an attorney in fact or successor pursuant to a power of attorney governed by sections 404.700 to 404.735, is subject to personal jurisdiction in this state with respect to matters relating to acts and transactions of the attorney in fact or successor performed in this state, performed for a resident of this state or affecting property in this state.

3. Sections 404.700 to 404.735 shall not be construed as providing an exclusive method for creating powers of attorney that are in fact durable or that may be durable as to one or more acts by reason of the fact that the attorney in fact or other person has a property or contract interest in the authority conferred.

4. Sections 404.700 to 404.735 shall not be construed to apply to powers of attorney that are not durable except where specifically so stated; and sections 404.700 to 404.735, insofar as they apply to powers of attorney that are not durable, are intended to be declaratory of existing law.

5. A durable power of attorney that purports to have been made under the provisions of the uniform durable power of attorney act or a substantially similar law of another state is governed by the law of the designated state and, if durable where executed, is durable and may be carried out and enforced in this state.

(L.1989, H.B. No. 145, § A(§ 14).)

#### COMMENT

This section is similar to the conflicts of law sections of the Transfers to Minors Law and Personal Custodian Law, §§ 404.094 and 404.650, RSMo 1986. Section 14.3 provides that the act is not the exclusive method for creating powers of attorney that are durable in fact and section 14.5 provides that powers of attorney, durable where executed, are valid and durable in Missouri and may be enforced in Missouri. See sections 404.094, MTML, and 404.650, PCL, RSMo. The section also recognizes that there may be nexus factors other than those listed and, to the extent that they exist, the principal has a choice of law in executing a durable power of attorney that refers to the Missouri law.

**404.731. Jurisdiction of probate division of circuit court—guardian or conservator ad litem appointed, when**

1. The probate division of the circuit court may hear and determine all matters pertaining to acts and transactions of an attorney in fact performed or undertaken under a power of attorney on behalf of a principal who is disabled or incapacitated, or who has become deceased.

2. The provisions of chapter 472, RSMo, apply to judicial proceedings involving powers of attorney to the extent that they apply to judicial proceedings involving trusts and are not inconsistent with sections 404.700 to 404.735.

3. If the probate division of the circuit court appoints a guardian or conservator for a principal who has appointed an attorney in fact under a durable power of attorney, after notice and hearing, the court may specify in an order the powers, duties and responsibilities of the principal's legal representative and any attorney in fact appointed under a durable power of attorney and the manner in which they shall coordinate the exercise of their respective powers and duties for and on behalf of the principal.

4. Upon filing of a petition under sections 404.700 to 404.735, the court shall issue an order to such persons and returnable on such notice as the court may require, to show cause why the relief prayed for in the petition should not be granted and, in due course, shall proceed to grant such relief as the court finds to be in the best interest of the principal.

5. Notwithstanding any other provision of law, if it is suggested in a petition filed by the principal, a creditor, a person interested in the welfare of the principal, or other interested person, including a member of the principal's family who may have a property right or claim against or an expectancy, reversionary or other interest in the estate of the principal, or if it affirmatively appears to the court that the principal is disabled or incapacitated and there is a possible conflict of interest between the principal and the attorney in fact, the court may appoint a guardian or conservator ad litem to represent the principal in any proceeding to adjudicate any right affected by the possible conflict of interest. The guardian or conservator ad litem shall have only such authority as is provided in the order of appointment and shall serve until discharged by the court.

6. If a court appoints a guardian or conservator ad litem for the principal, the court may, by order entered in the proceeding, provide reasonable compensation and reimbursement for expenses for the guardian or conservator ad litem and, in appropriate cases, allow the payment out of the estate of the principal or enter a judgment for the amount as costs against some other person who is a party to the proceeding and whose conduct is determined by the court as giving rise to the necessity for the appointment of the guardian or conservator ad litem.

(L.1989, H.B. No. 145, § A(§ 15).)

**COMMENT**

This section is similar to § 404.640, RSMo 1986, of the Personal Custodian Law and § 404.091, RSMo 1986, of the Transfers to Minors Law. The probate division of the circuit court has concurrent jurisdiction with other circuit courts and some proceedings, such as a determination of capacity, may only be handled in that court. Chapter 472 is made applicable to proceedings handled in the probate court respecting durable powers of attorney to the extent they would be applicable to trust cases.

Section 15.3 anticipates and addresses the question of guardians and conservators being appointed while an attorney in fact may be acting under a durable power of attorney. The court may specify their respective duties. In many families it would be expected that the two functions would be performed by the same person. See §§ 404.091, MTML, and 404.640, PCL, RSMo 1986.

Section 15.5 provides authority for appointing a guardian ad litem in any proceeding where the principal and attorney in fact may have a conflict of interest. It is similar to §§ 475.097.2 and 404.660, RSMo 1986.

**404.735. Repeal of sections 486.550 to 486.595 does not affect validity of existing durable powers of attorney**

1. The repeal of the Missouri durable power of attorney law, sections 486.550 to 486.595, RSMo, shall not affect the validity of durable powers of attorney created under that law, the validity of the acts and transactions of attorneys in fact under authority granted in durable powers of attorney executed under that law, or the duties of attorneys in fact under durable powers of attorney executed under that law.

2. The provisions of sections 404.700 and 404.703, subsections 2, 3 and 4 of section 404.705, and sections 404.707 to 404.735 henceforth apply to durable powers of attorney executed before August 28, 1989 insofar as the application of sections 404.700 to 404.735 does not impair constitutionally vested rights.

3. A power of attorney that complies with the provisions of subsection 1 of section 404.705 and that was executed before August 28, 1989 is durable and valid after August 28, 1989.

4. A durable power of attorney executed under prior law need not be recorded as provided in that law to be effective and durable except as to conveyances of real estate; and the appointment of a legal representative for the principal or the principal's estate shall not require an accounting by an attorney in fact acting under a power of attorney executed under prior law, unless ordered by a court pursuant to a petition to the court under section 404.727.

5. Compliance with the provisions of subsection 1 of section 404.705 is not required for durability of a power of attorney executed prior to January 1, 1990, if the form of the power of attorney was sufficient for durability under subdivision (2) of section 486.555, RSMo 1986.

(L.1989, H.B. No. 145, § A(§ 16).)

**COMMENT**

The enactment of the Durable Power of Attorney Law of Missouri does not affect powers of attorney executed or recorded under the previous law. The old law is repealed and new durable powers of attorney will have to follow and be executed under the new law. Except for the new format requirements, all the new provisions apply to outstanding durable powers of attorney but powers of attorney executed under the old law are not subject to the mandatory recording and accounting requirements of the old law. The law also gives effect to durable powers of attorney that may be in the process of execution at or near the time when this law goes into effect.

**NEBRASKA**

[from Neb. Rev. Stat. § 49-1501 et seq. (1988)]

**Neb. § 49-1502. Act, how construed**

The Nebraska Short Form Act shall be liberally construed and applied to promote its underlying policies and purposes to simplify and standardize the routine use of certain expressions and forms in certain commonly occurring and recurring situations and transactions and, in the absence of permitted intentional modification, to promote the uniform operation, substantive content, and effect of such expressions and forms.

**Neb. § 49-1503. Law and equity supplemental to act**

Unless displaced by the particular provisions of the Nebraska Short Form Act, the principles of law and equity shall supplement its provisions.

**Neb. § 49-1508. Agent, defined**

Agent shall mean all, any one or more, or each of the one or more corporate fiduciaries or other persons designated by any principal as the agent under any statutory short form or other version of a power of attorney.

**Neb. § 49-1512. General power, defined**

General power shall mean any one of the separate general aggregations of related authorities and powers defined by any short form expression specified by the Nebraska Short Form Act.

**Neb. § 49-1515. Plenary power, defined**

Plenary power shall mean the general and universal aggregation of authorities and powers defined by the short form expression specified by the Nebraska Short Form Act.

**Neb. § 49-1516. Plenary power subject to limitations, defined**

Plenary power subject to limitations shall mean the general and universal aggregation of authorities and powers with restrictions defined by the short form expression specified by the Nebraska Short Form Act.

**Neb. § 49-1517. Power of attorney, defined**

Power of attorney shall mean any statutory short form effectuated under and specified by the Nebraska Short Form Act as and for a statutory short form power of attorney and shall also mean any other document of like import otherwise effective to create and establish a similar agency relationship between a principal and an agent.

**Neb. § 49-1519. Principal, defined**

Principal shall mean any person accepted by the agent as the principal under any statutory short form or other version of a power of attorney.

Neb. § 49-1521. Specific authority, defined

Specific authority shall mean any one of the dependent or independent specific aggregations of related authorities and powers defined by any short form expression specified by the Nebraska Short Form Act.

Neb. § 49-1524. Content and substance of forms; general principles

The following general principles shall in part govern the content and substance of a statutory short form or other version of a power of attorney:

(1) Reference to or other use in a statutory short form or other version of a power of attorney, in the identical indicated words and not in any other formulation of words, of the exact short form expression, durable power of attorney, shall be equivalent to the use of, shall be construed and interpreted with the force and effect of, and shall be deemed to incorporate at length and in full the provisions of the full expression and shall mean that the principal, as permitted and prescribed by the Uniform Durable Power of Attorney Act intends the authority conferred upon the agent to be or to become exercisable without regard to subsequent disability or incapacity of the principal and that the power of attorney either shall not be affected by subsequent disability or incapacity of the principal or shall become effective upon the disability or incapacity of the principal;

(2) Incorporation into or any other use as part of any other short form expression or reference to or other use in a statutory short form or other version of a power of attorney, in the identical indicated words or in substantially the same or more similar than dissimilar formulation of words, of any one or more of each of the respectively indicated short form expressions set out in sections 49-1525 to 49-1544 shall be equivalent to the use of, shall be construed and interpreted with the force and to the effect of, and shall be deemed to incorporate at length and in full the respective provisions of each of the respectively indicated full expressions; and

(3) Incorporation into or any other use as part of any other short form expression or reference to or other use in a statutory short form or other version of a power of attorney, in the identical indicated words or in substantially the same or more similar than dissimilar formulation of words, or any one or more of each of the respectively indicated short form expressions set out in sections 49-1545 to 49-1556 shall be equivalent to the use of, shall be construed and interpreted with the force and to the effect of, and shall be deemed to incorporate at length and in full the respective provisions of each of the respectively indicated full expressions, as further expanded by any additional incorporation required by reference to or use of other provisions of the Nebraska Short Form Act to be effected.

PENNSYLVANIA

[from 20 Pa. Cons. Stat. Ann. § 5601 et seq. (Purdon Supp. 1990)]

Pa. § 5601. General provision

In addition to all other powers that may be delegated to an attorney-in-fact, any or all of the powers referred to in section 5602(a) (relating to form of power of attorney) may lawfully be granted in writing and, unless the power of attorney expressly directs to the contrary, shall be construed in accordance with the provisions of this chapter.

Pa. § 5602. Form of power of attorney

(a) Specification of powers. -- A principal may, by inclusion of the language quoted in any of the following paragraphs or by inclusion of other language showing a similar intent on the part of the principal, empower his attorney-in-fact to do any or all of the following, each of which is defined in section 5603 (relating to implementation of power of attorney):

- (1) Either:
  - (i) "to make gifts"; or
  - (ii) "to make limited gifts."
- (2) "To create a trust for my benefit."
- (3) "To make additions to an existing trust for my benefit."
- (4) "To claim an elective share of the estate of my deceased spouse."
- (5) "To disclaim any interest in property."
- (6) "To renounce fiduciary positions."
- (7) "To withdraw and receive the income or corpus of a trust."
- (8) "To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care."
- (9) "To authorize medical and surgical procedures."

(b) Appointment of attorney-in-fact and successor attorney. -- A principal may provide for:

- (1) The appointment of more than one attorney-in-fact, who shall act jointly, severally or in any other combination that the principal may designate, but if there is no such designation, such attorneys-in-fact shall only act jointly.
- (2) The appointment of one or more successor attorneys-in-fact who shall serve in the order named in the power of attorney, unless the principal expressly directs to the contrary.
- (3) The delegation to an original or successor attorney-in-fact of the power to appoint his successor or successors.

(c) Filing of power of attorney. -- An executed copy of the power of attorney may be filed with the clerk of the orphans' court division of the court of common pleas in the county in which the principal resides, and if it is acknowledged, it may be recorded in the office for the recording of deeds of the county of the principal's residence and of each county in which real property to be affected by an exercise of the power is located. The clerk of the orphans' court division or any office for recording of deeds with whom the power has been filed, may, upon request, issue certified copies of the power of attorney.

Each such certified copy shall have the same validity and the same force and effect as if it were the original, and it may be filed of record in any other office of this Commonwealth (including, without limitation, the clerk of the orphans' court division or the office for the recording of deeds) as if it were the original.

Pa. § 5607. Corporate attorney-in-fact

A bank and trust company or a trust company incorporated in this Commonwealth, or a National bank with trust powers having its principal office in this Commonwealth, acting as an attorney-in-fact pursuant to a power of attorney, or appointed by another who possesses such a power, shall have the powers, duties and liabilities set forth in section 3321 (relating to nominee registration; corporate fiduciary as attorney-in-fact; deposit of securities in a clearing corporation; book-entry securities).