#L-3044 su996
02/23/92

Memorandum 92-21

Subject: Study L-3044 -- Comprehensive Power of Attorney Statute (Policy Issues; Comments of State Bar Team)

Background of Study

With this memorandum, the Commission continues its consideration of the comprehensive power of attorney statute. To review the course of this study, the Commission made a series of policy decisions in July 1990. A draft implementing the policy decisions was prepared and distributed to interested bar groups in October 1990. The staff draft was restructured and renumbered to meet some concerns of the State Bar review team and redistributed in the form attached to Memorandum 91-40 (May 1991). The Commission reviewed the first 26 pages of this May 1991 draft at the September 1991 meeting, working through draft Section 2415.070. A copy of Memorandum 91-40 and the May 1991 draft is attached. The memorandum also includes some comments from the Beverly Hills Bar Association. Preliminary comments from the State Bar Team are also included in an exhibit to the First Supplement to Memorandum 91-40 (attached).

Last August the staff met with the State Bar Team in an effort to answer some of the technical questions that have arisen in the process of reviewing the statute. We have also received comments from the Team concerning several issues raised in the draft and at the September 1991 Commission meeting. These Team comments are attached to this memorandum as Exhibit 1.

Tasks for March Meeting

At this meeting, the Commission needs to consider the policy issues raised by the State Bar Team and, if possible, finish considering the draft sections. The detailed section

review would start on page 27 of the May 1991 draft attached to Memorandum 92-40. After the Commission has reviewed the entire draft, the staff will be able to prepare a revised draft implementing the decisions made. If we are to have a bill ready for the 1993 legislative session, we will need to have a tentative recommendation ready for distribution this summer so that comments can be considered in the fall in time to prepare the final recommendation.

Comments of State Bar Team Four

The comments of Team Four are set out in a question and answer format, apparently as a response to questions submitted to the Team by Valerie J. Merritt. (Contrary to the statement on page 1 of Exhibit 1, Ms. Merritt's memorandum was not attached.) We understand that one or more representatives of the State Bar Team will attend to March meeting and they will be able to raise their points at that time as we proceed through the draft. Several general issues raised by the Team, and comments relating to sections the Commission has already covered, are considered below.

Scope of Study

The State Bar Team has taken the position that the project should include a revision of the health care power statutes. (See, e.g., Exhibit 1, p. 1.) From the start, however, this study has been limited, focusing mainly on powers and duties of attorneys in fact under durable powers of attorney for property and related issues. The power of attorney for health care may be in need of revision, but the staff believes that it would be a major effort to undertake a substantive revision of the health care power statute. In addition, although the staff originally intended to collect a number of general provisions applicable to both types of powers, we did not find very many generalizable rules in the course of drafting the statute.

The Team continues to press for broadening the scope of the study, arguing that a comprehensive revision cannot be done properly if part of the statute is not integrated with the rest. This sounds plausible, as a general proposition, but having gone through the exercise of trying to draft general provisions for both types of powers, the staff is not convinced that much can be gained by undertaking a substantive revision of health care powers. It would set the project back at least one year, perhaps two. It is also difficult to assess the legislative prospects for such a revision.

Location of Power of Attorney Statute

At the September 1991 meeting, the Commission discussed the best location for the power of attorney statute. (See the discussion in Memorandum 91-40, at pp. 2-4.) The Commission decided to defer a final decision until the views of Commissioner Gregory, the Legislative Counsel, could be heard.

The staff thinks that the better location would be the Probate Code, but the State Bar Team is unanimous in the view that the statutes should stay in the Civil Code. (See Questions 1 & 2 in Exhibit 1, pp. 1-3.) The current draft statute attempts to restructure the power of attorney statute in the current location, leaving the health care power and the Uniform Statutory Form Power of Attorney Act largely untouched. The staff does not feel strongly about the issue; it is certainly not a matter worthy of a great struggle. It should be noted, however, that the power of attorney statutes, unlike the general agency rules, have a particular connection to the Probate Code. For power of attorney sections that refer to the Probate Code, see Civ. Code §§ 2402(b), 2411, 2413, 2417(e). We do not find any cross-references to the general agency statutes in the power of attorney statutes. It is worth remembering as well that

the Uniform Durable Power of Attorney Act originated in the Uniform Probate Code. See UPC §§ 5-501 to 5-505 (1990).

Relation to General Agency Statutes

A perennial issue is the extent to which the general agency rules apply to durable powers of attorney. As the Team notes, powers of attorney are a subclass of agency, but as the power of attorney statutes have become more developed and detailed over the years, the general statutory agency rules have less of a role to play. The Team wants to maintain the presumed relationship of agency law and the power of attorney statutes. (See Question 2 in Exhibit 1, pp. 2-3.) Thus the Team would apparently have problems with draft Section 2400.020 and with the conforming revisions in Sections 2023 and 2360 which sever the two bodies of statutory law.

The staff proposed severing the statutes because we did not find any rules in the general agency statutes that were needed. That is, the relevant rules were already explicit and clearer in the power of attorney statute. The staff proposes to do further research on this point in light of the Team's comments. Perhaps the statute should only provide that the power of attorney statute prevails over any conflicting general statute. This approach is not as clear as the proposed draft, since it leaves open for argument the question of whether there are conflicting rules and whether silence in the power of attorney statute leaves the door open for applying some general Field Code rule.

Terminology

The Team feels strongly that the term "attorney-in-fact" should be used in the statute, not "agent." (See Question 4 in Exhibit 1, pp. 4-5.) The Commission has deferred decision on this issue so that the State Bar could present its arguments. The staff finds "attorney-in-fact" to be awkward, confusing, misleading, and uninformative.

But perhaps it is so well-accepted that it is too late to abolish it. Note that statutory forms generally prefer the term "agent." We also see the Harley Spitler, a member of the Team, has recently recommended a clause to be inserted in durable powers of attorney that uses "agent." Spitler, *A Trap for the Wary!*, in 11 Estate Planning, Trust & Probate News 19 (Fall 1991). The Commission should decide which terminology it prefers so the next draft can be settled on this issue.

Capacity to Execute Durable Power of Attorney

The Team discusses the question of capacity to execute different types of powers and suggests further study to see if the requirements of capacity can be made more explicit. (See Question 5 in Exhibit 1, pp. 5-6.) It seems generally agreed that the capacity to contract is necessary to execute a power of attorney for property, but the appropriate standard for health care powers is not clear. Since the project has not as yet been expanded to include a comprehensive revision of health care powers, the staff has not attempted to resolve the issue of capacity in this realm.

Powers of a Third Kind: Personal Care Powers

The draft statute has raised the issue of how to treat durable powers concerning personal care, that is, powers that are not traditional property powers nor health care powers. (See the Staff Note following draft Section 2402.130, on page 5 of the draft.) The Team has concluded that the statute needs to provide some guidance in this area as a matter of highest priority. (See Question 7 in Exhibit 1, pp. 7-8.) The staff is not convinced that this need be done, as explained in the Staff Note just cited, but it might be worth investigating in the next draft.

Organizational Matters; UDPA

The Team suggests that the California Uniform Durable Power of Attorney (UDPA) be preserved relatively intact and in a separate subtitle or chapter. (See Questions 9 & 10 in Exhibit 1, pp. 9-10.) The Commission has adopted a presumption against tinkering with uniform acts as a general rule. However, the staff believes that UDPA needs to be split up in order to fit the organizational scheme of a new comprehensive statute. The uniform act is still in the draft statute, as indicated in draft Section 2405.020, although it is not in one sequence of sections. Of course, the existing statute is not identical to the official uniform act, and it includes a non-uniform section in its midst (Civ. Code § 2400.5).

Dating and Acknowledgment

The Team would require powers of attorney to be dated and acknowledged. (See Questions 11 & 12 in Exhibit 1, pp. 10-11.) As noted in Memorandum 91-40, the Beverly Hills Bar Association has also suggested that dating be required. The Commission has twice decided not to require acknowledgment so as not to invalidate powers unnecessarily. The comments to relevant sections will note that acknowledgment is required for a power of attorney to be recordable. The Commission has also been reluctant to require dating and has asked the staff to draft a dating provision like that applicable to holographic wills under Probate Code Section 6111. Such a provision might read as follows:

> If a power of attorney [for property] does not contain a statement as to the date of its execution, the following rules apply:
>
> (a) If the omission results in doubt as to whether its provisions or the inconsistent provisions of another power of attorney are controlling, the undated power of attorney is invalid to the extent of the inconsistency unless the time of its execution is established to be

after the date of execution of the other power of attorney.

(b) If it is established that the principal lacked capacity at any time during which the power of attorney might have been executed, the power of attorney is invalid unless it is established that it was executed at a time when the principal had capacity.

The Team distinguishes the situation of a holographic will, since a court will be looking at the will, whereas a power of attorney is needed in day-to-day, private transactions. Note that the statutory forms require dating and acknowledgment. See Civ. Code §§ 2475-2476.

Variation of Duties and Liabilities

The Commission decided not to include draft Section 2410.110 permitting the principal and agent to agree to vary the terms of the power of attorney as between themselves. The Team would also delete this provision. (See Question 18 in Exhibit 1, pp. 13-14.)

Certified Copy of Power of Attorney

The Commission has directed the staff to investigate the feasibility of empowering court clerks and city clerks to certify copies of powers of attorney, with reference to draft Section 2410.150. The Team would go further and permit attorneys and notaries to certify durable powers of attorney. Presumably the effect of such a provision would be to permit third persons to rely on the certified copy.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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October 30, 1991

Stan Ulrich, Esq.
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c/o CA Law Revision Commission
4000 Middlefield Road - D-2
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BY FEDERAL EXPRESS

Re: Memorandum 91-40 - Comprehensive Powers of Attorney Statute

Dear Stan:

Enclosed is a copy of "Team 4's Report - California Law Revision Commission Memorandum 91-40; Comprehensive Powers of Attorney Statute." On October 26, 1991, the Executive Committee of the Estate Planning, Probate and Trust Law Section of the State Bar ("Executive Committee") discussed the enclosed Team 4 Report, particularly Questions 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15 and 22. With respect to each individually noted question in the preceding sentence (except for question number 12 which is noted in the Report), the Executive Committee adopted Team 4's recommendations and positions.

We hope that these Team 4's comments will be of assistance to the Commission. If you have any questions, please do not hesitate to contact me.

Thank you for your consideration.

Cordially,

Kathryn A. Ballsun

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cc: Team 4
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TEAM 4 REPORT

CALIFORNIA LAW REVISION COMMISSION MEMORANDUM 91-40;

COMPREHENSIVE POWERS OF ATTORNEY STATUTE

On Saturday, October 12, 1991, the members of Team 4 (Sandy Rae, Bill Schmidt, Harley Spitler, Clark Byam, Don Green, Tom Stikker, Marc Hankin and Kathryn A. Ballsun) met to discuss the September 13, 1991 comments of the California Law Revision Commission ("Commission") to and about Memorandum 91-40, Comprehensive Powers of Attorney Statute ("Durable Powers of Attorney").

Although Team 4 has responded to the policy issues and drafting concerns raised by the Commission, Team 4 feels that it is important to emphasize that California practitioners and the people of the State of California would be best served by the introduction and adoption of a comprehensive statute encompassing both durable powers of attorney for property and durable powers of attorney for health care. As Team 4 believes will become evident by a review of this report, the issues involving both types of durable powers of attorney are often complex, intertwining and interdependent; therefore, it is a critical purpose of the redrafting that the statute be as logical and straightforward as possible. Drafting a durable power of attorney statute in segments is almost certain to undermine this critical purpose of the redrafting. Team 4 is concerned that a statute which takes a fragmented approach by only addressing durable powers of attorney for property will result in a host of foreseeable problems which will only require additional redrafting. Thus, Team 4 continues to urge the Commission to consider and propose a truly comprehensive durable power of attorney statute, one addressing both durable powers of attorney for property and durable powers of attorney for health care.

In responding to the Commission, Team 4 used as a guide the September 22, 1991 memorandum prepared by Valerie J. Merritt and addressed to the members of Team 4 and the Executive Committee of the State Bar Estate Planning, Probate and Trust Law Section. A copy of that memorandum is attached to this report. Team 4's responses and the reasoning underlying those responses are as follows:

1. **Question:** Should the provisions dealing with durable powers of attorney for property and durable powers of attorney for health care remain in the Civil Code rather than being transferred to the Probate Code?

Team 4 Response:

Team 4's position is that the statutory provisions concerning durable powers of attorney for health care and durable powers of attorney for property should remain in the Civil Code. Any type of durable power arises as a result of a grant of power from one individual to another individual. This is the essence of an agency relationship, and a durable power of attorney for property or health care should be regarded as simply one type or sub-species of agency.

Durable powers are used extensively by general practitioners as well as by attorneys specializing in business law. It is improbable that a business attorney or a general practitioner would look in the Probate Code for the statutes governing durable powers of attorney. Since durable powers of attorney are, in fact, simply a type of agency, searching for durable powers in the Probate Code would not be logical in any event. The proposed transfer of durable powers of attorney to the Probate Code would create a "trap" for attorneys and non-attorneys as long as the main law of agency remains in the Civil Code.

If statutes governing durable powers of attorney were transferred to the Probate Code, then the transfer would result in a fragmentation of the statutes dealing with the same topic into different codes. The proposed revision would engender confusion instead of clarification - the professed goal of the current effort to restate the durable power of attorney statutes. Finally, Team 4's responses to item 2 (below) further support Team 4's unanimous conclusion that durable powers of attorney should remain in the Civil Code.

2. **Question:** Should the relationship between durable powers and the statutory agency provisions currently set forth in the Civil Code be severed?

Team 4 Response:

Team 4 unanimously feels that durable powers of attorney cannot, and should not, be separated from statutory agency provisions currently set forth in the Civil Code.

As stated previously, durable powers of attorney are simply one manifestation of an agency. Even if an attempt were made to redraft the entire durable powers of attorney law, as a practical matter, it would appear to be difficult, if not impractical, to re-legislate each and every aspect of agency law as currently set

forth in the Civil Code. Agency law would have to remain as the larger statutory framework supporting durable powers of attorney.

Even if the redrafted durable power of attorney statute did include a severance of agency law, as with any new law, certain issues still would not be addressed in the new statute. Both practitioners and the court would have to resort to some other body of law for reference and clarification. For durable powers of attorney, such unresolved issues logically should be resolved by reference to the law of agency. If the severance between durable powers and agency occurred, then the result either would be reference to the agency provisions notwithstanding the severance or total reliance upon the courts to fashion such interpretation as they deem proper.

Team 4 does not agree with Mr. Ulrich's conclusion that if durable powers of attorney were severed from the existing statutory agency provisions, that the courts would still be able to and would rely upon current case law. In fact, such a severing would appear to create tremendous interpretative difficulties for a court and would engender substantial confusion among practitioners as well as the public. Team 4 agrees that the law of agency should be redrafted to better reflect current trends and concerns. However, although agency law may be archaic, it does have a well documented interpretive history which should continue to be used by practitioners until replaced by a comprehensive statute. Team 4 does not believe that the task of redrafting the law of agency is within the scope of the present project.

Further, although some parts of agency law may conflict or overlap with certain provisions of durable powers of attorney for health care, such duplication does not mean that an entire body of law should be discarded. Instead, such conflicting or overlapping provisions require extraordinarily careful drafting and analysis in the redrafting of the existing durable powers of attorney statutes. If any provisions of the newly enacted law were to conflict with existing agency law statutes, then the new law should provide that it expressly supersedes any contrary provision in prior law.

Any durable power of attorney, whether durable or non-durable, creates an agency relationship. The creation of the agency relationship has nothing whatsoever to do with: 1) the probate of a decedent's estate; or 2) the devolution of property upon the death of the principal. Nothing in the Probate Code deals with the concepts of agency or agents. The law of agency is an integral part of durable powers of attorney and should remain so.

3. **Question:** Should California law (i.e., Civil Code § 2400.040) be rewritten to make it clear that if a power of

attorney is durable in another state that it will be treated as durable in California regardless of whether or not such durable power of attorney complies with the provisions of the Uniform Durable Powers of Attorney Act (as enacted in California)?

Team 4's Response:

Team 4 agrees that Civil Code § 2400.040 should be rewritten so that if a power of attorney is durable in another state, it will be treated as durable in California regardless of whether such a durable power complies with the provisions of the Uniform Durable Powers of Attorney Act as enacted in California. Team 4 favors the broadest possible interpretation of the durable powers of attorney statutes; such liberal interpretation should enable durable powers of attorney to become more portable. The concept of having portable durable powers of attorney is the basic concept underlying the Uniform Durable Powers of Attorney Act which California has adopted and which Team 4 believes important to retain (to the extent possible) as part of California law. Therefore, the revised durable powers of attorney statutes should be rewritten with an expansive perspective, which will encourage the use of and reliance upon durable powers of attorney. Such a perspective includes acknowledging as valid any non-California durable power of attorney which manifests an intent to function as or have the effect of a durable power of attorney.

4. **Question:** In rewriting the durable powers of attorney statute, should the word "attorney-in-fact" or the term "agent" be used to designate the individual (or institution) designated by the principal to fulfill the duties and responsibilities delegated under the durable power of attorney?

Team 4's Response:

Team 4 feels strongly that the term attorney-in-fact should be used as the statutory term to designate the individual appointed to act for the principal under a durable power of attorney. The term "agent" is a chameleon term. There are many types of agents. One of those types of agents is the attorney-in-fact under a durable power of attorney. For precise legal language, attorney-in-fact is preferable inasmuch as an attorney-in-fact cannot be confused with any other type of agent.

The purpose of redrafting the durable power of attorney statute is so that the statute will be uniformly interpreted by judges and lawyers who are familiar with the concepts of agency which underlie durable powers of attorney. For this reason, it is

strongly compelling that the terminology in the statutes be as precise as possible. On the other hand, if a practitioner feels that a member of the public would be confused by the term attorney-in-fact, then the word agent can be used in individually drafted documents. Team 4 believes that as the term "attorney-in-fact" continues to be used, that it will gain wide public acceptance in part because of the convenience in being able to distinguish attorneys-in-fact from all other agents.

5. **Question:** What capacity must the principal possess in order to execute a valid durable power of attorney? Team 4 has interpreted the question of capacity as relating to both a durable power of attorney for property and a durable power of attorney for health care.

Team 4's Response:

Team 4 believes that the standard of capacity which must exist for an individual to execute a durable power of attorney for property should be that the individual has the power to contract, that is the capacity to enter into a contract.

Team 4 is much less certain as to the proper standard of capacity which should exist before an individual can execute a durable power of attorney for health care. At the time of the execution of the durable power of attorney for health care, must an individual have the capacity to give informed medical consent? What does the ability to give informed medical consent mean? How are judges to interpret the standard? Is the ability to give informed medical consent a greater or lesser standard than the ability to enter into a contract? Are there any objective criteria for determining capacity which should be reflected in the durable power of attorney statutes?

The definition of "capacity" is critical to a meaningful redrafting of the durable powers of attorney statute. If the definitions are not clear, then the courts will be forced to spend considerable time and effort not only in determining whether in a particular instance, capacity existed but, as well, the very definition of capacity.

Medical and scientific procedures and techniques currently exist which assist in determining capacity and providing objective evidence of that capacity. Considering the emotion and conflicting interests that often are involved at the time of the execution of a durable power of attorney, objective criteria could remove a tremendous area for conflict. Team 4 is uncertain whether and to what extent scientific criteria should be incorporated into the

statute. However, Team 4 requests that the Commission carefully consider available medical and scientific tests for incapacity and whether such objective criteria should be adopted into the statute.

Team 4 is somewhat perplexed as to the reasons that durable powers of attorney for health care are being discussed so extensively in questions 5, 6, and 7 inasmuch as the Commission determined to defer action on the durable power of attorney for health care. As has been indicated several times, Team 4 feels that it would be most advantageous for both practitioners and the people of the State of California if one comprehensive durable power of attorney bill were introduced which reflected thorough analysis and integration of the durable power of attorney statutes. Specifically with respect to the durable powers of attorney for health care, Team 4 feels that the issue of capacity strongly illustrates the need to coordinate the capacity provisions between the durable powers of attorney for health care and the durable power of attorney for property.

Further, other issues with respect to the capacity issue require careful consideration. For example, does it make sense to have two different capacity standards, one for each type of durable power? Must the same capacity standard be met in order to terminate a durable power of attorney? To modify or restate a durable power of attorney?

Still another reason which reinforces the need to consider both durable powers of attorney at one time is the fact that many medical decisions may have a significant economic impact. For instance, if an individual stated that he/she wanted extensive medical intervention, and if the attorney-in-fact were to elect to pursue certain cancer treatments and maintain the individual at home, then the cost to the individual's estate could be overwhelming. Thus, an individual's directive to pursue certain medical remedies may have a major economic impact upon that person's estate. A host of issues emerge from this scenario and slight variations upon it. Which consideration, health care or property prevails? How should the conflict between the competing considerations be resolved? Team 4 believes that great care should be taken in redrafting the durable power attorney statutes so that the revisions will represent long-term and reasonable solutions.

6. **Question:** What is the effect of co-mingling provisions relating to durable powers of attorney for health care, durable powers of attorney for property and nominations of conservator in one and the same document? This issue becomes particularly acute in the event that different standards are required for the capacity to create one or the other of the durable powers of attorney.

Team 4's Response:

Team 4 believes that one document can combine a durable power of attorney for property and a durable power of attorney for health care. In many instances, such a combination would seem to represent a logical approach inasmuch as the health care decisions may have economic repercussions (see response to Question 5). Team 4 believes that the requirements and formalities required for each durable power of attorney (e.g. the requisite capacity that must exist in order to execute a durable power of attorney) must be met even though several durable powers of attorney appear in one document. For example, if a document combines both durable powers of health care and property, then an individual still must be able to contract in order for the durable power of attorney for property to be valid.

At this point, Team 4 again feels that it is important to emphasize that an integrated and thorough analysis of both types of durable powers is desirable and required. Team 4 believes that such questions as the effect of an integrated document cannot and should not be considered in a vacuum, and this is all the more reason that the durable powers of attorney for property and health care should be considered and dealt with at one time.

7. **Question:** The Commission was concerned with certain types of "powers" which cannot be categorized precisely into either a property or a health care category. Examples of these powers are the powers to determine the residence, to select a companion, to determine recreation and so forth.

Team 4's Response:

After extensive discussion of both types of durable powers of attorney, Team 4 felt that neither of the existing powers of attorney adequately addressed the types of powers listed in Question 7. On the other hand, Team 4 believes that an attorney-in-fact should have such powers (as listed below) if the attorney-in-fact is responsible for providing for all the possible needs of an individual. Furthermore, enabling a principal to grant these powers, and the manner of their granting should be addressed in the statute. An ellipsis in the statute will only mean that at some point, a court (with less time to consider and perhaps less background in the area) will have to resolve the issues involving these types of personal care considerations. Providing guidance in this area should be given the highest priority.

Therefore, Team 4 suggests that a new durable power, a durable power of attorney for personal care, be introduced as one of the

basic type of durable powers. The durable power of attorney for personal care would reflect the types of provisions mentioned above, e.g., selecting a companion, and other powers which cannot be easily encompassed within either the durable power of attorney for property or the durable power of attorney for health care. In attempting to delineate the range of powers which would be dealt with in the durable power of attorney for personal care, it is helpful to consider the various powers which currently are given to a conservator of a person. Team 4 feels that the law should recognize such personal care powers, but again emphasizes that it would be most helpful to the practitioners of the State of California if all of the durable powers were considered at one time.

Team 4 believes that it is important to recognize a durable power of attorney for personal care, but that the law should not prescribe where such powers should be set forth (e.g. requiring that a durable power of attorney for personal care could only be set forth in a separate and distinct document). In other words, such a durable power of attorney for personal care could be included in a durable power of attorney for property, a durable power of attorney for health care, or could be set forth in a separate document. All, except one of the members of Team 4, felt that the durable power of attorney for personal care should be totally a creation of statute. That is, the statute should expressly state how the durable power for personal care would be created and the capacity that an individual must possess in order to exercise such a power. Team 4 believes that in order to execute a durable power of attorney for personal care that an individual should have the same capacity as required for the execution of a valid durable power of attorney for property, that is the power to enter into a contract. In all fairness, it should be mentioned that one vocal member of Team 4 felt that the manner of creating a durable power of attorney for personal care should be omitted from the statute entirely.

8. **Question**: If conflicting provisions appear in different durable powers, then how should the conflicts be reconciled? The Commission also appeared to be particularly concerned as to how to reconcile various provisions relating to the disposition of remains and burial instructions.

Team 4 Response:

The issue of which provisions prevail in the event that various documents contain conflicting provisions is complex if only because of the number of permutations involved. Therefore, Team 4 felt that the issue warranted an extensive study which should

include a consideration of the interaction of all the various types of durable powers of attorney.

However, Team 4's preliminary response to the issues raised by the Commission are as follows: 1) with respect to the disposition of remains and burial instructions, a later executed document, including a will, should prevail over an earlier executed document; and 2) with respect to documents executed on the same date and all other documents which contain conflicting provisions, the intent of the person should control. Therefore, the issue would become one of a question of fact. In reality, later executed documents most often would control, and Team 4 believes this should be the general rule subject to the above considerations.

Team 4 also felt that it was critical to protect parties who had relied on earlier executed documents, and that this issue was particularly intertwined with the provisions set forth in the law of agency. In the law of agency, an agent is usually protected until that agent has been notified of a change of circumstances. Therefore, Team 4 felt that it would be important that in this case (as in many other instances) that the law of agency continue to apply to durable powers of attorney.

9. **Question:** Whether durable and non-durable powers of attorney should be addressed in one statute?

Team 4 Response:

Durable powers of attorney and non-durable powers of attorney are exactly the same except for the durable provisions. Therefore, the rewritten durable power of attorney statute should apply to both durable and non-durable powers except where expressly stated. Under the law of agency, there would be a separate section (title?) to deal with durable powers of attorney in order to preserve the Uniform Durable Power of Attorney Act (as enacted in California) intact.

If Team 4's above position is accepted, then it would mean that the word "durable" would have to be removed from many parts of the proposed statute and that each particular section in the proposed Memorandum would have to be re-examined in order to see whether or not such section should be reintegrated with the powers of attorney statute as a whole. In summary, durable and non-durable powers of attorney would be dealt with in one title (article?), except with respect to those particular provisions constituting a part of the Uniform Durable Power of Attorney Act which would be set forth in a separate division.

10. **Question:** Whether Civil Code § 2402.210 should include durable powers as well as non-durable powers?

Team 4's Response:

As stated in Question 9, Team 4 believes that the term "power of attorney" generally should apply to both durable and non-durable powers of attorney. The concerns of the Commission about the confusion in the types of agents (e.g., real estate brokers) who could be appointed under the durable power of attorney statutes is largely resolved if the words "attorney-in-fact" are used instead of the more generic (and confusing) term "agent". Team 4 suggests that the wording of § 2402.210 should be redrafted as follows:

> "(a) "Power of attorney" means a written instrument, however denominated, that is executed by a natural person who has the capacity to contract and who grants powers to an attorney-in-fact."

Team 4 further feels that a document does not have to be named a "power of attorney" in order for it to so function.

11. **Question:** Should durable powers of attorney be dated?

Team 4's Response:

Team 4 believes that it is important to require that durable powers of attorney be dated. Third parties often rely upon durable powers of attorney, and an undated document can create innumerable doubts and difficulties for such third parties. In addition, requiring a date is not unduly burdensome, but on the other hand does assist in determining the validity of the document. A durable power is different from an undated holographic will, inasmuch as an undated holographic will is submitted to a court for the court to determine the validity of the instrument. On Team 4, six members voted that documents should be dated while two members voted that dating should be voluntary.

12. **Question:** Does a durable power of attorney for property or health care have to be acknowledged in order for the document to be valid?

Team 4's Response:

On October 26, 1991, the entire Executive Committee discussed whether or not a durable power had to be acknowledged in order to be valid. The vote was 8 to 8, with the Chair then voting for acknowledgement.

13. **Question:** Should Civil Code § 2410.020 be rewritten as suggested by Team 4?

Team 4's Response:

Team 4 thanks the Commission for accepting Team 4's suggestion that § 2410.020 should be rewritten as follows:

> "In a power of attorney for property, a principal may grant to an attorney-in-fact powers to act on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes."

14. **Question:** Should the following language be deleted from Civil Code § 2410.040: "... notwithstanding any incapacity of the principal or any uncertainty as to whether the principal is dead or alive."

Team 4's Response:

Team 4 urges that the above quoted language be deleted from Civil Code § 2410.040 for the following reasons. Team 4 feels that the language if included would simply create a redundancy inasmuch as incapacity is already mentioned in a previous clause of the same statute. Furthermore, the reference to whether the principal is dead or alive is overly broad and general. There are other sections, i.e., § 2425.040, that specifically refer to and deal with the effect of the death or incapacity of the principal. The reference in this section to the principal being alive or dead merely creates confusion, and the cross-references are ineffective to remedy such confusion. Finally, this section is part of the Uniform Durable Powers of Attorney Act. Team 4 believes that in the interest of uniformity, that the language of the Uniform Act should be retained wherever possible.

15. Question: Whether or not the warning which should be included on the statutory durable power of attorney should be revised?

Team 4's Response:

Team 4 believes that the warning should be revised, and suggests that the following language be adopted by the Commission:

"WARNING TO PERSON EXECUTING THIS DOCUMENT

This is an important legal document. It creates a durable power of attorney. Before you sign this document, consider these important facts:

This document gives a person the power to act as your agent.

This document may give your agent broad powers to manage, dispose, sell or convey your real and personal property and to borrow money using your property as security for the loan.

Your agent has no duty to do any act under this power until your agent agrees to do so.

These powers may exist until you die unless you include a time limit in this document. These powers will continue to exist even if you can no longer make your own decisions.

Your agent is entitled to reasonable compensation for services rendered to you, unless your agent agrees otherwise. The agreement should be in writing.

You have the right to revoke or terminate this durable power of attorney at any time.

If there is anything about this form that you do not understand, ask a lawyer to explain it to you."

16. Question: Should Civil Code §2410.060 only apply to a durable power of attorney for property?

Team 4 Response:

Team 4 believes that the statute should not be rewritten. The provision regarding the nomination of a conservator of the person or estate or both should apply to both a durable power of attorney for property and a durable power of attorney for health care.

Since this provision is part of the Uniform Durable Power of Attorney Act, the provision should be kept intact unless there is a compelling reason for redrafting Section 2410.060. Team 4 believes that no such compelling reason exists.

17. **Question**: Should Civil Code § 2410.070 concerning springing powers of attorney be rewritten to apply only to durable powers of attorney for property?

Team 4 Response:

Team 4 believes that § 2410.070 concerning springing powers of attorney should be retained with the general provisions concerning durable powers of attorney and should not be rewritten. This is an example of a provision which pertains to both durable powers of attorney for property and durable powers of attorney for health care, and which should be integrated into one comprehensive statute. For the benefit of practitioners, provisions which concern both types of durable powers of attorney, such as springing powers should be located in one section dealing with provisions which are common to both types of durable powers.

18. **Question**: Civil Code § 2410.110 permits the principal and agent to enter into separate agreements which vary the provisions of the durable power of attorney between principal and agent. Should such side agreements be permitted?

Team 4 Response:

Team 4 believes that Civil Code § 2410.110 which permits side agreements should be deleted in its entirety. Team 4 believes that "side agreements" are dangerous and create substantial uncertainty inasmuch as they may lack the formalities which are required to create other durable powers of attorney and which protect the principal as well as the agent. In addition, third parties would find it difficult to rely upon a durable power of attorney if it were possible for the principal and agent to enter into a side agreement.

A third party always would be forced to pose questions about a possible side agreement. Such questions would include whether or not there was a side agreement. Did the side agreement vary or modify the durable power of attorney provisions under consideration? If so, to what extent? Third parties would require the production of any such side agreements. All in all such side

agreements would inhibit rather than facilitate the use of durable powers attorney, and all for no real purpose. Team 4 generally feels that the benefits of permitting such side agreements would be outweighed by the many negative aspects.

19. **Question**: Civil Code § 2410.120 concerns the manner of modifying a durable power of attorney by the principal. The issue raised by the Commission was whether or not oral modifications of a durable power of attorney should be permitted.

Team 4 Response:

Team 4 would rewrite Civil Code § 2410.120 so that the section dealt exclusively with modification of a durable power of attorney as opposed to both modification and termination. Team 4 felt that any modification should only be in writing. However, in view of Team 4's position with respect to side agreements, a conflict arises with respect to amendments as opposed to a total restatement. After balancing competing considerations, Team 4 felt that no amendments of durable powers should be permitted. In lieu of any amendment, an entirely new document would have to be executed. It should not be unduly burdensome to create such a new document, particularly because the certainty to be achieved would facilitate the use of the durable powers of attorney by both third parties and the attorney-in-fact.

Team 4 suggests that subparagraph (d) originally set forth in statute § 2410.120 which concerns recordation of a termination or modification be transferred to § 2410.130, with the reference to modification being deleted.

20. **Comment:** The Commission requested Mr. Ulrich to rewrite and update the language of Civil Code § 2410.130.

Team 4 Response.

Team 4 agrees that the language of § 2410.130 should be clarified and updated, and will review the revised statute upon receipt.

21. **Question:** Under Civil Code § 2410.140 does a temporary incapacity revoke a power of attorney under current law?