

Memorandum 90-65

Subject: Study L-3042 - General Standard of Duty of Attorney in Fact

The California Bankers Association and others have from time to time suggested the need for a statutory statement of the general obligations of an attorney in fact under a power of attorney. The Commission decided to defer consideration of this matter until work on the new Probate Code was substantially completed.

The new comprehensive Missouri statute governing powers of attorney includes provisions dealing with the general standard of duty of the attorney in fact. The relevant provisions are attached as Exhibit 1. Does the Commission believe that these provisions could serve as a basis for drafting California provisions? If so, the staff will review the provisions and prepare a draft for consideration at a future meeting.

Durable powers of attorney have become a common tool in estate planning practice. California does not have a comprehensive statute dealing with powers of attorney. The statutory provisions governing agency law are designed for commercial situations, and they are ill suited for powers of attorney. The staff believes that it would be a useful project to develop appropriate statutory provisions for powers of attorney. The Missouri law may be useful as a starting point in developing appropriate California provisions. The Missouri statute was drafted by a special subcommittee of the Probate and Trust Committee of the Missouri Bar. A table of contents of the Missouri statute is attached as Exhibit 2. Does the Commission wish to undertake to prepare a comprehensive statute? The staff does not believe that the project would require a substantial amount of Commission resources or time. We anticipate that we would receive substantial assistance from the State Bar Section since probate attorneys frequently draft and use powers of attorney and are aware of the problems involved in their use.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

MISSOURI STATUTE

Section 6. Name in which acts are performed and property is held

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.

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.

Section 7. 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:

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

(b) 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, 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 interest in the subject of the power of attorney or the attorney in fact's authority 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.

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, MPGL, RSMo 1986.

Section 7.2 states the obvious, that 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.

NEW DURABLE POWER OF ATTORNEY LAW

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