

## Memorandum 77-77

Subject: Study 30.300 - Guardianship-Conservatorship Revision (Power of Attorney Which Will Survive Principal's Incompetency)

The Commission has requested the staff to present for Commission consideration a provision similar to Section 5-501 of the Uniform Probate Code, which enables a person executing a written power of attorney to provide in the instrument that the power will become or remain effective upon the person's later incompetency (sometimes called a "durable" power of attorney). If such a provision were adopted in California, it would change the rule that a power of attorney (other than one coupled with an interest) is revoked upon the principal becoming incompetent. Civil Code § 2356.

In its 1973 critique of the Uniform Probate Code, the State Bar reported:

The concept of power of attorney that would not be affected by disability, as provided under UPC 5-501, has a great deal of merit, although some consideration might be given to requiring the power to be notarized or witnessed to impress the principal with the extensiveness of the power and authority being granted. [State Bar of California, The Uniform Probate Code: Analysis and Critique 182 (1973).]

About six months ago, the State Bar Committee on Probate and Trust Law recommended a provision based on Section 5-501 of the Uniform Probate Code with several minor revisions, including the addition of a provision for acknowledgement. The provision would be codified as new Section 2307.1 of the Civil Code, and Civil Code Section 2356 (termination of power) would be amended to make an exception for powers of attorney created under Section 2307.1. The recommendation is now part of the State Bar's tentative legislative program for 1978. A copy of the recommendation is attached to this memorandum as Exhibit 1, and a copy of Section 5-501 of the Uniform Probate Code is attached as Exhibit 2.

The staff recommends the inclusion in the Commission's guardianship-conservatorship recommendation of a section identical to the State Bar's draft of proposed Section 2307.1 of the Civil Code except that the

words "or guardian" should be deleted in the three places where they occur since under the Commission's recommendation there will no longer be guardianships for adults. Section 2356 of the Civil Code should be amended as recommended by the State Bar.

Respectfully submitted,

Robert J Murphy III  
Staff Counsel

# AGENDA ITEM

MAY 11(e)  
Report of Committee on  
Probate & Trust Law re  
Durable Powers of Attorney

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April 8, 1977

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TO: STATE BAR BOARD OF GOVERNORS

FROM: COMMITTEE ON PROBATE AND TRUST LAW

SUBJECT: DURABLE POWER OF ATTORNEY - PROPOSED AMENDMENTS  
TO CIVIL CODE

This report responds to the letter from the State Bar dated February 2, 1977. The concept of a durable power of attorney has been under consideration by this Committee for a considerable period of time. Basically, the concept is that a "special" type of power of attorney can be established which is not automatically terminated by the incapacity of the principal. The Committee supports the concept.

The Committee recommends an amendment to Civil Code Section 2356 and adoption of new Civil Code Section 2307.1, all as set forth in the attachments to this letter.

The Committee believes that this special type of durable power of attorney will serve a valuable and useful purpose. As in all situations, the durable power of attorney should only be used under the proper circumstances. The concept of the durable power of attorney was approved in the report of the State Bar entitled "Uniform Probate Code: Analysis and Critique" published in March, 1973.

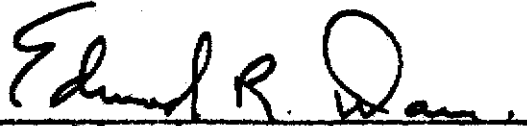
The Committee believes that the proposed legislation has high priority and that it should be a part of the State Bar's

State Bar Board Of Governors  
Durable Power Of Attorney - Proposed Amendments  
To Civil Code  
April 8, 1977  
Page 2

legislative program.

Please advise me if you have any questions concerning  
our recommendation.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Edmond R. Davis", is written over a horizontal line.

Edmond R. Davis  
Chairman

ERD:mew  
ENC.

§ 2307.1 (NEW) Creation of Agency Surviving Incapacity

When a principal designates another his attorney in fact or agent by a power of attorney in writing, signed by the principal and acknowledged, and the writing contains the words "This power of attorney shall not be affected by the subsequent disability or incompetency of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his later disability or incompetency, then the authority of the attorney in fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incompetency of the principal at law. All acts done by the attorney in fact or agent, pursuant to the power during any period of disability or incompetence have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representatives as if the principal were competent and not disabled. If a conservator or guardian shall thereafter be appointed for the property or estate of the principal, the attorney in fact or agent shall, during the continuance of the appointment, account to the conservator or guardian rather than the principal. The conservator or guardian has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency.

Proposed Amendment to Civil Code

§ 2356. Agency not coupled with an interest; bona fide transaction without knowledge of termination; power of attorney

Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by:

(1) Its revocation by the principal; (2) his death; or, (3) his incapacity to contract, except for powers of attorney created under the provisions of Section 2307.1 of this code;

Provided, that 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 heirs, devisees, legatees, and other successors in interest; and provided, further, that nothing herein contained shall affect the provisions of Section 1216 of this code.

EXHIBIT 2

**Section 5-501. [When Power of Attorney Not Affected by Disability.]**

Whenever a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains the words "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 shall be exercisable notwithstanding his disability, the authority of the attorney in fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney in fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees and personal representative as if the principal were alive, competent and not disabled. If a conservator thereafter is appointed for the principal, the attorney in fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same power the principal would have had if he were not disabled or the principal would have had if he were not protected or the power of attorney or agency.

**COMMENT**

This section permits a person who is sui juris to execute a power of attorney which will become or remain effective in the event he should later become disabled. If the Court should subsequently appoint a conser-

vator, the latter may either permit the attorney in fact to continue to act or revoke the power of attorney. The section is based in part on Code of Va. (1960), Sec. 11-9.1.