

Memorandum 81-4

Subject: Study L-500 - Durable Powers of Attorney

At the February 1980 meeting, the Commission approved a Tentative Recommendation relating to Uniform Durable Power of Attorney Act to be circulated to the State Bar Estate Planning, Trust and Probate Law Section and others for review and comment. (A durable power of attorney is one which provides that it shall remain effective notwithstanding the later incapacity of the principal.) We have received a total of 20 responses commenting on the TR, 15 of which are attached to this memorandum. The five which are omitted are from members of the State Bar Estate Planning, Trust and Probate Law Section or the Legal Services Section which have been superseded by a consolidated viewpoint now expressed in Exhibit 1 (see discussion infra). Of the 15 letters which are attached to this memorandum, 12 express unqualified support (these include letters from the State Bar, Court of Appeal Justice Robert Kingsley, retired Superior Court Judge Clayton Horn, Professors Jesse Dukeminier and James Blawie, and the San Francisco Bar Association), two would support the TR if revisions were made, and one (Commissioner David Lee) is opposed.

The staff has made a few technical revisions in the TR and has incorporated these in the Staff Draft of a Recommendation relating to Uniform Durable Power of Attorney Act, attached to this memorandum. These revisions are:

(1) Where the Uniform Act refers to the principal's "disability or incapacity," this has been changed to refer simply to the principal's "incapacity," since it is the principal's legal incapacity--and not a physical or other disability--which terminates a nondurable power of attorney.

(2) The Uniform Act provision which gives a court-appointed fiduciary the power to revoke or amend a durable power of attorney is modified so that if the fiduciary is a California conservator, prior court authorization is required for the revocation or amendment (see proposed Section 2402).

(3) A transitional provision is added.

General comments

Those who supported the TR had the following to say about it:

"[T]he durable power of attorney would enable an individual's property to be administered after his incompetency by one he trusts, the same as could be done with a living trust but without the expense of the trust's creation. . . . The Act is a good one and would represent a major improvement in the probate law, and we support legislation to adopt the Act." (Exhibit 11.) "[P]assage of the entire Uniform Act would provide a valuable and necessary alternative for trusts and court-supervised conservatorships for persons of modest means." (Exhibit 3.) "This letter is to endorse your recommendation that Civil Code Section 2307.1 be repealed and that California adopt the Uniform Durable Power of Attorney Act. I agree with the need for a durable power" (Exhibit 2.) "I believe the concept of the durable power of attorney is a useful one and am gratified to note its widespread adoption." (Exhibit 5.) "It will provide a useful and inexpensive tool for small equities." (Exhibit 6.) "I think the act is excellent and needed, and I hope it will be enacted." (Exhibit 9.) The "statutes, amendments and repealers, are nicely calculated to meet a troublesome problem in California law." (Exhibit 8.) "[S]uch legislation is needed, and we see no way in which the tentative recommendation could be improved." (Exhibit 10.) "I approve the Commission's tentative recommendation I think the California legislature should enact it." (Exhibit 4.) "[T]his would be good legislation." (Exhibit 12.) "I concur in your recommendation." (Exhibit 7.)

Alameda County Probate Commissioner David Lee--who opposes the Uniform Durable Power of Attorney Act--said:

The present law of conservatorship has been carefully forged so as to guarantee as nearly as possible due process protections for persons; even to the extent of requiring a voluntary conservatee to appear in court or be visited by court investigators. The Durable Power would undermine all of those protections. . . . Unfortunately, my experiences in the Probate Court for the past ten years leaves me convinced that more mischief than good would come from such a change. The potential for abuse is without end. The horror stories of confidants obtaining such powers of attorney to the detriment of the grantors abound.

(Exhibit 15.)

Views of the State Bar; disclosure statement

Initially the Legal Services Section of the State Bar opposed the durable power of attorney concept, with two members of the Executive Committee dissenting. One of the dissenters stated that opponents of the durable power concept argue

that the potential for abuse of a durable power of attorney greatly outweighs its convenience, without producing any data to underpin [their] arguments. Every conceivable situation involving interaction among people has a potential for abuse. In my opinion, the benefits of the durable power of attorney as proposed outweigh the potential of abuse, if disclosure of possible abuses is required by the legislation.

Later the Legal Services Section reconsidered its position to adopt the former minority view to support the durable power concept if a disclosure statement advising the principal of the legal effect of a durable power of attorney were required.

Still more recently, the Legal Services Section and the Uniform Probate Code Subcommittee of the Estate Planning, Trust and Probate Law Section have, after more internal discussion, concluded that the disclosure statement is unworkable and not likely to be an effective preventative for fraud. Thus both of these State Bar groups now support the Uniform Durable Power of Attorney Act. (See Exhibit 1.)

Conclusive effect of affidavit of attorney-in-fact

Section 2403 of the proposed legislation provides that the death or incapacity of the principal does not terminate a written power of attorney (whether durable or nondurable) as to the attorney-in-fact or other person who, without actual knowledge of the death or incapacity of the principal, acts in good faith under the power. Section 2404 provides that as to acts undertaken in good faith reliance on a power of attorney (whether durable or nondurable), if the attorney-in-fact executes an affidavit stating that the attorney-in-fact did not have at the time of the exercise of the power actual knowledge of revocation of the power or of the principal's death, the affidavit is conclusive proof of the nonrevocation or nontermination of the power at that time. Attorney Robert Scolnik, who generally supports the TR, is concerned about this provision giving the affidavit of the attorney-in-fact conclusive effect, since it may lead to fraud. (Exhibit 13.)

Proposed Section 2403 is consistent with existing California law, which provides that any bona fide transaction entered into with an agent by any person acting without actual knowledge of revocation of the agency or of the death or incapacity of the principal is binding. Civil Code § 2356. The Restatement rule is to the contrary: Death or incapacity of the principal destroys the power of the agent to act, and terminates apparent authority as well as actual authority, irrespective of notice to the third party. Restatement (Second) of Agency §§ 133, 120 et seq. (1957); 1 B. Witkin, Summary of California Law Agency and Employment § 200, at 794 (8th ed. 1973). Formerly the California rule was the same as the Restatement rule, but the law was amended in 1943 to give effect to a bona fide transaction made with apparent authority. 1 B. Witkin, supra.

Proposed Section 2404 gives conclusive effect to the affidavit of the attorney-in-fact only as to acts undertaken in good faith reliance. If there is collusion between the attorney-in-fact and the third person, there can be no good faith reliance by the third person. On the other hand, if the third person acts in good faith reliance on the apparent authority of the attorney-in-fact while the attorney-in-fact has undisclosed knowledge of the revocation or termination of the power of attorney, it would appear that the attorney-in-fact could make a fraudulent affidavit which would validate the transaction. This appears to be a deliberate policy choice by the drafters of the Uniform Act, and is consistent with the policy of the California Civil Code Section 2356 which protects third persons who act without knowledge of revocation or termination.

Accordingly, the staff recommends retaining the provision of the Uniform Act which gives conclusive effect to the affidavit of the attorney-in-fact.

Surety bond by attorney-in-fact

Attorney Kenneth James Arnold opposes enactment of the Uniform Durable Power of Attorney Act without a requirement that the attorney-in-fact post a surety bond to indemnify the principal. (Exhibit 14.) However, a bond ought not to be required while the principal is competent. Such a requirement would saddle the principal with an expense he or she

may not want. The difficulty of requiring a bond only after the principal becomes incompetent is that without an adjudication it is impossible to know exactly when incompetency occurs. The staff is unaware of any other support for such a requirement.

The staff therefore recommends that a requirement of bond not be included in the proposed legislation.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

Memo 81-4

Exhibit 1

[Exhibit 1 was to have been a letter from attorney John L. McDonnell, Jr., writing on behalf of the Uniform Probate Subcommittee of the State Bar's Estate Planning, Trust and Probate Law Section and expressing the support of that section and of the Legal Services Section for the Uniform Durable Power of Attorney Act. As of December 31, 1980, this letter was thought to be enroute to the Commission. When this letter is received, the staff will attach it to a First Supplement to Memorandum 81-4 and distribute it with other meeting materials.]

JAMES R. BANCROFT
A PROFESSIONAL CORPORATION
JAMES H. McALISTER
LUTHER J. AVERY
ALAN D. BONAPART
HENRY L. GLASSER
NORMAN A. ZILBER
EDMOND G. THIEDE
ROBERT L. DUNN
JAMES WISNER
SANDRA J. SHAPIRO
GEORGE R. DIRKES
BOYD A. BLACKBURN, JR.
MICHELE D. ROBERTSON
JANET F. STANSBY
ROBERT C. SCHUBERT
JOHN R. BANCROFT
DENNIS O. LEUER
DAVID M. LEVY

LAW OFFICES OF
BANCROFT, AVERY & McALISTER
601 MONTGOMERY STREET, SUITE 900
SAN FRANCISCO, CALIFORNIA 94111

TELEPHONE
AREA CODE 415
788-8855
CABLE ADDRESS: BAM

April 10, 1980

OUR FILE NUMBER

California Law Revision Commission
Stanford Law School
Stanford, California 94305

UNIFORM DURABLE POWER OF ATTORNEY ACT

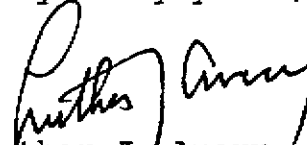
Gentlemen:

This letter is to endorse your recommendation that Civil Code Section 2307.1 be repealed and that California adopt the Uniform Durable Power of Attorney Act. I agree with the need for a durable power and can attest that in my practice it is the assumption of clients that a power of attorney will operate during disability. In fact, most clients intend the power of attorney to operate during disability and will use a power under the old law even though it may be questionable.

I agree with the reasoning of the Tentative Recommendations and if you need testimony or specific instances of hardship caused by not having a durable power available, I am prepared to assist.

Page 5 of the February, 1980 report is a very faint copy. I would appreciate receiving a better copy.

Very truly yours,


Luther J. Avery

LJA:ble



BANK OF AMERICA

JOHN H. MCGUCKIN, JR.
Counsel

April 10, 1980

The California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Re: Tentative Recommendation Relating to
Uniform Durable Power of Attorney Act
(February 1980 Draft)

Gentlemen/Ladies:

I have reviewed and approve of the tentative recommendation of the Commission relating to the Uniform Durable Power of Attorney Act. Although the enactment of Civil Code §2307.1 was a significant step in the right direction, I feel that the passage of the entire Uniform Act would provide a valuable and necessary alternative for trusts and court-supervised conservatorships for persons of modest means.

I will be happy to review any further drafts relating to the statute.

Sincerely yours,

A handwritten signature in dark ink, appearing to read 'John H. McGuckin, Jr.', written over a horizontal line.

John H. McGuckin, Jr.
Counsel

JHM:sm

UNIVERSITY OF CALIFORNIA, DAVIS

BERKELEY • DAVIS • IRVINE • LOS ANGELES • RIVERSIDE • SAN DIEGO • SAN FRANCISCO



SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW

DAVIS, CALIFORNIA 95616

April 14, 1980

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Re : Uniform Durable Power of Attorney Act

Ladies and Gentlemen :

I teach Wills and Trusts and Estate Planning
at the above law school. I approve the commission's
tentative recommendation relating to the above act.
I think the California legislature should enact it.

Sincerely,

Joel C. Dobris
Joel C. Dobris
Acting Professor of Law

JCD:ch



Province of
British Columbia

Law Reform Commission
of British Columbia

10th Floor
1055 West Hastings Street
Vancouver
British Columbia
V6E 2E9
Phone: (604) 668-2366

18 April 1980

California Law Revision Commission,
Stanford Law School,
Stanford, California 94305

Dear Sirs:

Re: Uniform Durable Power of Attorney Act

I have read with interest your tentative recommendation covering durable powers of attorney.

As you may know, in 1975 this Commission made a Report recommending such an innovation for British Columbia (copy enclosed). A short time later this matter was taken up by the Uniform Law Conference of Canada and in 1978 uniform legislation was promulgated. In 1979 the uniform draft (which conformed in spirit to our recommendations) was adopted as an amendment to our Powers of Attorney Act. A copy of the amending legislation is enclosed.

I believe the concept of the durable power of attorney is a useful one and am gratified to note its widespread adoption.

Yours sincerely,

A handwritten signature in cursive script, reading "A. Close".

Arthur L. Close,
Commissioner.

ALC/ss

encls.



Superior Court of California
San Francisco

CLAYTON W. HORN, JUDGE

RETIRED

4/21/80

Cal. Law Rev. Com:

Re: Shareable Power Atty.

I have reviewed the tentative recommendation and approve. It will provide a useful and inexpensive tool for small equities.

Yours truly,
Clayton W Horn

STATE OF CALIFORNIA
COURT OF APPEAL
SECOND DISTRICT—DIVISION FOUR
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

ROBERT KINGSLEY
ASSOCIATE JUSTICE

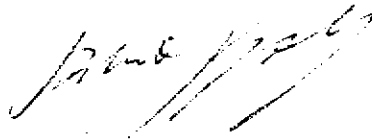
April 22, 1980

California Law Revision Commission,
Stanford Law School,
Stanford, California 94305

Gentlemen:

I have reviewed your Tentative Recommendation
relating to adoption of the Uniform Durable
Power of Attorney Act, with a minor amendment.
I concur in your recommendation.

Yours very truly,





THE UNIVERSITY OF SANTA CLARA • CALIFORNIA • 95053

SCHOOL OF LAW

April 29, 1980

Hon. Nat Sterling
California Law Revision Commission
Stanford Law School
Stanford CA 94305


Dear Nat--

Just in case you have not managed to find that earlier letter, here is the duplicate which I promised to mail.

I have been looking over the durable power of attorney act and am much impressed. In practice, I have handled this very difficult situation, usually involving an elderly person, in the usual way. That is, by making up a general power of attorney, and at the same time, making up a nomination of conservator. As you indicate, it is necessary to deal with the possibility that any person, but particularly an elderly person, will become non sui juris. It is a cumbersome procedure, involving the formalities of a will and requiring witnesses. Despite the hassle, for some reason, I never thought of writing to you to call it to your attention as a proper subject for statute. I guess that I am frozen in to patterns of gestalt logic in certain areas.

Anyway, I think that the statute, or rather, statutes, amendments and repealers, are nicely calculated to meet a troublesome problem in California law.

Best wishes,


James L. Blawie

UNIVERSITY OF CALIFORNIA, LOS ANGELES

UCLA

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SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW
LOS ANGELES, CALIFORNIA 90024

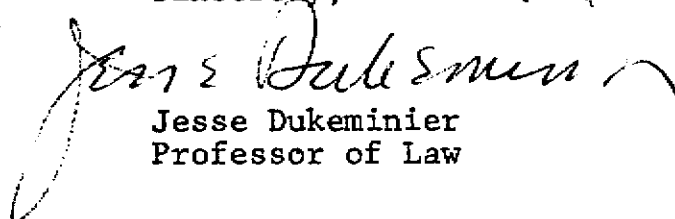
April 29, 1980

Mr. John H. DeMouilly
California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Dear Mr. DeMouilly:

I have read over the Commission's Tentative Recommendation of the Durable Power of Attorney Act. I think the act is excellent and needed, and I hope it will be enacted.

Sincerely,

A handwritten signature in cursive script, reading "Jesse Dukeminier".

Jesse Dukeminier
Professor of Law

CS

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WASHINGTON, D.C. OFFICE
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HENRY DUQUE (1904-1971)

May 14, 1980

California Law Revision Commission
Stanford Law School
Stanford, California 94305

Gentlemen:

We have received and reviewed the Tentative Recommendation relating to Uniform Durable Power of Attorney Act. We have no comment except that such legislation is needed, and we see no way in which the tentative recommendation could be improved.

Sincerely,



DAVID M. BOSKO

DMB:pre

The Bar Association of San Francisco

220 Bush Street • Twenty-First Floor • Mills Tower • San Francisco, CA 94104 • (415) 392-3960

May 30, 1980

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California Law Revision Commission
Stanford Law School
Stanford, California 94305

Re: Uniform Durable Power of Attorney Act

Gentlemen:

The Bar Association of San Francisco and its Probate and Trust Law Section approve the California Law Revision Commission's tentative recommendation to adopt the Uniform Durable Power of Attorney Act. Rather than subject persons of modest means to the expense and inconvenience of conservatorships, the durable power of attorney would enable an individual's property to be administered after his incompetency by one he trusts, the same as could be done with a living trust but without the expense of the trust's creation.

The Bar previously sponsored legislation to have the Durable Power of Attorney Act in California, but it was emasculated in the legislative processing, resulting in the almost worthless Civil Code §2307.1.

One set of opponents to the Durable Power of Attorney Act may be title companies which may be fearful of some kind of instability in conveyancy. The fear is false in view of the provision in the legislation giving presumptive validity to transfers pursuant to the Durable Power. To our knowledge, the only other opposition may come from groups which believe that adoption of the Uniform Durable Power of Attorney Act would undermine the safeguards surrounding the property of an incompetent person which are contained in the conservatorship law. If people don't want those cumbersome and expensive safeguards, they should be free to avoid them, as most people who have proper advice and sufficient means do when they create revocable inter-vivos trusts.

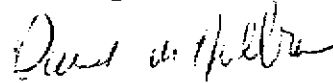
San Francisco Bar Association of San Francisco

To: California Law Revision Commission
Re: Uniform Durable Power of Attorney Act

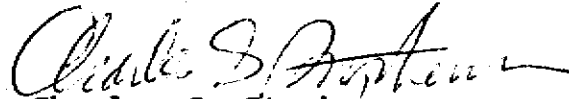
May 30, 1980
page two

The Act is a good one and would represent a major improvement in the probate law, and we support legislation to adopt the Act.

Sincerely,



David M. Heilbron
President, Bar Association
of San Francisco



Charles G. Stephenson
Chairman, Probate and Trust
Law Section, Bar Association
of San Francisco

dkr



NATIONAL
RETIRED
TEACHERS
ASSOCIATION



AMERICAN
ASSOCIATION
OF RETIRED
PERSONS

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(714) 422-5234

Frank Freeland, Member and
Chairman, Taxation Subcommittee

July 11, 1980

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road Room D-2
Palo Alto, Ca. 94306

Dear Mr. DeMouilly:

This is to inform you, and the members of your Commission, that we have reviewed the "TENTATIVE RECOMMENDATION relating to UNIFORM DURABLE POWER OF ATTORNEY ACT" dated February 1980, which we understand was developed by your Commission. In our consideration of this material, we have looked at it as being a part of the Uniform Probate Code, and it appears to us that this would be good legislation.

We know that our National Associations have long looked with favor on proposals for adoption of the Uniform Probate Code in all of the states, and we are informed that we should support provisions which are appropriate steps in the right direction, and we understand that this includes the Uniform Durable Power of Attorney Act. In our review of your RECOMMENDATION, we find no conflicts with our position on this matter.

We compliment your Commission for its progress thus far, and we thank you for keeping us on your mailing list for progress reports.

Frank Freeland

429 Dunster Dr. #2
Campbell, Ca. 95008

408 379-0782

Frank M. Hughes
President NRTA

J. Leonard Johnson
President AARP

Cyril F. Brickfield
Executive Director

National Headquarters: 1909 K Street, N.W., Washington, D.C. 20049 (202) 872-4700

ROBERT J. SCOLNIK
ATTORNEY AT LAW
100 BUSH STREET
SUITE 2000
SAN FRANCISCO, CALIFORNIA 94104
GARFIELD 1-2945

April 15, 1980

California Law Revision Commission
Stanford Law School
Sanford, CA 94305

Gentlemen:

Thank you for sending me your tentative recommendation relating to the Uniform DPA Act.

I have reviewed your analysis and recommendations, and I agree with your proposal, except for one question.

In connection with proposed C.C. 2404 (Section 5 of the Uniform DPA Act) I am concerned about why it is necessary to make the affidavit executed by the attorney in fact conclusive.

Since I have no experience in this field of law, my observations and comments may be way off base. But while such conclusive affidavit would clearly protect the attorney in fact and the third party, suppose either of them were guilty of fraud, or connivance or gross negligence. For example, there could easily be a close question about whether either of them had actual knowledge of the principal's death at the time the transaction was entered into. If an unethical attorney for reasons of personal self-interest or whatever falsely executed the affidavit in question, the estate of the principal would have no redress.

Perhaps such unjust result is forestalled by the qualification in proposed C.C. 2404 of "good faith," or the reference to "good faith" in proposed sections 2403(a) and 2403(b). But those references do not seem sufficient to guard against the potential evil I have mentioned.

I apologize if my lack of knowledge and experience in this field of law has resulted in some dumb comments on my part, but I feel obliged to call this to your attention. After all, few affidavits (by attorneys or anyone else) enjoy the lofty status of constituting conclusive evidence. A rebuttable presumption is one thing; but a conclusive presumption is something else.

As noted above, such conclusive presumption will certainly protect an innocent third party who may himself (or herself) be in good faith. But suppose the attorney in fact suffers a lapse of integrity. How is the principal or principal's estate protected?

Even if section 2404 does not preclude a fraud action against the attorney in fact, if the property is irrevocably in the hands of the third party, a judgment against the attorney in fact may be wholly insufficient.

I assume that in practice the attorney in fact contemplated by this law as a relatively simple, easy, effective and inexpensive for managing the property of the elderly or infirm (see your fn 2, page 1, and your comments in the last two paragraphs on page 6) is not necessarily a licensed attorney who is a member of the State Bar. Considering the reputation of attorneys at law these days, I would not want to argue about what types of persons are more reliable, honest, etc. But temptation has proved the undoing of many otherwise stalwart citizens.

Thus, the concept of the conclusive affidavit seems troublesome. Whether the attorney in fact did in fact have actual knowledge of the death of the principal at a certain point in time could simply be the difference between his word and someone else's word. Receipt of a phone call, a telegram, etc. could make the difference. It might hang on a few minutes one way or the other. The transaction involved could be a very substantial one, even if the premise of this law is that anyone with substantial property would have established a fancy trust and would not be utilizing the device of the DPA.

If I am way off base on this, please don't hesitate to so inform me.

Very truly yours,


Robert J. Scolnik

RJS/nj

Kenneth James Arnold
Attorney at Law
P. O. Box 14218
San Francisco, California 94114

September 13, 1980

California Law Revision Commission
Stanford Law School
Stanford, CA 94305

Re: Tentative Recommendation Relating to Uniform Durable Power
of Attorney Act

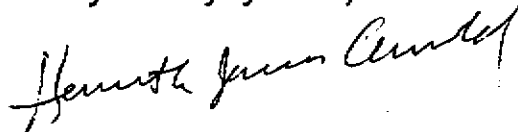
Dear People:

Please forgive my tardiness in responding. I have been
ill the past several months.

My only criticism of your tentative draft is that it
contains no provision for the posting of a bond. To whom
does this attorney in fact account? The entire emphasis
appears to be on protecting the attorney in fact (who may
be a layman) from any liability or duty to account at the
expense of the principal and his or her estate. Without
inclusion of a requirement for the posting of a bond or
undertaking, not subject to waiver unless the attorney in
fact is the sole heir of the principal, I would hope the
proposal would not be enacted.

Again, I apologize for my late reply.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kenneth James Arnold".

Kenneth James Arnold

**SUPERIOR COURT
STATE OF CALIFORNIA
COUNTY OF ALAMEDA**

ADMINISTRATION BUILDING
1221 OAK STREET
OAKLAND, CALIFORNIA 94612
874-7742

DAVID C. LEE
PROBATE COMMISSIONER

June 11, 1980

John H. DeMouilly
Executive Secretary
California Law Revision Commission
Stanford Law School
Stanford, California 94305

Dear Mr. DeMouilly:

I am writing in regard to the present study the Commission is conducting of the Durable Power of Attorney Act.

While I am aware of the support it enjoys from the State Bar and other proponents, I must speak my reservations.

In view of the care with which the Commission reviewed the conservatorship law resulting in Assemblyman McAlister's fine bill, I am sure you will appreciate my concern. The present law of conservatorship has been carefully forged so as to guarantee as nearly as possible due process protections for persons; even to the extent of requiring a voluntary conservatee to appear in court or be visited by the court investigators.

The Durable Power would undermine all of those protections.

I realize many thoughtful attorneys champion the Durable Power as a potentially valuable estate plan.

Unfortunately, my experiences in the Probate Court for the past ten years leaves me convinced that more mischief than good would come from such a change. The potential for abuse is without end. The horror stories of confidants obtaining such powers of attorney to the detriment of the grantors abound.

Indeed it seems clear to me that those who disfavor conservatorships would even more disfavor this notion.

John H. DeMouilly
Page Two
June 11, 1980

I realize mine may be a minority voice arguing against a concept presently fashionable. So be it. I am sure you will consider with open mind my sincere reservations.

Cordially



DAVID C. LEE
Probate Commissioner

DCL:g

cc: Honorable Beatrice P. Lawson, Chair, CLRC
Honorable Alister McAlister