

Second Supplement to Memorandum 84-71

Subject: Study L-500 - Durable Power of Attorney (Voting of Corporate Shares)

The Uniform Durable Power of Attorney Act (Civil Code §§ 2400-2407) was enacted in 1981 on Commission recommendation. Section 2400 contains language not found in the Uniform Act and providing: "For the purposes of this article, a durable power of attorney does not include a proxy given by a person to another person with respect to the exercise of voting rights that is governed by another statute of California." The staff drew this language to deal with a concern of the Business Law Section of the State Bar that the Durable Power of Attorney Act might override Section 705 of the Corporations Code governing the duration of proxies and the effect on a proxy of the maker becoming incompetent. Section 705 is set out in Exhibit 2.

The above-quoted language may create a problem by suggesting that one cannot give a durable power to vote shares, thus requiring a cumbersome and expensive conservatorship for that purpose. This problem is raised in a letter from attorney Louis Naiditch, a copy of which is attached as Exhibit 1. The Uniform Durable Power of Attorney Act should permit a principal to give an attorney in fact the power to vote the principal's shares either in person or by giving a proxy to a third person, consistent with the new statutory short form power of attorney which permits the attorney in fact to vote corporate shares "in person or by the granting of a proxy." Civil Code § 2462(a)(5)(H), enacted by 1984 Cal. Stats. ch. 602. The proxies themselves should be governed by the Corporations Code, not the Uniform Durable Power of Attorney Act. This would be accomplished by the clarifying amendments attached to this Supplement.

If the Commission approves these amendments, the staff will send them to the Business Law Section of the State Bar for review and comment.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

Civil Code § 2400 (amended). Definition

SEC. ____ . Section 2400 of the Civil Code is amended to read:

2400. (a) A durable power of attorney is a power of attorney by which a principal designates another his or her attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent incapacity of the principal," or "This power of attorney shall become effective upon the incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity. ~~For the purposes of this article, a durable power of attorney does not include a proxy given by a person to another person with respect to the exercise of voting rights that is governed by any other statute of California.~~

(b) A printed form of a durable power of attorney sold in this state for use by a person who does not have the advice of legal counsel shall include the following notice in 10-point bold face type:

**WARNING TO PERSON EXECUTING
THIS DOCUMENT**

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

1. This document may provide the person you designate as your attorney in fact with broad powers to dispose, sell, convey, and encumber your real and personal property.

2. These powers will exist for an indefinite period of time unless you limit their duration in this document. These powers will continue to exist notwithstanding your subsequent disability or incapacity.

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

(c) Nothing in subdivision (b) invalidates any transaction in which a third person relied in good faith upon the authority created by the durable power of attorney.

Comment. Section 2400 is amended to delete the last sentence from subdivision (a). That sentence is superseded by Section 2400.5.

[Note. The basic memorandum--Memo 84-71--proposes other amendments to Section 2400.]

Civil Code § 2400.5 (added). Proxy given by attorney in fact

SEC. ____ . Section 2400.5 is added to the Civil Code, to read:

2400.5. Where a durable power of attorney gives an attorney in fact the power to exercise voting rights, a proxy given by the attorney in fact to another to exercise the voting rights is subject to all the provisions of law applicable to such proxy and is not a durable power of attorney subject to this article.

Comment. Section 2400.5 supersedes language formerly found in subdivision (a) of Section 2400. This revision is clarifying, and more accurately states the original intent of the superseded language.

For the rules applicable to proxy voting in business corporations, see Corp. Code Section 705. For other statutes dealing with proxies, see Corp. Code §§ 178, 702, 5069, 5613, 7613, 9417, 12405, 13242; Fin. Code §§ 7654, 7655, 9251, 9253, 9309.

Corporations Code § 702 (amended). Who may vote corporate shares

SEC. ____. Section 702 of the Corporations Code is amended to read:

702. (a) Subject to subdivision (c) of Section 703, shares held by an administrator, executor, guardian, ~~conservator, or custodian, or attorney~~ in fact may be voted by such holder

either in person or by proxy, without a transfer of such shares into the holder's name; and shares standing in the name of a trustee may be voted by the trustee, either in person or by proxy, but no trustee shall be entitled to vote shares held by such trustee without a transfer of such shares into the trustee's name.

(b) Shares standing in the name of a receiver may be voted by such receiver; and shares held by or under the control of a receiver may be voted by such receiver without the transfer thereof into the receiver's name if authority to do so is contained in the order of the court by which such receiver was appointed.

(c) Subject to the provisions of Section 705 and except where otherwise agreed in writing between the parties, a shareholder whose shares are pledged shall be entitled to vote such shares until the shares have been transferred into the name of the pledgee, and thereafter the pledgee shall be entitled to vote the shares so transferred.

(d) Shares standing in the name of a minor may be voted and the corporation may treat all rights incident thereto as exercisable by the minor, in person or by proxy, whether or not the corporation has notice, actual or constructive, of the nonage, unless a guardian of the minor's property has been appointed and written notice of such appointment given to the corporation.

Comment. Section 702 is amended to add "attorney in fact" in subdivision (a). This addition is consistent with general agency law. See Civil Code §§ 2304, 2305. The addition is also consistent with Section 178 (proxy may be signed by attorney in fact).

LAW OFFICE

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August 27, 1984

California Law Revision Commission
4000 Middlefield Road
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Palo Alto, CA 94306

Gentlemen:

Will you please change your records to reflect my new address as indicated by this letterhead.

Question -- Under Durable Power Act.

Durable Power Act expressly excludes proxy covered by Corporations Code.

Invariably, in estate planning, we find substantial portfolio of securities.

Query, how best to avoid the necessity of conservatorship in connection with the voting of shares?

I take the liberty of propounding the question in view of your prior invitation to make inquiries respecting pending or proposed legislation. I assume the existing restriction is the result of the pressures or requirements of the securities market.

Have I overlooked something in current or proposed legislation?

Kindest regards,

LN:Fkm

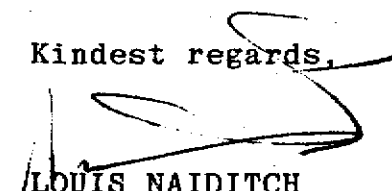

LOUIS NAIDITCH

EXHIBIT 2

Corporations Code § 705

705. (a) Every person entitled to vote shares may authorize another person or persons to act by proxy with respect to such shares. Any proxy purporting to be executed in accordance with the provisions of this division shall be presumptively valid.

(b) No proxy shall be valid after the expiration of 11 months from the date thereof unless otherwise provided in the proxy. Every proxy continues in full force and effect until revoked by the person executing it prior to the vote pursuant thereto, except as otherwise provided in this section. Such revocation may be effected by a writing delivered to the corporation stating that the proxy is revoked or by a subsequent proxy executed by the person executing the prior proxy and presented to the meeting, or as to any meeting by attendance at such meeting and voting in person by the person executing the proxy. The dates contained on the forms of proxy presumptively determine the order of execution, regardless of the postmark dates on the envelopes in which they are mailed.

(c) A proxy is not revoked by the death or incapacity of the maker unless, before the vote is counted, written notice of such death or incapacity is received by the corporation.

(d) Except when other provision shall have been made by written agreement between the parties, the recordholder of shares which such person holds as pledgee or otherwise as security or which belong to another shall issue to the pledgor or to the owner of such shares, upon demand therefor and payment of necessary expenses thereof, a proxy to vote or take other action thereon.

(e) A proxy which states that it is irrevocable is irrevocable for the period specified therein (notwithstanding subdivision (c)) when it is held by any of the following or a nominee of any of the following:

- (1) A pledgee;
- (2) A person who has purchased or agreed to purchase or holds an option to purchase the shares or a person who has sold a portion of such person's shares in the corporation to the maker of the proxy;
- (3) A creditor or creditors of the corporation or the shareholder who extended or continued credit to the corporation or the shareholder in consideration of the proxy if the proxy states that it was given in consideration of such extension or continuation of credit and the name of the person extending or continuing credit;

(4) A person who has contracted to perform services as an employee of the corporation, if a proxy is required by the contract of employment and if the proxy states that it was given in consideration of such contract of employment, the name of the employee and the period of employment contracted for; or

(5) A person designated by or under an agreement under Section 706.

(6) A beneficiary of a trust with respect to shares held by the trust.

Notwithstanding the period of irrevocability specified, the proxy becomes revocable when the pledge is redeemed, the option or agreement to purchase is terminated or the seller no longer owns any shares of the corporation or dies, the debt of the corporation or the shareholder is paid, the period of employment provided for in the contract of employment has terminated, the agreement under Section 706 has terminated, or the person ceases to be a beneficiary of the trust. In addition to the foregoing clauses (1) through (5), a proxy may be made irrevocable (notwithstanding subdivision (c)) if it is given to secure the performance of a duty or to protect a title, either legal or equitable, until the happening of events which, by its terms, discharge the obligations secured by it.

(f) A proxy may be revoked, notwithstanding a provision making it irrevocable by a transferee of shares without knowledge of the existence of the provision unless the existence of the proxy and its irrevocability appears on the certificate representing such shares.