#L-500 1/16/85

First Supplement to Memorandum 85-8

Subject: Study L-500 - Durable Powers of Attorney

We have just received comments from the California Bankers Association relating to durable powers of attorney. Although there is little time before the meeting, we are sending you the comments now so you can review them before the meeting. The comments are attached as Exhibit 1.

The comments are not directed toward the changes proposed in the Commission's Tentative Recommendation Relating to Durable Powers of Attorney. Rather the comments relate to matters not dealt with in the Tentative Recommendation.

Comprehensive revision of law of agency. The California Bankers Association believes that the entire law of agency should be revised. The California provisions codifying the law of agency were enacted in 1872 and have remained largely unchanged since then. The staff believes that serious consideration should be given to undertaking a study to draft a modern, comprehensive agency law. However, the Commission is not now authorized to make this study and we are not in a position to undertake new projects at this time. We are now engaged in drafting a new Probate Code and there is no time or resources available to work on other projects. Accordingly, the staff recommends that this suggestion be deferred for consideration when the Probate Code project is completed. At that time, the Commission can review the various deferred matters and establish priorities.

Court supervision of attorney in fact under durable power of attorney. The California Bankers Association is concerned that the fiduciary powers granted to a durable power of attorney holder might be misused. The Association suggests that the fiduciary responsibility of the power holder should be codified and that limitations on the authority of the attorney in fact be provided by statute in some circumstances.

Civil Code Sections 2410-2423 provides a procedure for obtaining a court review of the acts or proposed acts of the attorney in fact under a power of attorney, durable or not, or for a court determination whether the attorney in fact violated or is unfit to perform the fiduciary duties under the power of attorney. This procedure was thought to be

sufficient at the time the durable power of attorney statute was enacted. The procedure is comparable to that provided for instructing or removing a trustee under Probate Code Sections 1138.1-1138.6.

California has enacted the Uniform Durable Power of Attorney Act. This act has been enacted in approximately 45 states, and uniformity is of great importance in view of the mobility of our population and the fact that a person may own property in more than one state. Limiting the authority under the Uniform Act would be a matter that would require careful background study. Moreover, the changes suggested by the California Bankers Association are likely to prove to be controversial, since they run counter to those who support the concept of the durable power as an alternative to a court supervised conservatorship.

The staff believes that the suggestions may merit study when the Probate Code project has been completed. At that time, the Commission can review this matter and determine whether it wishes to give this study a priority.

Protection of third persons who rely on durable power of attorney. The California Bankers Association suggests that the following new provision be added to the durable power of attorney statute:

> Any person or entity shall be entitled to act in reliance upon a durable power of attorney which appears on its fact to be valid and which is presented to the person or entity by the attorney in fact named in the durable power of attorney. Such person or entity should have no liability to the principal or to any other person for so acting.

The Uniform Durable Power of Attorney Act does not include a comparable provision. The only provisions of the Uniform Act that protect third persons acting in reliance upon the durable power of attorney are Civil Code Sections 2403 and 2404, which provide:

> 2403. (a) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.
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> (b) The incapacity of a principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his or her successors in interest.

> 2404. As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he or she did not have at the time of the exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

These sections do not protect the third person who acts in reliance upon a durable power of attorney against a claim that it was not executed by the principal (that it is a forgery) or against a claim that the principal was not competent to execute the durable power at the time it was executed. The third person may be unwilling to act in reliance on the durable power absent some protection against such claims.

The Uniform Act does not require that the durable power of attorney be acknowledged before a notary public. Nor does the Uniform Act require that there be any witnesses to the execution of the durable power of attorney by the principal. The California Statutory Short Form Power of Attorney which governs property matters requires two witnesses and acknowledgment before a notary public. Each witness must sign the following declaration:

> I declare under penalty of perjury under the laws of California that the person who signed or acknowledged this document is personally known to me (or proved to me on the basis of convincing evidence) to be the principal, that the principal signed or acknowledged this power of attorney in my presence, and that the principal appears to be of sound mind and under no duress, fraud, or undue influence.

The certificate of acknowledgment of the notary public is in the following form:

> On this _____ day of _____, in the year _____, before me, (name of notary) personally appeared (name of principal), personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument and acknowledged that he or she executed it.

If a Statutory Short Form Power of Attorney is used, the staff believes that the third person should be protected from liability if the third person relies in good faith on the witnesses and acknowledgment to establish that the instrument was actually executed by the principal and

that the principal had the capacity to execute the document at the time it was executed. We would add a new section to the proposed legislation in the tentative recommendation to accomplish this:

> 2457. Any person who acts in good faith reliance upon a statutory short form durable power of attorney which appears on its fact to be valid and which is presented to the person by the attorney in fact named in the statutory short form durable power of attorney is not liable to the principal or to any other person for so acting.

A durable power of attorney affecting real property ordinarily is acknowledged before a notary so that it can be recorded in the county property records. Should a durable power of attorney that is acknowledged but does not have two witnesses, be given the same effect as would be given by the provision recommended above? We are advised by representatives of the notary publics that the notary does not have any responsibility to refuse to accept an acknowledgment from a person who appears to lack the capacity to execute the instrument. Nevertheless, the acknowledgment does assure that the instrument is executed by the principal, and the staff recommends that the provision recommended above also apply to such a power of attorney so that it will be accepted and acted on by third persons. Absent such protection, there will be a need to use the statutory short form durable power of attorney instead of the tailor made, attorney drafted durable power of attorney. The staff recommends against making the recommended provision apply to a durable power of attorney that has no witnesses and no acknowledgment before a notary public.

Giving this recommended protection to third parties is consistent with other provisions of law. For example, the effect of the affidavit provided under Section 630 of the Probate Code to secure the delivery of transfer of personal property of a decedent is specified in Section 631 of the Probate Code, which provides in part:

> 631. The receipt of such affiant or affiants shall constitute sufficient acquittance for any payment of money or delivery of property made pursuant to the provisions of this article and shall fully discharge such person, representative, corporation, officer or body from any further liability with reference thereto, without the necessity of inquiring into the truth of any of the facts stated in the affidavit. . . .

The effect of a transfer (without probate or a court order) by a surviving spouse of community or quasi-community real property 40 days after the death of the other spouse is specified in Section 649.2:

> The right, title, and interest of any grantee, purchaser, encumbrancer, or lessee shall be as free of rights of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving spouse.

Similar protection is afforded to one acting in good faith upon instructions of a custodian under the California Uniform Transfers to Minors Act. See Probate Code § 3916. See also Section 3402 (effect of written receipt of parent to whom property belonging to child is delivered). And see Probate Code Section 3720 ("Any person who acts in reliance upon the power of attorney [of an absentee as defined in Probate Code Section 1403] when accompanied by a copy of the certificate of missing status is not liable for relying or acting upon the power of attorney.").

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT 1

# DURABLE POWERS OF ATTORNEY

The California Bankers Association believes the entire law of agency should be redrafted. Several problems of a general nature are identified below. Additionally, specific problems in the draft language of the Tentative Recommendations are listed.

## A. DRAFTING CONCERNS

1. A total revision of the agency provisions in the Code is needed. A complete section detailing the powers of attorney provisions should be enacted. The piece-meal provisions inserted into the agency law do not clearly establish the rights and duties of the power holder and third persons.

2. California has only a durable power of attorney statute; there is no power of attorney statute. Confusion is possible in relation to the general agency sections.

3. Some of the existing sections in the Durable Power Act apply to non-durable powers (but apparently not to agencies in general). These are not clearly defined.

4. Provisions that apply to non-durable powers should not be added to the Durable Power of Attorney statute itself.

5. There should be a separate Power of Attorney Statute, distinct from the agency sections.

## B. MAJOR CONCERNS WITH SUBSTANTIVE PROVISIONS:

1. The CBA is very concerned that fiduciary powers granted to a Durable Power of Attorney holder might be misused. An example would be the ability to change the donor's estate plan benefiting the power holder.

2. The fiduciary responsibility of the power holder should be codified, to prevent that person from an essentially self interested act.

3. The provisions in the Guardianship and Conservatorship statute require the approval of the Probate Court prior to a will or trust being drafted for the ward or conservatee. It appears appropriate that this safeguard also be inserted in the Durable Power of Attorney Act.

4. The donor's estate plan should only be amendable by the power holder if the instrument specifies that the power holder has this right. Such amendment should occur only after the incapacity of the Donor.

5. Alternatively, the ability of the power holder to amend an estate plan should only occur if the courts so approve. The Substitution of Judgment provisions under §2412 could be utilized in this situation.

6. Section 2304 should be amended so that the agent/power holder cannot act as fiduciary for a third party. The Donor who acts as fiduciary for an individual should not have the power to appoint another person as that individual's trustee. See Civil Code §2281 (Vacation of Office) with respect to this question.

7. Third persons who act in reliance of a power holder's direction should be exculpated.

8. The following is suggested as amended language for §2401:

CIVIL CODE DURABLE POWER OF ATTORNEY

**Section 2401** Effect of acts by attorney in fact during incapacity of principal.

(a) All acts done by an attorney in fact pursuant to a Durable Power of Attorney during any period of incapacity of the principal have the same affect and inure to the benefit of and bind to the principal and his or her successors in interest as if the principal were competent.

(b) Any person or entity shall be entitled to act in reliance upon a Durable Power of Attorney which appears on its face to be valid and which is presented to the person or entity by the attorney in fact named in the Durable Power of Attorney. Such person or entity should have no liability to the principal or to any other person for so acting.

(c) Notwithstanding subdivision (a), the attorney in fact shall have no power to perform any of the following acts unless such act is authorized by a court under petition pursuant to §2412:

(1) Execute a will, codicil, trust agreement or property agreement on behalf of the principal;

(2) Exercise any rights or powers reserved to the principal under a trust agreement or property agreement;

(3) Alter, amend or revoke any will, codicil, trust agreement or property agreement previously executed by the principal;

(4) Change the beneficiary designation selected by the principal in connection with any insurance or annuity policy, employee benefit plan, individual retirement account or bank account.

9. The California Bankers Association recommends that the provisions of subdivision (b) above apply to all Powers of Attorney, not exclusively to Durable Powers of Attorney. There should be some protection for the person acting in reliance upon the direction of a person holding a Power of Attorney.