

Memorandum 89-87

Subject: Study L-3024 - Springing Powers of Attorney

A durable power of attorney may be immediately effective or may be drafted as a "springing" power to become effective only when the principal becomes incapacitated or upon the occurrence of some other event. The California Uniform Durable Power of Attorney Act recognizes the validity of a "springing" durable power of attorney, specifically one that becomes effective upon the incapacity of the principal. Civil Code § 2400. However, the statute does not further implement springing powers, nor does the statute mention other contingencies that might trigger a springing power.

The problem is that a springing power may turn out to be useless as an alternative to judicial proceedings if third persons are unwilling to accept that the triggering event or condition has occurred.

In recent years, recognition of this problem has spurred efforts to provide some statutory guidance in several jurisdictions. On recommendation of the New York Law Revision Commission, the New York Legislature enacted a statute in 1988 recognizing springing powers and making them effective. Missouri has recently enacted a substantial revision of its durable power of attorney statute to deal with this and other problems. In addition, the Law Reform Commission of British Columbia has just circulated a working paper on this subject. Inspired by these efforts, the staff proposes some revisions to improve the operation of springing powers of attorney in the attached draft tentative recommendation.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

New York General Obligations Law

§ 5-1602. Powers of attorney effective at a future time or upon the occurrence of a contingency specified in the instrument

1. An instrument granting a power of attorney may limit such power to take effect at a specified future time.

2. An instrument granting a power of attorney may limit such power to take effect upon the occurrence of a specified contingency, including but not limited to the incapacity of the principal, provided that the instrument requires that a person or persons named in the instrument declare, in writing, that such contingency has occurred. A power limited as provided in the preceding sentence shall take effect upon the written declaration of the person or persons named in the instrument that the specified contingency has occurred, without regard to whether the specified contingency has occurred.

3. The disability or incompetence of a principal shall not revoke or terminate the authority of an attorney-in-fact who acts under a power of attorney executed in writing by the principal in accordance with subdivision one or two if the instrument contains the words "This power of attorney shall not be affected by the disability or incompetence of the principal," or words of similar import showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's disability or incompetence.

4. The powers delegable to an attorney-in-fact under this section shall be the same as those delegable under sections 5-1501 through 5-1601 of this article.

[N.Y. Gen. Oblig. L. § 5-1602 (McKinney 1989)]

British Columbia Law Reform Commission Draft

Springing Power of Attorney

7.1 (1) A power of attorney may stipulate that it takes effect at a specified future time.

(2) A power of attorney may stipulate that it takes effect on the occurrence of a specified event or contingency including, but not limited to, the subsequent mental infirmity of the donor.

(3) A power of attorney described in subsection (2) may name one or more persons on whose written declaration the specified contingency or event is conclusively deemed to have occurred for the purpose of bringing the power of attorney into effect.

(4) A person referred to in subsection (3) may be the attorney appointed in the instrument.

[B.C. L. Ref. Comm'n, *Working Paper on the Enduring Power of Attorney: Fine-Tuning the Concept* 28 (Working Paper No. 62, July 1989)]

#L-3024

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09/25/89

TENTATIVE RECOMMENDATION
RELATING TO
SPRINGING POWERS OF ATTORNEY

The durable power of attorney¹ is a popular means for individuals to provide for the care of their property and management of their financial affairs should they become incapacitated, without incurring the expense and delay of formal conservatorship proceedings or setting up a trust. The Law Revision Commission has previously recommended legislation to make durable powers of attorney more readily available through use of a statutory short-form power of attorney² and to make the durable power of attorney more effective by protecting third persons who rely on the power in good faith.³ Recently attention has been drawn to the need to provide more guidance as to "springing" powers of attorney — powers of attorney that become effective at a future time specified in the instrument or on the occurrence of a particular event or contingency specified in the instrument.⁴

1. Civil Code §§ 2400-2423. See *Recommendation Relating to Uniform Durable Power of Attorney Act*, 15 Cal. L. Revision Comm'n Reports 351 (1980). For additional legislative history, see 16 Cal. L. Revision Comm'n Reports 25, 43-46 (1982).

2. Civil Code §§ 2450-2473. See *Recommendation Relating to Statutory Forms for Durable Power of Attorney*, 17 Cal. L. Revision Comm'n Reports 701 (1984). For additional legislative history, see 18 Cal. L. Revision Comm'n Reports 18-19, 45-47 (1986).

3. Civil Code §§ 2510-2513. See *Recommendation Relating to Durable Powers of Attorney*, 18 Cal. L. Revision Comm'n Reports 305 (1986). For additional legislative history, see 18 Cal. L. Revision Comm'n Reports 216-17, 379-82 (1986).

4. See generally N.Y. L. Revision Comm'n, *Recommendation Relating to Springing Durable Powers of Attorney*, Report for 1988, at 230-45 (Leg. Doc. No. 65, 1988); B.C. L. Ref. Comm'n, *Working Paper on the Enduring Power of Attorney: Fine-Tuning the Concept* 28 (Working Paper No. 62, July 1989); Montgomery & Wright, *Durable powers of Attorney for Property Management*, in 1989 California Durable Power of Attorney Handbook § 2.6, at 30-32, § 2.96, at 82 (Cal. Cont. Ed. Bar 1989).

The California Uniform Durable Power of Attorney Act recognizes a springing power of attorney that becomes effective upon the incapacity of the principal,⁵ but otherwise California law is silent on the matter.⁶ A well-drawn springing power of attorney will provide for an appropriate means of determining whether the triggering event or contingency has occurred, such as by the certification of the principal's physician, an attending physician, or the principal's attorney, or a trusted friend or relative.⁷ However, without appropriate statutory guidance, even the well-drawn instrument may be inadequate since third persons may not be willing to rely on its terms or may be unwilling to make the effort to interpret the instrument to see whether its terms have been satisfied. Eventually judicial proceedings to determine the principal's incapacity may be required, thus incurring the delay, expense, and potential embarrassment that the springing power sought to avoid.

The need for springing powers of attorney is evident, since a person may be unwilling to grant an immediately effective power. While there are other options, they may not be as practical or desirable as the springing power. A person who is wary of granting an immediately effective power of attorney may retain the instrument, or leave it in the possession of his or her attorney, friend, or relative with instructions to deliver it to the attorney in fact when the time is ripe. This arrangement may work well enough in many situations, but there is no reason to force people into selecting this arrangement rather than a relatively simple springing power of attorney. In any event, springing powers are being used now in preference to other arrangements and should be made effective.

5. Civil Code § 2400.

6. It should also be noted that a springing power of attorney need not be contingent on the incapacity of the principal; there are other appropriate triggering events such as a future certain date or the failure to return from a trip. Nor is it necessary that a springing power of attorney be durable, if it is not contingent on the incapacity of the principal.

7. See Montgomery & Wright, *Durable powers of Attorney for Property Management*, in 1989 California Durable Power of Attorney Handbook § 2.6, at 30-32 (Cal. Cont. Ed. Bar 1989).

The Law Revision Commission recommends a simple statutory validation of springing powers of attorney that would protect third persons who act in reliance on a written declaration that the power is effective. A springing power intended to take advantage of the statute would designate a person or persons who have the power to execute a written declaration under penalty of perjury that the specified event or contingency triggering the springing power has occurred. The person named as attorney in fact could be designated as the person to determine the triggering event either alone or together with other persons. A third person would be able to rely on the declaration of the designated persons without any liability and without regard to whether the triggering event or contingency has actually occurred. The statutory provision is simple and easy for drafters to invoke. It would not supplant any different procedure for determining the triggering event spelled out in the instrument.

The new statute should apply retroactively to powers of attorney drafted before its effective date if they fall within its terms by designating a person or persons to determine whether the triggering event has occurred. Application of the new statute to existing powers of attorney would meet the expectations of principals and would not impair any vested rights.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Section 2414 to the Civil Code, relating to powers of attorney.

The people of the State of California do enact as follows:

Civil Code § 2414. Springing power of attorney

SECTION 1. Section 2414 is added to the Civil Code, to read:

2414. (a) As used in this section:

(1) "Attorney in fact", "power of attorney", and "principal" have the meanings provided these terms in Section 2410.

(2) "Springing power of attorney" means a power of attorney stating that it becomes effective at a specified future time or on the occurrence of a specified event or contingency including, but not limited to, the subsequent incapacity of the principal. A springing power of attorney may be a durable power of attorney or a nondurable power of attorney.

(b) In a springing power of attorney, the principal may designate one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively that the specified event or contingency has occurred. The principal may designate the attorney in fact or another person to perform this function, either alone or jointly with other persons.

(c) A springing power of attorney containing the designation described in subdivision (b) becomes effective when the person or persons designated in the power of attorney execute a written declaration under penalty of perjury that the specified event or contingency has occurred, regardless of whether the specified event or contingency has actually occurred, and any person may act in reliance on the written declaration without liability to the principal or to any other person.

(d) This section applies to a power of attorney whether executed before, on, or after January 1, 1991, if the power of attorney contains the designation described in subdivision (b).

Comment. Section 2414 is a new provision intended to make springing powers of attorney more effective by providing a mechanism for conclusively determining that the trigger event or contingency has occurred. Subdivision (b) makes clear that the principal may give the attorney in fact (or one or more other persons) the power to determine by written declaration under penalty of perjury that the event or contingency specified in the springing power of attorney has occurred so that the power of attorney is effective. This section does not apply to springing powers of attorney containing different procedures for determining whether the triggering event or contingency has occurred. This section applies only where the terms of subdivision (b) are satisfied.

Subdivision (c) makes clear that the written declaration of the persons designated in the power of attorney is conclusive, even though it may turn out that the event or contingency did not occur, or that circumstances have now returned to normal. The purpose of the conclusive written declaration is to permit other persons to act in reliance on the written declaration without liability.

A springing power of attorney may or may not be a durable power of attorney. A springing power that takes effect on the occurrence of a contingency other than the incapacity of the principal, such as, for

example, the principal's failure to return from a vacation or business trip by a certain date, need not be a durable power of attorney. However, a springing power of attorney that takes effect upon the subsequent incapacity of the principal is necessarily a durable power of attorney, and the other rules concerning durable powers of attorney are applicable. See, e.g., Sections 2400-2407 (Uniform Durable Power of Attorney Act).

Subdivision (d) makes clear that this section applies to powers of attorney executed before the operative date of this section if they contain the designation provided in subdivision (b).