

Second Supplement to Memorandum 89-103

Subject: Study L-3019 - Uniform Statutory Form Power of Attorney

The Commission has received three additional letters commenting on the Tentative Recommendation Relating to the Uniform Statutory Form Power of Attorney Act.

Cheryl Templeton (letter not reproduced) approves the Tentative Recommendation: "Good idea. The new form is much easier for a client to follow and at least provides a lead in to the Civil Code provisions."

Arnold F. Williams (Exhibit 51 attached) reports that financial institutions and brokerage houses will refuse to honor a power of attorney unless it is on their own form. He suggests that the court be authorized to award attorney fees for failure without good cause to honor a power of attorney if the agent must enforce the power by instituting court action. This is the proposal the staff made in Memorandum 89-1-3 (pages 7-9. However, the Williams suggestion apparently would go further than the staff suggestion which was limited to enforcement of the statutory form power of attorney. We would be reluctant to impose on a third party the obligation to read and interpret a detailed power of attorney in each case where one is presented to the third party.

Peter L. Muhs (Exhibit 52 attached) concurs "in the desire to have a uniform (and hopefully less complicated) California form, and to modify the Uniform Act to provide for joint or several action by co-agents." He makes some suggestions concerning the Tentative Recommendation which are discussed below.

Muhs suggests that the language in the Comment to Section 2475 be added as an additional option, perhaps titled "Further Grant of All Powers Possible" with a space to initial such a grant. This suggestion has some appeal, since there undoubtedly are many persons who will grant all possible powers. However, the staff recommends against adoption of the suggestion, since it would cause the form to depart

significantly from the uniform act form. An informed user of the uniform act form can add a specially drafted provision to grant such broad powers if that is desired. The Comment to Section 2475 (first indented quote on page 17) contains a draft of a provision that would grant the broadest possible powers. In addition, the existing statutory form (statute will be repealed but form can still be used) includes the option suggested by Mr. Muhs.

Muhs further suggestions:

Along similar lines, and perhaps subject to some restraint with respect to agents dealing with themselves or discharging an obligation of support (in order to be sensitive to possible problems under Internal Revenue Code §2041 relating to general powers of appointment), it would be helpful to have a form addendum of "Supplemental Estate Planning Powers (Broad Form)."

The staff recommends against an attempt to draft a form addendum of "Supplemental Estate Planning Powers (Broad Form)." We do not want to change the uniform act form itself. Suggested language to include in the "Special Instructions" portion of the form to broaden the powers is found in the Comment to Section 2475. If a form addendum is to be drafted, we would prefer that it be drafted by the Continuing Education of the Bar or other private group serving members of the bar. Accordingly, the staff recommends against any change in the Recommendation as a result of this comment.

Muhs also notes:

that the broad estate planning (gift) matters referred to in the comment to §2475 do not include any discussion of the agent making disclaimers. I would suggest that the comment be revised to reference this, since doing so would serve as an alert to those who might otherwise believe they have the power to make a disclaimer without extra "addendum" authority under a power of attorney under the Uniform Statutory form.

Section 2493(a) permits a disclaimer of a share or payment the principal is, may become, or claims to be entitled, as a beneficiary. We think this covers the matter that concerns Muhs.

Finally Muhs raises a question concerning the meaning of the language in a provision of the Uniform Act:

I wonder if the language in §2490(H), which would appear to allow the attorney-in-fact to borrow funds at margin, is interpreted by stockbrokers to allow for margin debt. I am aware that brokers often are sensitive to a fiduciary

creating a margin account. Subject to deductibility concerns, margin debt is often the cheapest and most readily available source of liquidity through borrowing. In situations involving trusts, some brokers have preferred to see the word "margin" in the trust powers rather than merely the authorization to pledge trust property as security for borrowing.

The staff recommends against revising the language of the uniform act provision. We do not want to deviate from the uniform act unless absolutely necessary. The uniform act provision appears to cover margin accounts. But we believe that brokerage houses will adopt an interpretation of the uniform act provision and will apply it throughout the country, probably without regard to local additions to the form.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

NOV 06 1989

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OF COUNSEL

November 2, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: Acceptance and Enforcement of powers of attorney

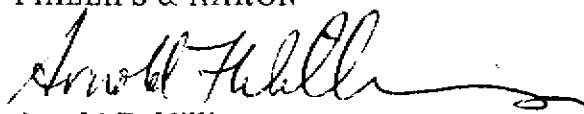
Gentlemen:

With regard to the Powers of Attorney provided for under the Civil Code, I submit to you that the legislative intent in Section 2423 cannot be carried through with regard to the submission of these powers of attorney to the various financial institutions. Banks, brokerage houses, and other financial institutions have generally refused to accept a statutory power of attorney as sufficient authorization to permit an agent to act on behalf of a principal. Generally, these institutions will require that the principal sign a power of attorney prepared by them. Because of the nature of the power of attorney, the principal does not always have the capacity to execute an additional, special power. In such circumstances, financial institutions refuse to act, despite the statutory immunity they enjoy for reliance upon a power of attorney.

I would suggest that you modify the statute to provide that if a third party refuses to act in accordance with the power of attorney without good cause and if the agent must enforce the power by instituting court action, the agent's attorneys fees may be awarded by the court.

I am very interested in seeing any legislation you propose along these lines. Thank you for your consideration.

Very truly yours,

DOWLING, MAGARIAN,
PHILLIPS & AARON
Arnold F. Williams

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November 3, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739Re: Probate Code §6402.5
Uniform Statutory Form Power of Attorney Act

Ladies and Gentlemen:

Somewhat belatedly, I am responding to your proposed recommendations captioned above. The repeal of in-law inheritance under §6402.5 appears desirable, provided that the repeal does not bring into question the rights under other statutes, including the right for such heirs to be takers of last resort in preference to an escheat.

With respect to the tentative recommendation on Uniform Statutory Form Power of Attorney Act, I concur in the desire to have a uniform (and hopefully less complicated) California form, and to modify the Uniform Act to provide for joint or several action by co-agents.

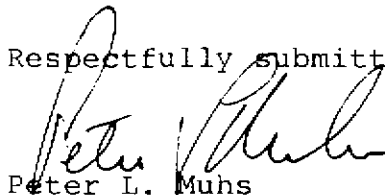
Because the broadest form powers of attorney will include this language anyway, I would prefer to see the language in the comment to §2475 added as an additional option, perhaps titled "Further Grant of All Powers Possible" with a space to initial either at the margin or within line (N). Along similar lines, and perhaps subject to some restraint with respect to agents dealing with themselves or discharging an obligation of support (in order to be sensitive to possible problems under Internal Revenue Code §2041 relating to general powers of appointment), it would be helpful to have a form addendum of "Supplemental Estate Planning Powers (Broad Form)." I also note that the broader estate planning (gift) matters referred to in the comment to §2475 do not include any discussion of the agent making disclaimers. I would suggest that the comment be revised to reference this, since doing so would serve as an alert to those who might otherwise believe they have the power to make a disclaimer without extra "addendum" authority under a power of attorney under the Uniform Statutory form.

I wonder if the language in §2490(H), which would appear to allow the attorney-in-fact to borrow funds at margin, is interpreted

by stockbrokers to allow for margin debt. I am aware that brokers often are sensitive to a fiduciary creating a margin account. Subject to deductibility concerns, margin debt is often the cheapest and most readily available source of liquidity through borrowing. In situations involving trusts, some brokers have preferred to see the word "margin" in the trust powers rather than merely the authorization to pledge trust property as security for borrowing.

By separate letter, I am responding to the tentative recommendations of September 1989 relating to safe deposit box access, miscellaneous code revisions, and notice to creditors.

Respectfully submitted,



Peter L. Muhs

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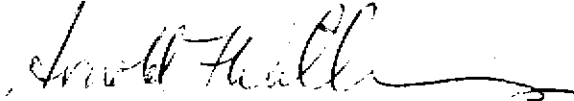
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