

Memorandum 90-140

Subject: Study L-3046 - Recognition of Agent's Authority Under
Statutory Form Power of Attorney (Comments on Tentative
Recommendation)

This memorandum reviews comments we have received on the *Tentative Recommendation Relating to Recognition of Agent's Authority Under Statutory Form Power of Attorney* [September 1990]. (A copy of the tentative recommendation is attached.) Twenty-three letters were received in response to this tentative recommendation.

Almost all of the commentators approved the proposal (21 out of 23), though several would broaden its scope, as discussed below. One writer opposes it.

Favorable Comments

The following persons approved the tentative recommendation, some with additional comments and suggestions discussed below:

EX#

1. Wilbur L. Coates, Poway
2. Harry P. Drabkin, Deputy County Counsel, Modesto
3. Dan L. Kirby, Office of General Counsel, Western Surety
Co., Sioux Falls, SD
4. Alvin G. Buchignani, San Francisco
5. Jerome Sapiro, San Francisco
6. Ruth E. Ratzlaff, Fresno
7. William J. Keeler, Jr., Fresno
8. Richard E. Llewellyn, II, Los Angeles
9. Thomas R. Thurmond, Vacaville
10. Robert J. Berton, San Diego
11. Ernest Rusconi, Morgan Hill
12. Linda A. Moody, Mill Valley
13. Henry Angerbauer, Concord
16. Ruth A. Phelps, Pasadena
17. Michael J. Anderson, Sacramento
18. Alan D. Bonapart, San Francisco
19. Frank M. Swirles, Rancho Santa Fe
20. Gregory Wilcox, Oakland
21. David W. Knapp, Sr., San Jose
22. Irwin D. Goldring, Los Angeles
23. Stuart D. Zimring, North Hollywood

Expand Proposal

Six of the commentators, while approving of the tentative recommendation, think it is too limited and should be expanded to cover agents under other types of powers of attorney.

Harry P. Drabkin (Exhibit 2, at p. 2) does not believe that the recommendation "goes far enough to meet the needs of ordinary people."

If one is wealthy, has easy access to attorneys, can pay the cost of litigation, and wishes to use the statutory form, this recommendation fits the bill. It does not answer the problems of persons who do not use the statutory form, but craft their own properly drafted power of attorney. It does not meet the needs of those persons who cannot afford to have an attorney bring an action. It does not meet the needs of those people whose assets do not warrant legal action, but are still important to them

Similarly, Alvin G. Buchignani (Exhibit 4, at p. 5) writes that the recommendation "needs to be broader" and apply to any other power of attorney:

At the very least, an attorney-drafted power that includes the same language, together with other language, that is contained in the statutory form should have the benefit of the section. Otherwise, attorneys will need to prepare both a statutory form power, and also a nonstatutory form power at the same time, if they wish to achieve the benefits of both.

Four others also suggest that the provision should apply to attorney-drawn powers of attorney: Jerome Sapiro (Exhibit 5, at p. 6), Michael J. Anderson (Exhibit 17, at p. 22), Gregory Wilcox (Exhibit 20, at p. 25), Stuart D. Zimring (Exhibit 23, at p. 28). Mr. Wilcox argues that the limited scope of the recommendation "makes attorney-drafted powers of attorney into second-class documents." Mr. Zimring writes that he never uses the statutory form.

This issue was considered at previous meetings. (See Memorandums 90-84 & 90-119.) A broader provision had been included in SB 1777 when it was before the 1990 Legislature, but was deleted from the bill due to objections from the California Bankers Association and the California Land Title Association. The tentative recommendation was drafted in light of this legislative history, to address a limited

issue arising under the newly enacted Uniform Statutory Form Power of Attorney Act (1990 Cal. Stat. ch. 986, operative Jan. 1, 1991). The issue was presented to the Commission in the following terms in Memorandum 90-119:

The issue of recognition of the agent's authority under a statutory form power of attorney needs to be resolved in the upcoming legislative session. While we will be considering the same general issue in the course of preparing the comprehensive power of attorney statute, the staff believes that the statutory form power of attorney should be treated separately. The statutory form is simple, short, and easy to understand, so that a stricter duty may be imposed on third persons to accept the exercise of the power. A third person may have a legitimate complaint that it is too burdensome to review and interpret a lengthy, custom-made power of attorney, but this is not the case with the statutory form. Ultimately, the Commission may decide to apply a general rule to both statutory forms and other powers of attorney, but until that decision is made, a provision directed to the statutory form is needed and appropriate.

The legislative history of the provision in SB 1777 has certainly played a role in the approach taken in the tentative recommendation and in its limited scope. This, of course, is background that the commentators did not necessarily know. But we also believe the point made in the quoted paragraph is a valid one, regardless of the experience with SB 1777. There is a limit to the risk that may be imposed on third persons. The liability for attorney's fees is normally considered an important incentive to compliance and is here justified because of the assessment that the task of determining the validity and scope of a statutory form power of attorney is relatively simple.

We remain sensitive to the point raised. The same problem is considered in connection with the current study of the comprehensive revision of power of attorney statutes. (See Memorandum 90-85, at 23-24; draft Sections 4200-4210 in staff draft attached to Memorandum 90-122 on this meeting's agenda.) The present perspective remains, however, that the distinction between simple statutory forms and hand-crafted powers of attorney is a valid one.

What of the argument that the tentative recommendation makes attorney-drawn or individually-drawn powers of attorney into second

class documents? Or that attorneys will need to prepare both a statutory form and a nonstatutory form at the same time?

Should the proposal be extended to apply to attorney-drafted powers (or nonattorney-drafted powers) that contain the same language, as suggested by Mr. Buchignani? (See Exhibit 4, at p. 5.) Once again, we are back to considering the burden placed on third persons to interpret language. By the "same" language, would we mean the identical language, or substantially similar language, or what? The Nebraska Short Form Act, applicable to the interpretation of language in any document in Nebraska, deals with these issues in a unique way. This statute categorizes the effect of different types of language, depending on (1) whether it is "identical" to the "exact" words of a "short form expression" and "not in any other formulation," or (2) whether it is "in substantially the same or more similar than dissimilar formulation of words." While having a certain theoretical appeal, we are uncertain that this sort of approach would be workable. The Nebraska approach was mentioned in earlier materials, but not recommended for Commission consideration in connection with this tentative recommendation. Even if we adopted rules like those in the Nebraska statute, would they provide third persons with the needed certainty to justify the imposition of liability for attorney's fees for failure to judge whether the language of a hand-drawn power is "more similar than not to" or "substantially the same as" or even "identical and not in any other formulation than" the statutory form language. In sum, the staff is sympathetic to the point made, having made it ourselves, but have not yet discovered a practical way to resolve the issues raised.

Does the tentative recommendation favor wealthy principals and those who can afford to hire attorneys? Assuming that it does, should the proposal be abandoned? Mr. Drabkin makes a good point that applies to any situation where legal action may be required to compel compliance with a statutory rule. (See Exhibit 2, at p. 2.) But it seems to the staff that the liability for attorney's fees under the tentative recommendation tends to equalize the positions of rich and poor, rather than discriminate against the poor. Nor do we see how we can compensate for the differential in the stakes involved under

different powers of attorney. This factor is not created by the tentative recommendation. Short of punitive damages or treble damages (which would also require litigation and employment of attorneys), the staff is unclear on what incentives would be needed to satisfy Mr. Drabkin's argument. His letter does not suggest any solution to the problems he identifies. In addition, it should be noted that the statutory form is there for the benefit of everyone, regardless of financial condition, and may be used without hiring a lawyer.

Cumulative Remedy

Mr. Drabkin is concerned that providing a right of action under the statutory form may be interpreted as a limitation on any other rights of action. (See Exhibit 2, at p. 2.) He suggests that the statute be revised to make clear that Section 2480.5 does not affect any other remedy. The staff has no objection to adding such a provision, although perhaps it would be sufficient to put a statement in the Comment to Section 2480.5. Section 2420(a) provides a similar rule as to the remedies provided in Sections 2410-2423.

A subdivision (e) should be added to Section 2480.5 reading as follows: "(e) The remedy provided in this section is cumulative and nonexclusive."

Procedure

Mr. Drabkin also suggests that the proposal should

delineate the type of action and the court in which such action should take place, such as an order to show cause, returnable in a stated period of time, which could be filed in a court of the appropriate jurisdiction concerning the value of the property in the hands of the third person. If that value is not ascertainable, in whatever court the agent could reasonably believe would have such jurisdiction.

(See Exhibit 2, at pp. 2-3.) We had assumed that it was sufficient to rely on Civil Code Section 2480 which incorporates Civil Code Sections 2410-2423. These sections provide a procedure in the superior court of the county of the agent's residence or, if a nonresident, in any county in the state. Section 2417 provides for a hearing on 30 days' notice. Where the provisions of this article do not apply, Section 2417(e)

incorporates the decedents' estates procedures in the Probate Code. Section 2480 and the provisions it incorporates were not set out in the tentative recommendation, so commentators may not have been aware of the overall structure.

The staff believes that, although somewhat convoluted, the statute is adequate. However, it should be noted that the section listing grounds for a petition (Section 2412) does not refer to the new cause created by Section 2480.5 in the tentative recommendation. It would be clearer if Section 2412 were amended:

§ 2412. Relief available

2412. Except as provided in Section 2412.5, a petition may be filed under this article for any one or more of the following purposes:

(a) Determining whether the power of attorney is in effect or has terminated.

(b) Passing on the acts or proposed acts of the attorney in fact.

(c) Compelling the attorney in fact to submit his or her accounts or report his or her acts as attorney in fact to the principal, the spouse of the principal, the conservator of the person or the estate of the principal, or to such other person as the court in its discretion may require, if the attorney in fact has failed to submit an accounting and report within 60 days after written request from the person filing the petition.

(d) Declaring that the power of attorney is terminated upon a determination by the court of all of the following:

(1) The attorney in fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

(2) At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney.

(3) The termination of the power of attorney is in the best interests of the principal or the principal's estate.

(e) Compelling a third person to honor the authority of an agent under a statutory form power of attorney pursuant to Section 2480.5.

(It may also be remarked that the article heading is too narrow -- "Court Enforcement of Duties of Attorney in Fact" -- whether Section 2412 is amended or not. It would be an improvement if the article heading were generalized as "Judicial Proceedings Concerning Powers of Attorney.")

Affidavit Procedure

Mr. Buchignani suggests that the affidavit procedure proposed for recognition of trustees' powers (see Memorandum 90-138) should be available for agents. (See Exhibit 4, at p. 5.) The staff proposes much the same thing in draft Section 4204 of the comprehensive power of attorney statute attached to Memorandum 90-122. As it is, the affidavit in Civil Code Section 2404 applies to statutory form powers of attorney, but this affidavit only goes to the issues of death, incapacity, revocation, and termination. The affidavit of existing law does not apply to the existence of agent's power, as does the affidavit proposed in the tentative recommendation discussed in Memorandum 90-138. The staff is sympathetic to Mr. Buchignani's suggestion, but we have not suggested the broader solution in this limited recommendation. If the Commission were not embarked on a revision of the entire statute, the staff would probably recommend expansion of Civil Code Section 2404.

Avoidance Through Contractual Provisions

Jeff Strathmeyer does "not think the statute will accomplish its intended purpose if financial institutions can avoid the statute by inserting a boilerplate provision into the original deposit agreement (etc.) which relieves them of the obligation to comply with the demand of an attorney in fact." (See Exhibit 14, at p. 18.) Mr. Strathmeyer is referring to the provision in Section 2480.5(c)(2) of the tentative recommendation that deems reasonable a refusal to accept the agent's authority that is authorized or required by a written provision of a contract or agreement between the third person and the principal. This provision derives from language that was drafted in the attempt to work out a compromise with the California Bankers Association and California Land Title Association during consideration of SB 1777.

Mr. Strathmeyer makes a good point. The opportunity to defeat this remedial legislation by boilerplate language in an account agreement, which is usually signed without being read (and if read, without the present concern with future use of agents), might prove too tempting for financial institutions to resist. The comprehensive power of attorney draft statute attached to Memorandum 90-122 asserts a much broader rule protecting the right of an individual to act through an

agent. Draft Section 4200 provides that an agent acting in accordance with a power of attorney for property is to be "accorded the same rights and privileges with respect to the . . . property and business interests of the principal . . . as if the principal were personally present and acting." This draft section also makes unenforceable any "provision of law and any purported waiver, consent, or agreement executed or granted by the principal to the contrary." This provision, drawn from the new Missouri Durable Power of Attorney Law, is intended to avoid just the sort of problem that Mr. Strathmeyer detects.

The staff recommends that the contract provision be stricken from Section 2480.5 of the recommendation:

(c) For the purpose of subdivision (b) and without limiting other grounds that may constitute a reasonable refusal to accept an agent's authority under a statutory form power of attorney, a third person does not act unreasonably in refusing to accept the agent's authority ~~in any of the following circumstances:~~

~~(1) If~~ if the refusal is authorized or required by a provision of a state or federal statute or regulation.

~~(2) If the refusal is authorized or required by a written provision of a contract or agreement between the third person and the principal.~~

An alternative middle ground, if the Commission is interested, would be to limit the excuse to cases where the contract or agreement was made by a principal acting with advice of counsel. This would answer the contract of adhesion issue. However, it would not be consistent with the general policy proposed in the staff draft statute attached to Memorandum 90-122.

Opposition

Larry M. Kaminsky, Vice President and Assistant General Counsel of Fidelity National Title Insurance Co., writing as Chairman of the Special Subcommittee on California Law Revision Commission Legislation of the California Land Title Association Forms and Practices Committee, opposes the tentative recommendation. (See Exhibit 15, at p. 19.) Mr. Kaminsky reports that the title industry is concerned with forged powers of attorney and that even a notary's acknowledgment does not provide the "requisite guaranty of trustworthiness sufficient to, on

that basis alone, determine the insurability of a real estate transaction." Of course, the third person is expected to make sure that the person claiming to be the agent is who he or she claims, but this is not the subject of the tentative recommendation. This comment might be more properly directed toward the application of Civil Code Section 2512, which protects third persons who rely in good faith on a power of attorney presented by the agent named in the power if the power of attorney appears valid on its face and includes a notary public's certificate of acknowledgment.

Mr. Kaminsky also writes that "it is not clear from the proposed statute that one can simply refuse to do business with an agent." It should be clear that a third person can refuse to do business with an agent, without risk of liability, only if the third person could refuse to do business with the principal. This is the entire thrust of this section. This approach was adopted in large measure to answer the concern of CLTA expressed during consideration of SB 1777 that title companies should not be forced by court order to do business with an agent. The rule adopted in the tentative recommendation, and the general rule prevailing in power of attorney law and agency law everywhere, is that a principal can make an effective designation of an agent and that this designation should be respected, subject to appropriate safeguards. If third persons are free to disregard agents in all cases at their sole discretion, powers of attorney are rendered impotent. The tentative recommendation puts the agent in the shoes of the principal, where the agent is supposed to be, and if the third person does not have reasonable grounds for refusing to deal with the agent in a case where the third person could not refuse to deal with the principal, the third person can be compelled to accept the agent's authority.

Mr. Kaminsky suggests that there may be cases where the agent is acting in conflict with the principal's interest. (See Exhibit 15, at pp. 19-20.) As an example, he cites the situation where the agent (trustor under deed of trust) requests a reconveyance from the trustee under a deed of trust where the principal is the beneficiary of the deed of trust. Mr. Kaminsky does not find "sufficient comfort" for the title industry in the tentative recommendation. This is an interesting

issue. Should third persons have the responsibility to enforce duties imposed agents, trustees, and other fiduciaries by statute and the common law? The trend of the statutes in recent decades has been to make clear that third persons do not have a duty to make sure that a trustee, for example, is acting in conformity with its duties. Typically, if the third person acts in good faith and without actual knowledge that the fiduciary is exceeding its duties, the third person is protected and has no duty to inquire or to ensure the proper application of the property delivered to the fiduciary. See Prob. Code §§ 18100-18101. The law applicable to powers of attorney is generally the same, and the staff draft comprehensive power of attorney statute would make it more explicitly the same. It is interesting to speculate on the reaction to a statute attempting to impose on third persons the duty to determine whether a fiduciary has the powers claimed, is properly exercising them, is violating any other fiduciary duty, and will correctly dispose of any property delivered or paid to the fiduciary.

We are sympathetic to the ever-present difficulty of deciding on which side of the line a particular case falls, but in this instance the staff does not believe the tentative recommendation imposes any significant new burden on title companies or other third persons who may be called upon to do business with an agent. As noted, the shape of this proposal was influenced in large measure by the concern of the title companies that they (and other third persons) should not be compelled to do business with an agent. But this concern is not the only relevant factor, and the tentative recommendation seeks to protect the legitimate rights of third persons while making powers of attorney effective and efficient.

Respectfully submitted,

Stan Ulrich
Staff Counsel

WILBUR L. COATS
ATTORNEY AND COUNSELOR AT LAW

TELEPHONE (619) 748-6512

September 25, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

CA LAW REV. COMM'N

SEP 27 1990

RECEIVED

In Re: Tentative Recommendations relating to:
Recognition of Trustee's Powers;
Recognition of Agent's Authority--Statutory Power of Attorney;
Gifts in View of Death;
Repeal of Civil Code Section 704;
Recognition of Trustees' Powers; and
Access to Decedent's Safe Deposit Box.

Dear Sirs:

I concur in all of the above cited recommendations except the proposal concerning Access to Decedent's Safe Deposit Box.

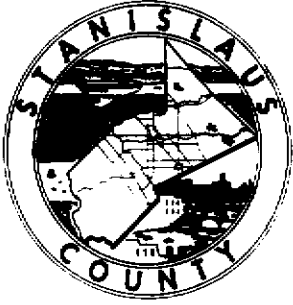
Often individuals place the original of an inter vivos trust in their safe deposit box. Therefore, it may be just as important to remove a trust document as it is to remove a Will.

I suggest an additional paragraph (5) be added to Section 331. (d) which would read:

(5) Permit the person given access to remove any trust documents.

Very truly yours,


Wilbur L. Coats



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Teresa Vig Rein
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September 25, 1990

CA LAW REV. COMM'N

SEP 27 1990

RECEIVED

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Commissioners:

IN RE: TENTATIVE RECOMMENDATION RELATING TO RECOGNITION OF
AGENT'S AUTHORITY UNDER STATUTORY FORM POWER OF
ATTORNEY

I have reviewed the Tentative Recommendation relating to Recognition of Agent's Authority Under Statutory Form Power of Attorney. I agree that there is a need that should be met in the situation requiring this tentative recommendation, and I think that that the tentative recommendation goes well along the way to meeting it. However, I do not think that the recommendation goes far enough to meet the needs of ordinary people.

If one is wealthy, has easy access to attorneys, can pay the cost of litigation, and wishes to use the statutory form, this recommendation fits the bill. It does not answer the problems of persons who do not use the statutory form, but craft their own properly drafted power of attorney. It does not meet the needs of those persons who cannot afford to have an attorney bring an action. It does not meet the needs of those people whose assets do not warrant legal action, but are still important to them, and it does not give guidance on what such an action should be.

Further, by having this right of action for the statutory power, I think a good argument could be made that, by giving a right of action to use with the statutory power, it excludes any right of action for persons not using the statutory form. At a very minimum, a subsection should be added to state that:

"It is not the legislative intention to exclude such other actions."

It would be better to delineate the type of action and the court in which such action should take place, such as an order to show cause, returnable in a stated period of time, which could be

California Law Revision Commission
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Page Two

filed in a court of the appropriate jurisdiction concerning the value of the property in the hands of the third person. If that value is not ascertainable, in whatever court the agent could reasonably believe would have such jurisdiction.

Very truly yours,

MICHAEL H. KRAUSNICK, County Counsel

By *Harry P. Drabkin*
Harry P. Drabkin, Deputy

HPD/sjp



Office of General Counsel

September 25, 1990

California Law Revision Commission
4000 Middlefield Road, Ste. D-2
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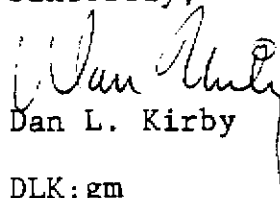
CA LAW REV. COMM'N
SEP 27 1990
RECEIVED

Dear Sir/Madam:

Re: Tentative Recommendations #L-3022, #L-3046, #L-644,
#L-3034
Our Special File CA-3949

Thank you for furnishing us with copies of these Tentative Recommendations. This Company is in agreement with each of these recommendations, and would appreciate being kept on your mailing list.

Sincerely,


Dan L. Kirby

DLK:gm

ALVIN G. BUCHIGNANI

ATTORNEY AT LAW

SEP 28 1990

RECEIVED

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September 25, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Recognition of Agent's Authority under Statutory
Form Power of Attorney

Dear Ladies & Gentlemen

I believe the proposed recommendation needs to be broader. I see no reason why the same or similar benefits that are given under the proposal to the statutory form power of attorney should not be given to any other power of attorney. At the very least, an attorney-drafted power that includes the same language, together with other language, that is contained in the statutory form should have the benefit of the section. Otherwise, attorneys will need to prepare both a statutory form power, and also a non-statutory form power at the same time, if they wish to achieve the benefits of both.

Also, I believe that the same or similar benefits should be available to the agent under a power of attorney that are in the proposal relating to the recognition of trustees' powers, by providing an affidavit procedure.

Very sincerely,



Alvin G. Buchignani

AGB/pzg

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CA LAW REV. COMM'N

SEP 27 1990

Sept. 26, 1990

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California Law Revision Commission
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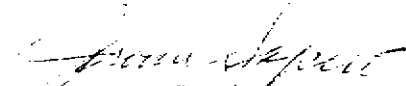
Re: Tentative Recommendation
relating to Recognition of
Agent's Authority Under
Statutory Form Power of Attorney,
Sept. 1990. - #L-3046

Hon. Commission:

I do approve the tentative recommendation.

However, should not the same legislative protection
and teeth of enforcement be given to both statutory form and
attorney drawn powers of attorney?

Respectfully,


Jerome Sapiro

JS:mes

CA LAW REV. COMM'N

OCT 01 1990

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RUTH E. RATZLAFF
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September 28, 1990

California Law Revision Commission
4000 Middlefield Road Suite D-2
Palo Alto, California 94303-4739

RE: Recognition of Agent's Authority
Under Statutory Form Power Of Attorney

Dear Commissioners:

I support wholeheartedly your tentative recommendation relating to relating to Recognition of Agents Authority Under Statutory Form Power Of Attorney.

I was also supportive of your recommendation for adoption of the Uniform Statutory Form Power Of Attorney Act.

I like the idea of adding the enforcement provision to the Uniform Act. Unfortunately, it will probably be necessary even though the Uniform Act affidavit process should be adequate.

Sincerely,



Ruth E. Ratzlaff

RER:pp

DOWLING, MAGARIAN, PHILLIPS & AARON
INCORPORATED

OCT 04 1990

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October 2, 1990

OUR FILE NO. ~~9999.00~~

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: The California Law Revision Commission
Tentative Recommendations

Gentlemen:

I have reviewed the tentative recommendation regarding recognition of agent's authority under statutory form power of attorney and am wholeheartedly in favor of the proposed legislation. It has too often been my experience that the sole reason a financial institution refuses to honor a power of attorney is precisely because the form was not its own such form. Similarly, I have encountered situations in which third persons unreasonably refuse to accept the existence of a trustee's power and thus, I am also in favor of that tentative recommendation.

Thank you for considering my comments.

Very truly yours,

DOWLING, MAGARIAN, PHILLIPS & AARON


William J. Keeler, Jr.

WJK:smc

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October 2, 1990

CA LAW REV. COMM'N

OCT 04 1990

RECEIVED

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, CA 94303-4739

Re: Recent Tentative Recommendations

Dear Commission:

In response to your request for comment on the Commission's Tentative Conclusions, I strongly support and am in agreement with the Commission's recommendations relating to (1) Recognition of Agent's Authority Under Statutory Form Power of Attorney, and (2) Access to Decedent's Safe Deposit Box.

I have no approval or disapproval as to the tentative recommendation concerning Recognition of Trustee's Powers, since although I have occasionally had problems with persons or institutions acknowledging a trustee's authority, I have found that most of such problems are easily remedied by simply providing an abstract or a full copy of the trust instrument.

Lastly, with regard to the Commission's tentative recommendation relating to Gifts in View Of Death, I would prefer to see the repeal rather than the clarification of the existing old law. Gifts of this nature are largely problematical and they are often impossible to verify with anything other than the donee's testimony.

Very truly yours,

HOLLEY & GALEN

By



Richard E. Llewellyn, II

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CALIF. REV. COMM'N

OCT 04 1990

RECEIVED

October 3, 1990

California Law Review Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendations

The following comments are in response to the tentative recommendations dated June and September 1990.

Repeal of Civil Code section 704

I concur with this recommendation, which comports with Federal supremacy concepts.

L-3034 - Gifts In View of Death

I concur with this recommendation, which clarifies the nature of such gifts and establishes the concept of a condition subsequent. Moving these sections to the Probate Code makes sense.

L-644 - Recognition of Trustees' Powers

I concur with this recommendation. It is another step toward resolving the continuing problem with third parties' recognition of trustees' powers. This provides another arrow in the attorney's quiver to encourage out-of-state and other institutions to cooperate in trust matters.

L-3046 - Recognition of Agent's Authority Under Statutory Form Power of Attorney

I concur with this recommendation. This should be an effective measure to counter the tendency of banks and other financial institutions to insist on the use of their own form powers of attorney. While this situation has improved considerably in recent years, there still are many institutions that are reluctant to accept attorney-drafted documents.

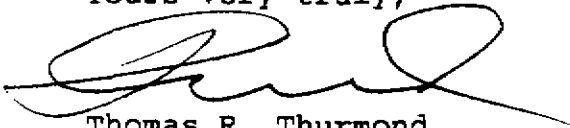
Page 2
California Law Revision Commission
October 3, 1990

L-3022 - Access to Decedent's Safe Deposit Box

I concur with this recommendation. The previous requirement that the institution directly file any will discovered in the safe deposit box created inefficiencies and delays in the establishment of probate estates. From an attorney's standpoint, this procedure is better.

Thank you for the opportunity to comment on these proposed revisions to the law.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Thurmond', with a large, stylized flourish extending from the end of the name.

Thomas R. Thurmond
Attorney at Law

TT/sr

LAW OFFICES OF
PROCOPIO, CORY, HARGREAVES AND SAVITCH

1900 UNION BANK BUILDING
530 B STREET
SAN DIEGO, CALIFORNIA 92101-4469
TELEPHONE (619) 238-1900

ON LAW REV. COMM'N

OCT 05 1990

RECEIVED

TELECOPIER
(619) 235-0398
(619) 235-0399

A. T. PROCOPIO
900-1974

HARRY HARGREAVES
RETIRED
JOHN H. GARRETT
RETIRED

October 3, 1990

ALEC L. CORY
EMMANUEL SAVITCH
GERALD E. CLSON
PAUL B. WELLS
TODD E. LEIGH
JEFFREY ISAACS
ROBERT J. BERTON
DENNIS HUGH MCKEE
JOHN C. MALUGEN
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ANTONIA E. MARTIN
RAYMOND G. WRIGHT
JAMES G. SANDLER
MICHAEL J. RADFORD
THOMAS R. LAUBE
PHILIP J. GIACINTO, JR.
STEVEN J. UNTERDOTT
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CRAIG R. SAPIN

M. WAINWRIGHT FISHBURN, JR.
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MICHAEL J. KINKELAAR
KENNETH J. ROSE
ERIC B. SHWISBERG
DAVID A. NODDIE
GERALD R. KENNEDY
LYNNE R. LASRY
EDWARD I. SILVERMAN
JEFFREY D. CAWDREY
KENNETH J. WITHERSPOON
CYNDY DAY-WILSON
ROBERT F. STANSELL
AUDREY V. NELSON
JOHN K. LADD
JACK D'AURORA
WILLIAM W. EIGNER
DEBORAH A. RIES
MATTHEW W. ARGUE
STEPHEN R. ROBINSON
J. MARCUS DAY
THOMAS J. HARRON

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear John:

Recently I have received and reviewed the Tentative Recommendations of the California Law Revision Commission relating to the following subjects:

1. Repeal of Civil Code Section 704 (passage on death of ownership of U.S. Bonds);
2. Gifts in View of Death;
3. Access to Decedent's Safe Deposit Box;
4. Recognition of Agent's Authority under Statutory Form Power of Attorney;
5. Recognition of Trustees' Powers.

It has been almost a decade since I commenced to serve on the Law Revision Commission. As you will well remember, it was during that time that we first addressed ourselves to an overhaul of the California Probate Code. It is interesting to note that many of the Tentative Recommendations now being recommended are the result of determining the practical application of the Probate Code reforms that were enacted.

In any event, I am in favor of all of the above referenced Tentative Recommendations. I am particularly pleased with respect to the recommendations involving recognition of an

Mr. John H. DeMouilly
October 3, 1990
Page 2

agent's authority under a Statutory Form Power of Attorney, the matter of access to a decedent's safe deposit box, and recognition of a trustee's powers. Like many other attorneys, I have, from time to time, commiserated with clients who are unable to convince third parties, often banks or similar institutions, of their authority to act. The Tentative Recommendations, in that regard, appropriately address the practical aspects of obtaining recognition for authority to act.

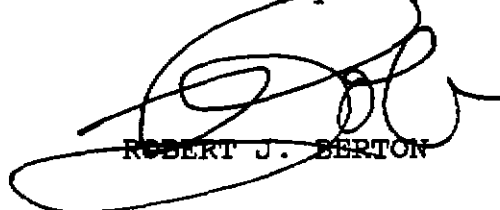
Turning to the Tentative Recommendation relating to recognition of trustees' powers, I call the following to your attention. It has been my experience that banks and other institutions often cause difficulties for trustees because of their refusal to proceed with the trust unless and until they have adequate proof of the existence of the trust and the identification of the trustee, as well as the authority of the trustee. Many a trustee client has requested that I prepare something akin to certified letters testamentary in a probate estate. To my knowledge, the closest one can come to such documentation is Probate Code Section 15603. That section allows the Clerk of the Court to issue a certificate showing that the trustee is duly appointed and acting, but only if there is some proceeding before the Court which would evidence those facts. Obviously, with most living trust situations, it is the desire of the trustee not to be involved with any Court proceedings. It is also true that in the case of a trust involving real property, the trust can be recorded pursuant to the provisions of Probate Code Section 15210. None of the cited sections truly address the desire of the typical trustee of a living trust with respect to having the ability to present proof of the trusteeship without the necessity of submitting the entire trust document. Your proposed Probate Code Section 18100.5 should go a long way towards providing a simple affidavit by virtue of which the trustee can satisfy third persons as to the trustee's authority without the necessity of presenting the entire trust document to the third person. In the context of the wording of proposed Section 18100.5 of the Probate Code, I recommend an additional sentence be added at the end of subsection (a) of Probate Code Section 18100.5. That additional sentence should read essentially as follows:

"The affidavit shall also state the name or other designation of the trust sufficient to identify it, that the trust is valid, and that the trust is in effect."

Mr. John H. DeMouilly
October 3, 1990
Page 3

It has been a while since I have talked with you, or corresponded with you or with other members of the staff. Therefore, please give my best regards to Nat, Bob and Stan. Hoping this letter finds you all well, I am

Sincerely yours,



ROBERT J. BERTON

RJB:jhc

OCT 09 1990

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RUSCONI, FOSTER, THOMAS & PIPAL

A PROFESSIONAL CORPORATION

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ERNEST RUSCONI
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SUSAN M. VICKLUND-WILSON

TELECOPIER: (408) 779-1553

October 5, 1990

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road Suite D-2
Palo Alto, CA 94303-4739

Re: Civil Code §704
Gifts in View of Death - Agent's Authority
Under Statutory Power of Attorney - Recognition
of Trustee's Powers

Gentlemen:

I have read the recommendations mailed to me recently by your office on the above subject matters. I cannot visualize anyone objecting to the repeal of Civil Code §704, and transferring that law to the Probate Code.

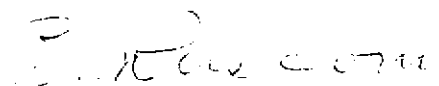
As to recognizing the power of an agent and that of a trustee as set forth above, these are much needed additions to the law. In fact, as to a power of attorney, we once had to threaten a bank with a suit for any damages caused our principal by the bank's failure to recognize the agent's authority.

If these provisions are enacted, we can simply point to these provisions in the law that require third parties to honor these documents.

In summary, I concur in your recommendations for each of the above proposed legislations.

Very truly yours,

RUSCONI, FOSTER, THOMAS & PIPAL



ERNEST RUSCONI

ER/bbr

OCT 12 1990

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MOODY & MOODY

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LINDA A. MOODY
GRAHAM B. MOODY

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FAX (415) 331-5387

October 10, 1990


California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Recognition of Agent's Authority Under Statutory Form
Power of Attorney (September 1990)

Ladies and Gentlemen:

A year ago we wrote asking you to give the matter of acceptability of statutory durable powers of attorney your serious attention. Perhaps others wrote you, as well. In any event, we are delighted to see your tentative recommendation relating to "Recognition of Agent's Authority Under Statutory Form Power of Attorney." Now we offer our whole-hearted support of your recommendation, with no comments for improvements in your draft.

Very truly yours,


Linda A. Moody

OCT 15 1990

Study L-3046

RECEIVED

10/12/90

Memo 90-140

EXHIBIT 13

HENRY ANGERBAUER, CPA
4401 WILLOW GLEN CT.
CONCORD, CA 94521

California Law Revision Commission

I have reviewed your recommendations as follows:

- (1) Access to Decedent's Safe Deposit Box,
- (2) Repeal of Civil Code Section 704,
- (3) Gifts in View of Death,
- (4) Recognition of Agent's Authority under Statutory Form Power of attorney,
- (5) Recognition of Trustees' Powers.

I agree with your recommendations and proposed conclusions related to the above mentioned items.

I suggest you implement your powers to recommend them to the legislature to be enacted

into law. Thanks for letting me make my views known

Henry Angerbauer

JEFFREY A. DENNIS-STRATHMEYER

ATTORNEY AT LAW

OCT 19 1990

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POST OFFICE BOX 533 - BERKELEY, CALIFORNIA 94701
(415) 642-8317

October 16, 1990

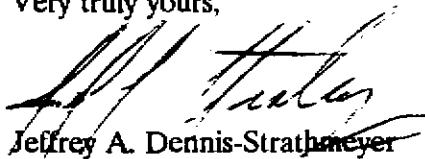
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Study L-3046. Tentative Recommendation relating to Agents Authority
Under Statutory Form Power of Attorney

Sirs:

I do not think the statute will accomplish its intended purpose if financial institutions can avoid the statute by inserting a boilerplate provision into the original deposit agreement (etc.) which relieves them of the obligation to comply with the demand of an attorney in fact.

Very truly yours,



Jeffrey A. Dennis-Strathmeyer



Fidelity National Title

INSURANCE COMPANY

Larry M. Kaminsky
Vice President
Assistant General Counsel

October 23, 1989

CA LAW REV. COMM'N

OCT 25 1990

RECEIVED

John H. DeMouilly, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

RE: Comments Regarding Tentative Recommendations
Study L-3046 Recognition of Agents Authority Under
Statutory Form Power of Attorney
Study L-644 Recognition of Trustee's Powers

Dear Mr. DeMouilly,

The California Land Title Association Forms and Practices Committee comments on the above-referenced Tentative Recommendations as follows:

From the viewpoint of the Title Industry, which, in general, supports statutory protections for third persons who, in good faith and for valuable consideration, deal with validly appointed trustees or agents (without actual knowledge of any infirmities in their capacity to act as such,) a fundamental problem with which we face countless times is resistance to any inquiry as to whether a principal-agent relationship has been validly established (i.e., whether the power of attorney itself is valid,) or whether a trust has been validly created and the trustee validly appointed.

Of major concern to the Title Industry is the question of forged instruments, particularly powers of attorney. The existence of a notary acknowledgment does not per se carry with it the requisite guaranty of trustworthiness sufficient to, on that basis alone, determine the insurability of a real estate transaction.

The existing statutory provision for an affidavit of authority from the agent, and the proposal for an affidavit from a trustee does not provide comfort to us in terms of establishing the valid creation of the relationship in the first place.

As to Study L-3046, though reflected in the comments, it is not clear from the proposed statute that one can simply refuse to do business with an agent, nor does it deal with conflict of interest situations. For example, a principal under a power of attorney happens to be the beneficiary under a deed of trust, and his agent, who is the trustor under said deed of trust sends to the trustee under the deed of trust, a request for full reconveyance, as agent of the beneficiary, along with the statutory affidavit. Does the trustee's

John H. DeMouilly
October 23, 1990
page two

refusal to accept the agent's authority subject the trustee to litigation and possible attorney's fees?

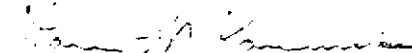
As stated above, the proposed statutory scheme does not provide sufficient comfort to the Title Industry to allow for any greater acceptance of powers of attorney, even if the affidavit of authority were permitted or required to be recorded in the public records, since if the power of attorney is itself void, so is any act purporting to be pursuant to it.

As to study L-644, as a result of the recent changes in the Probate Code pertaining to the statutory authority of a trustee, the Title Industry has been less concerned with the question of what is authorized by statute, than with the underlying question of whether the trust has been validly created under Probate Code Sections 15200-15210, or if there are any limitations on statutory powers contained in the trust instrument. In this instance, the affidavit proposed by the Tentative Recommendation will not provide any relief, and will result in more litigation when questions as to the validity of the trust itself are interpreted as the questioning of authority.

In this regard, perhaps the proposed statutory scheme regarding an affidavit should enable a third person dealing with another who represents himself as the trustee of a specifically designated trust to assume that such a trust exists and that the party he is dealing with it, in fact, the duly appointed and designated trustee, without limitation. If not, then the person dealing with a purported trustee may have a duty of inquiry as to the valid creation of the trust and the valid appointment of the purported trustee.

Thank you for the opportunity to comment on the above matters, and if you have any questions or comments for us, please don't hesitate to contact us.

Sincerely,



Larry M. Kaminsky
Chairman, Special Subcommittee on
California Law Revision Commission
Legislation of the California Land
Title Association Forms & Practices
Committee

OCT 25 1990

RECEIVED

Edward M. Phelps
Deborah Ballins Schwarz
Ruth A. Phelps
Of Counsel
Barbara E. Dunn

Phelps, Schwarz & Phelps
Attorneys at Law
215 North Marengo Avenue
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Pasadena, California 91101

(818) 795-8844
Facsimile: (818) 795-9586

October 23, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739


Re: Tentative Recommendation Relating to
Recognition of Agent's Authority Under
Statutory Form Power of Attorney

Dear Sir/Madam:

I have read this recommendation. I believe that banks do not accept other powers of attorney and prefer to use their own forms because their own forms are the only ones that fit in their drawers.

I agree with this recommendation. The banks will not like it but it is a very needed statute. I approve it.

Very truly yours,



Ruth A. Phelps
PHELPS, SCHWARZ & PHELPS

RAP:sp

Law Offices of
Michael J. Anderson, Inc.
77 Cadillac Drive, Suite 260
Sacramento, California 95825
(916) 921-6921
FAX (916) 921-9697

CALIF. REV. COMM'N

OCT 25 1990

RECEIVED

Michael J. Anderson

October 24, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

To whom it may concern:

I favor without comment the following:

In respect to the Repeal of Code Section 704 I am in agreement with it. I am also in favor of Recognition of Trustees' Powers and Access to Descendant's Safe Deposit Box.

In respect to Recognition of Agent's Authority Under Statutory Form Power of Attorney, I would request that it be expanded to include any Power of Attorney drafted by an Attorney.

I have no objections to Gifts in View of Death.

Sincerely,



MICHAEL J. ANDERSON

MJA/fa



CA LAW REVISION

OCT 26 1990

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October 25, 1990

OUR FILE NUMBER

Attorneys at Law

P900.05-1d.

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OF COUNSEL

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ROBERT L. DUNN
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JOHN L. KOENIG
M. KIMBALL HETTENA
RONALD S. KRAVITZ
FORREST E. FANG
LEAH R. WEINGER
MICHAEL G. SCHINNER
LEONARD W. ROTHSCHILD, JR.

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94303-4739

Tentative Recommendations

I have reviewed the following tentative recommendations and I concur in the recommendations:

#L-644 Relating to Recognition of Trustees' Powers - September 1990,

#L-3034 Relating to Gifts in View of Death - September 1990,

#L-3046 Relating to Recognition of Agent's Authority Under Statutory Form Power of Attorney - September 1990 and

Relating to Repeal of Civil Code Section 704 (Passage on Death of Ownership of U.S. Bonds) - June 1990.

Sincerely yours,

Alan D. Bonapart

ADB:ah

OCT 27 1990

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FRANK M. SWIRLES
LAW CORPORATION

October 26, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

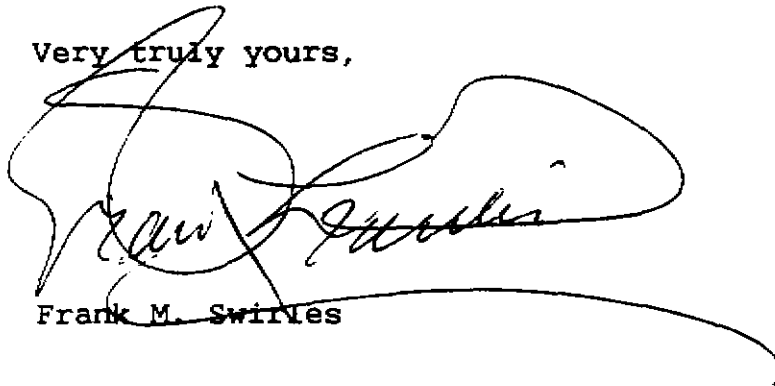
Re: Tentative Recommendations - re

1. Repeal of CC Section 704
2. Access to decedent's safe deposit box
3. Recognition of Trustee's powers
4. Recognition of agent under statutory power
5. Gifts in view of death

Gentlemen:

I have no objections to your recommendations in the above matters.

Very truly yours,



Frank M. Swirles

NO. 60X 1490
RANCHO SANTA FE, CALIFORNIA 92067

GREGORY WILCOX
ATTORNEY AT LAW

CA LAW REV. COMMISSION

OCT 31 1990

RECEIVED

506 FIFTEENTH STREET, SUITE 700
OAKLAND, CALIFORNIA 94612-1486
(415) 451-2600

October 30, 1990

Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Re: Recognition of Agent's Authority Under Stat. Form Power of Atty./ #L-3046

Dear Mr. Sterling:

Thank you for sending me the Tentative Recommendation with regard to Recognition of Agent's Authority Under the Statutory Form Power of Attorney.

As a person who has had some difficulty in achieving acceptance of powers of attorney by third parties, I am in accord that this proposal would substantially enhance the statutory form's effectiveness.

I find it anomalous, however, that the recommended amendment extends only to the statutory form power of attorney, and not to all powers of attorney. Indeed, the fact that the recommended scope is so limited, and makes attorney-drafted powers of attorney into second-class documents, is not even addressed.

I would welcome such a rule applied to all powers of attorney, statutory form as well as attorney drafted.

I appreciate this opportunity to respond on this issue.

Very truly yours,



GREGORY WILCOX

pc: James V. Quillinan
Diemer, Schneider, Luce & Quillinan
444 Castro Street, Suite 900
Mountain View, CA 94041

DAVID W. KNAPP, SR.
DAVID W. KNAPP, JR.

LAW OFFICES
KNAPP & KNAPP
1093 LINCOLN AVENUE
SAN JOSE, CALIFORNIA 95125
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October 5, 1990

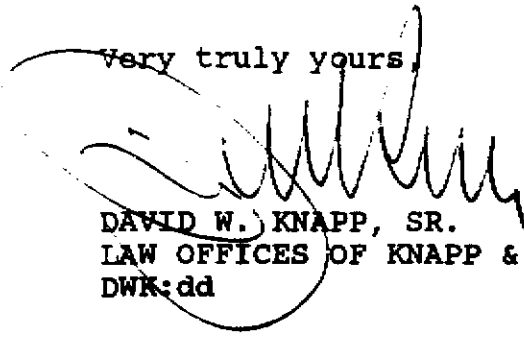
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: YOUR TENTATIVE RECOMMENDATIONS CONCERNING THE FOLLOWING
REVISIONS:

1. ASSESS TO DECEDENT'S SAFE DEPOSIT BOX:
I highly approve the recommendation and it is long overdue;
2. RECOGNITION OF TRUSTEE'S POWERS:
I highly approve as it will be a great help;
3. RECOGNITION OF AGENTS AUTHORITY UNDER STATUTORY FORM POWER OF ATTORNEY:
Since the inception of the law (1982) I have had many difficult sessions with both Bank of America (who insists on the use of their own forms) and the local Wells Fargo who at first refused entirely to honor the same. Your recommendation, if only accepted, will be of great service to we probate lawyers and will possibly "educate" the institutions of the protection they have in honoring the powers of attorney. It's a great idea;
4. GIFTS IN VIEW OF DEATH:
I approve. It puts the law where it should be;
5. REPEAL OF CIVIL CODE SECTION 704:
I approve.

Your Commission should be congratulated on the fine work you are doing in straightening out many misunderstand sections of the law.

Very truly yours,


DAVID W. KNAPP, SR.
LAW OFFICES OF KNAPP & KNAPP
DWK:dd

NOV 01 1990

RECEIVED

IRWIN D. GOLDRING
ATTORNEY AT LAW
1925 CENTURY PARK EAST, SUITE 950
LOS ANGELES, CALIFORNIA 90067
TELEPHONE (213) 201-0304
TELECOPIER (213) 277-7994

October 29, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Recognition of Agent's Authority Under
Statutory Form Power of Attorney

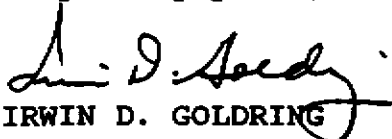
Gentlemen:

As you are aware I have long been an advocate of the legislation suggested in this Tentative Recommendation.

I believe the statute strikes a happy balance between the expectations of persons executing powers of attorneys and those who will be called upon to recognize them.

I am especially pleased with Subparagraph (d) Section 2480.5 which is an area in which the most consistent disregard of a person's power of attorney has occurred.

Very truly yours,


IRWIN D. GOLDRING

IDG:hs

#L-3046

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

Recognition of Agent's Authority Under Statutory Form Power of Attorney

September 1990

This tentative recommendation is being distributed so interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Comments sent to the Commission are a public record, and will be considered at a public meeting of the Commission. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe it should be revised.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN OCTOBER 31, 1990.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

**CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739**

THE CALIFORNIA LAW REVISION COMMISSION

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EDWIN K. MARZEC
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SANFORD M. SKAGGS
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ANN E. STODDEN
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Office Technician

VICTORIA MATIAS
Composing Technician

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

CALIFORNIA LAW REVISION COMMISSION

4000 MIDDLEFIELD ROAD, SUITE D-2
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ARTHUR K. MARSHALL

FORREST A. PLANT

SANFORD M. SKAGGS

ANN E. STODDEN

Letter of Transmittal

The Uniform Statutory Form Power of Attorney Act was enacted on Commission recommendation in the 1990 legislative session. See Civ. Code §§ 2475-2499.5, enacted by 1990 Cal. Stat. ch. 986. This tentative recommendation would make the statutory form more effective by making clear that a third person may be compelled to honor the agent's authority under the statutory form to the same extent as the principal could compel the third person to act. A third person who acts unreasonably in refusing to honor the agent's authority under the statutory form would be liable for attorney's fees in an action to compel acceptance. The tentative recommendation would also protect third persons whose refusal is required by a state or federal statute or regulation or by a contract between the third person and the principal. This study has been made pursuant to Resolution Chapter 37 of the Statutes of 1980.

RECOMMENDATION

The Uniform Statutory Form Power of Attorney Act was enacted in 1990 to provide a simple, readily understood, and widely usable power of attorney form.¹ In order to fully accomplish its purposes, the statutory form needs to be accepted by third persons with whom the agent desires to transact business on behalf of the principal. Judging from past experience with powers of attorney prepared by attorneys and with statutory and nonstatutory forms, the intentions of persons who believe they have put their affairs in order, consistent with the applicable law, have been frustrated by the unwillingness of some third persons to honor a power of attorney and accept the authority of the agent under a power of attorney.² In many cases, this reluctance may simply be a bureaucratic reaction to the variety of powers of attorney that the particular business or institution may encounter. Some businesses have adopted a general policy of not honoring powers of attorney unless executed on a form approved by the business itself. In other cases, a third person may genuinely be in doubt as to the authority of the agent even after taking the time to examine the power of attorney.

Existing law attempts to deal with this problem by protecting third persons from liability in specified circumstances. Civil Code Section 2404 protects a third person who relies on the agent's affidavit in support of the

1. Civ. Code §§ 2475-2499.5, enacted by 1990 Cal. Stat. ch. 986, § 2. This legislation was enacted on recommendation of the Law Revision Commission. See *Recommendation Relating to Uniform Statutory Form Power of Attorney Act*, 20 Cal. L. Revision Comm'n Reports 415 (1990).

2. See, e.g., Montgomery & Wright, *Durable Powers of Attorney for Property Management*, in 1990 California Durable Power of Attorney Handbook §§ 2.56-2.61 (Cal. Cont. Ed. Bar), discussing policies of banks with regard to accounts, safe deposit boxes, and trusts, and of title companies, insurance companies, and stock transfer agents.

statutory form, the same as any other power of attorney.³ This affidavit protects a third person from liability for actions undertaken in good faith reliance on the affidavit as to issues of termination and revocation of the power of attorney,⁴ but has no compulsory effect on third persons. Similarly, Civil Code Section 2512 protects a third person who acts in good faith reliance on a power of attorney, including a statutory form power of attorney,⁵ if the power of attorney is presented by the named agent, appears to be valid on its face, and includes a notary public's acknowledgment.⁶ This protection should work well with a statutory form power of attorney presented to a third person by the agent named in the instrument because the statute requires it to be acknowledged before a notary public⁷ and the facial validity of the form should be easy to determine. As before, however, these provisions encourage, but do not compel, acceptance by third persons.

The Law Revision Commission recommends adding a provision to the Uniform Statutory Form Power of Attorney Act to address these problems. The proposed legislation would permit the agent under a properly executed statutory form power of attorney to bring an action to compel a third person to accept the agent's authority to the same extent as the principal would be able to compel the third person to act if an

3. For background on Civil Code Section 2404, see *Recommendation Relating to Uniform Durable Power of Attorney Act*, 15 Cal. L. Revision Comm'n Reports 351 (1980). This general provision in the Uniform Durable Power of Attorney Act (Civ. Code §§ 2400-2407) applies to the Uniform Statutory Form Power of Attorney Act (Civ. Code §§ 2475-2499.5) as provided in Civil Code Section 2480(a).

4. The appropriate extent of the protection afforded by Civil Code Section 2404 for powers of attorney generally is the subject of a pending study by the Law Revision Commission. See also [Tentative] *Recommendation Relating to Recognition of Trustees' Powers* [September 1990], __ Cal. L. Revision Comm'n Reports __ (19__).

5. See Civ. Code § 2480(c).

6. For background on Civil Code Section 2512, see *Recommendation Relating to Durable Powers of Attorney*, 18 Cal. L. Revision Comm'n Reports 305 (1986).

7. See Civ. Code §§ 2475 (form), 2476(c) (acknowledgment of principal's signature).

action were brought on the principal's own behalf.⁸ This provision would permit an action against a business, insurance company, financial institution, or other person who holds property of the principal, who owes a debt to the principal, or who owes a duty or performance to the principal. It would not permit the agent to compel a third person to act where the principal could not do so. Thus, a business that could choose not to accept the principal as a customer would be completely free to decline to deal with the agent.

In order to make the proposed remedy effective, the proposed legislation also requires the court to award attorney's fees in an action to compel acceptance of the agent's authority if the court finds that the third person acted unreasonably in refusing to accept the agent's authority.⁹ The proposed legislation makes clear, however, that a third person would not be acting unreasonably if the refusal to accept the agent's authority under the power of attorney was authorized or required by a state or federal statute or regulation or by a written provision in a contract or agreement between the third person and the principal. On the other hand, the proposed legislation provides that a third person will not be found to have acted reasonably if the sole reason for refusing to accept the agent's authority was insistence on use of the third person's own form.

8. This rule is similar to the power of a decedent's successor to enforce delivery or payment of property under the affidavit procedure for collection and transfer of property of a small estate. See Prob. Code § 13105(b). The general power of attorney statute in Minnesota also contains a similar provision. See Minn. Stat. Ann. § 523.20 (West Supp. 1990).

9. This provision is also drawn from the affidavit procedure for collection and transfer of a small estate to a successor. See Prob. Code § 13105(b).

PROPOSED LEGISLATION

Civil Code § 2480.5 (added). Compelling third person to honor statutory form power of attorney; liability for attorney's fees

2480.5. (a) If a third person to whom a properly executed statutory form power of attorney under this chapter is presented refuses to honor the agent's authority under the power of attorney within a reasonable time, the third person may be compelled to honor the agent's authority under the power of attorney, in an action for this purpose brought against the third person, to the same extent as the principal would be able to compel the third person to honor the authority of the principal acting in the principal's own behalf.

(b) If an action is brought under this section, the court shall award attorney's fees to the agent if the court finds that the third person acted unreasonably in refusing to accept the agent's authority under the statutory form power of attorney.

(c) For the purpose of subdivision (b) and without limiting other grounds that may constitute a reasonable refusal to accept an agent's authority under a statutory form power of attorney, a third person does not act unreasonably in refusing to accept the agent's authority in any of the following circumstances:

(1) If the refusal is authorized or required by a provision of a state or federal statute or regulation.

(2) If the refusal is authorized or required by a written provision of a contract or agreement between the third person and the principal.

(d) Notwithstanding subdivision (c), a third person's refusal to accept an agent's authority under a statutory form power of attorney under this chapter is unreasonable if the only reason for the refusal is that the power of attorney is not on a form prescribed by the third person to whom the power of attorney is presented.

Comment. Section 2480.5 is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988). Subdivisions (a) and (b) are drawn in part from Probate Code Section 13105(b) (compelling payment or delivery under affidavit procedure for collection or transfer of personal property of small estate). See also Section 2404 (affidavit of lack of knowledge of termination of power of attorney).

Subdivision (a) permits an agent to bring an action to compel a third person to honor a statutory form power of attorney to the same extent as the principal, disregarding any legal disability, could bring an action to compel the third person to act. Under this rule, a third person who could not be forced to do business with the principal consequently may not be forced to deal with the agent. However, a third person who holds property of the principal, who owes a debt to the principal, or who is obligated by contract to the principal may be compelled to accept the agent's authority.

In addition, as provided in subdivision (b), if the refusal to deal with the agent is found to be unreasonable, the third person will also be liable for attorney's fees incurred in the action to compel compliance. The determination of reasonableness depends on the particular circumstances of each case. A person to whom the power of attorney is presented may, for example, act reasonably in refusing to accept the agent's authority where it is not clear that the power of attorney grants the agent authority with respect to the particular transaction. Likewise, a third person may reasonably refuse to honor the power of attorney if, for example, the person is not reasonably satisfied as to the identity of the agent or has information that would lead a reasonable person to question the validity of the power of attorney. See also Section 2512 (protection of person relying in good faith).

Subdivision (c) provides some specific guidelines as to the meaning of the reasonableness rule in subdivision (b) as it relates to the liability for attorney's fees. However, subdivision (d) makes clear that an institution's preference for its own power of attorney form is never a reasonable ground for refusing to accept the authority of an agent under a properly executed and effective statutory form power of attorney.