

#L-3044

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07/11/91

First Supplement to Memorandum 91-40

Subject: Study L-3044 - Comprehensive Powers of Attorney Statute
(Comments of Team 4 of Executive Committee of the State Bar
Estate Planning, Trust and Probate Law Section)

Attached to this supplement are the comments of Team 4 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section on the issues discussed in Memorandum 91-40, which were raised by the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association. We will consider the State Bar comments when Memorandum 91-40 is considered.

Respectfully submitted,

Stan Ulrich
Staff Counsel

1st Supp. Memo 91-40

Study L-3044

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

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July 11, 1991

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BY FAX

Re: Memorandum 91-40 - Comprehensive Powers of Attorney Statute

Dear Stan:

As we discussed during our last telephone conference, Team 4 intends to prepare a thorough analysis and review of Memorandum 91-40, Comprehensive Powers of Attorney Statute (Study L-3044). However, at this time (and prior to Team 4's scheduled full-day meeting when it will discuss Memorandum 91-40 in depth), Team 4, wanted to comment upon the issues raised by the Legislative Subcommittee of the Beverly Hills Bar Association Probate, Trust and Estate Planning Committee ("BHBA Committee") in its May 20, 1991 letter to the Law Revision Commission ("Commission").

The following comments are presented in the same order as the list of issues and comments presented in the Commission's introductory pages (white pages) of Memorandum 91-40. The issues enumerated by the Commission and Team 4's responses are as follows:

1. **Issue:** Should the Comprehensive Powers of Attorney Statute ("Powers of Attorney Statute") remain in the Civil Code, and if the response is yes, where should the statute be located in the Civil Code?

07-11-91 THU 11:57 P. 03

Stan Ulrich, Esq.
July 11, 1991
Page 2

Response: Team 4 agrees with the Commission that the Powers of Attorney Statute should remain in the Civil Code rather than being moved to the Probate Code.

Since the response to retaining the Powers of Attorney Statute in the Civil Code was in the affirmative, the second issue to be addressed is the location of the Powers of Attorney Statute within the Civil Code itself. On page 3 and 4 of the Commission's introductory materials, the Commission presented three basic placement alternatives. After a considerable amount of discussion, Team 4 concluded that the Powers of Attorney Statute should remain in the same place as it is currently found in the Civil Code, that is, it should appear as part of Civil Code §2400.010 et seq. In addition to the other reasons set forth in the Commission's comments, it would seem to be important to defer any further consideration about the final placement of the Powers of Attorney Statute until the in-depth analysis of the Statute contemplated by Team 4 is completed and additional comments from practitioners are received.

2. Issue: The second issue (and the remaining issues discussed in this letter) were raised by the BHBA Committee. Although it is the intent of Team 4 to respond to the issues presented by the BHBA Committee, Team 4 also wishes to make it very clear that these are not the only concerns which it has about the proposed Powers of Attorney Statute, and as mentioned above, a much more extensive analysis will follow.

In any event, the second issue in the Commission's discussion concerns whether or not the durable power of attorney form should be required to be dated.

Response: Although several of Team 4 members felt that a dating requirement would become a trap for the unwary, the majority of Team 4 felt that the durable power of attorney forms should be dated. In the event of any contest with respect to capacity to execute a durable power of attorney, a dated durable power of attorney should provide an accurate and efficient method of resolving the issue. Particularly with issues involving capacity, the need for a clear record and (hopefully) unambiguous writing becomes paramount. The dated form could also provide a benchmark in the event that other controversies arose, e.g., two purportedly valid durable powers of attorney; a dated power of attorney would assist in establishing that the latest prevailed. Various devices (bold or large type) could be used to emphasize the importance of complying with the "dating" requirement.

Stan Ulrich, Esq.
July 11, 1991
Page 3

3. **Issue:** The third issue was whether or not an acknowledgment should be required in order to have a valid power of attorney.

Response: Although it often would be beneficial to have a durable power of attorney notarized, Team 4 felt that an acknowledgment would unduly inhibit the public's use of durable powers of attorney, i.e. finding a notary public might be difficult. In addition, although many persons believe that an acknowledgment confers additional legitimacy upon a document, an acknowledgment's most useful application arises if a document requires recordation. The recordation requirement most likely would only benefit a few individuals who would want to use a durable power of attorney; on the other hand, it most likely would have a chilling effect upon the public's use of this relatively inexpensive yet powerful estate planning tool. In the event that a principal wanted to use a durable power in connection with real property, then adequate warnings could be included within the form about the necessity of obtaining an acknowledgment.

4. **Issue:** The fourth issue was one which not only the BHBA Committee, but as well various study groups and practitioners throughout the State of California have debated. This issue is whether or not the term "attorney-in-fact" should be deleted, and the word "agent" substituted for it.

Response: Although Team 4 agrees that consistency might require the use of the term "agent", Team 4 also strongly feels that the term "attorney-in-fact" should be the statutory designation of the agent in a durable power of attorney. It would seem to be most beneficial to distinguish durable powers of attorney from other types of agencies and to emphasize the particular and unique relationship established by a durable power of attorney.

5. **Issue:** The next issue concerns the name of the durable power of attorney for property.

Response: Although the name is somewhat cumbersome, Team 4 disagrees with the suggestion of the BHBA Committee that a durable power of attorney for property should be referred to as a Durable Power of Attorney (Non-Healthcare). The proposed new name is not shorter, is less specific than the existing name and fails to communicate either the general or specific nature of the durable power of attorney being used. Therefore, Team 4 recommends that

Stan Ulrich, Esq.
July 11, 1991
Page 4

the Durable Power of Attorney for Property continue to be so designated and identified.

6. Issue: The BHBA Committee raised the issue of whether or not certain types of directions/powers could be includable in either a durable power of attorney for health or a durable power of attorney for property at the discretion of the principal.

Response: The BHBA Committee said that it was difficult to categorize certain powers (e.g., the location of the residence or other personal care issues) as belonging exclusively in a durable power of attorney for health or for property. Team 4 agrees that such directions could reasonably be included in either durable power and that maximum flexibility to reflect the wishes of the principal should be maintained. Therefore, Team 4 agrees that with respect to the location of the residence and other personal care issues, that a principal should be able to include such directions in either type of power of attorney.

Team 4 also foresaw the possibility of two durable powers of attorney (one for property and one for health) being executed, and that each of the two durable powers of attorney could contain inconsistent requirements with respect to the location of the residence and other personal care issues. Team 4 suggests that the Commission deal with this issue by requiring that if a conflict arises between the provisions contained in a durable power of attorney for health and a durable power of attorney for property, that the provision(s) contained in the most recently executed durable power of attorney prevail.

7. Issue: The next item concerned how and whether to provide for a certification of the durable power of attorney.

Response: The BHBA Committee suggested that a notary should be able to certify a copy of the durable power of attorney. Although agreeing that certification may be desirable, Team 4 wishes to defer its comments until it has had more of an opportunity to consider this issue in depth.

8. Issue: Item 8 concerns multiple agents and successor agents, and whether such multiple or successor agents would be liable for the acts of their predecessors.

Response: Again, Team 4 wishes to defer its response on this issue.

Stan Ulrich, Esq.
July 11, 1991
Page 5

9. **Issue:** Item 9 raises the issue of the compensation of the agent-in-fact.

Response: As with executors and other fiduciaries, the principal should be advised that whoever becomes an agent must assume a substantial number of duties and responsibilities. These duties and responsibilities must be performed competently, conscientiously, faithfully and loyally. Considering the nature and extent of the duties and responsibilities assumed, it would seem reasonable to have the statute provide that an agent-in-fact is entitled to reasonable compensation. More precisely, the statute should expressly provide that an agent-in-fact is entitled to receive compensation unless the principal provides otherwise.

10. **Issue:** The next item concerns the affect of dissolution or annulment of the marriage between the principal and the agent-in-fact.

Response: Team 4 agrees that in the event of the dissolution or annulment of the principal and agent-in-fact's marriage or in the event of the legal separation of the principal or agent-in-fact, that the agent-in-fact's authority should terminate automatically and completely upon entry of the particular judgment or decree. However, Team 4 also believes that such agency should not be terminated if the parties expressly direct otherwise in the judgment of dissolution, annulment or legal separation.

11. **Issue:** The issue is whether or not the courts should be available in order to review issues involving durable powers of attorney.

Response: Considering the complexity of the issues and often conflicting desires involved with durable powers of attorney, it would seem most prudent for the probate court to become an arbitrator and protector of the principal and agent-in-fact; in other words, to be available to review and resolve the numerous operating difficulties that undoubtedly will arise after either type of durable power of attorney becomes effective. Therefore, Team 4 agrees with the suggestion of the BHBA Committee that any person interested in the welfare of the principal should be permitted to petition the court for review of the durable power of attorney or of the actions of the agent-in-fact. Since the issue of standing often consumes a substantial amount of a court's time, it would be most helpful to enumerate specifically who has standing to bring such a petition before the court.

Stan Ulrich, Esq.
July 11, 1991
Page 6

We hope that these comments will be of assistance to the Commission. If you have any questions, please do not hesitate to contact me. Thank you for your consideration.

Cordially,

Kathryn A. Ballsun

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