First Supplement to Memorandum 92-21

Subject: Study L-3044 - Comprehensive Powers of Attorney Statute (Comments from Prof. Jesse Dukeminier and Harley Spitler)

Attached to this supplement are letters from Professor Jesse Dukeminier (Exhibit 1) and Mr. Harley Spitler (Exhibit 2) concerning the comprehensive powers of attorney statute attached to Memorandum 91-40.

Professor Dukeminier raises several interesting policy issues concerning the extent of the powers of an agent under a durable power of attorney. Particularly, he asks why an agent may not make a will if an agent may make gifts and create trusts. He also suggests that it would be useful if the agency could extend for a period such as nine months after the principal's death to cure defects in estate planning and deal with tax problems. The staff will analyze these suggestions in a future memorandum and on a schedule giving adequate time for the bar to comment.

Mr. Spitler's letter concerns the issue of whether and to what extent an agent under a durable power of attorney has a duty to act, with specific reference to draft Civil Code Section 2418.010. We will discuss Mr. Spitler's letter when we reach that point in reviewing the draft statute.

One matter discussed by Mr. Spitler should be clarified. On page two of his letter, Mr. Spitler suggests that the relevant provisions in the draft attached to Memorandum 91-40 constitute the staff response to Commission concern raised in 1989. The history of this issue is a bit more tortuous. The staff responded to the November-December 1989 request by Memorandum 90-30 (Jan. 19, 1990). That memorandum proposed adding a Section 2515 to the Civil Code providing in part that an agent under a power of attorney, durable or nondurable, could accept the duties by signing the power or a separate document or by knowingly exercising powers or performing duties. The purpose was to make clear that a gratuitous agent did not have a duty to act before doing so, and

to provide statutory recognition of a written acceptance. The Commission approved this proposal at the March 1990 meeting. However, it was referred back to the staff at the April 1990 meeting in light of the decision to make a comprehensive review of the general power of attorney statutes. The issues were discussed in Memorandum 90-85, considered in July 1990, and have been continued in Memorandum 90-122 (the Probate Code version of the comprehensive power of attorney draft) and currently in Memorandum 91-40 (the Civil Code version of the draft), which is attached to Memorandum 92-21 on the agenda for this meeting.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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March 3, 1992

Mr. Stan Ulrich
California Law Revision Commission
4000 Middlefield Road -- D-2
Palo Alto, CA 94306

Dear Stan:

RE: Memorandum 92-21
Durable Power of Attorney

I like your durable power of attorney statute, but I think you should consider expanding the power in two ways.

First, an agent may be authorized (a) to create, modify, or revoke a trust, (b) to give the principal's property away, and (c) to change the death beneficiary on any payable-on-death account or contract. § 2421.060. In view of this (which I approve), why cannot an agent be granted the power to make or revoke the principal's will? This is forbidden by § 2421.070.

It is hard to see why an agent can make a will substitute but not a will. These are just alternative means of disposing of the principal's property at death. In order for the principal to authorize an agent to dispose of his non-P.O.D. property at death, the principal must create a trust during lifetime and transfer his property to it. An inter vivos trust may or may not have advantages to the principal, but it seems to me the principal ought to be able to choose between authorizing an agent to dispose of his property by way of an inter vivos trust <u>or</u> by will.

Of course, a principal could indirectly authorize an agent to dispose of his property at death by executing a will giving the agent a general or special power of appointment over the property. But this method does not offer the principal the same opportunities for tax savings as the power to make a will would.

I am not sure an agent can be given the power to sever any joint tenancy of the principal, but this would seem a desirable power. The agent could turn a joint tenancy with a spouse into community property with tax advantage, for example.

Second, why does the durable power expire at death of the principal? It seems to me that if the agent can act for the principal before death, it should be possible to authorize the agent to act for the principal within a nine-month period after death. This might be useful in curing defects in the estate plan, including tax problems and problems arising from disclaimers, that surface for the first time after death when all the relevant facts are known. The power should say that action under it during this nine-month period shall be treated for all purposes as though the action was taken just before the death of the principal.

Whether the IRS would accept this might be questionable, but if a principal can authorize an agent to create or revoke a trust of the principal's property before the principal's death, I see no private law objection to authorizing the agent to amend a trust within nine months after the principal's death and treating this as having been done by the principal himself.

I hope the Commission will consider broadening the durable power statute in these two ways.

Sincerely,

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March 4, 1992

California Law Revision Commission
4000 Middlefield Road, D-2
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Attention: Stan Ulrich,
Assistant Executive Secretary

Re: C.L.R.C. Memorandum 91-40 as Amended and Supplemented

Dear Stan:

Here with is my personal position on one major subject, and several related subjects, of C.L.R.C. Memorandum 91-40 as Amended and Supplemented.

The major subject deals with the duty of the Attorney-in-Fact ("Agent") to act. I believe that subject begins in new proposed Civil Code section 2418.010, on page 32, of the May 24, 1991 staff draft under study L-3044.

I. My Personal Interest

While I have been, for some years, and still am, a member of Team 4, and am presently a technical advisor of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the California State Bar, in the general area of durable powers and health care this letter states my personal position.

Since the advent of durable powers of attorney in California, I have been very active before California legislative committees, and in published writings, in advocating durable powers of attorney in California. I have also been, and still am, a member of the Joint Editorial Board for the Uniform Probate Code which has the major responsibility, nationally, for promoting durable powers of attorney. More recently, I am an observer to the N.C.C.U.S.L. drafting committee which is in the process of drafting a uniform health-care decisions act. I mention the above solely to lay the ground work for my personal interest in durable powers of attorney.

II. The Agent's Duty To Act

My position is quite simple to state: The Agent always has a duty to act, as a fiduciary, in the best interest of the Principal. And that is true irrespective of whether the durable power instrument contains a grant of powers or a grant of duties or a mix of powers and duties.

In creating a duty to act, the legal status of the Agent is very important:

A. The Agent is a fiduciary. In that respect, the Agent is analogous to, but not the same as, the trustee under any trust agreement.

B. When the principal signs a durable power granting powers only, the principal's expectation is that, in the event of the principal's incapacity, the Agent has a duty to act in the best interest of the Principal. Most certainly, the Principal's expectation is not that the agent will do nothing.

III. Brief History Of Duty To Act In C.L.R.C. Study

A bit of history of the Duty To Act In C.L.R.C. Study.

This issue first arose, I believe, at a C.L.R.C. meeting held on November 30, 1989 at the Grosvenor Hotel, San Francisco Airport. My presentation was scheduled for 1:30 p.m. The agenda items were (i) Springing Powers of Attorney and (ii) the California Uniform Statutory Form Power of Attorney. My presentation was on behalf of the above Executive Committee. Among other points, I urged that all California forms of durable powers should always provide for the Agent's written acceptance. At that point Vaughn Walker, who was then a member of C.L.R.C., asked, in substance, "Are you saying that the Agent has no duty to do any act unless he accepts the appointment". My response was: "Yes, that is my understanding of the law". There was considerable discussion of that point. The discussion concluded with Vaughn Walker's direction to the staff to study the problem and determine whether or not there was any statutory method of always having the Agent under some duty to act.

I believe C.L.R.C. memo 91-40 is the staff response.

IV. The Attorney In Fact Always Has A Fiduciary Duty To Act In The Best Interests Of The Principal

My opinion is that the Attorney in Fact always has a fiduciary duty to act in the best interests of the principal.

That opinion is based upon the following:

A. The Attorney in Fact Is A Fiduciary. The relationship of principal and Attorney in Fact, legally, is a fiduciary relationship. That is well-accepted "boilerplate" law. The Attorney in Fact is not a trustee; however, like a trustee, the Attorney in Fact has a continuing fiduciary duty to act in the best interests of the principal.

B. The "Powers" Issue. It has been suggested, by some, that under a durable power that contains only a grant of powers (and does not contain a grant of duties) that the Attorney in Fact is not required to do anything at anytime irrespective of whether the Attorney in Fact does, or does not, accept the appointment in writing.

My opinion: That is totally wrong as a matter of law.

Take this example: The Attorney in Fact has power (not a duty) to sell securities, and has agreed in writing to accept the appointment. The principal is incapacitated. One security is 1,000 shares of Gold Mining Co. which had a market value of $1,000 per share when the durable power instrument was executed. The market value of Gold Mining Co. begins to drop and plummets to $75.00 per share. All investment advice is to "sell" because, for a number of reasons, the market value of Gold Mining Co. is going only in one direction -- down! The Attorney in Fact does nothing, saying to himself: "I hold only a power to sell and am not obligated to do anything!"

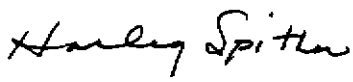
My opinion: The Attorney in Fact had a duty to sell Gold Mining Co., at some point in time, in view of the continuing down trend of the market. That duty derives from his continuing fiduciary duty to act, always, in the best interests of the incapacitated principal.

V. Possible Statutory Solution

One possible statutory solution would be along these lines:

> Civil Code Section ____. The attorney in fact is a fiduciary; and as a fiduciary always has a duty to act in the best interests of the principal.

Sincerely,



Harley Spitler

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