#L-3044

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04/22/92

Second Supplement to Memorandum 92-21

Subject: Study L-3044 - Comprehensive Powers of Attorney Statute (Comments from Harley Spitler)

Attached to this supplement is a letter from Mr. Harley Spitler concerning the fiduciary duties of agents, with particular reference to the attorney in fact under a power of attorney. This letter supplements Mr. Spitler's letter of March 4, which is attached to the First Supplement to Memorandum 92-21. We will discuss this letter at the meeting.

Respectfully submitted,

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March 23, 1992

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**Re: CLRC Memorandum 91-40 as amended and supplemented**

Dear Mr. Ulrich:

This is a supplement to my March 4, 1992 letter re CLRC Memorandum 91-40 as amended and supplemented.

There is strong support in:

1. The Restatement (Second) of Agency

2. California statutes

3. Court decisions

for the propositions that (i) the agent is a fiduciary and (ii) as a fiduciary always has a duty to act in the best interests of the principal.

I. Restatement (Second) of Agency

The Restatement (Second) of Agency, Sec. 13 states:

"An agent is a fiduciary with respect to matters within the scope of his agency"

The Restatement "Comment" states in part:

"The agreement to act on behalf of the principal causes the agent to be a fiduciary, that is a person having a duty, created by his undertaking to act primarily for the benefit of another in matters connected with his undertaking"

Restatement (Second) of Agency, p. 58.

Restatement (Second) of Agency, Sec. 387 states:

"Sec. 387. General principle

Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."

II. California's Statutes

California Civil Code 2322(c) provides:

"An authority expressed in general terms, however broad, does not authorize an agent to do any of the following:

- - - - -

(c) Violate a duty to which a trustee is subject under Section 16002, 16004, 16005, or 16009 of the Probate Code"

Probate Code 16002(a) provides:

"(a) The trustee has a duty to administer the trust solely in the interest of the beneficiaries."

I believe all responsible commentators agree that when transposing the power of attorney section into the trust section, the language of Probate Code 16002(a) would be interpreted to read:

"(a) The attorney in fact has a duty to administer the power of attorney solely in the interest of the principal."

There are a number of specific duties of the attorney in fact set forth in Probate Code Sections 16004, 16005 and 16009.

III. CLRC Memos Re Duty Of Attorney In Fact To Act

I believe the first CLRC memo on the duty of the Attorney in Fact to act is memorandum 90-30 re Study L-3031 dated 1/19/90. Therein the staff recommendation was the addition of section 2515 to the Civil Code reading as follows:

"Staff Recommendation

We could add a provision to the Civil Code to read:

Civil Code § 2515. Acceptance of duties of attorney in fact

2515(a) A person named as attorney in fact in a power of attorney, whether or not a durable power of attorney, may accept the duties of attorney in fact by any of the following methods:

(1) Signing the power of attorney or signing a separate written acceptance.

(2) Knowingly exercising powers or performing duties under the power of attorney.

(b) If the person named as attorney in fact receives consideration for agreeing to serve and the agreement is not required by law to be in writing, the person may accept the duties of attorney in fact as provided in subdivision (a) or by orally agreeing or otherwise manifesting acceptance by words or conduct.

Comment. Section 2515 is new. Subdivision (a) makes two changes in what appears to have been prior law. First, a gratuitous attorney in fact is bound by written acceptance, whether or not actually entering upon performance. See 2B. Witkin, Summary of California Law *Agency and Employment* § 62, at 68 (9th ed. 1987). Second, a gratuitous attorney in fact is no longer bound by oral acceptance, nor is acceptance implied from circumstances and conduct. Id. § 36, at 49-50.

> Subdivision (b), concerning an attorney in fact who is compensated, is consistent with prior law. See id.; cf. Civ. Code § 2309 (when written authority required).
>
> Proposed Section 2515 would eliminate uncertainty about whether a gratuitous attorney in fact has any duty to perform before actually entering upon performance. This seems to be a desirable clarification, particularly for a durable power of attorney where the principal needs assurance that the named attorney in fact will perform if the principal becomes incompetent."

That new proposed C.C. Section 2515 would have solved the problem.

However at the April 1990 meeting, CLRC deferred action on C.C. 2515 and referred it back to the staff "in light of the decision to make a comprehensive review of the general power of attorney statutes." CLRC memo 90-85 dated 7/10/90, page 8.

Then, in memo 90-122 dated 10/31/90, the staff reversed the position taken by it in CLRC memo 90-30, set forth above. With due respect to the staff, the reasons given by it for that reversal of position are contradictory, confusing and wrong. There is no mention of CLRC memo 90-30.

Here are several examples of the contradiction and confusion in the "Duty to Act" section (pink section) and the "General Duties of Agents" section (pink section) of the staff draft of CLRC memo 90-122:

1. The cursory dismissal of C.C. 2322(c) and Probate Code 16002 in footnote 46 is simply both wrong and incomplete. The staff does not even quote Probate Code 16002(c), set forth above, which when transposed into power of attorney language places a duty upon the agent to administer the power of attorney solely in the interest of the principal.

2. The equally cursory dismissal of C.C. 2475:

> "By accepting or acting under the appointment, the agent assumes the fiduciary and other legal responsibilities of an agent"

is strange. Footnote 39 says: "The full implication of this statement is unknown." That could be said of every new statute. C.C. 2475 was enacted in 1990. I believe it was sponsored by CLRC. Most certainly, CLRC should have some view of the

meaning of the above sentence when it placed that sentence in C.C. 2475. If the sentence does not mean what it clearly says, CLRC should consider an amendment to delete the sentence!

3. The staff places heavy reliance upon statutes of other states, especially Illinois and Missouri. Several comments:

a. Staff says it is "the trend of modern statutes to relieve the agent under a power of attorney from a duty to exercise the authority granted." It cites only Illinois and Missouri.

b. What the staff fails to do is to examine the other related statutes in Illinois and Missouri to determine whether or not those states have statutes similar to California's C.C. 2322(c) and C.C. 2475 and Probate Code 16002(a).

c. The staff also fails to point out other states whose statutes define the attorney in fact as a fiduciary with a fiduciary duty to act in the best interests of the incapacitated principal.

For example, why doesn't the staff look at the statutes of a state such as South Carolina which specifically provide that the agent under a durable power of attorney is a fiduciary; and as a fiduciary, the agent is liable to the principal for the agent's failure to act prudently or the agent's failure or refusal to act. See South Carolina Durable Power of Attorney Statute S.C. Code Ann. 62-5-501 reading in relevant part:

> "The attorney in fact has a fiduciary relationship with the principal and in fact has a fiduciary relationship with the principal and is responsible as a fiduciary."

d. Finally, as to Illinois and Missouri, what concern has California with these states. We, CLRC and the legislature, want to do what is best for California residents.

4. The Client's Expectation. I would like to have the staff furnish me the name and phone number of one client, of any attorney, whose understanding after paying a $_____ fee for a set of durable powers was that if he/she, the client, became incapacitated, the agent never had to perform any act at any time! Utter nonsense! The client's rightful expectation is that in the unfortunate event of

incapacity, his/her agent has a continuing fiduciary duty to act in the best interests of that incapacitated principal.

IV. Court Decisions

As we are not concerned with court decisions in other states, this section deals only with California reported decisions. I believe, however, that there is no reported decision in any state holding that the attorney in fact under a power of attorney is not a fiduciary. The rule that the attorney in fact under a power of attorney is a fiduciary is "Boiler plate" law and a universal rule.

For California, see Kinert v. Wright (1947) 81 CA(2d) 919 at 925:

> "The relations of principal and agent, like those of beneficiary and trustee, are fiduciary in character."

For a sound federal court of appeals decision, see Hill v. Bache Halsey Stuart Shields Inc. (1986, 10th Circuit) 790 F.(2d) 817 at 824:

> "Any state law fiduciary duty of Bache and Wright arose from their agency relationship with Hill. Wright, on behalf of Bache, was Hill's agent at least for the purpose of conducting trades Hill ordered. Wright therefore was a fiduciary, because all agents are fiduciaries "with respect to matters within the scope of [their] agency." *Restatement (Second) of Agency* § 13 (1958). But the district court instruction failed to address the key question, i.e., what was *the scope* of the agency? *See Sherman v. Sokoloff*, 570 F.Supp. 1266, 1269 n. 10 (S.D.N.Y.1983) (noting importance of scope question when stockbroker charged with willful or reckless breach of duty tantamount to fraud); *see also Restatement (Second) of Trusts* § 2, comment b (1959) ("A person in a fiduciary relation to another is under a duty to act for the benefit of the other *as to matters within the scope of the relation.*") (emphasis added). An agency relationship is consensual on both sides. *Restatement (Second) of Agency* § 1. A fiduciary duty thus cannot be defined by asking the jury to determine simply whether the principal reposed "trust and confidence" in the agent. The jury should have been instructed to decide first what Wright had agreed to do for Hill and then to determine whether Wright executed those tasks properly."

Please note, in particular, the quotation from Restatement (Second) of Trusts, section 2, page 6:

> "A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation."

Sincerely,

Harley Spitler

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