#L-3044 su1043
04/22/92

Third Supplement to Memorandum 92-21

Subject: Study L-3044 - Comprehensive Powers of Attorney Statute (State Bar comments)

Attached to this supplement are two letters. Exhibit 1 is a letter from Mr. William V. Schmidt on behalf of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section concerning the Committee's position on duties of agents. This letter is in response to the letter from Mr. Spitler, attached to the First Supplement to Memorandum 92-21.

Exhibit 2 reports additional comments on the draft statute from Team 4 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section. This report concerns the duty of an attorney in fact to act and the effect of remarriage on a power of attorney terminated by dissolution, annulment, or legal separation. The report supplements the Team's earlier report attached to Memorandum 92-21.

We will discuss these materials at the meeting.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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

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April 19, 1992

REPLY TO:

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California Law Revision Commission
4000 Middlefield Road, D-2
Palo Alto, CA 94306

Attn: Stan Ulrich,
Assistant Executive Secretary

Re: First Supplement to Memorandum 92-21

Dear Stan:

At the February 29, 1992 meeting of the Executive Committee in Los Angeles, the resolution set forth below was proposed by Don Green and adopted by a vote of 14 to 5.

"The law as to durable power - power of attorney should be that the holder of the power has no duty to act under that power, subject to two exceptions:

(1) Duty to follow through with an action to the extent that that action is undertaken.

(2) To the extent there is an express duty that has been expressly accepted by the agent."

I am aware of the March 4, 1992 letter to you from Harley Spitler which is attached to the First Supplement to Memorandum 92-21 as Exhibit 2. The purpose of this letter is (1) to inform you of the vote and position of the Executive Committee; and (2) to make you aware that some of the contents of Mr. Spitler's letter are inconsistent with the position of the majority of the Executive Committee.

It is always possible that this matter will again be placed on the agenda of the Executive Committee for further discussion and reconsideration. If this happens and the Executive Committee adopts a different position, we will most assuredly inform you of that position.

If you have any questions, please feel free to contact me.

Very truly yours,

Wm. V. Schmidt

WILLIAM V. SCHMIDT

WVS/dk
cc: Valerie Merritt
Michael Vollmer
Kathryn Ballsun
Harley Spitler
Matthew Rae
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April 22, 1992

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

Re: Law Revision Commission, Memorandum 91-40;
Comprehensive Powers of Attorney Statute

Dear Stan:

Enclosed is a copy of Part Two of Team 4's report concerning the above-referenced Memorandum.

Part Two contains a discussion of several additional policy questions which Team 4 has discussed since Part One of its report was sent to you. We look forward to discussing the enclosed issues with you.

Thank you for your continuing cooperation.

Cordially,

Kathryn A. Ballsun

KATHRYN A. BALLSUN
A Member of
Stanton and Ballsun
A Law Corporation

cc: Team 4

Enclosure

TEAM 4 REPORT

PART II

CALIFORNIA LAW REVISION COMMISSION MEMORANDUM 91-40;

COMPREHENSIVE POWERS OF ATTORNEY STATUTE

(March 13, 1992)

In Part I of Team 4's Report to the Law Revision Commission ("Commission"), Team 4 discussed the September 13, 1991 comments of the Commission to and about Memorandum 91-40, Comprehensive Powers of Attorney Statute ("Durable Powers of Attorney").

Since the submission of its initial report, Team 4 has continued its review, discussion and study of the Durable Powers of Attorney. The purpose of this Part II is to present certain additional policy issues which have arisen as a result of Team 4's continued study of the Durable Powers of Attorney. The issues, Team 4's responses and the reasoning underlying those responses are as follows:

1. **Question 1:** Under current California law, if an attorney-in-fact does not accept his/her appointment, then that attorney-in-fact has no duty to act. Should the law continue to reflect this position, or should the law be changed so that an attorney-in-fact has an obligation to act, either at all times or under certain circumstances?

1.1 When does the attorney-in-fact's duty to act arise? (Under what circumstances does the attorney-in-fact's duty spring into power?)

1.2 Once an attorney-in-fact's duty to act arises, what is the extent of the duty?

1.3 Does acting in one transaction mean that the attorney-in-fact has undertaken to act in all transactions?

1.4 What type of an act can trigger the duty to act?

1.5 Can the acceptance of one power by the attorney-in-fact reasonably be construed to mean that the attorney-in-fact has accepted all powers under the Durable Power of Attorney?

1.6 Should there be a difference in the treatment of compensated and non-compensated attorneys-in-fact with respect to the assumptions of duty and the extent of the duties assumed?

By a vote of 14 to 5, the Executive Committee of the Estate Planning, Probate and Trust Law Section of the State Bar of California adopted the following resolution in response to the questions set forth above:

> "The holder of a durable power of attorney has no duty to act on or exercise that power, subject to the following two exceptions: (1) the power holder must follow through with an action which is undertaken; and (2) the power holder must comply with any express duty to act which is expressly accepted by the agent."

Although the vote of the Executive Committee was 14 to 5, each of the respective viewpoints was strongly asserted by its respective proponents. In fairness to those proponents, the arguments which were advanced in favor of and in opposition to the above resolution are set forth below. The arguments which were advanced in favor of the above resolution (as articulated by Executive Committee member Don Green) are as follows:

1. Powers of attorney are commonly used in a broad variety of situations by persons of widely varying technical expertise. Changing the law to impose broader duties will result in confusion and errors.

2. A legal document should do what it appears to do. Most powers of attorney, particularly those regarding property, grant only powers that have no express duties whatsoever.

3. To avoid the common frustration of third parties' reluctance to recognize the attorney-in-fact's authority, powers of attorney are commonly drafted very broadly. If implied duties to act are imposed on powers, agents will require that they be given the least power necessary. This will result in frustration of the purpose of the power when unexpected problems arise.

4. Prudent persons will refuse to accept powers of attorney in order to avoid liability for failure to act. If merely acting on a power of attorney becomes acceptance of a broad duty to affirmatively exercise all the powers as needed, the holders of powers are more likely to refuse to act at all.

5. Powers of attorney are importantly different than typical revocable trusts or conservatorships, because powers of attorney do not require acceptance of a primary obligation to handle all aspects of the assets of the principal. Imposing implied duties to act, or liability for failure to act, will vitiate this important distinction and substantially reduce the range of options available for incapacity planning.

6. Imposing additional duties to act will cause an explosion of litigation, defining and clarifying the scope and limits of a substantially new tort ("failure to act on implied duty to exercise power of attorney"). This litigation will involve not only the principal and the attorney-in-fact, but also third parties who will seek recovery against the attorney-in-fact for failure to act. (E.g., a person injured on a broken stair would also sue the attorney-in-fact if the attorney-in-fact should have seen the broken stair months earlier when collecting a rent check while the landlord/principal was temporarily away.) This new tort would also raise substantial and difficult issues regarding which insurance policies cover and are primarily liable for such claims.

The position which was expressed in opposition to the above position (as articulated by Executive Committee member Harley Spitler) can be summarized as follows:

"As a fiduciary, the attorney-in-fact always has a duty to act in the best interest of the principal. This duty exists 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 attorney-in-fact is very important. First, the agent is a fiduciary. In that respect, the agent is analogous, but not the same as, the trustee under any trust agreement. Second, when the principal signs a durable power granting powers only, the primary expectation is that, in the event of the principal's incapacity, the attorney-in-fact has a duty to act and will act in the best interest of the principal."

2. **Question 2:** If an attorney-in-fact's authority is terminated as a result of the dissolution or annulment of the marriage of the attorney-in-fact and the principal, or the legal separation of the attorney-in-fact and the principal, should the attorney-in-fact's authority, terminated in the manner set forth above, be revived by the principal's remarriage to the attorney-in-fact?

The Executive Committee voted 17 to 4 that in the event of the remarriage of the principal and the attorney-in-fact after the dissolution of their marriage that neither the durable power of attorney for health care, nor the attorney-in-fact's authority, should be revived automatically as a result of the remarriage. The Executive Committee believes that such automatic revival would be contrary to the expectations of the parties. In addition, the implementation of a durable power should be given most serious consideration by the principal. In the event of a dissolution, and notwithstanding their subsequent remarriage, other circumstances or

considerations may have occurred which would negate the reasons for authorizing an automatic revival. Moreover, in the interim between the dissolution and the remarriage, the principal may have executed another durable power which, notwithstanding the remarriage, may more closely reflect the principal's current desires and intent. For all of these reasons, the durable power should not be revived in the event of the remarriage of the principal and the attorney-in-fact after the dissolution of their prior marriage.