

First Supplement to Memorandum 93-43

**Subject: L-3044— Comprehensive Power of Attorney Statute (Explanatory Text
for Draft Tentative Recommendation)**

Attached to this supplement is a staff draft of the explanatory text for the draft tentative recommendation attached to Memorandum 93-43. This material, as revised to reflect Commission decisions and editorial suggestions, will be combined with the tentative recommendation when it is distributed for comment.

Respectfully submitted,

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COMPREHENSIVE POWER OF ATTORNEY STATUTE

BACKGROUND

The statutes governing powers of attorney are in need of reorganization and revision.¹ Since 1979, several bills have been enacted recognizing durable powers of attorney for property and for health care, providing statutory forms, specifying a procedure for enforcement of the duties of attorneys-in-fact, and making a number of other changes in the law.² From the beginning of these reforms, the power of attorney statutes have been added to the part of the Civil Code relating to agency.

1. Power of attorney statutes consist of the following: Civ. Code §§ 2400-2407 (Uniform Durable Power of Attorney Act), 2410-2423 (court enforcement of duties of attorney in fact), 2430-2444 (durable power of attorney for health care), 2450 (statutory short form power of attorney), 2475-2499.5 (Uniform Statutory Form Power of Attorney Act), 2500-2508 (statutory form durable power of attorney for health care), 2510-2513 (miscellaneous provisions relating to powers of attorney). See also Civ. Code §§ 2019-2022, 2295-2357 (general rules relating to agency); Prob. Code § 3720 (federal absentee's power of attorney).

2. Almost all of the legislation in this area was enacted on recommendation of the Law Revision Commission:

Recommendation Relating to Uniform Durable Power of Attorney Act, 15 Cal. L. Revision Comm'n Reports 351 (1980) (enacted as 1981 Cal. Stat. ch. 511). For legislative history, see 16 Cal. L. Revision Comm'n Reports 25 (1982); *Report of Senate Committee on Judiciary on Assembly Bill 329*, 16 Cal. L. Revision Comm'n Reports 43 (1982).

Recommendation Relating to Durable Power of Attorney for Health Care Decisions, 17 Cal. L. Revision Comm'n Reports 101 (1984) (enacted as 1983 Cal. Stat. ch. 1204). For legislative history, see 17 Cal. L. Revision Comm'n Reports 822 (1984); *Report of Assembly Committee on Judiciary on Senate Bill 762*, 17 Cal. L. Revision Comm'n Reports 889 (1984).

Recommendation Relating to Statutory Forms for Durable Powers of Attorney, 17 Cal. L. Revision Comm'n Reports 701 (1984) (enacted as 1984 Cal. Stat. chs. 312 & 602). For legislative history, see 18 Cal. L. Revision Comm'n Reports 18 (1986); *Report of Assembly Committee on Judiciary on Senate Bill 1365*, 18 Cal. L. Revision Comm'n Reports 45 (1986).

Recommendation Relating to Durable Powers of Attorney, 18 Cal. L. Revision Comm'n Reports 305 (1986) (enacted as 1985 Cal. Stat. ch. 403). For legislative history, see 18 Cal. L. Revision Comm'n Reports 216 (1986); *Communication from California Law Revision Commission Concerning Senate Bill 1270*, 18 Cal. L. Revision Comm'n Reports 379 (1986).

Recommendation Relating to Springing Powers of Attorney, 20 Cal. L. Revision Comm'n Reports 405 (1990) (enacted as part of 1990 Cal. Stat. ch. 986). For legislative history, see 20 Cal. L. Revision Comm'n Reports 2219 (1990).

Recommendation Relating to Uniform Statutory Form Power of Attorney Act, 20 Cal. L. Revision Comm'n Reports 415 (1990) (enacted as part of 1990 Cal. Stat. ch. 986). For legislative history, see 20 Cal. L. Revision Comm'n Reports 2219 (1990); *Report of the California Law Revision Commission on Chapter 986 of the Statutes of 1990 (Senate Bill 1777)*, 20 Cal. L. Revision Comm'n Reports 2291 (1990).

Recommendation Relating to Elimination of Seven-Year Limit for Durable Power of Attorney for Health Care, 20 Cal. L. Revision Comm'n Reports 2605 (1990) (enacted as 1991 Cal. Stat. ch. 896). For legislative history, see 21 Cal. L. Revision Comm'n Reports 22 (1991).

The initial authorization in 1979 for a durable power provided only for a power lasting for one year after the principal's disability. See 1979 Cal. Stat. ch. 234 (enacting Civ. Code § 2307.1, repealed by 1981 Cal. Stat. ch. 511, § 1). Civil Code Section 2307.1 was superseded by enactment of the California version of the Uniform Durable Power of Attorney Act (1979) in 1981. See *Recommendation Relating to Uniform Durable Power of Attorney Act*, 15 Cal. L. Revision Comm'n Reports 351, 359-60 (1980).

A shortage of space and available section numbers in this part of the Civil Code, in league with the piecemeal nature of the revisions over the past 12 years, has resulted in a disorganized set of statutes. In some cases it is difficult to determine whether a particular provision applies to all powers of attorney, to durable powers generally, or only to health care powers. The degree to which the different varieties of powers of attorney are subject to the general agency rules is unclear. The general agency statutes are obscure and incomplete.³ They provide little practical guidance to individuals attempting to resolve issues that may arise in connection with powers of attorney.⁴

Durable powers of attorney have become an increasingly important tool in recent years.⁵ This has resulted in more legislative attention in several other jurisdictions, as in California. A few states have enacted new comprehensive statutes that the Commission has considered in the preparation of this proposed law. Of particular interest are the new statutes in Illinois (1987), Minnesota (1984), Missouri (1989), and Nebraska (1988).⁶

3. See Civ. Code §§ 2019-2022, 2295-2357. Of the 51 agency sections appearing in the Civil Code of 1872, only four have been revised in 120 years. The 1872 Code, drawn from the Field Civil Code proposed in New York, was prepared by revisers who “felt themselves under ‘lash and spur’” to prepare a bill before the 1872 legislative session and who reported that they felt “embarrassment” in this revision. Revision Commission, *Final Note*, [Proposed] Revised Laws of the State of California in Four Codes: Civil Code 609 (1871). The Civil Code of 1872 was the subject of an unrelenting attack by Professor Pomeroy who argued in 1884 that the Revision Commission had created a great source of doubt, uncertainty, and error by the “constant, but wholly unnecessary practice, of abandoning well-known legal terms and phrases ... and of adopting instead thereof an unknown and hitherto unused language and terminology.” Quoted in Van Alstyne, *The California Civil Code*, in 6 West’s Ann. Cal. Codes: Civil Code 1, 30 (1954). Pomeroy concluded that there was “hardly a definition, or a statement of doctrine in the whole work, the full meaning, force and effect of which can be apprehended or understood without a previous accurate knowledge of the common law doctrines and rules on the same subject matter.” *Id.*

4. Many of the general agency statutes are concerned with ratification and ostensible authority, matters that are either irrelevant or handled differently in the power of attorney statutes. The general agency statutes overlap and seem at cross-purposes in some instances, such as Sections 2019 (agent cannot exceed authority), 2315 (agent has authority conferred), 2319 (agent’s necessary authority), 2320 (agent’s power to disobey), and 2322 (limits on general authority). The language of many of these rules is so general and abstract as to provide almost no guidance at all. See Civ. Code §§ 2298-2300, 2315-2320.

5. Twenty-seven jurisdictions have adopted the Uniform Durable Power of Attorney Act in whole or substantial part. See 8A Unif. L. Ann. at 82 (West Supp. 1990). Durable powers of attorney in some form are available in all fifty states and the District of Columbia. See Collin, Lombard, Moses, & Spitler, *Drafting the Durable Power of Attorney: A Systems Approach* 14 (2d ed. 1987). A different approach has been taken in Illinois and Oregon where all agencies have been made durable. See Ill. Ann. Stat. ch. 110 ¶¶ 802-5 (Smith-Hurd Supp. 1990); Or. Rev. Stat. Ann. § 127.005(1) (Supp. 1990). For an overview of legislation nationally, see Collin, *Planning and Drafting Durable Powers of Attorney*, 15 Prob. Notes 27 (Am. C. Prob. Couns. 1989); Vignery, *Legislative Trends in Nonjudicial Surrogate Health Care Decision Making*, 23 Clearinghouse Rev. 422 (1989).

6. See Ill. Ann. Stat. ch. 110 ¶¶ 802-1 to 802-11 (Smith-Hurd Supp. 1990); Minn. Stat. Ann. §§ 523.01-523.25 (West Supp. 1990); Mo. Ann. Stat. §§ 404.700-404.735 (Vernon 1990); Neb. Rev. Stat. §§ 49-1501 to 49-1561 (1988); see also Burns, *New Power of Attorney Statute*, 41 Bench & Bar of Minn., Dec. 1984, at 9; Eickhoff, *New Durable Power Law and Custodial Trust Act Amendments*, 45 J. Mo. B. 329 (1989); Missouri Bar Ass’n, *Missouri Probate and Trust Update — 1989*, at 123-70; Zartman, *Illinois Power of Attorney Act*, 13 S. Ill. U.L.J. 1 (1988).

OVERVIEW OF PROPOSED COMPREHENSIVE STATUTE

Location of Proposed Law

The proposed comprehensive Power of Attorney Law would restructure the power of attorney statutes and relocate them as a new Division 4.5 in the Probate Code, commencing at Section 4000. Relocating the power of attorney statutes in the Probate Code reinforces the estate planning nature of the durable power of attorney, and assists in distinguishing them from powers of attorney given in business transactions. A durable power of attorney may serve as an alternative to a conservatorship, hence placing the new statutes following the guardianship-conservatorship law is appropriate.⁷ Under existing law, the judicial review provisions apply Probate Code procedures.⁸

Relation to General Agency Law

Under this proposal, the power of attorney statutes would not be completely severed from the general agency rules. The substance of general agency rules thought to be useful have been worked into the fabric of the proposed law, in the interest of providing a relatively complete statute.⁹ However, powers of attorney are a type of agency and would remain subject to the general law of agency, except to the extent that the Power of Attorney Law provides a rule. The general rules concerning agency in the Civil Code would be left in place with only a few conforming revisions required to remove material relevant only to powers of attorney.¹⁰

Scope of Revision

The Commission's tentative proposal would make most of its changes in the law relating to powers of attorney for property — i.e., powers other than durable powers of attorney for health care — because these statutes are incomplete and

7. Relocation to the Probate Code would continue a process that began in 1931 when the Probate Code was first created, mainly from pieces of the Civil Code. See Turrentine, *Introduction to the California Probate Code*, 52 West's Annotated California Codes: Probate Code 1, 27-30 (1954). This process has continued in recent years. Enactment of the Trust Law in 1986 removed several parts of the Civil Code to the Probate Code. See 1986 Cal. Stat. ch. 820; *Selected 1986 Trust and Probate Legislation*, 18 Cal. L. Revision Comm'n Reports 1201 (1986). Most recently, the power of appointment statute was relocated from the Civil Code to the Probate Code. See 1992 Cal. Stat. ch. 30; *Relocation of Powers of Appointment Statute*, 21 Cal. L. Revision Comm'n Reports 91 (1991). Many other pieces of the Civil Code have been removed in the process of spawning other codes, such as the Commercial Code, Corporations Code, Family Code, Financial Code, Insurance Code, Labor Code, and Water Code.

8. See Civ. Code §§ 2413, 2417(e).

9. See, e.g., proposed Prob. Code §§ 4120 (continuing Civ. Code § 2296 requirement that principal have capacity to contract), 4152 (drawn from termination rules in Civ. Code §§ 2355-2356), 4205 (consistent with delegation rules in Civ. Code § 2349).

10. See proposed amendments to Civ. Code §§ 2355-2357.

disorganized.¹¹ Much of the proposed legislation is directed toward supplying more detailed rules and filling gaps in existing coverage, rather than making any major substantive revisions.

The scope of the proposed law is broad, but not unlimited. It applies to durable powers of attorney (including durable powers of attorney for health care), statutory form powers of attorney, and any other power of attorney that incorporates or refers to the Power of Attorney Law. A power of attorney is defined as a written agency agreement executed by a natural person that grants powers to an attorney-in-fact, and a durable power is one that survives the incapacity of the principal. The effect of these provisions is to avoid unintentional application of the Power of Attorney Law to powers of attorney executed in business affairs.

The proposed law also generalizes certain rules to apply to all powers of attorney covered by the statute, whether for property, health care, or personal care. Rules concerning execution, termination, revocation of authority, and the like would apply to all powers covered by the statute, thereby achieving a greater consistency in the law. The statutes relating to durable powers of attorney for health care¹² and powers under the Uniform Statutory Form Power of Attorney Act¹³ the would remain largely self-contained, with only minor technical changes to conform to the restructured statute.

GENERAL RULES

Default Rules Subject to Control by Power of Attorney

The proposed law makes clear that many statutory rules are default rules subject to control by the power of attorney. Thus, where the statute does not provide otherwise, the principal may limit or nullify a default rule by a specific provision in the instrument. For example, the principal may impose greater or lesser duties on the attorney-in-fact, provide special rules concerning modification or termination of the power of attorney or the authority of the attorney-in-fact, or determine the rate of compensation of the attorney-in-fact or provide for no compensation. On the other hand, the proposed law does not permit certain rules to be limited by the principal. Thus, the power of attorney cannot waive statutory qualifications for the attorney-in-fact, alter operative date rules or form requirements, or change the rules protecting third persons from liability.

11. "Power of attorney for property" is used to refer to all powers of attorney other than durable powers of attorney for health care. This usage is consistent with the terms used in practice. See, e.g., 1991 California Durable Power of Attorney Handbook § 1.1, at 2 (Cal. Cont. Ed. Bar).

12. See Civ. Code §§ 2430-2444 (durable power of attorney for health care), 2500-2508 (statutory form durable power of attorney for health care); see also §§ 2410-2423 (court enforcement of duties of attorney in fact), 2511 (identity of principal).

13. See Civ. Code §§ 2475-2499.5.

Creation of Power of Attorney

The proposed law provides general rules governing of a power of attorney. As under existing law, power of attorney must be in writing and signed by the principal.¹⁴ There is no requirement that the attorney-in-fact sign the instrument. The proposed law generalizes the requirement that a power of attorney be dated, which applies under existing law to the durable power of attorney for health care and the statutory form power.¹⁵ Including the date of execution is essential to determining whether the principal had capacity to execute the power and also aids in determining which is the later of two conflicting powers of attorney.

In addition, the proposed law requires as a general rule that powers of attorney be either acknowledged before a notary public or signed by two witnesses.¹⁶ This requirement is drawn from the execution requirements applicable to non-form durable powers of attorney for health care.¹⁷ The witnessing or acknowledgment requirement is intended to provide a protective level of formality for durable powers of attorney. Acknowledgment before a notary public is needed to facilitate recording a power of attorney in transactions affecting real property.¹⁸

Qualifications of Attorney-in-Fact

Existing law imposes no particular qualifications on who may be an attorney-in-fact under a power of attorney for property,¹⁹ although special restrictions apply in the case of a durable power of attorney for health care.²⁰ At a minimum, the attorney-in-fact should be a person with the capacity to contract.²¹ The proposed

14. See Civ. Code §§ 2400; Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1991 California Durable Power of Attorney Handbook § 2.47, at 56 (Cal. Cont. Ed. Bar). There is no explicit general requirement in the statutes that a power of attorney be signed. The statutory forms require the principal's signature. See Civ. Code § 2475 (Uniform Statutory Form Power of Attorney); see also Civ. Code § 2500 (statutory form durable power of attorney for health care).

15. See Civ. Code §§ 2475 (uniform statutory form), 2432(a)(2) (durable power of attorney for health care), 2500, 2502 (statutory form durable power of attorney for health care), 2503 (printed form durable power of attorney for health care).

16. Witnessing would not be an option under the statutory form power of attorney, in the interest of consistency with the uniform form used in other states.

17. See Civ. Code §§ 2432(a)(3) (durable power of attorney for health care). The requirement that the statutory form durable power of attorney for health care be signed by two witnesses, rather than notarized, is retained in the proposed law. See Civ. Code §§ 2500, 2502 (statutory form durable power of attorney for health care), 2503 (printed form durable power of attorney for health care).

18. See Civ. Code §§ 1213, 1216.

19. Civil Code Section 2400 provides that a durable power of attorney designates "another" as attorney in fact for the principal. The general agency rules provide that "any person may be an agent." Civ. Code § 2296.

20. See Civ. Code §§ 2432(b)-(c), 2432.5, 2500 (§ 1 of statutory form durable power of attorney for health care).

21. Some commentators conclude that "[a]pparently a principal can appoint any mentally competent natural adult person who has not been deprived of his or her civil rights and can also appoint institutions." Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1991 California Durable Power of Attorney Handbook § 2.46, at 55-56 (Cal. Cont. Ed. Bar).

law provides than any person (including natural persons and entities)²² who has the capacity to make a contract may be an attorney-in-fact. The proposed law also makes clear that designation of an unqualified person as an attorney-in-fact does not affect the immunities of third persons nor the duties owed to the principal.²³

Multiple and Successor Attorneys-in-Fact

The proposed law provides explicitly for designation of multiple and successor attorneys-in-fact in a power of attorney for property. The new statutory form power of attorney provides a place for designating multiple attorneys-in-fact and for providing that they may act separately or jointly.²⁴ The proposed law provides authority for designating multiple attorneys-in-fact and, if the power of attorney does not provide otherwise, specifies that the multiple attorneys-in-fact must act unanimously. This is consistent with the default rule applicable under the statutory form power of attorney and with the law governing trustees.²⁵ The proposed law also adopts the trust rules permitting action by the remaining co-attorneys-in-fact when one of the co-attorneys-in-fact cannot act due to absence, illness, or other temporary incapacity or when a co-attorney-in-fact's position has become vacant, such as through death or other termination of authority.²⁶

In addition to multiple attorneys-in-fact who have the same authority, the proposed law recognizes that the principal may designate different attorneys-in-fact to perform separate functions, and may make the designations in one or more powers of attorney.²⁷ This recognizes that different attorneys-in-fact may have expertise in different areas.²⁸ The proposed law recognizes that the power of attorney may designate successor attorneys-in-fact and provide the manner of their succession. As in the case of trustees, the proposed law makes clear that co-attorneys-in-fact and successor attorneys-in-fact are not liable for the acts of other attorneys-in-fact.²⁹

Delegation of Attorney-in-Fact's Authority

Existing law is unclear on the extent to which an attorney-in-fact may delegate authority under a power of attorney for property. The power of attorney statutes are silent on the matter, but the general agency statutes permit delegation (1) if the

22. See Prob. Code § 56 ("person" defined).

23. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.707(4) (Vernon 1990).

24. Civ. Code § 2475. The statutory form does not provide the option of action by a majority of the designated agents.

25. Prob. Code § 15620.

26. See Prob. Code §§ 15621-15622.

27. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.707(1) (Vernon 1990).

28. See Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1991 California Durable Power of Attorney Handbook § 2.21, at 42 (Cal. Cont. Ed. Bar).

29. See Prob. Code §§ 16402(a), 16403(a).

act is “purely mechanical,” (2) if the act cannot be performed by the attorney-in-fact but can be by the subagent, (3) if it is the “usage of the place” to delegate the authority, or (4) if the delegation is authorized by the principal.³⁰ Under these general rules, a subagent is not responsible to the principal, nor is the original attorney-in-fact responsible to third persons for the acts of a “lawfully appointed” subagent.³¹ The language of these statutes seems more appropriate to business agencies than to the normal power of attorney prepared by an individual.

As the default rule, the proposed law permits delegation of mechanical acts or acts the attorney-in-fact cannot lawfully perform. However, unlike the general agency rule, the original attorney-in-fact remains responsible to the principal for the exercise of the authority delegated.

Compensation of Attorneys-in-Fact

Existing statutory law provides no rules on compensation of attorneys-in-fact, except that consideration is not necessary to make an attorney-in-fact’s authority binding on the principal.³² An attorney-in-fact under a power of attorney is generally not expected to receive compensation, since the attorney-in-fact is usually a friend or member of the principal’s family who accepts the designation as an accommodation.³³ The proposed law provides that the attorney-in-fact is entitled to reasonable compensation and to reimbursement of expenses.³⁴ This authority is comparable to the law applicable to compensation and reimbursement of trustees.³⁵ The default right to compensation and reimbursement is subject to control in the power of attorney. It is expected that most attorneys-in-fact will serve without expecting compensation, but if the principal becomes incompetent and the attorney-in-fact is expected to incur substantial expenditures of time and money, compensation is entirely appropriate. In fact, not to provide for compensation may result in the failure of a durable power of attorney to carry out its purpose since the attorney-in-fact may be unwilling to continue without compensation and reimbursement.

Duty to Act

The existing statutes are silent as to what obligation, if any, a person designated as an attorney-in-fact has to accept the position or what obligation there is to

30. See Civ. Code § 2349.

31. See Civ. Code §§ 2022, 2050, 2051; see also Civ. Code § 2400.5 (proxy given by agent to exercise stock voting rights).

32. Civ. Code § 2308. The statutory form power of attorney provides authority for the agent to reimburse expenditures properly made. Civ. Code § 2485(i).

33. See Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1991 California Durable Power of Attorney Handbook § 2.51, at 58 (Cal. Cont. Ed. Bar); Missouri Bar Ass’n Comment to Mo. Ann. Stat. § 404.725 (Vernon 1990), Missouri Bar Ass’n, Missouri Probate and Trust Update — 1989, at 156.

34. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.725 (Vernon 1990).

35. See Prob. Code §§ 15681, 15684(a).

continue acting as attorney-in-fact.³⁶ In the absence of a written acceptance, it appears that an attorney-in-fact is free to act or not to act, may refuse to act in future transactions after having acted in some matters, and can resign at will. This is consistent with the idea that a power of attorney in a private relationship typically is an accommodation between friends or relatives. Many practitioners reportedly have the attorney in fact sign the power as a routine matter “to establish the attorney-in-fact’s acceptance of the authority granted by the principal and the concurrent responsibilities as an agent.”³⁷ The Uniform Statutory Form Power of Attorney provides that “by accepting or acting under the appointment, the agent assumes the fiduciary and other legal responsibilities of an agent.”³⁸

The situation is more formal with regard to trustees. Under the Trust Law, if a trustee accepts the trust, the trustee becomes subject to all applicable duties to administer the trust, cannot later refuse to act, and may resign only by following the procedures prescribed in the statute or the trust instrument. A trustee accepts by signing the trust instrument or knowingly exercising powers under the trust, except in emergency situations.³⁹ Once the trustee has accepted the trust, the trustee has a duty to administer the trust that does not end until the trustee is removed or allowed to resign.⁴⁰

The trend of modern statutes is to relieve the attorney-in-fact under a power of attorney from a duty to exercise the authority granted.⁴¹ The proposed law adopts this approach, making clear that a person who is designated as an attorney-in-fact has no duty to exercise the authority conferred in the power of attorney.⁴² This rule applies whether or not the principal has become incapacitated, is missing, or is otherwise unable to act, unless the attorney-in-fact has agreed expressly in writing to act for the principal in certain circumstances. In addition, the proposed law provides, contrary to the trust rule, that acting for the principal in one or more transactions does not obligate the attorney-in-fact to act for the principal in later

36. Some rules are suggested in the cases on agency: A gratuitous agent is bound by written acceptance, whether or not actually entering upon performance. See 2 B. Witkin, *Summary of California Law Agency and Employment* § 62, at 68 (9th ed. 1987).

37. Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1991 California Durable Power of Attorney Handbook § 2.47, at 56 (Cal. Cont. Ed. Bar).

38. See Civ. Code § 2475. The full implication of this statement is unknown. This language from the Uniform Statutory Form Power of Attorney Act was inadvertently stricken from the statute in the course of making a conforming revision in the form of the notary’s certification. See 1993 Cal. Stat. ch. 141, § 2 [AB 346]. This language is restored in the proposed law.

39. Prob. Code § 15600. Provision is also made for rejecting a trust or modification of a trust. See Prob. Code § 15601.

40. See Prob. Code §§ 15640-15645 (resignation and removal), 16000 (duty to administer trust).

41. For example, the Illinois statute provides that the agent has no duty to exercise powers granted or to assume control of or responsibility for the principal’s property, care, or affairs, regardless of the principal’s physical or mental condition. Ill. Ann. Stat. ch. 110 ¶¶ 802-7 (Smith-Hurd Supp. 1990). See also Mo. Ann. Stat. § 404.705(4) (Vernon 1990).

42. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.705(4) (Vernon 1990).

transactions, but the attorney-in-fact has a duty to complete a transaction that has been commenced.

These rules are intended to facilitate use of powers of attorney.⁴³ It is believed that in the usual case, the principal wants someone to have the ability to act if something needs to be done, but rarely would expect to impose a duty to act on a family member or friend where the person chooses not to act. If potential attorneys-in-fact understand that there is a duty to act, they may be reluctant to accept the designation in the first instance. Under the proposed rule, the attorney-in-fact may also merely wait until the situation arises and then determine whether to act. The attorney-in-fact may refuse to act because of the personal inconvenience at the time of becoming involved, or for any other reason and is not required to justify a decision not to act. The attorney-in-fact may believe that there are others in a better position to act for the principal or that the situation really warrants appointment of a court supervised guardian or conservator. However, once the attorney-in-fact undertakes to act under the power of attorney, the transaction is governed by the fiduciary duties imposed in the law. But even where the attorney-in-fact has agreed in writing to act for the principal, the proposed law permits the attorney-in-fact to resign by giving notice to the principal (if the principal is competent), when a successor attorney-in-fact agrees [in writing] to serve in place of the resigning attorney-in-fact, or pursuant to a court order.

General Duties of Attorneys-in-Fact

The power of attorney statutes do not provide any set of duties for the guidance of attorneys-in-fact, even though an attorney-in-fact will normally be a nonprofessional. The general agency statutes provide insufficient guidance. A few duties are scattered amongst the general agency statutes, such as the obligations not to exceed actual authority, to keep the principal informed, and not to commit fraud on the principal.⁴⁴ The agency statute also forbids violation of a number of duties applicable to trustees.⁴⁵ Agents' duties have been fleshed out by commentators and the courts by reference to the Restatement on Agency and the duties of trustees.⁴⁶ But these sources will not be of much assistance to a friend or relative undertaking responsibilities under a durable power of attorney.

Other fiduciary laws typically provide a list of basic duties, such as statutes applicable to guardians and conservators,⁴⁷ custodians under the Uniform

43. This discussion draws on the Missouri Bar Association Comment to the new Missouri section. See Missouri Bar Ass'n, *Missouri Probate and Trust Update* — 1989, at 123-70.

44. See, respectively, Civ. Code §§ 2019, 2020, 2306.

45. See Civ. Code § 2322(c), forbidding violation of duties of trustee under Prob. Code §§ 16002 (duty of loyalty), 16004 (duty to avoid conflict of interest), 16005 (duty not to undertake adverse trust), 16009 (duty to keep trust property separate and identified).

46. See, e.g., 2 B. Witkin, *Summary of California Law Agency and Employment* §§ 41, 43, 48 (9th ed. 1987); Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1991 California Durable Power of Attorney Handbook §§ 2.64-2.67, at 67-71 (Cal. Cont. Ed. Bar).

47. See Prob. Code § 2101, 2107, 2109, 2350 *et seq.*

Transfers to Minors Act,⁴⁸ personal representatives,⁴⁹ and trustees.⁵⁰ The Commission believes that it is appropriate to set out in the statute the basic duties of an attorney-in-fact under a power of attorney. The duties in the proposed law have been drawn from existing agency law, from the Trust Law, and from the relevant laws in other states. The proposed law provides the following duties: a duty of loyalty, a duty to keep the principal's property separate and identified, a duty to keep the principal informed and follow instructions, a duty to consult with other persons designated by the principal, a duty to keep records of transactions on behalf of the principal, a duty to use special skills, and a duty to deliver property to appropriate persons on termination of the attorney-in-fact's authority.

Standard of Care

The existing agency rules do not provide a positive statement of a standard of care. The courts, however, have read the statutes to impose a fiduciary standard on attorneys-in-fact, typically the standard applicable to trustees.⁵¹ The standard of care for trustees has undergone revision from time to time since the general principle analogizing attorneys-in-fact to trustees was laid down.⁵² Much of trust law is influenced by the skilled property management and investment services professional trustees are expected to provide.

The situation of a typical attorney-in-fact under a power of attorney for property is more analogous to a custodian under the Uniform Transfers to Minors Act⁵³ than to a trustee. Accordingly, the proposed law provides a nonprofessional fiduciary standard of care as a general rule. This standard requires the attorney-in-fact to observe the standard of care that would be observed by a prudent person dealing with property of another. If the attorney-in-fact is not compensated, the attorney-in-fact is not liable for losses to the principal's property unless the losses result from the attorney-in-fact's bad faith, intentional wrongdoing, or gross negligence. However, if the attorney-in-fact has special skills or was designated as an attorney-in-fact on the basis of representations of special skills, the attorney-in-fact is required to observe the standard of care that would be observed by those with similar skills.⁵⁴

48. See Prob. Code § 3912.

49. See Prob. Code § 9600 *et seq.*

50. See Prob. Code § 16000 *et seq.*

51. See cases cited in 2 B. Witkin, *Summary of California Law Agency and Employment* §§ 41 (9th ed. 1987).

52. For background, see *Selected 1986 Trust and Probate Legislation*, 18 Cal. L. Revision Comm'n Reports 1201, 1238-42 (1986).

53. See Prob. Code § 3912(b).

54. This rule is consistent with the general rule concerning expert fiduciaries stated in the cases. See the discussions in *Estate of Collins*, 72 Cal. App. 3d 663, 673, 139 Cal. Rptr. 644 (1977); *Coberly v. Superior Court*, 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64 (1965); *Estate of Beach*, 15 Cal. 3d 623, 635, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (bank as executor); see also Section 4169 (agent's duty to use special skills); Comment to Section 2401 (standard of care applicable to professional guardian or conservator of estate);

Authority of Attorneys-in-Fact

The general agency statutes contain a number of statements concerning the power and authority of attorneys-in-fact,⁵⁵ but these statements are expressed in broad terms and in an artificial, legalistic language that is unlikely to be of much assistance to an attorney-in-fact under a power of attorney. By way of contrast, the Uniform Statutory Form Power of Attorney Act provides for grants of general powers that are amplified in highly detailed statutory language.⁵⁶ But if a principal sets out to draft his or her own power of attorney, the statute provides no real guidance. An attorney-drafted power of attorney should provide the necessary powers, but this will not always be the case. By way of comparison, the settlor of a trust may rely on the general powers provided in the Trust Law.⁵⁷

The proposed law does not attempt to provide another statement of available powers. Instead, it fleshes out the meaning of a grant of general authority or limited authority to an attorney-in-fact. It also makes clear that an attorney-in-fact granted limited authority has the authority incidental, necessary, or property to carry out the limited authority.⁵⁸

The proposed law also authorizes the incorporation of authority by reference to other provisions, such as the Uniform Statutory Form Power of Attorney Act, the guardianship-conservatorship law, or the Trust Law.

Some authority may only be exercised by an attorney-in-fact if the authority expressly granted in the power of attorney, such as the power to create, fund, or revoke a trust, to make, revoke, or disclaim a gift, to change beneficiary designations, or to nominate a conservator for the principal.⁵⁹ There is also a set of

Comment to Section 3912 (standard of care applicable to professional fiduciary acting as custodian under California Uniform Transfers to Minors Act); Comment to Section 16040 (standard of care applicable to expert trustee).

55. See, e.g., Civ. Code §§ 2318 (agent has “actually such authority” as provided by title on agency unless “specifically deprived thereof” by the principal), 2307 (authority may be conferred by “a precedent authorization or a subsequent ratification”), 2315 (“agent has such authority as the principal, actually or ostensibly, confers upon him”), 2316 (actual authority is that intentionally conferred on the agent or that the principal “intentionally, or by want of ordinary care, allows the agent to believe himself to possess”), 2317 (ostensible authority is what the principal “intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess”), 2319 (agent has authority to do “everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency”), 2320 (agent has power to disobey instructions where “clearly for the interest of his principal that he should do so, and there is not time to communicate with the principal), 2321 (if “authority is given partially in general and partially in specific terms, the general authority gives no higher powers than those specifically mentioned”), 2322 (general authority does not authorize the agent to act in his own name, unless it is in the usual course of business, to “define the scope of the agency,” or to violate basic fiduciary principles concerning loyalty, conflict of interest, or commingling).

56. See Civ. Code §§ 2475 (statutory form), 2480-2498 (construction of powers).

57. Prob. Code §§ 16200-16249.

58. This is comparable to the general agency rule in Civil Code Section 2319(1).

59. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(6) (Vernon 1990). It is not clear whether an agent may nominate a conservator under existing law. See Montgomery & Wright, *Durable Powers of Attorney for Property Management*, in 1991 California Durable Power of Attorney Handbook § 2.66, at 70 (Cal. Cont. Ed. Bar).

powers that can never be exercised by an attorney-in-fact under a power of attorney: making, amending, or revoking a will, or consenting to certain health care procedures, such as convulsive treatment, psychosurgery, sterilization, and abortion.⁶⁰

Termination of Power of Attorney and Authority of Agent

The general agency statute lists several events that act to terminate an agency. An “agency” is terminated “as to every person having notice thereof” by (1) expiration of its term, (2) extinction of its subject, (3) death of the agent, (4) the agent’s renunciation of the agency, (5) the incapacity of the agent to act as such, (6) divorce, annulment, legal separation, between agent and principal, or the filing of an action to do so, in the case of a federal “absentee.”⁶¹ Where the power of the agent is not coupled with an interest, an agency is also terminated by (7) revocation by the principal, (8) the principal’s death, (9) or the principal’s incapacity to contract (subject to durable power exception).⁶² A good faith transaction of the agent without actual knowledge of items (7)-(9) is binding on the principal.⁶³ The existing power of attorney statute focuses on what does not terminate a durable or nondurable power, providing that the death of the principal does not terminate the agency as to anyone acting in good faith without actual knowledge of the principal’s death.⁶⁴

The proposed law reorganizes and combines these rules, but preserves most of their substance. As a default rule, the proposed law requires modifications to be executed with the same formality as a power of attorney is created. This rule is intended to provide some certainty to persons dealing with the attorney-in-fact as to the effective contents of the power of attorney. If the principal were allowed to readily modify the terms of the power of attorney, third persons might not be willing to rely on its contents, notwithstanding statutory protections.

Revocation of the attorney-in-fact’s authority is simpler, however, in order to protect the interests of the principal. Thus, the authority of the attorney-in-fact may be revoked orally, as between the principal and attorney-in-fact and as to any third person who has notice of the revocation.

Events that terminate the authority of the attorney-in-fact under a power of attorney, whether durable or nondurable, include (1) expiration of its term, (2) extinction of its subject or fulfillment of its purpose, (3) revocation by the principal, (4) death of the principal (except for specific statutory authority that

60. This is consistent with the general agency rule in Civil Code Section 2304 (actions to which principal is bound to give personal attention) and the limitations on guardians and conservators under Probate Code Section 2356 (health care) and Section 2400 *et seq.* (estate matters).

61. Civ. Code § 2355.

62. Civ. Code § 2356.

63. Civ. Code § 2356(b).

64. Civ. Code § 2403.

continues after death),⁶⁵ and (5) removal of the attorney-in-fact by the principal or a court, (6) resignation of the attorney-in-fact, (7) incapacity of the attorney-in-fact, (8) dissolution or annulment of marriage between the principal and attorney-in-fact, and (9) death of the attorney-in-fact.

In the case of a principal and attorney-in-fact who are married, the proposed law generalizes the rule applicable to durable powers of attorney for health care.⁶⁶ Thus, as a default rule, dissolution or annulment revokes the authority of the spouse designated as attorney-in-fact, although the authority is revived by a remarriage of the parties. This general rule is limited to cases where the marriage between the principal and attorney-in-fact is dissolved or annulled and does not apply when a petition for dissolution, annulment, or separation is filed, as is the case with federal “absentees.”⁶⁷ Termination on dissolution or annulment is appropriate in consideration of the broad powers that may be granted in a power of attorney for property. The general rule is also consistent with the rule applicable to wills that, upon the dissolution or annulment of the marriage of the testator, revokes a power of appointment conferred on the former spouse or appointment of the former spouse as executor, trustee, conservator, or guardian.⁶⁸

As under existing law, an attorney-in-fact or third person who does not have knowledge of a terminating event are protected from liability.⁶⁹

Relations with Third Persons

Existing law provides a number of rules concerning the relation between attorneys-in-fact and third persons, both in the general agency statutes⁷⁰ and in the power of attorney statutes.⁷¹ These rules protect attorneys-in-fact and third persons without knowledge of some event that would terminate the power of attorney or the authority of the attorney-in-fact. An attorney-in-fact’s lack of knowledge of revocation or termination by death or incapacity may be formalized by the giving of an affidavit and the affidavit is deemed conclusive proof of the facts at the time

65. This authority includes winding up affairs under the power of attorney and delivering property and records to the person entitled to them and, where specifically authorized, the authority to make anatomical gifts, authorize an autopsy, or direct disposition of remains.

66. See Civ. Code § 2437(e).

67. See Civ. Code § 2355(f), enacted as part of the P.O.W.-M.I.A. Family Relief Act of 1972 (1972 Cal. Stat. ch. 988, § 1). The special rule applicable to federal absentees under Civil Code Section 2355(f) — that filing a petition for dissolution, annulment, or legal separation revokes the authority — would be relocated to the Probate Code with other absentee provisions. See Prob. Code § 3720.

68. See Prob. Code §§ 6122(a)(2)-(3), 6226(a).

69. See discussion under “Relations with Third Persons” *infra*.

70. See, e.g., Civ. Code §§ 2342 (warrant of authority), 2343 (agent’s responsibility to third persons), 2355(a) (effect of notice on termination), 2356(b) (effect of lack of knowledge of termination of authority on bona fide transactions).

71. See Civ. Code §§ 2403 (effect of death or incapacity of principal), 2404 (affidavit of lack of knowledge of termination of power), 2510(c) (good faith reliance in absence of required warning statement), 2512 (protection of person relying in good faith on durable power of attorney).

it is given.⁷² A third person may be compelled to accept the authority of an attorney-in-fact under a statutory form power of attorney to the same extent as the principal could compel the third person to act.⁷³

The proposed law continues these principles of existing law, but adds several additional rules intended to make powers of attorney more effective. The proposed law sets forth a general duty on the part of third persons to accord the same rights and privileges with respect to the interests of the principal as if the principal were personally present and acting.⁷⁴ This duty may not be restricted by contract. In order to facilitate compliance with this duty, the proposed law protects a third person acting in good faith and protects the third person in relying on the representations of the attorney-in-fact.

The attorney-in-fact's affidavit is broadened and made more effective in the proposed law.⁷⁵ The affidavit may be given voluntarily or in response to the request of a third person. A third person who is given an affidavit and refuses to accept the exercise of the attorney-in-fact's authority covered by the affidavit will be liable for attorney's fees in any judicial proceedings necessary to confirm the attorney-in-fact's authority.

The proposed law also adds new provisions recognizing the right of third persons to require appropriate identification from the attorney-in-fact⁷⁶ and specifying when a third person who conducts activities through employees is charged with knowledge that would deprive the third person of statutory protections from liability.⁷⁷

In order to facilitate use of powers of attorney, the proposed law provides that a copy has the same force and effect as the original if it is certified by a California notary public or attorney or by an official of any state who is authorized to make certifications.

72. See Civ. Code § 2404.

73. Civ. Code § 2480.5. See *Recognition of Agent's Authority Under Statutory Form Power of Attorney*, 22 Cal. L. Revision Comm'n Reports 965 (1992).

74. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(9) (Vernon 1990). It is consistent with the general agency rule in Civil Code Section 4319.

75. This provision is patterned on Probate Code Section 18100.5 applicable to trusts. [But see AB 1249 (1993 session), which would revise Section 18100.5.]

76. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(4) (Vernon 1990).

77. The information must be received at a home office or place where there is an employee who is responsible for acting on the information and the employee has a reasonable time within which to act in light of the procedure and facilities available to the third person in the regular course of its operations. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(3) (Vernon 1990).

UNIFORM STATUTORY FORM POWERS OF ATTORNEY

The Uniform Statutory Form Power of Attorney Act⁷⁸ is left largely untouched because it is a recently enacted uniform act. Several statutory cross-references are revised in the proposed law to reflect relocation of the statute to the Probate Code.

DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

The provisions concerning durable powers of attorney for health care⁷⁹ are continued in the proposed law with only a few minor changes. The changes involve technical references necessary because of the relocation and renumbering of the sections and to conform to general rules applicable to all non-form powers of attorney. In addition, the general provisions governing durable powers of attorney for health care have been reordered in a more logical sequence. This permits grouping of like provisions, such as those concerning limitations on the use health care powers, in a separate article for the convenience of persons using the statute.⁸⁰

JUDICIAL PROCEEDINGS

The procedure for obtaining judicial interpretation and enforcement of duties of attorneys-in-fact under powers of attorney⁸¹ are reorganized in the proposed law, but remain substantively the same. This procedure applies to durable and nondurable powers of attorney for property, to durable powers of attorney for health care, and to statutory forms of both types of powers.

The proposed law also adds some new provisions clarifying the general jurisdiction and power of the superior court in dealing with powers of attorney,⁸² making the personal jurisdiction over attorneys-in-fact more concrete,⁸³ providing new venue rules,⁸⁴ and making clear that there is no right to a jury trial, consistent with the general rule concerning fiduciaries.⁸⁵

78. Civ. Code §§ 2475-2499.5. See *Recommendation Relating to Uniform Statutory Form Power of Attorney Act*, 20 Cal. L. Revision Comm'n Reports 415 (1990).

79. Civ. Code §§ 2430-2444 (general provisions concerning durable power of attorney for health care), 2500-2508 (statutory form durable power of attorney for health care).

80. See Civ. Code §§ 2435, 2440-2443.

81. See Civ. Code §§ 2410-2423.

82. For comparable provisions, see Prob. Code §§ 7050 (decedents' estates), 17000-17001, 17004 (trusts).

83. For comparable provisions, see Prob. Code §§ 3902(b) (custodian under Uniform Transfers to Minors Act), 17003(a) (trustees).

84. For comparable provisions, see Prob. Code §§ 1820-1821 (venue under guardianship-conservatorship law).

85. This is comparable to the rule applicable elsewhere under the Probate Code. See Prob. Code §§ 1452 (guardianships and conservatorships), 7200 (decedents' estates), 17006 (trusts).