#L-3019

jd 963
10/23/89

Memorandum 89-103

Subject: Study L-3019 - Uniform Statutory Form Power of Attorney

BACKGROUND

The Commission distributed a Tentative Recommendation proposing enactment of the Uniform Statutory Form Power of Attorney Act to interested persons for review and comment. A copy of the Tentative Recommendation is attached to Memorandum 89-91.

Most of the comments received on the Tentative Recommendation were reviewed in Memorandum 98-91 and three supplements to that memorandum. That material, which included 45 Exhibits containing comments, was prepared for the October meeting, which was cancelled for lack of a quorum. We have received additional letters commenting on the tentative recommendation. The additional letters are attached as Exhibits to this Memorandum.

For your convenience, we have prepared this memorandum which outlines the various issues presented by all of the comments received of the tentative recommendation. In some cases, reference is made to the earlier memorandum and supplements for additional discussion of a particular issue.

GENERAL REACTION TO TENTATIVE RECOMMENDATION

We have now received comments from approximately 45 persons on the Tentative Recommendation. About half of them approved the Tentative Recommendation as proposed. With a very few exceptions, the others approved the Tentative Recommendation with revisions or additions. Five objected to the entire concept of a statutory power of attorney form, an objection that goes to the existing statutory form as well as the Uniform Act form.

Accordingly, the staff recommends that the Commission approve the Tentative Recommendation for printing and submission to the Legislature in 1990 with such revisions as the Commission decides should be made in the Tentative Recommendation.

BASIC CONSIDERATION IN STAFF RECOMMENDATIONS ON COMMENTS RECEIVED

The Tentative Recommendation proposes that Uniform Statutory Form Power of Attorney Act be enacted in California to replace the existing California Statutory Short Form Power of Attorney statute. The Tentative Recommendation states:

> The form provided by the Uniform Act is simple and easy to understand. This simplicity, together with the advantage of having a uniform form that will receive national acceptance, outweigh any benefit that might be thought to exist because of the broader scope, the additional provisions, and the more complex execution requirements of the existing California statutory short form.

The November 1989 issue of *Money* magazine, at page 35, discusses the problem of the willingness of third persons to act in reliance on a power of attorney:

> Q. *Why are comprehensive durable power of attorney instruments, obtained at considerable expense, not honored by many banks and thrifts? Recently, a bank wouldn't honor mine and insisted that its own form be used. Can I compel banks to use my form?*
> **Sally Walter**
> Poway, Calif.
>
> A. There's no way to force them, but no reason why they shouldn't honor it either. A durable power of attorney gives you the right to make financial transactions for a friend or relative, . . . But this document, which must be witnessed and notarized, is not enough for banks. They whine that it's long and that, to make sure it applies to them, they have to go to the trouble of *reading* it. Boo-hoo. They also argue that it's easier (for them, of course) to use their own power of attorney. . . .

The reluctance of financial institutions and other third persons to rely on a comprehensive durable power of attorney instrument was also mentioned by persons commenting on the Tentative Recommendation.

It is apparent that the major advantage of the Uniform Act form is that the financial institution, stock transfer agent, or other third party will not *in each case* have to read and understand the Uniform Act form. Once the attorney for the third party has reviewed the language of the Uniform Act form and the statutory provisions that explain the details of the powers granted by the Uniform Act, the attorney can

advise the operating employees that the Uniform Act form (absent any special provisions added to the Uniform Act form) should accepted in place of the form provided by the financial institution, stock transfer agent, and other third party.

It is not unreasonable to expect that the attorney for a financial institution, stock transfer agent, and other third party will review and give a general direction to operating persons to accept the printed Uniform Act form. However, the staff is far less confident that the attorney for a third person operating nationally will review and instruct the operating persons to accept a printed form that deviates from the Uniform Act form. To the extent that the California statute makes deviations from the Uniform Act form, the staff is concerned that the California form will become less acceptable nationally and in California. Accordingly, in reviewing the various suggestions for deviation from the Uniform Act form, the staff has adopted the position that the Commission should retain the Uniform Act form without change absent some compelling consideration otherwise. This is the reason that the staff recommends below against making various technical and substantive revisions in the Uniform Act form.

REVIEW OF COMMENTS ON TENTATIVE RECOMMENDATION

NARROWER SCOPE OF UNIFORM ACT

The powers granted under the Uniform Act printed form are narrower than those granted under the existing California printed form. A number of commentators opposed the Uniform Act because it was narrower than the existing California statutory form or suggested revisions to the Uniform Act that generally would expand the scope of the powers *automatically* granted to permit gifts and estate planning actions. This would broader the scope of the Uniform Act to conform to the scope of the existing California statutory form statute. See the discussion on pages 3-7 of Memorandum 89-91.

A person using the Uniform Act form can add specially drafted provisions to grant the agent any additional powers desired, including but not limited to powers to make gifts and take estate planning actions. This permits the attorney to add to the form specially

drafted provisions granting the desired additional powers. However, as some persons who commented point out, it is not likely that a person using the form without the advice of an attorney will add any specially drafted provisions to grant additional powers.

Staff Recommendation The staff recommends approval of the Uniform Act form without expanding the scope of the powers automatically granted to the agent. As the Tentative Recommendation states, the simplicity, together with the advantage of having a uniform form that will receive national acceptance, outweigh any benefit that might be thought to exist because of the broader scope of the existing California form.

OMISSION OF EXPRESS PROVISION FOR "SPRINGING POWER"

A number of persons who commented on the Tentative Recommendation suggested that the printed form include a provision for a "springing power" (a provision that provides that the power of attorney does not go into effect until a specified event occurs, such as the incompetency of the principal.) See letters from Jeffrey A. Dennis-Strathmeyer, Francis J. Collin, Harley Spitler, and Alan D. Bonapart (attached as Exhibits to Memorandum 89-91 and supplements and to this Memorandum). On the other hand, Ruth E. Ratzlaff specifically approved the omission of a printed springing power provision, stating: "I and many other attorneys would go a bit farther and say that [a springing power provision] should never be used. Removing the option from a form that will be used frequently without legal counsel is in the bast interest of the persons who will use the form." Wilber L. Coats objects to any deviations from the Uniform Act form; he believes, for example, that the addition of the provision for co-agents will make it difficult to obtain acceptance of the power from third persons. Other commentators were concerned about the acceptability of the Durable Power of Attorney. Linda A. Moody comments: "The matter of acceptability of the DPA is one of the most serious questions relating to its use." She discusses the problem of gaining acceptance of a durable power where there is any question as to the capacity of the principal. Richard E. Llewellyn and Arthur Steven Brown point out the difficulty of having a broad form durable power of attorney accepted by a bank.

Team 4 originally commented in a letter from Kathryn A. Ballsum, dated May 5, 1989 (attached as the First Supplement to Memorandum 89-50):

> 2. Neither the present California Short Form nor the Uniform Act contains a "springing" power, that is a power that becomes effective upon the occurrence of certain events. A majority of Team 4 believes that most clients do not want the durable power to become immediately effective, although several members strongly dissent from this view. In order to achieve maximum flexibility, Team 4 urges that the Uniform Act be amended in order to give the principal the option of making the Durable Power effective immediately or of defining those circumstances which will trigger the power.

The Commission considered this suggestion and decided to retain the Uniform Act scheme. Under the Uniform Act scheme, the power becomes operative immediately unless the person granting the power includes a provision under the "Special Instructions" portion of the form providing when the power becomes operative. The instructions to the "Special Instructions" portion of the Uniform Act form state: "UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED."

The Uniform Act permits the person executing the form, if the person desires, to include a provision for a springing power in the "Special Instructions" portion of the form. A carefully drafted springing power provision can take a variety of forms and can be drafted in a form that will not make the power of attorney unacceptable to third persons. For example, the provision can give the agent or another person the authority to determine conclusively whether the event that triggers the power (i.e., incapacity of the principal) has occurred. See the discussion in Memorandum 89-87. But given the variety of choices that might be made in drafting such a provision and the amount of instruction necessary to guide the person making the choices, the staff does not believe that such a special provision can be included in the printed portion of the form.

We received a subsequent communication (attached as Exhibit 44 to the Second Supplement to Memorandum 89-91) stating that the Executive Committee has "unanimously endorsed the opinions expressed by Harley Spitler" who strongly urged that the Uniform Act form be revised to include a printed provision for a springing power of attorney.

Specifically, Mr. Spitler suggests that the following provision be added to the Uniform Act form:

> ☐ This power of attorney shall become effective upon my incapacity.

Suppose the person executing the power of attorney checks this provision and the power of attorney is presented to a financial institution or stock transfer agent. Stock transfer agents will be familiar with the uniform act form, which does not include the springing power provision. Will the title company or stock transfer agent accept anything less than a court order determining incapacity? The staff believes that inclusion of the Spitler provision will make the power of attorney practically ineffective when dealing with financial institutions, title companies, stock transfer agents, and other institutional holders of property. Inclusion of the provision will require institution of a court proceeding to determine whether the condition which causes the power to become effective has in fact occurred. And the proceeding will not necessarily be an inexpensive one since the court may on its own initiative require substantial expert testimony in order to protect the interests of the claimed incompetent. Accordingly, the staff strongly recommends against inclusion of the suggested provision in the statutory form. We would retain the existing scheme, which permits the addition of a springing power provision in the appropriate space on the form if that is what is desired.

Although the staff recommends against including a printed provision for a springing power in the statutory form, consideration might be given to adding a section to the Uniform Act (drawn from the New York law) that would recognize that a springing power provision could be added to the Uniform Act form under the "Special Instructions" portion of the form. If this is desired, the **STAFF RECOMMENDS** the addition of the following section to the recommended legislation:

> **§ 247?. Power of attorney that becomes effective upon occurrence of specified event or contingency**
>
> 247?. (a) A power of attorney under this chapter may limit the power to take effect upon the occurrence of a specified event or contingency, including but not limited to

the incapacity of the principal, if the power of attorney contains language that requires that a person or persons named in the instrument declare, in writing, that the event or contingency has occurred.

(b) A power of attorney under this chapter limited as provided in subdivision (a) takes effect upon the written declaration of the person or persons named in the power of attorney that the specified event or contingency has occurred, regardless whether the specified event or contingency has actually occurred, and any person may act in reliance on the written declaration without liability to the principal or to any other person.

(c) The provision described in subdivision (a) may be included in the "Special Instructions" portion of the form set out in Section 2475.

(d) Nothing in this section limits the provisions that may be included in the "Special Instructions" portion of the form set out in Section 2475.

Comment. Section 247? is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988). The section is drawn from Section 5-1602 of the New York General Obligations Law. The section protects a third person who relies on the declaration of the person or persons named in the power of attorney that the specified event or contingency has occurred. The principal may designate the agent or another person to make the declaration that the event or contingency has occurred.

The staff believes that it is unlikely that the inclusion of this section will make the power of attorney unacceptable to third persons. Unlike the Spitler provision previously discussed, the staff recommended section requires inclusion of a described provision that avoids the need for court determination of incapacity and also provides protection to third persons who rely on the declaration of the designated person or persons that the specified event or contingency has occurred. If the Commission approves the substance of this provision, the staff will review the language in light of the action taken by the Commission on Memorandum 89-87 (springing powers of attorney).

ENCOURAGING THIRD PERSONS TO ACCEPT AND RELY ON POWER OF ATTORNEY

A number of commentators pointed out the difficulty of persuading third persons to rely on a power of attorney. The issue raised is whether some provision should be added to the Uniform Act to discourage third persons from unreasonably refusing to accept a statutory form durable power of attorney.

A provision drawn from Probate Code Section 13105 (affidavit procedure for collection or transfer of personal property of a small estate) might be included in the recommended legislation, to read substantially as follows:

> § 247?. Compelling third person to honor power of attorney
>
> 247?. If a person to whom a properly executed statutory form power of attorney under this chapter is presented refuses to honor it within a reasonable time, the attorney in fact may compel the person to honor the power of attorney in an action for that purpose brought against the person. If an action is brought under this section, the court shall award attorney's fees to the attorney in fact if the court finds that the person acted unreasonably in refusing to honor the power of attorney.
>
> **Comment.** Section 247? is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988). The section is drawn Probate Code Section 13105 (affidavit procedure for collection or transfer of personal property of small estate). The person to whom the power of attorney is presented may, for example, act reasonably in refusing to honor it where it is not absolutely clear that the power of attorney grants the agent authority with respect to the particular transaction. Likewise, for example, the person may reasonably refuse to honor the power of attorney if the person is not reasonably satisfied as to the identity of the agent or has information that would lead a reasonable person to question the validity of the power of attorney.

It should be recognized that presentation of a statutory form power of attorney that includes special instructions may require that the attorney for the person to whom it is presented review the instrument before a decision is made to honor it.

An equally important consideration that will encourage a third person to honor the power of attorney is provision for adequate immunity to persons who in good faith honor a power of attorney. In this connection, the California Bankers Association Committee (Exhibit 51 attached) comments:

> The affidavit procedure should continue in effect as found in current Civil Code Section 2404. The protection for a third party acting in reliance on a power holder's affidavit should be clearly established in the new Act.

The text of the various provisions that provide protection to third parties apply to any power of attorney, whether or not executed on the statutory form. The issue is whether these provisions should be

specifically recognized in the California version of the Uniform Act. The draft of the Tentative Recommendation recognizes that these provisions apply to the statutory form power of attorney. See the Comment to Section 2475 (the statutory form) at the bottom of page 18 and top of page 19 of the Tentative Recommendation. The Bankers appear to overlooked this statement and would like the applicability of these protections to be "clearly established in the new Act." If it is desired to include an express provision in the Uniform Act, the staff suggests consideration of the following (to be added as a new section in Article 1 following Section 2478):

§ 247?. General provisions applicable to power under this chapter

247?. The following provisions apply to a statutory form power of attorney under this chapter:

(a) Article 3 (commencing with Section 2400) of Chapter 2.

(b) Article 4 (commencing with Section 2410) of Chapter 2.

(c) Sections 2512 and 2513.

Comment. Section 247? makes clear that the general provisions that apply to a power of attorney apply to a statutory form power of attorney under this chapter. Accordingly, the following provision apply to a power of attorney under this chapter:

Section 2400 (requirements to create durable power of attorney). The statutory form set out in Section 2475 satisfies the requirements to create a durable power of attorney unless the provision making the power of attorney durable is struck out on the form.

Section 2400.5 (proxies given by attorney in fact to exercise voting rights).

Section 2401 (effect of acts by attorney in fact during incapacity of principal).

Section 2402 (effect of appointment of a conservator of the estate or other fiduciary charged with the management of the principal's property).

Section 2403 (good faith reliance upon power of attorney after death or incapacity of principal).

Section 2404 (good faith reliance upon affidavit of attorney in fact as conclusive proof of the nonrevocation or nontermination of the power).

Sections 2410-2423 (court enforcement of duties of attorney in fact).

Section 2512 (protection against liability of person acting in good faith reliance upon power of attorney).

Section 2513 (application of power of attorney to all or portion of property of principal; unnecessary to describe items or parcels of property).

PROVISION FOR DESIGNATION OF CO-AGENTS

One writer objected to the provision added to the Uniform Act form to permit designation of co-agents. The person believed that this provision would make the power of attorney less acceptable to third persons to whom it is presented. For discussion, see pages 7-8 of Memorandum 89-91.

PROVISION FOR SELECTION OF SUCCESSOR AGENTS

Two writers suggested that the form include a provision for designation of successor agents. See Memorandum 89-91, pages 8, 11.

PROVISION FOR DESIGNATION OF CONSERVATOR IF ONE NEEDED

Several writers suggested that a provision be added to the form to permit designation of a conservator if one is needed. The existing statutory form includes such a provision. See Memorandum 89-91, page 8.

REQUIREMENT THAT ACTION BE PROSECUTED IN NAME OF THE REAL PARTY IN INTEREST

The staff recommends adding a paragraph to the Comment to make clear that the authority to litigate does not affect the requirement that an action be prosecuted in the name of the real party in interest. See First Supplement to Memorandum 89-91, pages 1-2.

CONTINUED USE OF OLD FORM

Although the existing California statutory form statute would be repealed when the Uniform Act is enacted, the recommended legislation permits continued use of the old form under the repealed statute. This was generally approved. One writer questions whether the old statutory form statute should be repealed. The staff recommends that no change be made in the scheme of the Tentative Recommendation. See the discussion in First Supplement to Memorandum 89-91, page 3.

TECHNICAL MATTERS RAISED BY COMMITTEE OF CALIFORNIA BANKERS ASSOCIATION

Attached to this Memorandum as Exhibit 50 is a letter from the California Bankers Association Trust Governmental Relations Committee.

The Committee raises the following technical matters:

Termination of revocable trust

The Bankers comment:

> The question of whether or not an attorney in fact may terminate a revocable trust should be clarified in Section 2493 of the new Act. This protection which is currently in Civil Code Section 2467(a)(5), should be continued, at least with respect to withdrawals and terminations, as well as encumbrances.

This is a matter that should be clarified. The Uniform Act does not give the agent power to revoke or modify a trust unless that power is expressly granted in the "Special Instructions" portion of the form. The staff does not propose to change this limitation of the Uniform Act. However, to clarify the matter, **the staff recommends** that the Commission add a new section to the statute, to be designated as Section 2499.5, to read:

> **§ 2499.5. Power to modify or revoke trust**
>
> 2499.5. A statutory form power of attorney under this chapter does not empower the agent to modify or revoke a trust created by the principal unless that power is expressly granted by the power of attorney. If a statutory form power of attorney under this chapter empowers the agent to modify or revoke a trust created by the principal, the trust may only be modified or revoked by the agent as provided in the trust instrument.
>
> **Comment.** Section 2499.5 is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988). Subdivision (a) makes clear that the agent has no power to modify or revoke a trust unless a specific provision is added to the statutory form giving the agent that power. The "Special Instructions" portion of the statutory form provides space for such a provision. Subdivision (a) is a clarification that is consistent with the Uniform Act powers. See Section 11 of the Uniform Statutory Form Power of Attorney Act (1988), which does not give the agent the power to modify or revoke a trust created by the principal.
>
> Subdivision (b) recognizes the requirement of Probate Code Section 15401(b) which precludes modification or revocation of a trust by an attorney in fact unless the trust instrument expressly so permits.

Ability to close safe deposit box

The Bankers comment that "Section 24900, dealing with banking and other financial institution transactions, should include the ability of

the power holder to close a safe deposit box as well as "hire" such a box as provided in subparagraph (c) of Section 2490. The staff recommends that subdivision (c) of Section 2490 be revised to read:

(c) Hire or close a safe deposit box or space in a vault.

CLARIFYING IMPROVEMENT

The staff suggests a clarifying improvement in the language of the instructions concerning designation of co-agents. See page 2 of Memorandum 89-91.

TYPOGRAPHICAL ERRORS

The staff will correct several typographical errors in the Tentative Recommendation:

Page 8, line 4, of preliminary portion of Tentative Recommendation:

Substitute "agent" for "principal."

Third line of Comment to Section 2476:

The reference to subdivision (b) should be changed to refer to subdivision (a).

Respectfully submitted,

John H. DeMoully
Executive Secretary

Cooley Godward Castro Huddleson & Tatum

Attorneys at Law

Northern California

One Maritime Plaza
20th Floor
San Francisco
CA 94111-3580
(415) 981-5252
Telex: 380815
COOLEY SFO
FAX: (415) 951-3699

Palo Alto CA 94306
(415) 494-7622

Menlo Park CA 94025
(415) 494-7622

Southern California

Newport Beach CA 92660
(714) 476-5252

October 9, 1989

John H. DeMoully, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Second Supplement to Memorandum 89-91.

Dear John:

This letter is written on my own behalf. It is not a product of either Team 4 or the Executive Committee of the Estate Planning, Trust and Probate Law Section. Neither Team 4 nor the Executive Committee has yet considered the above Second Supplement to Memorandum 89-91.

First, thanks very much for attaching copies of my July 13 and July 20, 1989 letters to the Second Supplement to Memorandum 89-91.

The balance of this letter is a response to your 4 page "Analysis of Comments Received" with particular reference to your pages 3 and 4. You are either intentionally, or ignorantly, misstating my position and the unanimous position of both Team 4 and the Executive Committee, as to the springing power option.

I. My Position and the Unanimous Position of Team 4 and the Executive Committee: The Form Should Contain an Option for the Springing Power

My position which is also the unanimous position of Team 4 and the Executive Committee is very simple: The form should contain an express option for the springing power.

Your statement, in the first complete paragraph on page 3 of your letter that "Mr. Spitler urges that the preprinted forms include a springing power provision" is wrong. As my two letters (July 13 and 30, 1989) very clearly state: the form should contain an express option for the springing power. The entire "springing power provision" is wholly different and, in carefully drafted instruments, provides for a number of things: (i) the means (e.g., a physician's

certificate; (ii) indemnity to third persons who in good faith rely upon the agent's directions; (iii) authority for the Agent to file a civil action against a recalcitrant third person who refuses to follow the agent's directions; etc. These clauses, and others, make up bundle of clauses that deal with the springing power. I'm not concerned with those related clauses; they differ from attorney to attorney depending upon the personal preferences of both the attorney and his client (the principal). In passing, you and your staff should note that you have all of the problems mentioned in (ii) and (iii) above in an immediate durable power -- those problems are not unique to a springing power!

II. Attorneys Who Practice In This Field Are In Agreement that Springing Power Option Should Be in the Form

Your following statement, on page 3 of your letter, is both wrong and misleading:

> "(1) Attorneys are not in agreement that a springing power provision should be included in a durable power of attorney. A majority of Team 4 recommended that such a provision be included in the uniform act form, but there was a strong dissent by some members of the Team to this recommendation."

It is completely wrong as to Team 4's position. There is no dissent whatsoever, among Team 4 members, as to Team 4's position. For verification, please phone Kathryn A. Ballsyn, Team 4 Captain, at (213) 474-5257. For further verification please review Exhibit 44 which is her letter to you dated September 29, 1989: it says that the Executive Committee has unanimously endorsed the opinions expressed in my letters to you; as you know, all members of Team 4 are on the Executive Committee in some capacity.

III. Inclusion of An Option Would Not Preclude Use of the Standard Uniform Act Form in California

The following statement, on page 73 of your letter, is also wrong and misleading:

> "(2) The standard uniform act form does not contain a springing power provision, and California

should not preclude use of the standard uniform act form in this state."

It is wrong for the simple reason that the inclusion of an option is consistent with California's basic uniform durable power of attorney statute which is Civil Code 2400:

"This power of attorney shall become effective upon the incapacity of the principal"

The present California form wholly ignores that springing power provision of C.C. 2400.

The present form is erroneously labeled. It should be labeled:

"Statutory Form
Immediate Durable
Power of Attorney For
Property"

That is precisely what it is! It is an immediate durable power of attorney for property management. Civil Code 2450, subd. 2. That title is accurate and consistent with the uniform act whose title is "Uniform Statutory Form Power of Attorney Act." The word "short" should be deleted; the California form with its accompanying powers is probably the longest extant statutory form of anything in any California statute!

Your above quoted paragraph "(2)" is misleading because it suggests that the inclusion of the option would, in some manner, preclude the use of the form in California. That is simply preposterous! The inclusion of a springing option would make the form more complete, more understandable and more usable.

IV. Inclusion of An Option is One Sentence -- Not A Lengthy Provision

With some reluctance, the third reason you advance against the option, leads me to the rather painful conclusion that you simply do not understand what the Executive Committee, Team 4 and I are unanimously proposing. Your lack of understanding is reflected in the following paragraph on page 3 of your letter:

> "(3) Even assuming enactment of the staff recommended provision to protect third persons who rely on a springing power (as proposed by the staff in Memorandum 89-91), the staff would not recommend that a springing power provision be added to the uniform act form. To add a provision in the uniform act form that would satisfy the requirements of the staff recommended provision would require that lengthy instructions be added to the form and greatly complicate the form. These instructions would be necessary to make sure the user understands the implications of giving a springing power and effect of selecting a person who can conclusively determine that the power of attorney has gone into effect."

First, as discussed above my proposal is not for an entire "springing power provision." It is only to include an option which is one simple sentence.

Second, that single option would not "greatly complicate the form" (your words). A one sentence option is most certainly not a complication.

Third, you say, or imply, that a one sentence option "would require that lengthy instructions be added to the form." Untrue! If you and the Staff believe that the form requires "lengthy instructions" why have you not suggested those instructions be added to the present form? If you do not add an option for the springing power to the present form you should most certainly add paragraphs explaining the springing power alternative to the principal. The principal should know, in plain english, that he has an option to your immediate durable power.

V. The Third Party Reliance Problem Is Not A Springing Power Problem

Finally, you comment as follows regarding my proposed option:

> "Mr. Spitler suggests that the following provision be added to the uniform act form to permit the user to select a springing power:

☐ This power of attorney shall become effective upon my incapacity.

Suppose the power of attorney that includes this provision is presented to a title company or a stock transfer agent. Stock transfer agents will be familiar with the uniform act form which does not include the springing power provision. Will the title company or stock transfer agent accept any less than a court order determining incapacity? The staff believes that inclusion of the provision will make the power of attorney practically ineffective when dealing with financial institutions, title companies, stock transfer agents, and other institutional holders of property."

These are a number of responses to your Staff:

A. I have never had any third party refuse to accept a springing durable power!

B. The third party reliance problem is not a springing power problem. The third party reliance problem is a durable power of attorney problem -- and exists whether the durable power is immediate or springing.

C. Your Staff is now acting inconsistently. While vehemently opposing a simple springing power option in the form, the Staff now proposes legislation, in CLRC Memorandum 89-87, that favors the use of the springing power. Perhaps, the Staff should explain this inconsistency to the practicing bar.

Sincerely,

Harley Spitler

Harley J. Spitler

cc: Team 4 Members
James V. Quinlinan
Irwin D. Goldring
Bruce R. Ross

20115891

JEFFREY A. DENNIS-STRATHMEYER
ATTORNEY AT LAW

POST OFFICE BOX 533 - BERKELEY, CALIFORNIA 94701
(415) 642-8317

October 6, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Study L-3013 Statutory Form Power of Attorney

Sirs:

I previously wrote indicating that I thought the proposed Uniform Act form should be amended to include the alternative to a springing power. Since then I have seen correspondence indicating springing powers are not desirable because of difficulty of getting title companies and transfer agents to honor them. This is a legitimate concern and a view I once held myself. But I have given less and less weight to it in recent years because:

1. It is frequently the actual intent of the client that the power only be exercised in the event of incapacity. (As the client's age increases (and--if married--the marriage lengthens and the risk of divorce becomes less), the client's intent may change. In which case the suitable form of power changes.)

2. I have seen enough incidences of fiduciaries "borrowing" funds in moments of financial exigency to become rather conservative about turning them loose with a loaded gun in the form of a power of attorney that the principal really did not intend to give.

3. In the overwhelming majority of cases where the client intends a power to be a conservatorship substitute there will be later opportunity to switch a client from a springing power to an immediate power when the client is older and starts to have failing health.

4. Civil Code §2410 et. seq. provides a quick and dirty method of getting a court decree declaring that the power has sprung and is currently in effect. Given the relatively rare frequency that the procedure will actually be needed, the risk of the associated court costs and attorney fees compares quite favorably in my mind with the risk associated with the loaded gun.

Very truly yours,

Jeffrey A. Dennis-Strathmeyer

BANCROFT AVERY & MCALISTER

Attorneys at Law

601 Montgomery Street
Suite 900
San Francisco, CA 94111

415/788-8855
Fax: 415/397-1925
Cable Address BAM
Telex: 3725929

Walnut Creek Office:
500 Ygnacio Valley Road
Suite 370
Walnut Creek, CA 94596

415/256-8200
Fax: 415/945-8932

JAMES R. BANCROFT
OF COUNSEL

JAMES H. MCALISTER
LUTHER J. AVERY
ALAN D. BONAPART
NORMAN A. ZILBER
EDMOND G. THIEDE
ROBERT L. DUNN
JAMES WISNER
SANDRA J. SHAPIRO
GEORGE R. DIRKES
BOYD A. BLACKBURN, JR.
DENNIS O. LEUER
ROBERT L. MILLER
JOHN S. MCCLINTIC
ARNOLD S. ROSENBERG
JOHN R. BANCROFT
REBECCA A. THOMPSON
JOHN L. KOENIG
M. KIMBALL HETTENA
RONALD S. KRAVITZ
LAURIE A. LONGIARU
FORREST E. FANG
HELEN OLIVE MILOWE
LEAH R. WEINGER
DAVID K. KAGAN SERGI

OUR FILE NUMBER

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September 29,1989

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Tentative Recommendation
Uniform Statutory Form of Power of Attorney Act

I agree with the position taken by the Executive Committee of the Estate Planning, Trust and Probate Section of the State Bar of California. The proposed Statutory Form should provide users with the option of selecting springing powers.

Please associate this letter with my earlier one on the subject of this Tentative Recommendation.

Thank you.

Sincerely yours,

Alan D. Bonapart

ADB:ah

STATUTORY FORM POWER OF ATTORNEY

I endorse this recommendation Please keep me on the list Joel C. Dobris U/C professor of law

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

Uniform Statutory Form Power of Attorney Act

August 1989

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature in 1990. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **SEPTEMBER 29, 1989.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

648 89 fhil 22
Professor Joel Charles Dobris
School of Law
University of California
Davis, CA 95616

EXHIBIT 50

WELLS FARGO BANK

DAVID W. LAUER
Vice President and
Senior Counsel
Trust Legal Department

111 Sutter Street, 11th Floor
San Francisco CA 94163
(415) 983 3751
FAX (415) 391 9720

October 5, 1989

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto CA 94303-4739

Re: Tentative Recommendation relating to Uniform Statutory Power of Attorney Act

Dear Mr. DeMoully:

I am writing to you on behalf of the California Bankers Association Trust Governmental Relations Committee.

Members of the Committee have reviewed the proposed Uniform Statutory Form Power of Attorney ("Statutory Form"), and have the following basic comments as they may relate to trustees and trust administration:

1. The question of whether or not an attorney in fact may terminate a revocable trust should be clarified in Section 2493 of the new Act. This protection which is currently in Civil Code Section 2467(a)(5), should be continued, at least with respect to withdrawals and terminations, as well as encumbrances.

2. The affidavit procedure should continue in effect as found in current Civil Code Section 2404. The protection for a third party acting in reliance on a power holder's affidavit should be clearly established in the new Act.

3. There were several apparent typographical errors which should be clarified. The comment in Section 2476 should refer to subdivision (a) on the third line. Additionally, Section 2490, dealing with banking and other financial institution transactions, should include the ability of the power holder to close a safe deposit box as well as "hire" such a box as provided in subparagraph (c) of Section 2490.

Thank you for your attention to this matter.

Very truly yours,

David W. Lauer

DWL:ba