

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Uniform Durable Power of
Attorney Act

December 1980

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

THE CALIFORNIA LAW REVISION COMMISSION

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Ex Officio

December 15, 1980

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The 1979 Legislature enacted a new comprehensive guardianship-conservatorship statute (1979 Cal. Stats. ch. 726) upon recommendation of the Law Revision Commission. See *Recommendation Relating to Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501 (1978). As a result of its continuing review of this area of the law, the Commission has prepared this recommendation relating to durable powers of attorney. Use of a durable power of attorney may avoid the need for a conservatorship.

The Commission recommends that California adopt the Uniform Durable Power of Attorney Act and that Civil Code Section 2307.1, which severely limits the use of a durable power of attorney, be repealed.

Two exhibits follow the recommendation:

(1) The Uniform Durable Power of Attorney Act. This exhibit includes a Prefatory Note and the Uniform Commissioners' Comment to each section of the Uniform Act. The Note and Uniform Commissioners' Comments should be considered in connection with the recommendation because they will be persuasive in construing the provisions of the Uniform Act if it is enacted in California.

(2) An article entitled "When you need to use a power of attorney." This article—taken from the November 1980 issue of "Changing Times"—contains a description in layman's language of the advantages of a durable power of attorney over other alternatives such as a trust or court-supervised conservatorship.

The Commission's authorization to study this topic is Resolution Chapter 27 of the Statutes of 1972 and Resolution Chapter 37 of the Statutes of 1980.

Respectfully submitted,

BEATRICE P. LAWSON
Chairperson

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RECOMMENDATION

relating to

UNIFORM DURABLE POWER OF ATTORNEY ACT

A durable power of attorney is a power of attorney by which the principal designates another as his or her attorney-in-fact in a writing that provides that the power will remain effective notwithstanding the subsequent incapacity of the principal.¹ The durable power is a useful device since it avoids the need to establish a trust for a person of modest means and the need for a costly court-supervised conservatorship in the event of the person's future incapacity. Accordingly, the durable power is a form of senility insurance—comparable to that available to relatively wealthy persons who use funded, revocable trusts—for a person who is unwilling or unable to transfer assets as required to establish a trust.

The concept of the durable power of attorney is a comparatively recent development that avoids the serious practical problems created by the rule that the incapacity of the principal to contract terminates a power of attorney.² Because the durable power is a quick, inexpensive, and useful device when the property owner is unable to handle his or her business affairs, well over half of the states of the United States have enacted legislation giving effect to durable powers of attorney.³ These recent enactments were

¹ A durable power of attorney can be written to take effect upon the incapacity of the principal. For example, a durable power might be framed to confer authority commencing when two or more named persons—such as the principal's lawyer, physician, or spouse—concur that the principal has become incapable of managing his or her affairs and they deliver a signed statement to that effect to the attorney-in-fact. See the Commissioners' Comment to Section 1 of the Uniform Durable Power of Attorney Act.

² "The power of attorney is perhaps the most commonly used device to manage the property of the elderly or infirm. . . . But there are serious practical drawbacks to its use. . . . [B]ecause the power is terminated by the principal's incapacity to contract (CC § 2356), the device is not dependable. Notwithstanding the language of CC § 2356 (protecting third parties to a transaction who are ignorant of the principal's incapacity) and of CC § 1216 (requiring recordation of certain instruments of revocation), third parties may be less willing to transact business with an attorney-in-fact than with a conservator or trustee." W. Johnstone & G. Zillgitt, *California Conservatorships* § 1.13, at 6-7 (Cal. Cont. Ed. Bar 1968).

³ A recent article lists 34 states that now have statutes that recognize the concept of the durable power of attorney: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, New

drawn from the provisions of the Uniform Probate Code concerning powers of attorney to assist persons interested in noncourt methods for the management of their business affairs in event of later incompetency.⁴

Whether a durable power of attorney would be an appropriate device for use in a particular case depends on the nature of the property, whether there is someone the person can trust with the power, and whether the person welcomes court supervision or seeks to avoid it.⁵ The person may decide to use a durable power where the power can be given to someone in whom the principal has complete confidence—both as to trustworthiness and property managing ability. In this type of case, the person may decide that the lack of court supervision is offset by the savings and informality of the durable power device.

The durable power of attorney is hedged by safeguards if the attorney-in-fact fails satisfactorily to exercise the power. The principal can revoke the power,⁶ or the principal or a relative, friend, or interested person can petition for the appointment of a conservator of the estate⁷ and, if a conservator is appointed, the conservator is authorized to revoke or amend the power.⁸ Thus, although there is no continuing court supervision over the durable power of attorney, the principal or any interested person can secure court protection and supervision whenever necessary.⁹

York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Vermont, Virginia, Washington, and Wyoming. See Joint Editorial Board for the Uniform Probate Code, UPC Notes No. 22, at 6, 13-15 (1978). In addition, California enacted legislation (discussed *infra*) in 1979 to give limited recognition to the durable power of attorney. A study by the California State Bar concluded that the concept of the durable power of attorney has a great deal of merit. State Bar of California, *The Uniform Probate Code: Analysis and Critique* § 5.35, at 182 (1973).

⁴ "The widespread reception by state legislatures of the [durable power of attorney concept] shows this portion of the [Uniform Probate] Code to be the most popular of all UPC features." Joint Editorial Board for the Uniform Probate Code, UPC Notes No. 22, at 6 (1978).

⁵ See W. Johnstone & G. Zillgitt, *California Conservatorships* § 1.19, at 10 (Cal. Cont. Ed. Bar 1968).

⁶ See generally 1 B. Witkin, *Summary of California Law Agency and Employment* §§ 191-231, at 785-818 (8th ed. 1973).

⁷ See Prob. Code § 1820.

⁸ See Uniform Durable Power of Attorney Act § 3. See also Civil Code § 2307.1.

⁹ In a conservatorship, court approval is required for many transactions affecting estate property, and periodic accountings are required.

Civil Code Section 2307.1¹⁰ was enacted in 1979 to give limited recognition in California to the concept of a durable power of attorney. However, the 1979 legislation provides that the durable power can be exercised by the attorney-in-fact only until one year after the disability or incapacity of the principal occurs or such lesser period specified by the principal. This limitation makes the power of attorney virtually useless as an inexpensive alternative to a court-supervised conservatorship, both because the one-year period is too short to cover more than a temporary inability to handle business affairs and also because it is impossible to know the precise moment when the principal becomes "disabled" or "incapacitated."¹¹

¹⁰ Civil Code Section 2307.1 provides:

2307.1. When a principal designates another his attorney in fact or agent by a power of attorney in writing, signed by the principal and acknowledged, and the writing contains the words "This power of attorney shall not be affected by the subsequent disability or incapacity of the principal until one year after the disability or incapacity occurs, or such lesser period specified by the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his or her later disability or incapacity, then the authority of the attorney in fact or agent is exercisable by him or her as provided in the power on behalf of the principal until one year after the disability or incapacity occurs, or such lesser period specified by the principal, notwithstanding later disability or incapacity of the principal at law, provided, however, that the authority of the attorney in fact or agent under a power created pursuant to this section to engage in any transaction involving the sale, conveyance, exchange, transfer, partition, lease, or encumbrance of real property, or any rights or security interest therein, shall be limited to real property which comprises the principal place of residence of the principal. A principal may limit the time period that a power of attorney survives that disability or incapacity to a period less than one year.

All acts done by the attorney in fact or agent, pursuant to the power during any period of disability or incapacity, have the same effect and inure to the benefit of and bind the principal or his or her heirs, devisees, and personal representatives as if the principal were competent and not disabled. Any bona fide purchaser or encumbrancer for value may conclusively rely upon, and need not inquire into, the capacity of the principal at the time a durable power of attorney is created pursuant to this section.

If a conservator or guardian shall thereafter be appointed for the property or estate of the principal, the attorney in fact or agent shall, during the continuance of the appointment, account to the conservator or guardian rather than the principal. The conservator or guardian has the same power the principal would have had if he or she were not disabled or incapacitated to revoke, suspend, or terminate all or any part of the power of attorney or agency.

¹¹ Prior to a court adjudication, it is impossible to determine the precise moment in time that a person becomes legally incompetent. The new California statute creates a risk that a court adjudication will roll back the time of incapacity and render invalid purported exercises of the power that were thought to be valid when exercised. Elimination of the one-year limit on the effectiveness of the durable power would make the question of the time when capacity ended irrelevant and thus avoid this risk and also eliminate doubts that will occasionally and unpredictably block desirable transactions. In addition, under the new California statute, the durable power terminates one year after the "disability" of the principal occurs. Since under Civil Code Section 2356, a power of attorney is terminated not by the "disability" of the principal but instead by the principal's "incapacity to contract," the new

Another serious defect in the 1979 California statute is that it limits the authority of the attorney-in-fact acting under a durable power of attorney: The authority with respect to real property is limited to the real property which comprises the principal place of residence of the principal. A nondurable power of attorney (one that does not include a provision that it is not affected by the subsequent disability or incapacity of the principal) need not be so limited. The result is that, by seeking to extend the effectiveness of the power of attorney to include the one-year period after disability or incapacity occurs, the principal is unable to use a durable power of attorney as a property management device for real property generally.

There is an additional defect in the 1979 California statute. The general rule is that a person must have capacity to contract in order to give a power of attorney.¹² The 1979 statute modifies this rule in the case of a durable power of attorney. The statute provides: "Any bona fide purchaser or encumbrancer for value may conclusively rely upon, and need not inquire into, the capacity of the principal at the time a durable power of attorney is created pursuant to this section."¹³ Accordingly, by including a provision in the power of attorney making it a durable power, a person who otherwise would not have the capacity to give the power of attorney can nevertheless do so and a transaction made pursuant to the power will be given effect as provided in the statute.¹⁴ Absent the provision making the power of attorney a durable power, the power of attorney would not be given this effect. The Commission sees no sufficient justification for this difference in the effectiveness of the creation of a power of attorney based merely on whether the power is a durable or nondurable power.¹⁵

California statute creates a new, vague standard that terminates a power of attorney based on the time when the principal becomes "disabled."

¹² Civil Code § 2296.

¹³ Civil Code § 2307.1. This provision may create an exception to Section 40 of the Civil Code which provides that a person whose incapacity has been judicially determined may not thereafter make a contract or delegate a power.

¹⁴ A person who lacks capacity to make a particular transaction and also lacks capacity to give a power of attorney may nevertheless be persuaded to give a durable power of attorney to another who can then execute the transaction which cannot thereafter be set aside as against a bona fide purchaser or encumbrancer for value on the ground that the principal lacked the capacity to give the power of attorney at the time it was created.

¹⁵ The Commissioners' Comment to Section 1 of the Uniform Durable Power of Attorney Act is consistent with this view. The Comment states: "In this and the following

Acting at its annual conference in 1979, the National Conference of Commissioners on Uniform State Laws approved a new Uniform Durable Power of Attorney Act and recommended the new act for enactment in all the states. The Uniform Act was based on the comparable provisions of the Uniform Probate Code with changes drawn from "the best of the ideas reflected in the recent flurry of new state laws on the subject."¹⁶ The Uniform Durable Power of Attorney Act was approved by the American Bar Association at its meeting in February 1980.

The Uniform Act makes two basic changes in the agency rules applicable to written powers of attorney. First, a principal is empowered to create a power of attorney which remains effective in spite of the principal's later loss of legal capacity. Second, in the case of a power of attorney, whether or not a durable power, the Uniform Act makes clear the validity of transactions pursuant to the power occurring after the principal's death but before the attorney-in-fact learns of the death.

The Law Revision Commission has reviewed the Uniform Durable Power of Attorney Act and some of the background materials used in its formulation. The Commission believes that the durable power of attorney is a useful estate planning tool. Because of the mobility of people in contemporary society, the durable power of attorney is a matter particularly appropriate for uniform legislation among the states. Accordingly, the Commission recommends that the Uniform Durable Power of Attorney Act be enacted in California with the following revisions:

(1) The provision of the Uniform Act which authorizes a court-appointed guardian, conservator, or other fiduciary to revoke or amend a durable power of attorney previously made by the ward or conservatee¹⁷ should be qualified by requiring a conservator appointed by a California court to obtain prior authorization for the revocation or amendment from the court in which the conservatorship proceeding is pending.

sections, it is assumed that the principal is competent when the power of attorney is signed. If this is not the case, nothing in this Act is intended to alter the result that would be reached under general principles of law."

¹⁶ See Commissioners' Prefatory Note to Uniform Durable Power of Attorney Act.

¹⁷ See Uniform Durable Power of Attorney Act § 3(a).

(2) A technical revision should be made in the provision of the Uniform Act which permits a person to use a durable power of attorney to nominate a guardian or conservator in the event one is needed in the future.¹⁸ The Uniform Act provision requires the court to make its appointment in accordance with the principal's most recent nomination in a durable power of attorney.¹⁹ This limitation is inconsistent with California's new guardianship-conservatorship law which permits a person to nominate a conservator²⁰ in any signed writing, whether or not a durable power of attorney.²¹ The nomination provision of the Uniform Act should be revised to conform to the nomination provision of the new guardianship-conservatorship law. This will give effect to the most recent nomination, whether or not made in a durable power of attorney.

(3) The references in the Uniform Act to the "disability" of the principal should be omitted.²² Under California law, it is the principal's incapacity to contract which affects an agency relationship.²³

With these technical revisions, the Uniform Act should be enacted as drafted by the National Conference of Commissioners on Uniform State Laws. The need for uniformity in this area of law outweighs any advantage to be gained by further modification of the language of the Uniform Act.

The Uniform Act will replace Civil Code Section 2307.1, which should be repealed.

¹⁸ Uniform Durable Power of Attorney Act § 3(b).

¹⁹ Uniform Durable Power of Attorney Act § 3(b). The court may make an appointment inconsistent with the principal's nomination "for good cause or disqualification." *Id.*

²⁰ Under California law, a conservator, not a guardian, is appointed for an adult in need of protective supervision. See Prob. Code § 1800. However, under the law of other states, a guardian, conservator, or some other comparable fiduciary may be appointed.

²¹ See Prob. Code § 1810.

²² See Uniform Durable Power of Attorney Act §§ 1, 2, 4, 5.

²³ Civil Code § 2356. For a discussion of what constitutes such incapacity as will terminate an agency relationship, see *Sullivan v. Dunne*, 198 Cal. 183, 191-94, 244 P. 343, 345-47 (1926); 1 B. Witkin Summary of California Law *Agency and Employment* § 192, at 785-86 (8th ed. 1973).

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Section 2356 of, to add Section 2357 to, to add Article 3 (commencing with Section 2400) to Chapter 2 of Title 9 of Part 4 of Division 3 of, and to repeal Section 2307.1 of, the Civil Code, relating to agency.

The people of the State of California do enact as follows:

Civil Code § 2307.1 (repealed). Durable power of attorney

SECTION 1. Section 2307.1 of the Civil Code is repealed.

2307.1. When a principal designates another his attorney in fact or agent by a power of attorney in writing, signed by the principal and acknowledged, and the writing contains the words "This power of attorney shall not be affected by the subsequent disability or incapacity of the principal until one year after the disability or incapacity occurs, or such lesser period specified by the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his or her later disability or incapacity, then the authority of the attorney in fact or agent is exercisable by him or her as provided in the power on behalf of the principal until one year after the disability or incapacity occurs, or such lesser period specified by the principal, notwithstanding later disability or incapacity of the principal at law, provided, however, that the authority of the attorney in fact or agent under a power created pursuant to this section to engage in any transaction involving the sale, conveyance, exchange, transfer, partition, lease, or encumbrance of real property, or any rights or security interest therein, shall be limited to real property which comprises the principal place of residence of the principal. A principal may limit the time period that a power of attorney survives that disability or incapacity to a period less than one year.

All acts done by the attorney in fact or agent, pursuant to the power during any period of disability or incapacity, have the same effect and inure to the benefit of and bind

the principal or his or her heirs, devisees, and personal representatives as if the principal were competent and not disabled. Any bona fide purchaser or encumbrancer for value may conclusively rely upon, and need not inquire into, the capacity of the principal at the time a durable power of attorney is created pursuant to this section.

If a conservator or guardian shall thereafter be appointed for the property or estate of the principal, the attorney in fact or agent shall, during the continuance of the appointment, account to the conservator or guardian rather than the principal. The conservator or guardian has the same power the principal would have had if he or she were not disabled or incapacitated to revoke, suspend, or terminate all or any part of the power of attorney or agency.

Comment. Former Section 2307.1 is superseded by Sections 2400-2407.

Civil Code § 2356 (amended). Termination of agency; binding effect of certain transactions

SEC. 2. Section 2356 of the Civil Code is amended to read:

2356. (a) Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by *any of the following* :

(1) ~~its~~ *Its* revocation by the principal ; .

(2) ~~his~~ *The death of the principal* ; ~~or~~ ; .

(3) ~~his~~ *The incapacity of the principal* to contract ; ~~except for a power of attorney created pursuant to Section 2307.1, which power terminates upon the expiration of one year from the occurrence of disability or incapacity of the principal, or of such lesser period specified by the principal .~~

(b) ~~However~~ *Notwithstanding subdivision (a)*, any bona fide transaction entered into with such agent by any person acting without actual knowledge of such revocation, death, or incapacity shall be binding upon the principal, his or her heirs, devisees, legatees, and other successors in interest.

~~Under this subdivision, in the case of an agent of a principal who is an absentee as defined in Section 1751.5 of the Probate Code, while the absentee continues in his missing status, and until receipt by the parties of notice from the secretary of the department or head of the agency concerned, or his delegate, of the termination of such missing status by the making of a finding of the death of the absentee, the parties shall be deemed to be without actual knowledge of any such revocation, death, or incapacity of the principal.~~

(c) Nothing in this section shall affect the provisions of Section 1216.

(d) With respect to a power of attorney, the provisions of this section are subject to the provisions of Article 3 (commencing with Section 2400) of Chapter 2.

Comment. Section 2356 is amended to delete the former reference to Section 2307.1 which has been repealed, to make the rules relating to termination of an agency provided by this section subject to the special rules provided by Sections 2400-2407 applicable to a power of attorney, and to make nonsubstantive technical revisions. The substance of the former provision of subdivision (b) relating to a principal who is an “absentee” is continued in Section 2357.

Subdivision (d) is a new provision that makes clear that the provisions of the Uniform Durable Power of Attorney Act (Sections 2400-2407) prevail over the provisions of subdivisions (a) and (b) of Section 2356. Under Sections 2400-2407, a durable power of attorney may be created that remains effective notwithstanding the subsequent disability or incapacity of the principal. In addition, Section 2403 protects the attorney in fact and third persons who rely on a power of attorney in good faith and without actual knowledge of the principal’s death, disability, or incapacity, and Section 2404 provides protection to a person acting in good faith in reliance on an affidavit of the attorney in fact that a power of attorney has not been revoked or terminated by the principal’s death, disability, or incapacity.

Civil Code § 2357 (added). “Absentee” principal

SEC. 3. Section 2357 is added to the Civil Code, to read:
2357. For the purposes of subdivision (b) of Section 2356 and Sections 2403 and 2404, in the case of a principal who is an absentee as defined in Section 1403 of the Probate

Code, a person shall be deemed to be without actual knowledge of:

(a) The principal's death or incapacity while the absentee continues in missing status and until the person receives notice of the determination of the death of the absentee by the secretary concerned or the head of the department or agency concerned or the delegate of the secretary or head.

(b) Revocation by the principal during the period described in subdivision (a).

Comment. Section 2357 continues the substance of a provision formerly found in Section 2356 but extends the application of the provision to Sections 2403 and 2404. The language of Section 2357 is drawn in part from language found in Section 3708 of the Probate Code (personal property of absentees).

Civil Code §§ 2400-2407 (added). Uniform Durable Power of Attorney Act

SEC. 4. Article 3 (commencing with Section 2400) is added to Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code, to read:

Article 3. Uniform Durable Power of Attorney Act

Comment. This article, which supersedes former Section 2307.1, is the Uniform Durable Power of Attorney Act as approved and recommended in 1979 by the National Conference of Commissioners on Uniform State Laws. Except as noted in the Law Revision Commission Comments, the text of this article is the same as the text of the Uniform Act.

Although the title of this article refers to durable powers of attorney, two sections of this article apply to powers of attorney whether durable or nondurable. See Sections 2403, 2404.

§ 2400. Definition

2400. A durable power of attorney is a power of attorney by which a principal designates another his or her attorney in fact in writing and the writing contains the words "This

power of attorney shall not be affected by subsequent incapacity of the principal,” or “This power of attorney shall become effective upon the incapacity of the principal,” or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal’s subsequent incapacity.

Comment Section 2400 is the same as the official text of Section 1 of the Uniform Durable Power of Attorney Act, except that the reference to the principal’s “disability” is omitted. Under Section 2356, it is the principal’s incapacity to contract which would otherwise terminate the power of attorney.

§ 2401. Durable power of attorney not affected by incapacity

2401. All acts done by an attorney in fact pursuant to a durable power of attorney during any period of incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his or her successors in interest as if the principal were competent.

Comment. Section 2401 is the same as the official text of Section 2 of the Uniform Durable Power of Attorney Act, except that the reference to the principal’s “disability” is omitted. Under Section 2356, it is the principal’s incapacity to contract which would otherwise terminate the power of attorney.

§ 2402. Relation of attorney in fact to court-appointed fiduciary

2402. (a) If, following execution of a durable power of attorney, a court of the principal’s domicile appoints a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of all of the principal’s property or all of his or her property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he or she were not incapacitated; but, if a conservator is appointed by a court of this state, the conservator can revoke or amend the power of attorney only if the court in which the conservatorship proceeding is pending has first made an

order authorizing or requiring the fiduciary to revoke or amend the durable power of attorney and the revocation or amendment is in accord with the order.

(b) A principal may nominate, by a durable power of attorney, a conservator of the person or estate or both, or a guardian of the person or estate or both, for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. If the protective proceedings are conservatorship proceedings in this state, the nomination shall have the effect provided in Section 1810 of the Probate Code, and the court shall give effect to the most recent writing executed in accordance with Section 1810 of the Probate Code, whether or not such writing is a durable power of attorney.

Comment. The first sentence of subdivision (a) of Section 2402 is the same as the first sentence of the the official text of subsection (a) of Section 3 of the Uniform Durable Power of Attorney Act except that "conservator of the estate" has been substituted for "conservator." This change is consistent with the concept of the Uniform Act that the fiduciary to whom the attorney-in-fact under a durable power is accountable and who may revoke or amend the durable power includes only a fiduciary charged with the management of the principal's estate and does not include a person appointed only to exercise protective supervision over the person of the principal. See the Commissioners' Comment to Section 3 of the Uniform Durable Power of Attorney Act.

The second sentence of subdivision (a) of Section 2402 is the same as the second sentence of the official text of subsection (a) of Section 3 of the Uniform Durable Power of Attorney Act, except that the requirement of prior court authorization for a California conservator to revoke or amend the power is new and the reference to the principal's "disability" has been deleted. This deletion conforms Section 2402 to the other provisions of this article.

Subdivision (b) of Section 2402 is drawn from subsection (b) of Section 3 of the Uniform Durable Power of Attorney Act, but has been revised to make it consistent with the general provision for nomination of a conservator in Section 1810 of the Probate Code. The second sentence of subsection (b) of Section 3 of the Uniform Act (most recent nomination in a durable power shall be given effect) is not adopted in California. Thus, the principal

may make a later nomination in a writing which is not a durable power of attorney, and, if at that time the principal has sufficient capacity to form an intelligent preference (Prob. Code § 1810), the later nomination will supersede an earlier nomination made in a durable power. This is consistent with the purpose and effect of Section 1810 of the Probate Code.

§ 2403. Power of attorney not revoked until notice

2403. (a) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(b) The incapacity of a principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his successors in interest.

Comment. Section 2403 is the same as the official text of Section 4 of the Uniform Durable Power of Attorney Act, except that the reference to the principal's "disability" is omitted. Under Section 2356, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

§ 2404. Proof of continuance of durable and other powers of attorney by affidavit

2404. As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he or she did not have at the time of the exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument

that is recordable, the affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

Comment. Section 2404 is the same as the official text of Section 5 of the Uniform Durable Power of Attorney Act, except that the reference to the principal's "disability" is omitted. Under Section 2356, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

§ 2405. Uniformity of application and construction

2405. This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

Comment. Section 2405 is the same as the official text of Section 6 of the Uniform Durable Power of Attorney Act.

§ 2406. Short title

2406. This article may be cited as the Uniform Durable Power of Attorney Act.

Comment. Section 2406 is the same as the official text of Section 7 of the Uniform Durable Power of Attorney Act.

§ 2407. Severability

2407. If any provision of this article or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

Comment. Section 2407 is the same as the official text of Section 8 of the Uniform Durable Power of Attorney Act.

Transitional provision

SEC. 5. (a) This act does not apply to a power of attorney executed in this state prior to the operative date of this act. Such a power of attorney is governed by the law that would apply had this act not been enacted.

(b) If under the applicable choice of law rules the validity of a durable power of attorney executed outside this state is to be determined under the law of this state, the validity of the durable power of attorney shall be determined under this act, whether the power was executed prior to or after the operative date of this act.

Comment. Subdivision (a) of Section 5 prevents this act from giving greater effect to a durable power of attorney executed in this state prior to the operative date of this act than the durable power would have had under former Section 2307.1 of the Civil Code (durable power ceases to be valid one year after incapacity of principal and in any event cannot affect real property which is not the principal's residence). Subdivision (b) states a different rule for a durable power of attorney executed outside California: If California law applies under applicable choice of law rules, then this act applies without regard to whether the power was executed before or after the operative date.

EXHIBIT I
UNIFORM DURABLE POWER OF
ATTORNEY ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

Approved and Recommended for Enactment
in All the States

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTY-EIGHTH YEAR
IN SAN DIEGO, CALIFORNIA
AUGUST 3-10, 1979

With Prefatory Note and Comments

Approved by the American Bar Association at its meeting in
Chicago, Illinois February 4-5, 1980.

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Historical Note

The Uniform Durable Power of Attorney Act was approved by the National Conference of Commissioners on Uniform State Laws in 1979. Sections 1 to 5 of the Act are identical to sections 5-501 to 5-505 of the Uniform Probate

Code, which sections comprise the amendments to Part 5 of Article V of the Probate Code also approved by the National Conference in 1979 as an alternative to sections 1 to 5 of the Uniform Durable Power of Attorney Act.

Commissioners' Prefatory Note

The National Conference included Sections 5-501 and 5-502 in Uniform Probate Code (1969) (1975) concerning powers of attorney to assist persons interested in establishing non-court regimes for the management of their affairs in the event of later incompetency or disability. The purpose was to recognize a form of senility insurance comparable to that available to relatively wealthy persons who use funded, revocable trusts for persons who are unwilling or unable to transfer assets as required to establish a trust.

The provisions included in the original UPC modify two principles that have controlled written powers of attorney. Section 5-501 (UPC (1969) (1975)), creating what has come to be known as a "durable power of attorney," permits a principal to create an agency in another that continues in spite of the principal's later loss of capacity to contract. The only requirement is that an instrument creating a durable power contain language showing that the principal intends the agency to remain effective in spite of his later incompetency.

Section 5-502 (UPC (1969) (1975)) alters the common law rule that a principal's death ends the authority of his agents and voids all acts occurring thereafter including any done in complete ignorance of the death. The new view, applicable to durable and nondurable, written powers of attorney, validates post-mortem exercise of authority by agents who act in good faith and without actual knowledge of the principal's death. The idea here was to encourage use of powers of attorney by removing a potential trap for agents in fact and third persons who decide to rely on a power at a time when they cannot be certain that the principal is then alive.

To the knowledge of the Joint Editorial Board for the Uniform Probate Code, the only statutes resembling the power of attorney sections of the UPC (1969) (1975) that had been enacted prior to the approval and promulgation of the Code were Sections 11-9.1 and 11-9.2 of Code of Virginia [1950]. Since then, a variety of UPC inspired statutes adjusting agency rules have been enacted in more than thirty states.

This [Act] [Section] originated in 1977 with a suggestion from within the National Conference that a new free-standing uniform act, designed to make powers of attorney more useful, would be welcome in many states. For states that have yet to adopt durable power legislation, this new National Conference product represents a respected, collective judgment, identifying the best of the ideas reflected in the recent flurry of new state laws on the subject; additional enactments of a new and improved uniform act should result. For other states that have acted already, this new act offers a reason to consider amendments, including elimination of restrictions that no longer appear necessary.

In the course of preparing this [Act] [Section], the Joint Editorial Board for the Uniform Probate Code, acting as a Special Committee on the new project, evolved what it considers to be improvements in §§ 5-501 and 5-502 of the 1969 and 1975 versions of the Code. In the main, the changes reflect stylistic matters. However, the idea reflected in Section 3(a)—that draftsmen of powers of attorney may wish to anticipate the appointment of a conservator or guardian for the principal—is new, and a brief explanation is in order.

When the Code was originally drafted, the dominant idea was that durable powers would be used as *alternatives* to court-oriented, protective procedures. Hence, the draftsmen merely provided that appointment of a conservator for a principal who had granted a durable power to another did not automatically revoke the agency; rather, it would be up to the court's appointee to determine whether revocation was appropriate. The provision was designed to discourage the institu-

tion of court proceedings by persons interested solely in ending an agent's authority. It later appeared sensible to adjust the durable power concept so that it may be used either as an alternative to a protective procedure, or as a designed supplement enabling nomination of the principal's choice for guardian to an appointing court and continuing to authorize efficient estate management under the direction of a court appointee.

The sponsoring committee considered and rejected the suggestion that the word "durable" be omitted from the title. While it is true that the act describes "durable" and "non-durable" powers of attorney, this is merely the result of use of language to accomplish a purpose of making both categories of power more reliable for use than formerly. In the case of non-durable powers, the act extends validity by the provisions in Section [4] [5-504] protecting agents in fact and third persons who rely in good faith on a power of attorney when, unknown to them, the principal is incompetent or deceased. The general purpose of the act is to alter common law rules that created traps for the unwary by voiding powers on the principal's incompetency or death. The act does not purport to deal with other aspects of powers of attorney, and a label that would result from dropping "durable" would be misleading to the extent that it suggested otherwise.

UNIFORM DURABLE POWER OF ATTORNEY ACT

Sec.

1. Definition.
2. Durable Power of Attorney Not Affected By Disability or Incapacity.
3. Relation of Attorney in Fact to Court-appointed Fiduciary.
4. Power of Attorney Not Revoked Until Notice.

Sec.

5. Proof of Continuance of Durable and Other Powers of Attorney by Affidavit.
6. Uniformity of Application and Construction.
7. Short Title.
8. Severability.
9. Time of Taking Effect.
10. Repeal.

Be it enacted

§ 1. [Definition]

A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability or incapacity.

Commissioners' Comment

This section, derived from the first sentence of UPC 5-501 (1969) (1975), is a definitional section that supports use of the term "durable power of attorney" in the sections that follow. The second quoted expression was designed to emphasize that a durable power with postponed effectiveness is permitted. Some UPC critics have been bothered by the reference here to a later condition of "disability or incapacity," a circumstance that may be difficult to ascertain if it can be established without a court order. The answer, of course, is that draftsmen of durable powers are not limited in their choice of words to describe the later time when the principal wishes the authority of the agent

in fact to become operative. For example, a durable power might be framed to confer authority commencing when two or more named persons, possibly including the principal's lawyer, physician or spouse, concur that the principal has become incapable of managing his affairs in a sensible and efficient manner and deliver a signed statement to that effect to the attorney in fact.

In this and following sections, it is assumed that the principal is competent when the power of attorney is signed. If this is not the case, nothing in this Act is intended to alter the result that would be reached under general principles of law.

§ 2. [Durable Power of Attorney Not Affected By Disability]

All acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled.

Commissioners' Comment

This section is derived from the second sentence of UPC 5-501 (1969) (1975) modified by deleting reference to the effect on a durable power of the principal's death, a matter that is now covered in Section [4] [5-504] which provides a single standard for durable and non-durable powers.

The words "any period of disability or incapacity of the principal" are intended

to include periods during which the principal is legally incompetent, but are not intended to be limited to such periods. In the Uniform Probate Code, the word "disability" is defined, and the term "incapacitated person" is defined. In the context of this section, however, the important point is that the terms embrace "legal incompetence," as well as less grievous disadvantages.

§ 3. [Relation of Attorney in Fact to Court-appointed Fiduciary]

(a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not disabled or incapacitated.

(b) A principal may nominate, by a durable power of attorney, the conservator, guardian of his estate, or guardian of his person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification.

Commissioners' Comment

Subsection (a) closely resembles the last two sentences of UPC § 5-501 (1969) (1975); most of the changes are stylistic. One change going beyond style states that an agent in fact is accountable *both* to the principal and a conservator or guardian if a court has appointed a fiduciary; the earlier version described accountability only to the fiduciary.

As explained in the introductory comment, the purpose of subsection (b) is to emphasize that agencies under durable powers and guardians or conservators may co-exist. It is not the purpose of the act to encourage resort to court for a fiduciary appointment that

should be largely unnecessary when an alternative regime has been provided via a durable power. Indeed, the best reason for permitting a principal to use a durable power to express his preference regarding any future court appointee charged with the care and protection of his person or estate may be to secure the authority of the attorney in fact against upset by arranging matters so that the likely appointee in any future protective proceedings will be the attorney in fact or another equally congenial to the principal and his plans. However, the evolution of a free-standing durable power act increases the prospects that UPC-type statutes cov-

ering protective proceedings will not apply when a protective proceeding is commenced for one who has created a durable power. This means that a court receiving a petition for a guardian or conservator may not be governed by standards like those in UPC § 5-304 (personal guardians) and § 5-401(2) and related sections which are designed to deter unnecessary protective proceedings. Finally, attorneys and others may find various good uses for a regime in which a conservator directs exercise of an agent's authority under a durable power. For example, the combination would confer jurisdiction on the court handling the protective proceeding to approve or ratify a desirable transaction that might not be possible without the protection of a court order. The alternative of a declaratory judgment proceeding might be difficult or impossible in some states.

It is to be noted that the "fiduciary" described in subsection (a), to whom an attorney in fact under a durable power is accountable and who may revoke or amend the durable power, does not in-

clude a guardian of the person only. In subsection (b), however, the authority of a principal to nominate extends to a guardian of the person as well as to conservators and guardians of estates.

Discussion of this section in NCCUSL's Committee of the Whole involved the question of whether an agent's accountability, as described here, might be effectively countermanded by appropriate language in a power of attorney. The response was negative. The reference is to basic accountability like that owed by every fiduciary to his beneficiary and that distinguishes a fiduciary relationship from those involving gifts or general powers of appointment. The section is not intended to describe a particular form of accounting. Hence, the context differs from those involving statutory duties to account in court, or with specified frequency, where draftsmen of controlling instruments may be able to excuse statutory details relating to accountings without affecting the general principle of accountability.

§ 4. [Power of Attorney Not Revoked Until Notice]

(a) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(b) The disability or incapacity of a principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person, who, without actual knowledge of the disability or incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his successors in interest.

Commissioners' Comment

UPC §§ 5-501 and 5-502 (1969) (1975) are flawed by different standards for durable and non-durable powers *vis a vis* the protection of an attorney in fact who purports to exercise a power after the principal has died. Section 5-501 (1969) (1975), applicable only to durable powers, expresses a most unsatisfactory standard; i. e. the attorney in fact is protected if the exercise occurs "during any period of uncertainty as to whether the principal is dead or alive. . . ." Section 5-502 (1969) (1975), applicable only to non-durable powers, protects the agent who

"without actual knowledge of the death . . . of the principal, acts in good faith under the power of attorney" Section [4] [5-504] (a) expresses as a single test the standard now contained in § 5-502 (1969) (1975). Subsection (b), applicable only to non-durable powers that are controlled by the traditional view that a principal's loss of capacity ends the authority of his agents, embodies the substance of UPC § 5-502 (1969) (1975).

The discussion in the Committee of the Whole established that the language "or other person" in subsections (a)

and (b) is intended to refer to persons who transact business with the attorney in fact under the authority conferred by the power. Consequently, persons in this category who act in good faith and without the actual knowledge described in the subsections are protected by the statute.

Also, there was discussion of possible conflict between the actual knowledge test here prescribed for protection of persons relying on the continuance of a power and constructive notice concepts under statutes governing the recording of instruments affecting real estate. The view was expressed in the Committee of the Whole that the recording statutes would continue to control since those statutes are specifically designed to encourage public recording of documents affecting land titles. It was also suggested that "good faith," as required by this section, might be lacking in the unlikely case of one who, without

actual knowledge of the principal's death or incompetency, accepted a conveyance executed by an attorney in fact without checking the public record where he would have found an instrument disclosing the principal's death or incompetency. If so, there would be no conflict between this act and recording statutes.

It is to be noted, also, that this section deals only with the effect of a principal's death or incompetency as a revocation of a power of attorney; it does not relate to an express revocation of a power or to the expiration of a power according to its terms. Further, since a durable power is not revoked by incapacity, the section's coverage of revocation of powers of attorney by the principal's incapacity is restricted to powers that are not durable. The only effect of the Act on rules governing express revocations of powers of attorney is as described in Section [5] [5-505].

§ 5. [Proof of Continuance of Durable and Other Powers of Attorney by Affidavit]

As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he did not have at the time of exercise of the power actual knowledge of the termination of the power by revocation or of the principal's death, disability, or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

Commissioners' Comment

This section, embodying the substance and form of UPC 5-502(b) (1969) (1975), has been extended to apply to durable powers. It is unclear whether UPC 5-502(b) (1969) (1975) applies to durable powers. Affidavits protecting persons dealing with attorneys in fact extend the utility of powers of attorney and plainly should be available for use by all attorneys in fact.

The matters stated in an affidavit that are strengthened by this section are limited to the revocation of a power by the principal's voluntary act, his death, or, in the case of non-durable power, by his incompetence. With one possible excep-

tion, other matters, including circumstances made relevant by the terms of the instrument to the commencement of the agency or to its termination by other circumstances, are not covered. The exception concerns the case of a power created to begin on "incapacity." The affidavit of the agent in fact that all conditions necessary to the valid exercise of the power might be aided by the statute in relation to the fact of incapacity. An affidavit as to the existence or non-existence of facts and circumstances not covered by this section nonetheless may be useful in establishing good faith reliance.

§ 6. [Uniformity of Application and Construction]

This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

§ 7. [Short Title]

This Act may be cited as the Uniform Durable Power of Attorney Act.

§ 8. [Severability]

If any provision of this Act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

§ 9. [Time of Taking Effect]

This Act takes effect _____.

§ 10. [Repeal]

The following acts and parts of acts are repealed:

- (1)
- (2)
- (3)

EXHIBIT II

When you need to use a power of attorney

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There are any number of reasons you might want to give someone else authority to act for you. Here's how it works.

A YOUNG COUPLE is concerned about who will manage the family finances should either of them become physically or mentally disabled. An elderly man worries about who will pay his bills and withdraw cash for him if he isn't able to make his weekly trips to the bank. A lieutenant wants to be sure her affairs will be looked after at home while she's abroad.

All these people might be able to find the financial management—and peace of mind—they're looking for by giving someone else authority to act in their place through a power of attorney. Making a will, owning property jointly, and executing a power of attorney to cover other contingencies are often considered key elements in simple estate planning. It's an attractive alternative for people who don't have enough assets to justify the cost of setting up and managing a trust and who want to spare their families the trouble and expense of possibly having to petition for a court-supervised guardianship.

It used to be that a power of attorney always ended if the person who gave it (the principal) became mentally unable to handle his or her own affairs. Now, however, nearly three-fourths of the states allow some form of "durable" power of attorney, which isn't affected by the principal's subsequent incapacity. Some states even authorize a so-called springing power of attorney, which doesn't take effect unless the principal can no longer act on his own behalf.

All this makes a power of attorney a valuable financial planning tool, but it's one that can backfire if it isn't handled with care.

Delegating the power

The phrase "power of attorney" refers to the written document by which you appoint someone as your agent, or your attorney-in-fact. This power can be broad, giving your agent authority to do anything you could do—write checks, make bank withdrawals, buy and sell stocks and real estate—or it

can be limited, spelling out exactly what your agent can and cannot do. Similarly, the document itself can be just a paragraph or two or can run to several pages of detailed instruction.

Powers of attorney can be simple to execute; standard forms are available at stationery stores that carry legal forms, and if you're mainly interested in giving someone else access to your bank accounts, you can probably get a form for a limited power of attorney from the bank. Powers of attorney that involve real estate are sometimes more complicated; in certain cases they have to be executed and filed just like deeds.

Each state has its own law on powers of attorney, so the document you sign should fulfill all the requirements of the state in which it's going to be used. In the case of real estate transactions, this will be the state in which the property is located rather than the state in which you live.

You don't necessarily need a lawyer's help to draft a power of attorney as long as it complies with state law. But the more complex the document, the more advisable it is to get expert advice. Ordinarily, this advice should cost no more than drafting a simple will.

Powers of attorney, even durable ones, automatically cease when the principal dies, though some states protect agents who act under the power before learning about the principal's death. Within that limitation, however, you can extend the power for as long as you like and terminate it whenever you like, usually without penalty. (If the power you're giving involves some contractual arrangement with the agent—for example, if you hire a real estate broker for a set period to buy or sell

property for you—you may be liable for breach of contract if you terminate the power of attorney prematurely.)

It's important, though, that you notify the agent, preferably in writing, that his authority has been revoked. Otherwise, you might be bound by any arrangements he makes on your behalf. To be on the safe side, you should also notify anyone with whom your agent has been dealing. In some states, if a third party continues to believe that your attorney-in-fact is still representing you, you can be held liable for their agreements.

A risky business

The most obvious caveat connected with powers of attorney is that you choose an agent who can be trusted to work in your best interests. An attorney-in-fact can have considerable leeway to do things that will be binding on you. Even when you restrict his authority, you can't always plan for every contingency, and you might find yourself bound by transactions you didn't bargain for.

Suppose, for instance, that you take a job in another state and give an agent power to sell the kitchen appliances in your old home. The agent proceeds to sell your stove and refrigerator and, without your authorization, guarantees that the appliances are in good working order. You can be held to that guarantee because your agent may have had "implied" authority (though not express authority) to give it. Or, if you found out about the guarantee but accepted the money without disavowing it, you could also be bound by it.

When you're drawing up the power of attorney, you should also make provisions for whether and how much your agent will be paid for his

services. Since many attorneys-in-fact are members of the principal's family, money often isn't an issue. But agents are legally entitled to reasonable compensation, so the details should be spelled out in the document.

Powers of attorney can be as risky for the attorney-in-fact as they are for the principal. Legally, an agent is in a fiduciary position—he is bound to exercise good faith, loyalty and honesty on behalf of the principal, and to obey all reasonable instructions. He must also act prudently in the principal's best interests.

Of course, as an agent you are liable if you misuse the property. But even if you fulfill all your responsibilities, you could still find yourself challenged; should the principal die, heirs might bring suit against you for having depleted the estate.

In dealing with an attorney-in-fact as a third party, the greatest dangers you face are that an agent will exceed his authority or claim authority when he has none. Your best defense is to ask to see a copy of the power of attorney before negotiating any deal. For his part, the principal should include in the power of attorney assurances that third parties will be protected against an agent who acts in excess of his authority.

An attractive option

Despite the risks, a carefully constructed power of attorney can be invaluable for "modest people in modest circumstances who want to take care of their own affairs," says John McCabe of the National Conference of Commissioners on Uniform State Laws, which has drafted the Uniform Durable Power of Attorney Act. It's especially attractive when you consider the alternatives.

► *Setting up a trust.* Unless you put into the trust assets worth \$100,000 to \$150,000, the earnings probably won't be enough to cover the cost of setting up the trust and having it administered by a corporate trustee.

► *Letting the court appoint a guardian.* This option, which comes into play when there is some question about the principal's competence, is a "top-heavy court-supervised procedure that's bad news," says Richard V. Wellman, a law school professor at the University of Georgia and head of the panel that drafted the Uniform Durable Power of Attorney Act. It can be time-consuming and costly, it involves a potentially stigmatizing court finding that the principal is incompetent, and it removes from the principal the power to choose who should administer his assets.

You can use a power of attorney whenever you won't be there to do something you want to do, says Wellman. That might include buying property in another state or making sure your bills are paid while you take a lengthy vacation.

Now that most states authorize the use of durable powers, many estate planners are using them with revocable trusts set up during the principal's lifetime; should the principal become incapacitated, his agent can start transferring assets into the trust.

But durable powers are probably of most interest to elderly people, for whom they've been described as a kind of senility insurance.

At least 35 states allow some form of durable power of attorney. In those jurisdictions that don't—Alabama, District of Columbia, Illinois, Kansas, Louisiana, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire,

Rhode Island, South Carolina, South Dakota, Tennessee, West Virginia and Wisconsin—the common law applies: Powers of attorney terminate when the principal is no longer mentally able to handle his own affairs. Note: Though a durable power continues after the principal becomes incompetent, it isn't valid unless he was competent when he signed it.

Possible drawbacks

Although it is an onerous procedure, a court-appointed guardianship does have an important advantage over a power of attorney: Since all transactions are approved by the court, there is no danger that heirs or even the principal, if he recovers, will challenge how assets have been used.

Because of this, and because guardians are sometimes appointed over the heads of agents, the Uniform Durable Power of Attorney Act makes the attorney-in-fact responsible to a guardian in the same way he is

responsible to the principal. If any problems arise, the guardian can get court approval for actions taken by the agent. So far no state has adopted the uniform act, which was approved by the American Bar Association last February, though several have adopted similar legislation.

Another drawback to durable powers is the possibility that third parties might be unwilling to recognize them. For example, one study shows that some life insurance companies have refused to recognize agents' requests to cash in whole life policies or borrow against them on behalf of the policy owners. Some proponents of durable powers speculate that this problem may be due more to the reluctance of companies to cash in policies than to any shortcomings in durable power laws. Says Wellman, "Some insurance companies don't like to pay out cash when they can find an excuse to retain it." □

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