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Administration of Estates

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Administration of Estates

Administration of Estates; powers of attorney

Civil Code § 2400 (repealed and new); §§ 2400.5, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2410, 2411, 2412, 2412.5, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2430, 2431, 2432, 2432.5, 2433, 2434, 2435, 2436, 2436.5, 2437, 2438, 2438.5, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2450, 2475, 2476, 2477, 2478, 2479, 2480, 2480.5, 2481, 2482, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2499.5, 2500, 2501, 2502, 2503, 2503.5, 2504, 2505, 2506, 2507, 2508, 2510, 2510.5, 2511, 2512, 2513, 2514 (repealed); §§ 2355, 2356, 2357 (amended); Financial Code § 6725 (amended); Probate Code §§ 3721, 3722, 4000, 4001, 4010, 4014, 4018, 4022, 4026, 4030, 4034, 4050, 4051, 4052, 4053, 4054, 4100, 4101, 4102, 4120, 4121, 4122, 4123, 4124, 4125, 4126, 4127, 4128, 4129, 4130, 4150, 4151, 4152, 4153, 4154, 4155, 4200, 4201, 4202, 4203, 4204, 4205, 4206, 4207, 4230, 4231, 4232, 4233, 4234, 4235, 4236, 4237, 4238, 4260, 4261, 4262, 4263, 4264, 4265, 4266, 4300, 4301, 4302, 4303, 4304, 4305, 4306, 4307, 4308, 4400, 4401, 4402, 4403, 4404, 4405, 4406, 4407, 4408, 4409, 4450, 4451, 4452, 4453, 4454, 4455, 4456, 4457, 4458, 4459, 4460, 4461, 4462, 4463, 4464, 4465, 4600, 4603, 4606, 4609, 4612, 4615, 4618, 4621, 4650, 4651, 4652, 4653, 4654, 4700, 4701, 4702, 4703, 4704, 4720, 4721, 4722, 4723, 4724, 4725, 4726, 4727, 4750, 4751, 4752, 4770, 4771, 4772, 4773, 4774, 4775, 4776, 4777, 4778, 4779, 4900, 4901, 4902, 4903, 4904, 4905, 4920, 4921, 4922, 4923, 4940, 4941, 4942, 4943, 4944, 4945, 4946, 4947, 4948 (new); § 5204 (amended).

SB 1907 (Campbell); 1994 STAT. Ch. 307

Existing law provides for the execution of powers of attorney,¹ including durable powers of attorney,² and durable powers of attorney for health care.³

1. See CAL. PROB. CODE § 4022 (enacted by Chapter 307) (defining power of attorney as a written instrument, executed by a natural person having the capacity to contract, that grants authority to an attorney-in-fact); *Frink v. Roe*, 70 Cal. 296, 307 (1886) (stating that an agent's authority or power is his right to act in the name of or on behalf of another, and this power is conferred by letter of attorney or power of attorney). See generally *Comprehensive Power of Attorney Law*, 24 CAL. L. REVISION COMM'N REPORTS 111, 121 (1994) (stating that under SB 1907, the power of attorney statutes are not completely severed from the general agency rules, and that the general agency provisions have been included in the fabric of SB 1907); 3 AM. JUR. 2d *Agency* §§ 23-35 (1986) (discussing powers of attorney in relation to agency law in general); Linda Feldman, *Topics/Seniors; Police Are Pros at Halting Cons Aimed at Elderly; Special Unit of LAPD Works Closely With the District Attorney's Office to Safeguard Vulnerable Class of Victims*, L.A. TIMES, Sept. 29, 1994, at J18 (reporting the Los Angeles Police Department's formation of the Elder Persons Estate Unit, a team specializing in combating the crime of the 1990s: preying upon the elderly by securing powers of attorney and taking their assets).

2. See CAL. PROB. CODE § 4018 (enacted by Chapter 307) (defining durable power of attorney); *id.* § 4124(a)-(c) (enacted by Chapter 307) (listing statements required to create a durable power of attorney); see also *id.* § 4026 (enacted by Chapter 307) (defining principal as a natural person who executes a power of

There are no particular qualifications required for an attorney-in-fact⁴ under

attorney). See generally *Comprehensive Power of Attorney Law*, 24 CAL. L. REVISION COMM'N REPORTS 111, 119 n.5 (1994) (explaining that durable powers of attorney are available in some form in all 50 states and the District of Columbia, and that in Illinois and Oregon all powers of attorney are durable); Michael Gilfix, *Advising Aging Clients*, CAL. LAW., Sept. 1986, at 50, 54 (stating that a durable power of attorney is designed to avoid the expense and other difficulties inherent in formal conservatorships, and that the device allows an elderly client to retain control over his or her affairs as long as possible and to choose a legal surrogate to serve in the event of his or her incapacity); Jeff Share, *Taking Care of Elderly's Affairs Tricky; Experts Urge Planning Ahead with Documents*, HOUSTON POST, Sept. 4, 1994, at D2 (declaring that experts agree that individuals should execute a durable power of attorney, which is much cheaper than seeking to have a guardian appointed).

3. CAL. PROB. CODE §§ 3721-3722, 4000-4001, 4010, 4014, 4018, 4022, 4026, 4030, 4034, 4050-4054, 4100-4102, 4120-4130, 4200-4207, 4230-4238, 4260-4266, 4300-4308, 4400-4409, 4450-4465, 4600, 4603, 4606, 4609, 4612, 4615, 4618, 4621, 4650-4654, 4700-4704, 4720-4727, 4750-4752, 4770-4779, 4900-4905, 4920-4923, 4940-4948, 5204 (enacted by Chapter 307); see *id.* (amending and re-enacting former California Civil Code sections relating to the various forms of powers of attorney); see also CAL. PROB. CODE § 4606 (enacted by Chapter 307) (defining durable power of attorney for health care as a durable power of attorney which authorizes an attorney-in-fact to make health care decisions for the principal); *id.* § 4609 (enacted by Chapter 307) (defining health care as any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition and includes decisions affecting the principal after death); *id.* § 4612 (enacted by Chapter 307) (defining health care decision as consent, refusal of consent, or withdrawal of consent to health care, or a decision to begin, continue, increase, limit, discontinue, or not to begin any health care). See generally *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 286 (1990) (holding that the United States Constitution does not forbid Missouri from requiring clear and convincing evidence of an incompetent's wishes for the withdrawal of life-sustaining treatment). The Court also concluded that the Due Process Clause does not mandate that a state accept the substituted judgment of close family members without substantial proof that their views reflect those of the patient. *Id.* at 284; Michele Yuen, Comment, *Letting Daddy Die: Adopting New Standards for Surrogate Decisionmaking*, 39 UCLA L. REV. 581, 619-20 (1992) (proposing arbitration in cases where an incapacitated patient's treatment preferences are not sufficiently clear by documentation, and the physician and family members disagree as to proper treatment); Sheila S. Nevins, *The Durable Power of Attorney for Health Care: Enhancing the Printed Forms*, L.A. LAW., Nov. 1991, at 40, 45 (stating that the principal of a durable power of attorney for health care should consider the use of additional instructions, definitions, and restraints on the attorney-in-fact because these efforts to express desires with precision will not only serve the best interests of the principal, but will satisfy the expectations of the Legislature and the courts that private decision-making regarding health care can be successful); Theresa Tighe, *Peace of Mind: Elderly Turning to Power of Attorney*, ST. LOUIS POST-DISPATCH, Aug. 5, 1994, at 1C (reporting that powers of attorney for finances and health care are preferable to guardianships and conservatorships because: (1) They cost less due to the fact that the creation of a power of attorney requires no court costs; (2) they can be drawn up by a lawyer in one day unlike a guardianship or conservatorship, which may take at least a month through the courts; and (3) they protect a family's privacy by keeping a person's finances and medical history private unlike a guardianship or conservatorship hearing in which these facts become part of the public record).

4. See CAL. PROB. CODE § 4014 (enacted by Chapter 307) (defining attorney-in-fact as a person granted authority to act for the principal in a power of attorney, and includes a person delegated authority by an attorney-in-fact or successor to an attorney-in-fact); *id.* § 4231(a) (enacted by Chapter 307) (imposing a duty of care and skill upon the attorney-in-fact); *id.* § 4232(a) (enacted by Chapter 307) (imposing a duty of loyalty upon the attorney-in-fact); *id.* § 4233(a) (enacted by Chapter 307) (requiring the attorney-in-fact to keep the principal's property separate from other property in a manner adequate to identify the property clearly as belonging to the principal); *id.* § 4234 (enacted by Chapter 307) (imposing a duty upon the attorney-in-fact to keep the principal informed and, unless otherwise approved by the court, to follow the principal's instructions); *id.* § 4236(a) (enacted by Chapter 307) (mandating the attorney-in-fact to keep records of all transactions entered into by the attorney-in-fact on behalf of the principal); see also *Haigler v. Donnelly*, 18 Cal. 2d 674, 681, 117 P.2d 331, 335 (1941) (stating that a broker or agent is ordinarily liable for converting the funds of his principal when he refuses to account for such funds upon demand); *Sterling v. Smith*, 97 Cal. 343, 347, 32 P. 320, 321 (1893) (providing that an agent who invests his principal's money in a corporation of which he is a member and to which he is largely indebted, without informing her either of his membership or of the debt,

a power of attorney for property; however, there are some restrictions in the case of a durable power of attorney for health care.⁵ Chapter 307 specifies that any person having the capacity to make a contract may be an attorney-in-fact.⁶

Existing law mandates that powers of attorney be in writing and signed by the principal.⁷ Chapter 307 imposes the additional requirement that powers of

is guilty of fraud, though there may be no actual wrongful intent; and the principal may recover such sum from the agent in the absence of a ratification by her of such an investment); *Whittaker v. Otto*, 188 Cal. App. 2d 619, 623, 10 Cal. Rptr. 689, 692 (1961) (stating that an agent may be authorized to carry forward any ordinary business transaction, and the agent's act becomes the act of his principal); *People v. Warrington*, 80 Cal. App. 167, 171, 251 P. 327, 328 (1926) (providing that a general power of attorney does not authorize an agent to divert funds entrusted to him for a specific purpose); RESTATEMENT (SECOND) OF AGENCY § 6 cmt. a (1958) (defining power as a legal attribute or an ability to change legal relations). See generally Sigvald Nielson, *The Power of an Agent to Bind His Principal—California and the Restatement*, 22 CAL. L. REV. 392 (1934) (discussing the bases of an agent's power to bind a principal under California law).

5. *Comprehensive Power of Attorney Law*, 24 CAL. L. REVISION COMM'N REPORTS 111, 125 (1994); see CAL. PROB. CODE § 4702 (enacted by Chapter 307) (enumerating limitations restricting who may be an attorney-in-fact under a durable power of attorney for health care).

6. CAL. PROB. CODE § 4200 (enacted by Chapter 307); see CAL. CIV. CODE § 1556 (West 1982) (providing that all persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights); *Rosman v. Cuevas*, 176 Cal. App. 2d Supp. 867, 869, 1 Cal. Rptr. 485, 487 (1960) (stating that in any contract, there must exist parties competent to enter into a contract as well as a mutual understanding of what is being done); *Comprehensive Power of Attorney Law*, 24 CAL. L. REVISION COMM'N REPORTS 111, 125-26 (1994) (stating that a minimum criterion for an attorney-in-fact is that the person has the capacity to contract). Compare CAL. PROB. CODE § 4200 (enacted by Chapter 307) (explaining that only a person having the capacity to contract is qualified to act as an attorney-in-fact) with 1985 Cal. Stat. ch. 403, sec. 1, at 1597 (amending CAL. CIV. CODE § 2400) (providing that a durable power of attorney is a power of attorney by which a principal designates merely "another," imposing no particular qualifications upon the attorney-in-fact). See generally George J. Alexander & Thomas S. Szasz, *From Contract to Status Via Psychiatry*, 13 SANTA CLARA LAW. 537, 538 (1973) (tracing the relationship between the right to contract and mental competence to the Romans, calling the capacity to consent, which is essential to contract formation, a "mental" quality that may be impaired by mental illness); Henry Weihofen, *Mental Incompetency to Contract or Convey*, 39 S. CAL. L. REV. 211, 211 (1966) (stating that all courts agree that a declaration of incompetency is sufficient to conclude that the person was incompetent to contract at the time of the adjudication). However, there are differing views as to whether the determination is conclusive of the person's incompetency at some time subsequent thereto. *Id.*; James T. Bentson, Comment, *Convicts—Loss of Civil Rights—Civil Death in California*, 26 S. CAL. L. REV. 425, 430 (1953) (stating that although California Civil Code § 1556 declares that all persons are capable of contracting except, *inter alia*, persons deprived of civil rights, the courts have often found a restoration of the right to contract for certain personal services); 17A AM. JUR. 2D *Contracts* § 23 (1991) (discussing capacity to contract generally); 14 CAL. JUR. 3D *Contracts* § 9 (1974) (discussing capacity to contract in California generally); 14 CAL. JUR. 2D *Criminal Law* § 283 (1954) (stating that no person convicted of an infamous crime is competent to serve as executor or administrator). But see RESTATEMENT (SECOND) OF AGENCY § 6 cmt. b (1958) (stating that any person may hold a power, regardless of that person's legal capacity to contract or to be subject to liability). Although a person does not have the legal capacity to bind himself, he has the power to bind another if he is authorized to act on the other's behalf. *Id.*

7. CAL. PROB. CODE § 4121(b) (enacted by Chapter 307); see *id.* § 4022 (enacted by Chapter 307) (requiring that a power of attorney be in writing). Compare *id.* § 4121(a)-(c) (enacted by Chapter 307) (setting forth the formalities for executing a power of attorney including: the date of its execution, the signature of the principal or some other person who is in the principal's presence and is directed to sign for him by the principal, and the power of attorney is either acknowledged by a notary public or signed by at least two witnesses who satisfy the requirements of California Probate Code § 4122) with 1992 Cal. Legis. Serv. ch. 178, sec. 3, at 722 (amending CAL. CIV. CODE § 2476) (requiring that the signature of the principal on the uniform statutory form power of attorney be acknowledged) and 1991 Cal. Legis. Serv. ch. 1090, sec. 1, at 4394 (amending CAL. CIV. CODE § 2475) (providing the uniform statutory form power of attorney which requires the signature and social security number of the principal). See generally *Comprehensive Power of Attorney*

attorney contain at least two witnesses' signatures or an acknowledgement by a notary public.⁸

Existing law does not provide a specific means by which an attorney-in-fact may resign,⁹ nor does existing law address a specific means by which an attorney-in-fact may receive compensation.¹⁰ Chapter 307 specifies that attorneys-

Law, 24 CAL. L. REVISION COMM'N REPORTS 111, 124 (1994) (stating that there is no requirement that the attorney-in-fact sign the instrument); David Bailey, *Bank Liable in Bogus Agency Scheme*, CHI. DAILY L. BULL., Mar. 17, 1994, at 3 (reporting that a Chicago bank must repay \$12,538 that was originally in an elderly woman's bank account, but was unlawfully acquired by her nephew who used forged power of attorney forms); Ken Hoover, *Convict Pleads Guilty to Harassment*, S.F. CHRON., May 7, 1994, at A19 (reporting a story in which a convicted child molester exacted revenge upon the woman who turned him in by intercepting her mail and forging power of attorney forms in her name with the IRS); *Preying on the Elderly?*, PLAIN DEALER, Aug. 14, 1994, at 2C (describing a story in which two elderly sisters' bank account was emptied and their house was sold for slightly more than half its worth prompting the police to investigate whether the sisters were deceived by their nephew into signing away their affairs under a power of attorney or whether he forged the documents).

8. CAL. PROB. CODE § 4121(c) (enacted by Chapter 307); *see id.* § 4122 (enacted by Chapter 307) (specifying that if the power of attorney is signed by witnesses, the witnesses must be adults; the attorney-in-fact may not act as a witness; and that each witness signing the power of attorney must witness either the signing of the instrument by the principal or the principal's acknowledgment of the signature or the power of attorney); *id.* § 4401 (enacted by Chapter 307) (providing the statutory form power of attorney indicating the mandatory inclusion of a certificate of acknowledgment of notary public in compliance with California Civil Code § 1189); *id.* § 4402(c) (enacted by Chapter 307) (requiring, as one element of a legally sufficient document, the signature of the principal on the statutory form power of attorney be acknowledged); *id.* § 4701(a) (enacted by Chapter 307) (providing that none of the following persons may act as a witness for a durable power of attorney for health care: the principal's health care provider or an employee of the principal's health care provider, the operator or an employee of a community care facility, or the operator or an employee of a residential care facility for the elderly); *id.* § 4701(b) (enacted by Chapter 307) (requiring each witness to make a declaration which states that the principal's identity was proven to the witness); *id.* § 4751 (enacted by Chapter 307) (defining convincing evidence for the purposes of California Probate Code § 4701(b)); *id.* § 4771 (enacted by Chapter 307) (setting forth the statutory form durable power of attorney for health care which requires the signatures of two qualified witnesses); *id.* § 4773(a) (enacted by Chapter 307) (setting forth the formal requirements of a durable power of attorney for health care, including the signature of two qualified witnesses); *see also* CAL. CIV. CODE § 1216 (West 1982) (declaring that no power contained in an instrument to convey or execute instruments affecting real property which has been recorded is revoked by any act of the party by whom it was executed, unless the instrument containing the revocation is acknowledged and recorded in the same office in which the instrument containing the power was recorded); *cf.* MINN. STAT. ANN. § 523.01 (West Supp. 1994) (requiring the power of attorney to be notarized only when the principal signs by a mark or someone signs the power of attorney on behalf of the principal). *See generally Comprehensive Power of Attorney Law*, 24 CAL. L. REVISION COMM'N REPORTS 111, 125 (1994) (providing a protective level of formality for durable powers of attorney by requiring witness signatures or notary acknowledgments).

9. CAL. CIV. CODE § 2355 (amended by Chapter 307); *see id.* (providing the means by which an agency may terminate); *Boehm v. Spreckels*, 183 Cal. 239, 248, 191 P.5, 9 (1920) (providing that where an agent's power is coupled with an interest, the power to revoke always exists under California Civil Code § 2355, but the right to revoke without damages depends upon the circumstances); *Jay v. Dollarhide*, 3 Cal. App. 3d 1001, 1022, 84 Cal. Rptr. 538, 551 (1970) (stating the general rule that a power of attorney is a form of agency); *Preszler v. Dudley*, 153 Cal. App. 2d 120, 123, 314 P.2d 138, 141 (1957) (explaining that an agency usually depends on the assent of both parties and hence may be revoked by the principal or renounced by the agent at any time); *see also* 2 AM. JUR. 2D *Agency* §§ 59-60 (1991) (providing the general rule that one form of agency is a power of attorney); *cf.* *Moore v. Scott*, 759 S.W.2d 827, 830 (Ky. 1988) (holding that a power of attorney could be revoked, even though the power of attorney had an expiration date subsequent to the revocation).

10. CAL. CIV. CODE § 2308 (West 1985); *see id.* (stating that consideration is not necessary to make an authority binding upon the principal); *Comprehensive Power of Attorney Law*, 24 CAL. L. REVISION COMM'N REPORTS 111, 134 (1994) (declaring that existing law does not provide any provisions on compensation of attorneys-in-fact); *Rodes v. Shannon*, 222 Cal. App. 2d 721, 726, 35 Cal. Rptr. 339, 343

in-fact are entitled to reasonable compensation.¹¹ Chapter 307 also enumerates methods by which an attorney-in-fact may resign.¹²

Existing law is silent on the extent to which an attorney-in-fact may delegate authority under a power of attorney for property.¹³ Similar to the general agency statutes, Chapter 307 permits the delegation of mechanical acts; however, unlike the general agency rule, the attorney-in-fact remains responsible to the principal for the exercise of the authority delegated.¹⁴ Chapter 307 further specifies that in

(1963) (declaring that a gratuitous agent owes the same obligation as any other agent with respect to the exercise of good faith); *Spector v. Miller*, 199 Cal. App. 2d 87, 95, 18 Cal. Rptr. 426, 431 (1962) (providing that a gratuitous agent cannot be compelled to perform his undertaking, but if he actually enters upon performance, he must obey instructions and he is bound to exercise the utmost good faith in dealing with the principal); *Lem v. Wilson*, 27 Cal. App. 512, 514, 150 P. 641, 642 (1915) (mandating that a gratuitous agent appointed to sell pledged property is liable to the pledgor for gross negligence resulting in loss); see also *Comprehensive Power of Attorney Law*, 24 CAL. L. REVISION COMM'N REPORTS 111, 134 (1994) (explaining that the omission of a right to compensation in prior law might have caused the failure of a durable power of attorney to carry out its intended purpose, since the attorney-in-fact may have been unwilling to continue service without compensation or reimbursement, if he or she was expected to incur substantial expenditures of time and money if the principal became incompetent); RESTATEMENT (SECOND) OF AGENCY § 441 (1958) (stating that unless the relation of the parties, the triviality of the services, or other circumstances, indicate that the parties have agreed otherwise, it is inferred that a person promises to pay for services which he requests or permits another to perform for him as his agent).

11. CAL. PROB. CODE § 4204 (enacted by Chapter 307); see *id.* § 4231(b) (enacted by Chapter 307) (providing that if an attorney-in-fact does not receive compensation, the attorney-in-fact is not liable for any loss to the principal's property, unless the loss is a result of the attorney-in-fact's bad faith, intentional wrongdoing, or gross negligence).

12. *Id.* § 4207 (enacted by Chapter 307); see *id.* § 4207(a) (enacted by Chapter 307) (providing that an attorney-in-fact may resign by: (1) Giving notice to the principal, if the principal is competent; (2) giving notice to the conservator, if a conservator has been appointed; (3) providing a written agreement of a successor who is designated in the power of attorney; or (4) pursuant to a court order); see also *id.* § 4238 (enacted by Chapter 307) (enumerating the duties of an attorney-in-fact upon the termination of his or her authority); *id.* § 4941(e) (enacted by Chapter 307) (providing that a petition may be filed for the purpose of approving the resignation power of attorney other than a durable power of attorney for health care).

13. *Comprehensive Power of Attorney Law*, 24 CAL. L. REVISION COMM'N REPORTS 111, 130 (1994); see CAL. CIV. CODE § 2349 (West 1985) (allowing the agent, under general agency law, to delegate his powers: (1) When the act to be done is purely mechanical; (2) when the act may not be legally performed by the agent, but may be legally performed by the sub-agent; (3) when it is customary to delegate such a power; or (4) when delegation is explicitly authorized by the principal); *Sayre v. Nichols*, 7 Cal. 535, 542 (1858) (explaining that an agent may not delegate any of his powers requiring the exercise of judgment or discretion, but may delegate mere mechanical powers or duties); *Kadota Fig Ass'n of Producers v. Case-Swayne Co.*, 73 Cal. App. 2d 815, 819, 167 P.2d 523, 526 (1946) (mandating that in the absence of explicit authority to do so, an agent may not delegate the power to another to pass upon the terms of a contract or to bind the principal by its unauthorized execution, however, the agent may nevertheless delegate to another the power to perform purely mechanical acts in relation to the contract); *Julian v. Schwartz*, 16 Cal. App. 2d 310, 328, 60 P.2d 887, 897 (1936) (stating that implied authority may exist for an agent to handle his principal's business in the usual and customary manner employed in the same or similar locality).

14. CAL. PROB. CODE § 4205 (enacted by Chapter 307); see RESTATEMENT (SECOND) OF AGENCY § 18 (1958) (declaring that in general, an agent is not permitted to delegate the exercise of discretion in the use of a power which is held for the benefit of the principal); *id.* § 18 cmt. b (1958) (explaining that it is uncommon for an agent to authorize a person to conduct a transaction as well as to confer the power to exercise discretion in the principal's matters); *id.* § 64 (1958) (providing that authority to buy or sell includes the authority to hire necessary professionals or other assistants); *id.* § 77 (1958) (stating that the authority to appoint agents, subagents, or servants of the principal can be conveyed in the same manner as authority to do other acts for the principal); *id.* § 78 (1958) (providing that the authority to conduct a transaction includes the authority to delegate incidental mechanical and ministerial acts but does not include the authority to delegate the

addition to acts authorized under a general grant of authority,¹⁵ the attorney-in-fact also has the inferred authority to perform tasks necessary to carry out the specific tasks in a power of attorney.¹⁶

Chapter 307 additionally clarifies and reorganizes the provisions for the termination and revocation of the attorney-in-fact's authority.¹⁷ Chapter 307 imposes a general duty upon third persons to grant an attorney-in-fact the same rights as would be granted to the principal.¹⁸

performance of incidental acts which involve discretion or the agent's special skill).

15. See *Comprehensive Power of Attorney Law*, 24 CAL. L. REVISION COMM'N REPORTS 111, 129 (1994) (stating that the general agency statutes provide for the power and authority of attorneys-in-fact); CAL. CIV. CODE § 2307 (West 1985) (specifying that a preceding authorization or a subsequent ratification may confer authority or create an agency); *id.* § 2315 (West 1985) (providing that an agent has as much authority as is conferred by the principal); *id.* § 2316 (West 1985) (defining actual authority as either that which a principal intentionally confers upon the agent, or allows the agent to believe himself to possess); *id.* § 2318 (West 1985) (providing that every agent has as much authority as is provided by general agency law, unless specially deprived by the principal); *id.* § 2322 (West Supp. 1994) (explaining that general authority does not authorize the agent to act in his or her own name, unless it is in the usual course of business to do so; to define the scope of the agency; or, to violate basic fiduciary duties imposed on a trustee).

16. CAL. PROB. CODE § 4261 (enacted by Chapter 307); see *id.* (providing that an attorney-in-fact has the same authority as any other person who has the capacity to contract if the power of attorney grants general authority to an attorney-in-fact and is not limited to specific actions); *id.* § 4262 (enacted by Chapter 307) (explaining limited power of attorney as a power granted to an attorney-in-fact, which gives the agent the authority incidental, necessary, or proper to carry out the granted authority); see also CAL. CIV. CODE § 2319 (West 1985) (granting the agent the necessary authority to satisfy the purpose of the agency); *id.* § 2320 (West 1985) (allowing the agent to disobey instructions where the interest of the principal will benefit and there is no time to communicate with the principal); *id.* § 2321 (West 1985) (stating that when an authority is given partly in general and partly in specific terms, the general authority does not provide any higher power than that which is specifically mentioned); *Comprehensive Power of Attorney Law*, 24 CAL. L. REVISION COMM'N REPORTS 111, 129-30 (1994) (stating that the intent of SB 1907 is to clarify a general grant of authority or limited authority, not to create a new set of powers); *supra* notes 13-14 and accompanying text (discussing the power of an agent to delegate the authority conferred by the principal under general agency statutes and Chapter 307).

17. *Comprehensive Power of Attorney Law*, 24 CAL. L. REVISION COMM'N REPORTS 111, 136 (1994); see *id.* (stating that although SB 1907 reorganizes and combines the rules for termination and revocation of powers of attorney, it preserves most of their substance); see, e.g., CAL. PROB. CODE § 4150(a) (enacted by Chapter 307) (allowing a principal to modify a power of attorney either in accordance with its terms or by an instrument executed in the same manner as the power of attorney); *id.* § 4151(a) (enacted by Chapter 307) (providing that a principal may revoke a power of attorney in accordance with the terms of the power of attorney or by a writing); *id.* § 4152 (enacted by Chapter 307) (enumerating events by which the authority of an attorney-in-fact is terminated); *id.* § 4153(a) (enacted by Chapter 307) (setting forth methods by which a principal may revoke the authority of the attorney-in-fact); *id.* § 4154(a) (enacted by Chapter 307) (stating that a spouse's designation as an attorney-in-fact is revoked at the dissolution or annulment of the marriage); *id.* § 4155(a) (enacted by Chapter 307) (providing that the authority of an attorney-in-fact under a nondurable power of attorney is terminated by the incapacity of the principal to contract).

18. CAL. PROB. CODE § 4300 (enacted by Chapter 307); see *id.* § 4301 (enacted by Chapter 307) (permitting a third party to rely on, contract with, and deal with an attorney-in-fact with respect to the subjects and purposes included in the power of attorney, regardless of whether the power of attorney expressly authorizes the act); *id.* § 4302 (enacted by Chapter 307) (authorizing a third person, before incurring any duty to comply with the power of attorney, to require the attorney-in-fact to provide identification); *id.* § 4303(a) (enacted by Chapter 307) (providing that a third person who acts in good faith reliance on a power of attorney is not liable to the principal or to any other person if the power of attorney is presented by the attorney-in-fact designated in the power of attorney, the power of attorney appears on its face to be valid, and the power of attorney includes a notary public's certificate of acknowledgement or is signed by two witnesses); *Comprehensive Power of Attorney Law*, 24 CAL. L. REVISION COMM'N REPORTS 111, 139 (1994) (explaining

INTERPRETIVE COMMENT

The purpose of Chapter 307 is to enact a new comprehensive Power of Attorney Law in the California Probate Code.¹⁹ The new law transfers the provisions governing powers of attorney from the California Civil Code to the Probate Code.²⁰ According to the California Law Revision Commission, prior to the enactment of Chapter 307, the statutes governing powers of attorney were completely disorganized and were in need of amendments and modifications.²¹ In the past fifteen years, a great deal of legislation has been enacted recognizing general durable powers of attorney and durable powers of attorney for health care.²² The piecemeal nature of these revisions has culminated in a disorganized set of statutes relating directly to powers of attorney.²³ In many situations, it is difficult to ascertain whether a particular provision applies to powers of attorney generally, to durable powers generally, or only to health care powers.²⁴ In addition, it is unclear the degree to which the different varieties of powers of attorney are subject to general agency rules.²⁵

Chapter 307 did not completely sever the power of attorney statutes from the general agency rules; thus, powers of attorney are still considered a form of agency and will remain subject to the general law of agency, except in situations where the Power of Attorney Law applies.²⁶ Much of Chapter 307 was drafted with the intent to provide a more explicit set of rules and to fill gaps in existing coverage, rather than making any major substantive revisions.²⁷

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that in order to facilitate compliance with the duty of all third parties to afford an attorney-in-fact the same rights and privileges given to the principal, SB 1907 protects third parties acting in good faith and those relying on the representations of the attorney-in-fact).

19. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1907, at 2 (June 30, 1994).

20. *Id.* at 1; *see supra* note 3 and accompanying text (enumerating the transferred provisions).

21. *Comprehensive Power of Attorney Law*, 24 CAL. L. REVISION COMM'N REPORTS 111, 117 (1994).

22. *Id.*; *see id.* at 117 n.2 (explaining that almost all of the recent durable power of attorney legislation was enacted based on the recommendation of the Law Revision Commission).

23. *Id.* at 118; *cf. id.* at 118 n.3 (providing that of the 51 sections relating to agency law which were present in the California Civil Code of 1872, only four have been revised in 120 years).

24. *Id.* at 118; *see id.* at 119 n.4 (explaining that many of the general agency statutes overlap or are concerned with issues which are either irrelevant or handled differently in the power of attorney statutes).

25. *Id.* at 118.

26. *Id.* at 121.

27. *Id.* at 122.

Administration of Estates; prohibition on transfers of property—exception

Code of Civil Procedure § 366.2 (amended); Probate Code §§ 19255, 21320, 21351 (amended).

AB 797 (Connolly); 1994 STAT. Ch. 40
(Effective April 19, 1994)

Existing law, subject to certain exceptions, invalidates an instrument¹ which attempts to make a donative transfer to a beneficiary² who was instrumental in creating or drafting the instrument or who has a particular relationship with the drafter.³ Under existing law, certain transfers are exempt from these invalidating provisions, including transfers made to a blood relation⁴ or a co-habitant,⁵ transfers reviewed by an independent attorney,⁶ and transfers approved by the court.⁷ Chapter 40 creates an additional exception to the invalidating provision

1. See CAL. PROB. CODE § 45 (West 1991) (defining instrument as a will, trust, deed, or other writing which designates a beneficiary or otherwise makes a donative transfer of property).

2. See *id.* § 24 (West 1991) (defining beneficiary as a person to whom a donative transfer of property is made or that person's successor in interest).

3. *Id.* § 21350(a)(1)-(3) (West Supp. 1994); see *id.* (noting that provisions which make donative transfers are invalid if the transfer is made to, among others, a person having a fiduciary relationship, an employee of the drafter or transcriber, or any partner or shareholder of any partnership or corporation in which the drafter has a 10% or greater ownership interest); *In re Schuyler*, 434 N.E.2d 1137, 1141 (Ill. 1982) (holding that transfers of property from an individual to his attorney raise a presumption of undue influence, placing the burden on the attorney to prove by clear and convincing evidence that the gift was not procured through undue influence); see also Gerald P. Johnston, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57, 60-61 (1984) (addressing the topic of attorneys who are named as beneficiaries in the wills that they draft and stating that courts are taking an increasingly hard stand against this type of activity); Leslie A. Evans, Review of Selected 1993 Legislation, *Administration of Estates; Fiduciaries—Self-Dealing*, 25 PAC. L.J. 368, 388-90 (1994) (describing the invalidating provisions and the individuals who are disqualified thereunder as beneficiaries); cf. KAN. STAT. ANN. § 59-605 (1983) (invalidating wills written or prepared by the sole principal beneficiary).

4. See CAL. PROB. CODE § 21350(b)(2)(A)-(C) (West Supp. 1994) (defining blood relation).

5. See CAL. FAM. CODE § 6209 (West 1994) (defining a co-habitant as a person who regularly resides in the household).

6. See CAL. PROB. CODE § 21351(b) (amended by Chapter 40) (providing that the transfer will be allowed if an attorney unrelated to and unassociated with the drafter or beneficiary reviews the instrument, counsels the transferor regarding the legal ramifications of the transfer, and provides a certificate of independent review); *id.* (providing a form of certificate of independent review); see also *In re Schuyler*, 434 N.E.2d at 1141 (holding that one factor considered when transfers are made by individuals to their attorneys is whether the transferor received independent advice before completion of the transaction). See generally Joseph W. deFuria, Jr., *Testamentary Gifts from Client to the Attorney-Draftsman: From Probate Presumption to Ethical Prohibition*, 66 NEB. L. REV. 695 (1987) (discussing different resolutions of the conflict implicit in situations in which an attorney is designated as a beneficiary of a donative transfer by a client, and stating that the typical judicial response is a presumption of undue influence because of the fiduciary nature of the relationship between the parties).

7. CAL. PROB. CODE § 21351(a)-(e) (amended by Chapter 40); see *id.* § 21351(a) (amended by Chapter 40) (providing an exception for transfers made by a transferor who is related by blood or marriage to, or is a cohabitant with, the transferee or the person who drafted or transcribed the instrument, or caused it to be drafted or transcribed); *id.* § 21351(b) (amended by Chapter 40) (providing that an instrument is not invalidated if it is reviewed by an attorney not related to or associated with the drafter or the beneficiary of the transfer, who counsels the client about the nature of the intended transfer and signs and delivers to the transferor and the drafter a certificate, the form of which is set forth within § 21351(b)); *id.* § 21351(c) (amended by Chapter

applicable to donative transfers, allowing such transfers to be made to federal, state, or local public entities⁸ and to certain tax exempt entities that drafted or transcribed the instrument.⁹ Chapter 40 validates the instrument to the extent of the entity's interest.¹⁰ Chapter 40 further provides for retroactive application to all instruments that become irrevocable, or are executed by individuals who die, on or after July 1, 1993.¹¹

Existing law provides that a cause of action which survives the death¹² of the individual against whom it is to be asserted and for which the applicable statute of limitations has not yet expired can be commenced within one year of death.¹³ Chapter 40 makes applicable to this provision the law pertaining to no-contest clauses,¹⁴ clarifying that the one year statute of limitations is tolled during the

40) (declaring that a transfer is not invalidated if, after full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with § 2580) of the California Probate Code); *id.* § 21351(d)-(e) (amended by Chapter 40) (providing that a transfer made on or before July 1, 1993, will not be invalidated if the court finds, based upon clear and convincing evidence, that the transfer was not produced by fraud, menace, duress, or undue influence and that it is fair, just, and equitable to all interested persons to allow the transfer).

8. See CAL. GOV'T CODE § 811.2 (West 1980) (defining public entity).

9. CAL. PROB. CODE § 21351(f) (amended by Chapter 40); *see id.* (providing that entities which are exempt from taxation under § 501(c)(3) or (19) of the Internal Revenue Code are encompassed under its provisions); *see also* 26 U.S.C.A. § 501(c)(3) (West Supp. 1994) (exempting non-profit organizations from taxation); *id.* § 501(c)(19) (West Supp. 1994) (exempting non-profit veteran's organizations from taxation).

10. CAL. PROB. CODE § 21351(f) (amended by Chapter 40). *See generally* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 797, at 3 (Mar. 8, 1994) (stating that the validation of the instrument is limited to the extent of the interest of the entity, in order to ensure that the exception still covers and protects charitable remainders, lead trusts, and pooled income funds).

11. CAL. PROB. CODE § 21351(f) (amended by Chapter 40).

12. See CAL. CIV. PROC. CODE § 377.20 (West Supp. 1994) (describing survival of causes of action).

13. *Id.* § 366.2(a)(1) (amended by Chapter 40); *see id.* § 377.30 (West Supp. 1994) (stating that a cause of action that survives the death of the person entitled to commence it passes to the decedent's successor in interest); *id.* § 377.40 (West Supp. 1994) (noting that the decedent's personal representative is subject to suit to the extent provided by statute); *see also* CAL. PROB. CODE § 13109 (West 1991) (declaring that a person to whom the decedent's property is transferred is liable for the unsecured debts of the decedent); *id.* § 13550 (West 1991) (explaining that the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the property, subject to the provisions of California Code of Civil Procedure § 13551). *See generally* 22 CAL. L. REVISION COMM'N REP. 895, 921 (1992) (providing that the one-year provision applies regardless of whether the statute otherwise applicable would have expired before or after the one-year period, as long as it had not expired at the decedent's death).

14. See CAL. PROB. CODE § 21300 (West 1991) (defining a no-contest clause as a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if the beneficiary brings a contest attacking an instrument or any provision of it); *Estate of Goyette v. Diocese of Monterey-Fresno Education & Welfare Corp.*, 258 Cal. App. 2d 768, 772, 66 Cal. Rptr. 103, 105 (1968) (defining no-contest clauses as those which are used to prohibit any legal proceeding designed to thwart the testator's wishes and indicating that these clauses are enforced according to their terms if clear and certain).

pendency of the court's determination of whether a particular action constitutes a contest.¹⁵ This provision becomes operative on January 1, 1995.¹⁶

Under existing law, when an instrument containing a no-contest clause becomes irrevocable, a beneficiary may apply to the court for a determination of whether a motion, petition, or other act by a beneficiary constitutes a contest.¹⁷ Prior law did not specifically provide that claims made by creditors were subject to the provisions regarding no-contest clauses.¹⁸ Chapter 40 clarifies that claims by creditors are subject to provisions regarding no-contest clauses, providing that a beneficiary can make a motion to the court to determine if a claim by a creditor constitutes a contest.¹⁹ This provision becomes operative on January 1, 1995.²⁰

Existing law provides that property distributed by a trustee²¹ in accordance with the terms of a trust²² after 120 days from either the notice of rejection²³ or from the day the claim was due, whichever is the latter, is not subject to claims asserted by creditors of the deceased settlor.²⁴ Chapter 40 provides that any time during which the office of the trustee is vacant is excluded from the time-frame.²⁵ This provision becomes operative January 1, 1995.²⁶

15. CAL. CIV. PROC. CODE § 366.2(b)(3) (amended by Chapter 40); *see id.* § 366.2(a)(2) (amended by Chapter 40) (providing that the statute of limitations is not tolled or extended for any reason, except as provided for in subsection (b)); *id.* § 366.2(b)(1)-(3) (amended by Chapter 40) (stating that this section remains subject to provisions relating to creditor claims in administration of estates of decedents, payment of claims, debts, and expenses from revocable trust of deceased settlor, and no contest clauses); *supra* note 17 (defining contest); *supra* note 14 (defining and discussing no-contest clauses).

16. 1994 Cal. Legis. Serv. ch. 40, sec. 5, at 3983.

17. CAL. PROB. CODE § 21320(a) (amended by Chapter 40); *see id.* § 21300(a) (West 1991) (defining contest); *Estate of Friedman v. Grunauer*, 100 Cal. App. 3d 810, 817, 161 Cal. Rptr. 311, 315 (1979) (holding that what constitutes a contest is determined according to the circumstances of each case); *Estate of Kazian v. Security Pac. Nat'l Bank*, 59 Cal. App. 3d 797, 802, 130 Cal. Rptr. 908, 910 (1976) (stating that what constitutes a contest is gleaned from considering the purpose the decedent sought to attain by the will provisions); *see also* 20 CAL. L. REVISION COMM'N REP., 1001, 1978 (1990) (discussing no contest clauses, their validity, construction, and procedural aspects); *id.* at 1981 (stating that since the request for a determination cannot itself be considered an attack within the parameters of the no-contest clause, the determination is confined to whether a particular act is considered an attack and does not encompass the merits of the controversy).

18. 1990 Cal. Legis. Serv. ch. 79, sec. 14, at 745-46 (enacting CAL. PROB. CODE § 21305).

19. CAL. PROB. CODE § 21320(a) (amended by Chapter 40); *see id.* §§ 9000, 19000 (West 1991 & Supp. 1994) (defining the creditor claims made subject to California Probate Code § 21320).

20. 1994 Cal. Legis. Serv. ch. 40, sec. 5, at 3983.

21. *See* CAL. PROB. CODE § 84 (West 1991) (defining trustee).

22. *See id.* § 82 (West 1991) (defining trust).

23. *See id.* § 19250 (West Supp. 1994) (discussing the ability of a trustee to reject a claim).

24. *Id.* § 19255 (amended by Chapter 40); *see* 20 CAL. L. REVISION COMM'N REP. 1001, 1978 (1990) (describing the procedure for the allowance and rejection of claims against decedent's estates); *cf.* CAL. PROB. CODE §§ 9000-9250 (West 1991 & Supp. 1994) (defining the procedures to be used by creditors with claims against decedent's estates). *See generally* 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Trusts* § 274Q (9th ed. Supp. 1993) (setting forth the provisions governing claims made by creditors against the estate of a deceased settlor and describing the creditor's claim procedure for claims against revocable trusts as substantially similar to that for decedent's estates); 18 CAL. L. REVISION COMM'N REP. 595, 596 (1986) (providing that the procedure for closing off creditor's claims against a trust estate is envisioned as analogous to the procedure for determining creditor's claims in probate).

25. CAL. PROB. CODE § 19255(d) (amended by Chapter 40).

26. 1994 Cal. Legis. Serv. ch. 40, sec. 5, at 3983.

INTERPRETIVE COMMENT

Existing law precludes certain individuals from being recognized as beneficiaries of donative transfers and was enacted in order to prevent the exercise of undue influence over donative transfers of property.²⁷ An unintended consequence of existing law involved its invalidation of transfers made by individuals to charitable organizations when the instrument was drafted by an employee of the charity and used by the donor without consulting an attorney.²⁸ Public policy dictates that individuals should be protected from making transfers of property induced through undue influence by individuals with whom they share a fiduciary relationship; however, public policy also dictates that there is a need to encourage transfers prompted by charitable motivations.²⁹ Consequently, Chapter 40 was enacted to ensure that particular recipients of transfers are not disqualified as beneficiaries simply because they drafted the language of the transferring instrument.³⁰

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27. CAL. PROB. CODE § 21350 (West Supp. 1994); *see* Evans, *supra* note 3, at 388-90 (describing the invalidating provisions and the individuals who are disqualified thereunder as beneficiaries).

28. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 797, at 2-3 (Mar. 8, 1994).

29. *Id.* at 3.

30. *Id.* at 2-3.

