

RESOLUTION 3-09-03

DIGEST

Power of Attorney: Reliance on Un-notarized Signature

Amends Probate Code section 4303 to allow third parties to rely on an un-notarized and un-witnessed signature on a power of attorney.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

None known.

Reasons:

This resolution amends Probate Code section 4303 to allow third parties to rely on an un-notarized and un-witnessed signature on a power of attorney. This resolution should be disapproved because allowing un-notarized and un-witnessed signatures on powers of attorney will significantly inhibit third parties from dealing with agents acting under such powers.

The purpose of the current statute is to allow third parties to deal with agents under powers of attorney. (Prob. Code § 4301.) An acknowledged signature gives both third parties and principals who have executed a power of attorney a confidence that the agent under power of attorney is entitled to take the action being taken. This resolution would create far greater uncertainty in this process.

Probate Code section 4121, subdivision (c) sets forth formal requirements of acknowledgment of a power of attorney—either a notary’s signature or the signatures of two adult witnesses. Without this acknowledgment, the power of attorney is invalid. Under this resolution, so long as the signature was “authentic” the third party could rely upon it even if it did not comply with the requirements of section 4121. However, without an acknowledgment it would be impossible for a third party to know if a signature was authentic. This could lead to delays in transactions between third parties and agents under a power of attorney. In a worst case scenario, it could lead to costly and time-consuming litigation over the authority of the agent. Thus, this resolution would increase uncertainty and potential cost to third parties dealing with an agent under a power of attorney to the point where some third parties may refuse to deal with such agents at all. The mere fact that there are sometimes fraudulent notarizations is no reason to eliminate this particular safeguard.

SECTION/COMMITTEE REPORT

TRUSTS AND ESTATES SECTION EXECUTIVE COMMITTEE

Recommendation: **DISSAPROVE**

Reasons:

While this resolution appears to be a companion to 3-08-2003, the committee determined that substantial differences exist between certificates of trust that may not need to be acknowledged and powers of attorney that have formal execution requirements under Probate Code §4121(c). The committee decided that further study of this issue is required.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 4303 to read as follows:

1 §4303
2 (a) A third person who acts in good faith reliance on a power of attorney is not liable to the
3 principal or to any other person for so acting if all of the following requirements are satisfied:
4 (1) The power of attorney is presented to the third person by the attorney-in-fact designated
5 in the power of attorney.
6 (2) The power of attorney appears on its face to be valid.
7 (3) The power of attorney includes a notary public's certificate of acknowledgment or is
8 signed by two witnesses.
9 (b) Nothing in this section is intended to create an implication that a third person is liable for
10 acting in reliance on a power of attorney under circumstances where the requirements of subdivision
11 (a) are not satisfied. If the signatures on a power of attorney are authentic, a third person shall not be
12 liable for acting in reliance on the power of attorney if it satisfies all of the requirements of
13 subdivisions (a)(1) and (a)(2). Nothing in this section affects any immunity that may otherwise exist
14 apart from this section.

(Proposed new language underlined; language to be deleted stricken.)

PROPOSER: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Provides that third persons who rely on a power of attorney in probate matters are not liable to the principal or to others if the conditions of the probate section are met.

This Resolution: Expands the protection offered to third persons relying on a power of attorney in probate matters to include powers of attorney that satisfy the requirements of the probate section, except for the requirement of subdivision (a)(3) (that it include a notary public's certificate of acknowledgment or is signed by two witnesses), provided that the signatures on the power of attorney are authentic.

The Problem: Under current law, a third person may still be liable for relying on a signed power of attorney that has the technical defect of not including a notary public's certificate of acknowledgment. The third person may still be liable even though the authenticity of the signature on the power of attorney is not an issue. This resolution cures the harsh result occurring from such a technical defect, when the power of attorney otherwise meets the requirements of this section and there is not a dispute over the authenticity of the signature.

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule.

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