

Memorandum 83-38

Subject: Study L-703 - Durable Power of Attorney for Health Care

On May 10, the Senate Committee on Judiciary passed out of committee Senate Bill No. 762 as amended. This bill was introduced as a spot bill. It was then amended to effectuate the Commission's recommendation relating to the Durable Power of Attorney for Health Care.

When the bill was amended to effectuate the Commission's recommendation, Senator Keene added Section 2435 to the bill. This section provides that a durable power of attorney may not authorize commitment to or placement in a mental health treatment facility, convulsive treatment, psychosurgery, or sterilization. It was Senator Keene's judgment that the bill could not be enacted unless this section was included.

The bill as amended prior to the hearing was supported by the following:

- State Bar Estate Planning, Trust and Probate Law Section
- California Hospital Association
- American Association of Retired Persons

The bill was opposed by the following:

- Los Angeles Bio-Ethics Commission (see Exhibit 1 attached)
- Legal Services Section of the State Bar (see Exhibit 2 attached)

The California Association of Health Facilities suggested technical amendments to the bill.

The counsel for the Senate Judiciary Committee advised that Senator Keene desired that I meet with the interested persons and seek to eliminate the opposition to the bill if possible. I drafted technical amendments to deal with concerns expressed by the California Association of Health Facilities and the California Medical Association. Then I met with a representative of the State Bar Legal Services Section. The attached bill (green pages) indicates the amendments that were made at the Senate Committee hearing to eliminate the objections of the Legal Services Section and to satisfy the concerns of others.

The representative of the Estate Planning, Trusts and Probate Law Section of the State Bar indicated that the Section supported the bill without these amendments and, although the Section supports the bill, it will review the amendments before the bill is heard in the Assembly and may be opposed to one or more of the amendments.

Dean Alexander, who you will recall was present at one of our meetings where this subject was under consideration, is satisfied with the bill as amended. See Exhibit 3. (However, he did not see the amendment to Section 2412.5(d)(1) and we believe he would object to that amendment.)

There are three revisions made in the attached bill that concern the staff:

First, the change in paragraph (1) of subdivision (d) of Section 2412.5 is a "clarifying revision" made by Senator Keene at the suggestion of the office of the Legislative Counsel. We propose to delete the added language.

Second, we propose to delete subdivision (c) which was added to Section 2433. We see no good reason to require the warning in a document prepared by an attorney or by the principal. We should be safe in assuming the attorney will advise his or her client as to the effect of the document. Note, however, that Dean Alexander has no problem with this amendment.

Third, we propose to amend subdivision (a) of Section 2434 so that it reads as it read prior to the amendments. The change made in this subdivision is unnecessary in view of the addition of Section 2440. In its present form, the subdivision requires the consent of both the attorney in fact and the principal in any case where there is any doubt concerning the capacity of the principal to consent. It should be sufficient to obtain the consent of the attorney in fact if the principal does not object to the treatment (which would preclude the treatment-- see Section 2440).

We suggest two additional revisions of the bill. We believe that it would be desirable for the witnesses to declare under penalty of perjury that the principal signed or acknowledged the power of attorney and appears to be of sound mind and under no duress, fraud, or undue influence. To effectuate this suggestion, we suggest that the following be substituted for subdivision (a)(2) of Section 2432:

(2) The durable power of attorney shall be witnessed by one of the following methods:

(A) Be signed by at least two persons each of whom witnessed either the signing of the instrument by the principal or the principal's acknowledgment of the signature or of the instrument, each witness making the following declaration in substance: "I declare under penalty of perjury under the laws of California that the

principal signed or acknowledged this durable power of attorney in my presence and that the principal appears to be of sound mind and under no duress, fraud, or undue influence."

(B) Be acknowledged before a notary public at any place within this state, the notary public certifying to the substance of the following:

State of California }
County of _____ } ss.

On this _____ day of _____, in the year _____,
before me, _____,
(here insert name of notary public)

personally appeared _____, personally known to me
(or proved to me on the basis of satisfactory evidence) to
be the person whose name is subscribed to this
instrument, and acknowledged that he or she executed it.
I declare under penalty of perjury that the person whose
name is subscribed to this instrument appears to be of
sound mind and under no duress, fraud, or undue
influence.

NOTARY SEAL

(Signature of Notary Public)

Senator Keene asked me to review a Michigan bill that would provide a durable power of attorney for personal matters. The bill contains one provision that would be a useful clarification of Senate Bill 762. We suggest that the introductory clause of Section 2438 be revised to read:

2438. A Except only to the same extent as would be the case if the principal having the capacity to do so had made the decision on his or her own behalf under like circumstances, a health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action where the health care provider relies on a health care decision and both of the following requirements are satisfied:

The staff also suggests that the Commission consider preparing for the 1984 session a recommendation proposing a Statutory Durable Power of Attorney for Health Care. This would be a form that could be used by a person who so desires. The concept is similar to the concept of the California Statutory Will. If the Commission so desires, the staff will prepare a draft of the form for the September meeting. We could send it to interested persons prior to the meeting as a staff draft so that the Commission would have the comments and suggestions of interested persons

before it when it considers the staff draft at the September meeting.
This probably would permit the Commission to approve the recommendation
at the September meeting.

Respectfully submitted,

John H. DeMouly
Executive Secretary

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May 6, 1983

The Honorable Barry Keene
California State Legislature
Sacramento Office
State Capitol
Sacramento, Ca. 95814

Re: S.B. 762

Dear Senator Keene:

I am writing to you on behalf of the Bioethics Committee of the Los Angeles County Bar Association, of which I am the present Chair.

Our committee has been closely involved with the drafting process of the Law Revision Commission in connection with their proposed legislation dealing with the appointment of a health care representative to make health care treatment decisions when an individual lacks that ability.

The original approach by the Law Revision Commission was a separate statute providing for the vehicle for an individual while competent to appoint another individual to make health care decisions upon the subsequent incapacity or inability of the appointor to make such decisions for himself or herself. Our Committee strongly believes that this type of legislation is necessary and should be enacted, and hence, we became involved in the drafting process, submitting our comments and appearing at hearings of the Law Revision Commission.

Unfortunately, the Law Revision Commission decided to proceed with amending the current Durable Power of Attorney Act, to incorporate therein the concept of health care decisions.

Although our Committee was against this approach, and we strongly urged the separate statute approach, we nevertheless believed that this legislation was important, and hence we proceeded to work on the drafting of the amendment to the Durable Power of Attorney Act, to provide for a vehicle for an individual while competent to appoint another individual to make these decisions upon subsequent incapacity.

The Honorable Barry Keene

May 6, 1983

Page 2

Many of our original comments and concerns were addressed by the Law Revision Commission and incorporated into their final draft which was then submitted to you.

We reviewed the current bill, and now find that we still have some of the main objections and concerns with this pending legislation, and accordingly, I am writing to you to bring these to your attention, with the hopes that these changes will be considered, prior to this bill leaving the current committee.

1. The Bioethics Committee strongly believes that separate legislation is by far the preferable means to accomplish and insure that an individual has the ability, while competent, to designate a representative of his or her choice, to make health care treatment (or non-treatment decisions, as the case may be), when, and only in such event, that individual subsequently is incapable of making the decision by reasons of a medical inability or lack of mental capacity. The criteria which we believe should be used is the ability of an individual to give informed consent for medical treatment, and if that ability no longer exists, then it would be appropriate for the designated representative to make such decisions.

To incorporate this concept into the existing Durable Power of Attorney Act, will, in our opinion, potentially create the ability for abuse and misuse of powers granted to a designated individual. The durable power of attorney, while designed to allow an individual to appoint an attorney in fact to make decisions concerning property, when encompassing also personal decisions, such as health care treatment, can be very easily misunderstood by the principal, as well as anyone attempting to act in reliance upon the durable power of attorney.

For example, a separate statute, providing for a form, limited solely to health care decisions, cannot be mistaken by either the individual executing the document, or any other individual acting under it, or relying upon it. This would by its very nature be limited in scope, and would not grant broad powers. This protection would seem to be crucial for all who may wish to take advantage of this type of vehicle to provide for himself or herself in subsequent years, when diminishing capacity would most likely occur.

The Honorable Barry Keene
May 6, 1983
Page 3

2. In the originally suggested format by the Law Revision Commission, i.e., a separate statute providing for a means to designate a "health care representative", a specific form was proposed. This form would be a specific printed form which could be used without an attorney, and again, would be extremely limited in scope. It could not have been used to unwittingly grant broader powers to the designee, and the individual executing the form would know specifically that he or she was only dealing with health care decisions. If broader authority, or specific types of authority, relating to health care treatment decisions were desired by the individual executing the form, the form could be tailored to so provide. This conceivably could be done either with an attorney or without one, but the built in safeguards would necessarily be present.

To use a printed durable power of attorney format, these built in safeguards are not present, and the principal could be granting very broad powers without realizing it and specifically without intending to do so. In essence, this type of form could be, and most likely would be, an open-ended form, without adequate protection to the principal.

3. One of the primary concerns which our Committee has had, and continues to have with the present Bill, is the fact that under no circumstances should either a health care representative or an attorney in fact be permitted to exercise health care decisions for an individual so long as that individual has that ability. This substituted decision maker should only have this authority once the individual no longer has the capacity to make these decisions. We believe that that would be the most common usage for either the durable power of attorney form or for the form designating a health care representative, and to allow a designee to exercise this authority when the individual still has the ability to make these decisions, can create situations which will either be contrary to the actual desires of the patient, or will create substantial uncertainty in the minds of the treating physicians, health care providers, and any other individual or facility which would be relying on the authority of the designee to act. In the instances where the individual patient has the ability to make the health care treatment decision, it would appear from the present bill, that in order to provide adequate protection for the health care provider, as well as the patient, both the patient and the attorney in fact must be consulted for each and every treatment decision. In the instances where there may be a disagreement, if the health care provider relies on the instructions of the attorney in fact, there is no safeguard for the patient. Although the present bill attempts to give the patient the "priority" over the attorney in fact, in treatment decisions, this would be true without the execution of any document, where the patient is competent and able to make these decisions.

The Honorable Barry Keene
May 6, 1983
Page 4

This language would seem to defeat the very purpose of allowing for the designation of a nominated person to act when the principal cannot make these decisions. To allow this when the patient is still able to make the necessary decisions and consent or refuse to consent to treatment, would seem to be circumventing the purpose of this type of legislation.

4. The present bill does not address the situation of cases where over a period of time the individual may execute either conflicting durable powers of attorney concerning health care treatment decisions, or execute subsequent powers of attorney appointing a different attorney in fact. Surely, the latest in time (the last executed power) should control. There could very well be an untenable situation where there are conflicting documents or several documents which have been executed over a period of years. This would necessarily create confusion in the minds of all who would be acting under or relying upon the powers of attorney, and could create circumstances which would have the effect of going against the actual intentions and desires of the principal (patient).

5. Another situation created by the present bill is the concept of allowing the attorney in fact access to all medical records and information. While this is extremely important when the attorney in fact is acting when the principal no longer has the capacity to do so, it also could act to invade the privacy of the principal while he or she is capable of making health care decisions. For example, presumably these documents will be executed well in advance of the need for a representative to make health care decisions, i.e., while the individual is relatively young and/or healthy and is looking to secure future possibilities of advancing age and/or incapacity. The document would most likely be executed by the principal and put away until the need arises for someone other than the principal to make these decisions. During this period of time the attorney in fact has the power and authority to gain access to medical records and information, which may certainly be contrary to the actual intentions and desires of the principal. Again, it is believed that this could be handled if the present bill made it explicitly clear that the authority does not commence until the principal is unable to make health care decisions, either by reason of physical inability or by reason of lack of mental capacity.

6. It is our opinion that only one person should be designated as either an attorney in fact or a health care representative. This person should not be a corporation or other type of entity, but should be an individual. To allow an individual to appoint "my family", "my children" or "my spouse and my children" would necessarily create conflict and procedural problems in carrying

The Honorable Barry Keene
May 6, 1983
Page 5

out the intended desires of the principal (patient). Specific language in the bill should provide for this to alleviate any potential conflict problems, disputes between family members, and to avoid putting the health care provider in the middle of such a problem.

7. Section 2438(b) which provides for immunity of a health care provider seems to imply that the health care provider acts at its own peril by the language "believes in good faith that the decision is consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the health care provider". There will be many situations where the health care provider will have no specific knowledge as to the actual desires or intentions of the principal, especially where the power of attorney form is silent, and there is no long standing relationship between the patient and the health care provider. It would seem that there should be immunity in cases where there is no contrary indications that the desires or intentions of the principal (patient) is contrary to the instructions of the attorney in fact. This language could put the burden on the health care provider to go beyond specific instructions where there is no information available to such provider as to the actual wishes or desires of the patient. We do not believe this was the intention of this section, but rather to insulate the health care provider from liability where action is taken relying upon the durable power of attorney, and where no other information has been given to the health care provider.

8. Section 2412.5 allows a petition to be filed with respect to a durable power of attorney for health care decisions, to provide for court determination of whether or not the power is still effective, and to allow for a determination that it is terminated upon the determination by the court that at such time the principal lacks the capacity to give or to revoke the power of attorney. It would seem in most cases, the power of attorney will not come into play until and when the principal no longer has the capacity to act on his or her own behalf, and certainly this should not be a criteria for defeating the expressed desires and intentions of the principal when the durable power was first executed.

In addition, certainty it would be necessary in some cases to determine that the attorney in fact is either unfit to act or is acting inconsistent with the desires of the principal. Whether or not the principal has the capacity to give or revoke a power at that point in time should be irrelevant to the determination that the attorney in fact should not be allowed to continue to act, if in fact, that attorney in fact is known to be acting in a manner inconsistent with the expressed or known intentions and desires of the principal.

The Honorable Barry Keene

May 6, 1983

Page 6

9. Section 2433 provides that "a printed form" of a durable power of attorney sold in this state (without use of counsel) shall include a warning to the principal concerning its execution. This language, although designed to protect lay individuals without advice of an attorney who may purchase a printed "fill in the blank form", does not provide any protections for forms which are drafted by other lay individuals without the use of an attorney. For example, one family member may draft such a document and ask another family member to sign it, and the person executing the document may still not have the complete understanding of the powers and authorities which he or she is delegating. This warning should be required on all forms whether preprinted or not, and whether sold or not, if not prepared by an attorney.

Unfortunately, I was just advised that hearings will be held on this bill on Tuesday, and I am unable to appear before the committee to personally raise the foregoing problems, questions and concerns.

I would, however, appreciate being kept advised of the status and progress of this bill, and all future hearings, if any, in this connection. Although, I cannot be present for the hearings, I will certainly be available by telephone to answer any questions which you may have.

As stated herein, the Bioethics Committee believes that some type of legislation is necessary to provide for a vehicle to allow an individual to appoint another individual to make health care decisions when he or she is no longer able to do so, however, S.B. 762 in its present form creates great concerns and potential problems. We urge that this bill be reviewed carefully and some if not all of the problems raised herein be addressed and corrected before it leaves the Committee.

I am sending a copy of this letter to Richard Thompson, the consultant with the Senate Judiciary Committee, to also advise him of our objections to this bill with the hope of creating additional amendments thereto.

In addition, for your information and review, I am enclosing herewith our original comments submitted to the Law Revision Commission, so that you may have the benefit of our attempts to raise these issues and questions, and our suggested solutions to the issues.

IRENE L. SILVERMAN

ATTORNEY AT LAW

The Honorable Barr Keene
May 6, 1983
Page 7

Thank you for your consideration of the foregoing,
and should you wish additional information or have additional
questions, we would welcome the opportunity of being of assistance
to you.

Very truly yours,



IRENE L. SILVERMAN
Chair
BIOETHICS COMMITTEE OF THE
Los Angeles County Bar Association

ILS:dh
encs.

cc: Richard Thompson, Senate Judiciary Committee
Jay N. Hartz
Richard S. Scott
John DeMouilly, Law Revision Commission
Gary Rowse

THE LEGAL SERVICES SECTION

OF THE STATE BAR OF CALIFORNIA

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May 6, 1983

The Honorable Barry Keene
 Member of the Senate
 The State Capitol
 Sacramento, California 95814

Re: SB 762

Dear Senator Keene:

The Legal Services Section's Committee on Legal Problems of Aging of the State Bar of California opposes SB 762 as presently drafted.

SB 762 would allow for durable powers of attorney to delegate decision-making authority with respect to health care decisions ("any care, treatment, service or procedure to maintain, diagnose, or treat an individual's physical or mental condition" [§2430(a)]). The Legal Problems of Aging Committee has been following the development of this legislation as it was being developed by the California Law Revision Commission. For your reference, a copy of our correspondence with the Law Revision Commission is attached to this letter.

The Committee, after much discussion, is of the opinion that SB 762, as presently drafted, has great potential for harm and abuse, especially with respect to elderly persons. Therefore, the Committee is opposed to the legislation.

On the other hand, the Committee believes that the basic concept of a "health care representative" could be both useful and beneficial. Moreover, we also believe that the legislation proposed by Senator Keene can be amended to accomplish this purpose.

More specifically, the Committee feels that the following amendments are necessary before the bill would be acceptable:

1. The principal (patient) must retain a "veto" power over any particular decision, irrespective of his or her perceived "capacity to give a durable power of attorney". In other words, a decision of an attorney in fact is valid only where either it is assented to by the principal or the principal expresses no decision.

The Committee believes that the major deficit and principal danger of this bill is the fact that the principal has the burden of proof that he or she has the capacity to revoke the power of attorney and the burden of commencing a court action to establish such a fact. This also flies in the face of well-established law that there is a presumption of sanity and testamentary capacity (See Estate of Lingenfelter (1952) 38 Cal.2d 571, 580-581, and Penal Code, Section 1369(f)). In the Committee's experience, misguided or over-zealous or evil-intended health care providers and attorneys in fact are not as rare as we would hope, and their misconstruction of a principal's mental status (e.g., "What do you mean that you disagree with my medical assessment; you must be crazy!") would deprive the patient of control of his or her medical treatment under § 2437 of this proposed law.

2. To the extent that the durable power of attorney format is used, the health decision delegation should be an entirely separate document from any powers of attorney regarding property. In other words, there must be two separate documents.

The proposed law does not require that a durable power of attorney regarding health care decisions be an entirely separate document from one authorizing decisions regarding property. The Committee is concerned that this might lead to confusion (must the attorney in fact be the same for both delegations?) or mistakes (e.g., signing before a notary so that real property might be sold with no intention of appointing any person as a health care attorney in fact).

3. The statute should specifically provide that no health care provider may condition admission to a facility or rendition of treatment on the requirement that a patient execute such a durable power of attorney.

There is a concern among members of the Committee that some health care facilities, particularly nursing homes, might require patients to appoint such attorneys in fact as a condition of their admission or continued treatment. That would be clearly an abuse of this statute and therefore must be prohibited.

4. Operators and employees of community care facilities should also be prohibited from becoming the attorney in fact for health care decisions.

Under proposed Section 2432(b), neither the treating health care provider nor any employee of the treating health care provider may be designated as the attorney in fact to make health care decisions. The Committee believes a potential for abuse also exists with regard to the operators and employees of community care facilities. While regulations currently generally prohibit such persons from accepting appointment as a conservator of the estate or a substitute payee (Title 22, California Administrative Code, Section 80343(b)), there is nothing which would prohibit such a person from being designated under this proposed statute.

5. All durable power of attorney for health care documents should contain boldfaced warnings.

Section 2433 of the proposed statute requires a boldfaced typed warning on any "printed form of a durable power of attorney sold in this state for use by a person who does not have the advice of legal counsel". First of all, the Committee fears that the failure to require such warnings on "non-printed" durable powers of attorneys invites easily circumvention of the protections such warnings are meant to provide. Even if the power of attorney was drafted by an attorney, it is unclear as to why the warning should be missing from that document. And, of course, the document does not have to be either printed or prepared by an attorney, but could be prepared by anyone else.

Second of all, the warning should include a provision which advises the prospective principal that they may restrict the type of medical treatment or placement that they do not desire.

The Committee also has other more technical objections to or questions about other provisions in the proposed statute. For example, while Section 2435(a) seems to limit the ability of an attorney in fact to consent to "involuntary placement in a mental health facility", since the attorney in fact would be "consenting" on behalf of the principal, how could it be "involuntary"?

Therefore, in summation, the Committee opposes the bill as presently drafted.

Senator Barry Keene
Re: SB 762
May 6, 1983
Page Four

The views expressed herein are those of the Legal Services Section and its Committee on Legal Problems of Aging, and not necessarily those of the State Bar of California. The Bar's Board of Governors has not reviewed or taken a position on this legislation.

Very truly yours,



Edward G. Feldman, Chair
Committee on Legal Problems of Aging
State Bar of California

EGF:jd



THE UNIVERSITY OF SANTA CLARA

SCHOOL OF LAW
OFFICE OF THE DEAN

May 17, 1983

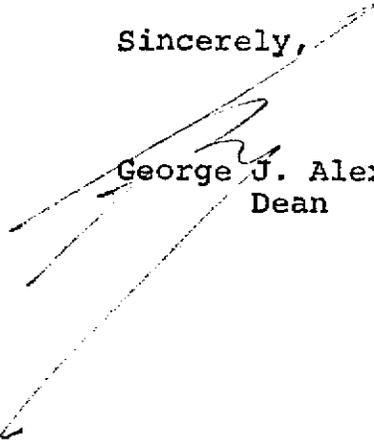
John H. DeMouly, Esq.
Executive Secretary
California Law Revision Commission
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Palo Alto, CA 94306

Dear John:

Congratulations on getting 762 through the Committee on Judiciary. I don't find any of the amendments, including amendment 6, to be bothersome. I think attorneys probably should put the warnings into instruments; at least I don't see how it hurts to have them do so. Those creating their own documents will probably go to a legal stationer and so have the warning provided.

I hope that the bill considered continues to get favorable consideration and, as always, offer whatever help I can provide.

Sincerely,



George J. Alexander
Dean

GJA:jsc

Amendments made at hearing are shown
by typewritten additions and by lining
out deleted material

AMENDED IN SENATE APRIL 7, 1983

SENATE BILL

No. 762

Introduced by Senator Keene

March 2, 1983

An act to amend Sections 2356, 2402, 2410, 2411, 2412, 2417, 2419, and 2421 of, to add Section 2412.5 to, and to add Article 5 (commencing with Section 2430) to Chapter 2 of Title 9 of Part 4 of Division 3 of, the Civil Code, relating to durable powers of attorney.

LEGISLATIVE COUNSEL'S DIGEST

SB 762, as amended, Keene. Durable powers of attorney. Existing law provides for durable powers of attorney under the Uniform Durable Power of Attorney Act but does not specifically provide for or regulate durable powers of attorney for health care.

This bill would add an article heading entitled "Durable Power of Attorney for Health Care." specifically provide for durable powers of attorney for health care, which would authorize the attorney in fact to make health care decisions for the principal. The bill requires such a durable power of attorney to be signed by at least 2 witnesses or acknowledged before a notary public. It would prohibit a treating health care provider and an employee of a treating health care provider from being designated as an attorney in fact. It would require printed forms to include specified statements. It would provide that while the principal has the capacity to give a durable power of attorney, the principal may revoke the power of attorney, as specified. It would permit a health care provider to rely on a health care decision made by the attorney in fact, as specified. It would make related changes and enact related provisions.

Vote: majority. Appropriation: no. Fiscal committee: no.

State-mandated local program: no.

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

1 SECTION 1. Article 5 (commencing with Section
2 2430) is added to Chapter 2 of Title 9 of Part 4 of Division
3 3 of the Civil Code, to read:

4
5 Article 5. Durable Power of Attorney for Health Care
6

7 SECTION 1. Section 2356 of the Civil Code is
8 amended to read:

9 2356. (a) Unless the power of an agent is coupled
10 with an interest in the subject of the agency, it is
11 terminated by any of the following:

12 (1) Its revocation by the principal.

13 (2) The death of the principal.

14 (3) The incapacity of the principal to contract.

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

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

23 (d) With respect to a power of attorney, the provisions
24 of this section are subject to the provisions of Article
25 Articles 3 (commencing with Section 2400) and 5
26 (commencing with Section 2430) of Chapter 2.

27 (e) With respect to a proxy given by a person to
28 another person relating to the exercise of voting rights, to
29 the extent the provisions of this section conflict with or
30 contravene any other provisions of the statutes of
31 California pertaining to the proxy, the latter provisions
32 shall prevail.

33 SEC. 2. Section 2402 of the Civil Code is amended to
34 read:

35 2402. (a) If, following execution of a durable power
36 of attorney, a court of the principal's domicile appoints a

1 conservator of the estate, guardian of the estate, or other
2 fiduciary charged with the management of all of the
3 principal's property or all of his or her property except
4 specified exclusions, the attorney in fact is accountable to
5 the fiduciary as well as to the principal. The fiduciary has
6 the same power to revoke or amend the power of
7 attorney that the principal would have had if he or she
8 were not incapacitated; but, if a conservator is appointed
9 by a court of this state, the conservator can revoke or
10 amend the power of attorney only if the court in which
11 the conservatorship proceeding is pending has first made
12 an order authorizing or requiring the fiduciary to revoke
13 or amend the durable power of attorney and the
14 revocation or amendment is in accord with the order.
15 *This subdivision does not apply to a durable power of*
16 *attorney to the extent that the durable power of attorney*
17 *authorizes the attorney in fact to make health care*
18 *decisions, as defined in Section 2430, for the principal.*

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

31 *SEC. 3. Section 2410 of the Civil Code is amended to*
32 *read:*

33 2410. As used in this article:

34 (a) "Attorney in fact" means an attorney in fact
35 designated in a power of attorney.

36 (b) "Durable power of attorney for health care"
37 means a durable power of attorney to the extent that it
38 authorizes an attorney in fact to make health care
39 decisions, as defined in Section 2430, for the principal.

40 (b)

1 (c) "Power of attorney" means a written power of
2 attorney, durable or otherwise, which designates for a
3 natural person an attorney in fact who was a resident of
4 this state at the time the power of attorney was created
5 or is a resident of this state at the time the petition is filed
6 under this article. For the purposes of this article, a power
7 of attorney does not include a proxy given by a person to
8 another person with respect to the exercise of voting
9 rights that is governed by any other statute of California.

10 ~~(e)~~

11 (d) "Principal" means the natural person who has
12 designated another as his or her attorney in fact in a
13 power of attorney.

14 *SEC. 4. Section 2411 of the Civil Code is amended to*
15 *read:*

16 2411. A petition may be filed under this article by any
17 of the following:

18 (a) The attorney in fact.

19 (b) The principal.

20 (c) The spouse or any child of the principal.

21 (d) The conservator of the person or estate of the
22 principal.

23 (e) Any person who would take property of the
24 principal under the laws of intestate succession if the
25 principal died at the time the petition is filed, whether or
26 not the principal has a will.

27 (f) The court investigator, referred to in Section 1454
28 of the Probate Code, of the county where the power of
29 attorney was executed or where the principal resides.

30 (g) The public guardian of the county where the
31 power of attorney was executed or where the principal
32 resides.

33 (h) *A treating health care provider with respect to a*
34 *durable power of attorney for health care.*

35 *SEC. 5. Section 2412 of the Civil Code is amended to*
36 *read:*

37 2412. *Except as provided in Section 2412.5, a*
38 *petition may be filed under this article for any one or*
39 *more of the following purposes:*

40 (a) Determining whether the power of attorney is still

- 1 effective or has terminated.
- 2 (b) Passing on the acts or proposed acts of the attorney
3 in fact.
- 4 (c) Compelling the attorney in fact to submit his or
5 her accounts or report his or her acts as attorney in fact
6 to the principal, the spouse of the principal, the
7 conservator of the person or the estate of the principal,
8 or to such other person as the court in its discretion may
9 require, if the attorney in fact has failed to submit an
10 accounting and report within 60 days after written
11 request from the person filing the petition.
- 12 (d) Declaring that the power of attorney is terminated
13 upon a determination by the court of all of the following:
- 14 (1) The attorney in fact has violated or is unfit to
15 perform the fiduciary duties under the power of
16 attorney.
- 17 (2) At the time of the determination by the court, the
18 principal lacks the capacity to give or to revoke a power
19 of attorney.
- 20 (3) The termination of the power of attorney is in the
21 best interests of the principal or the principal's estate.
- 22 *SEC. 6. Section 2412.5 is added to the Civil Code, to*
23 *read:*
- 24 *2412.5. With respect to a durable power of attorney*
25 *for health care, a petition may be filed under this article*
26 *for any one or more of the following purposes:*
- 27 (a) *Determining whether the durable power of*
28 *attorney for health care is still effective or has*
29 *terminated.*
- 30 (b) *Determining whether the acts or proposed acts of*
31 *the attorney in fact are consistent with the desires of the*
32 *principal as expressed in the durable power of attorney*
33 *or otherwise made known to the court.*
- 34 (c) *Compelling the attorney in fact to report his or her*
35 *acts as attorney in fact to the principal, the spouse of the*
36 *principal, the conservator of the person of the principal,*
37 *or to any other person as the court in its discretion may*
38 *require, if the attorney in fact has failed to submit such*
39 *a report within 10 days after written request from the*
40 *person filing the petition.*

1 (d) Declaring that the durable power of attorney for
 2 health care is terminated upon a determination by the
 3 court of both of the following:

4 (1) The attorney in fact has violated or is unfit to
 5 perform the duty under the durable power of attorney
 6 for health care

or has failed to act consistent with the desires of the
 7 principal.

8 (2) At the time of the determination by the court, the
 9 principal lacks the capacity to give or to revoke a durable
 10 power of attorney for health care.

11 SEC. 7. Section 2417 of the Civil Code is amended to
 12 read:

13 2417. (a) Upon the filing of a petition under this
 14 article, the clerk shall set the petition for hearing.

15 (b) At least 30 days before the time set for hearing, the
 16 petitioner shall serve notice of time and place of the
 17 hearing, together with a copy of the petition, on all of the
 18 following:

19 (1) The attorney in fact if not the petitioner.

20 (2) The principal if not the petitioner.

21 (3) Any other persons the court in its discretion
 22 requires.

23 (c) Service shall be made by mailing to the last known
 24 address of the person required to be served unless the
 25 court in its discretion requires that notice be served in
 26 some other manner. Personal delivery is the equivalent
 27 of mailing.

28 (d) Proof of compliance with subdivisions (b) and (c)
 29 shall be made at or before the hearing. If it appears to the
 30 satisfaction of the court that the notice has been given as
 31 required, the court shall so find in its order, and the order,
 32 when it becomes final, is conclusive on all persons.

33 (e) Proceedings under this article shall be governed,
 34 whenever possible, by the provisions of this article, and
 35 where the provisions of this article do not appear
 36 applicable, the provisions of Division 3 (commencing
 37 with Section 300) of the Probate Code shall apply.

38 (f) The court for good cause may shorten the time
 39 required for the performance of any act required by this
 40 section.

1 (g) In a proceeding under this article commenced by
2 the filing of a petition by a person other than the attorney
3 in fact, the court may in its discretion award reasonable
4 attorney's fees to:

5 (1) The attorney in fact if the court determines that
6 the proceeding was commenced without any reasonable
7 cause.

8 (2) The person commencing the proceeding if the
9 court determines that the attorney in fact has clearly
10 violated the fiduciary duties under the power of attorney
11 or has failed without any reasonable cause or justification
12 to submit accounts or report acts to the principal or
13 conservator of the estate ~~within 60 days~~ *or of the person,*
14 *as the case may be,* after written request from the
15 principal or conservator.

16 *SEC. 8. Section 2419 of the Civil Code is amended to*
17 *read:*

18 2419. An appeal may be taken from any of the
19 following:

20 (a) Any final order or decree made pursuant to
21 subdivision (a), (b), or (d) of Section 2412 or ~~from an~~
22 *subdivision (a), (b), or (d) of Section 2412.5.*

23 (b) An order dismissing the petition or denying a
24 motion to dismiss under Section 2416.

25 *SEC. 9. Section 2421 of the Civil Code is amended to*
26 *read*

27 2421. (a) Except as provided in ~~subdivision (b)~~
28 *subdivisions (b), (c), and (d),* a power of attorney may
29 expressly eliminate the authority of any person listed in
30 Section 2411 to petition the court under this article for
31 any one or more of the purposes enumerated in Section
32 2412 or 2412.5 if both of the following requirements are
33 met:

34 (1) The power of attorney is executed by the principal
35 at a time when the principal has the advice of a lawyer
36 licensed to practice law in the state where the power of
37 attorney is executed.

38 (2) The approval of the lawyer described in paragraph
39 (1) of the power of attorney is included as a part of the
40 instrument that constitutes the power of attorney.

1 (b) Notwithstanding any provision of the power of
2 attorney, *except as provided in subdivision (c)*, the
3 conservator of the estate of the principal may petition the
4 court under this article for any one or more of the
5 purposes enumerated in Section 2412.

6 (c) *Notwithstanding any provision of the power of*
7 *attorney, in the case of a durable power of attorney for*
8 *health care, the conservator of the person of the principal*
9 *may petition the court under this article for any of the*
10 *purposes enumerated in subdivisions (a), (c), and (d) of*
11 *Section 2412.5.*

12 (d) *Notwithstanding any provision of the power of*
13 *attorney, in the case of a durable power of attorney for*
14 *health care, the attorney in fact may petition the court*
15 *under this article for any of the purposes enumerated in*
16 *subdivisions (a) and (b) of Section 2412.5.*

17 *SEC. 10. Article 5 (commencing with Section 2430) is*
18 *added to Chapter 2 of Title 9 of Part 4 of Division 3 of the*
19 *Civil Code, to read:*

20
21 *Article 5. Durable Power of Attorney for Health Care*
22

23 *2430. As used in this article:*

24 (a) *"Durable power of attorney for health care"*
25 *means a durable power of attorney to the extent that it*
26 *authorizes an attorney in fact to make health care*
27 *decisions for the principal.*

28 (b) *"Health care" means any care, treatment, service,*
29 *or procedure to maintain, diagnose, or treat an*
30 *individual's physical or mental condition.*

31 (c) *"Health care decision" means consent, refusal of*
32 *consent, or withdrawal of consent to health care.*

33 (d) *"Health care provider" means a person who is*
34 *licensed, certified, or otherwise authorized by the law of*
35 *this state to administer health care in the ordinary course*
36 *of business or practice of a profession.*

37 (e) *"Person" includes an individual, corporation,*
38 *partnership, association, the state, a city, county, city and*
39 *county, or other public entity or governmental*
40 *subdivision or agency, or any other legal entity.*

1 2431. (a) A durable power of attorney executed after
2 December 31, 1983, is effective to authorize the attorney
3 in fact to make health care decisions for the principal only
4 if the power of attorney complies with this article.

5 (b) A durable power of attorney executed before
6 January 1, 1984, that specifically authorizes the attorney
7 in fact to make decisions relating to the medical or health
8 care of the principal shall be deemed to be valid under
9 this article after January 1, 1984, notwithstanding that it
10 fails to comply with the requirement of paragraph (2) of
11 subdivision (a) of Section 2432 or subdivision (c) of
Section 2433

12 ; but, to the extent that the
13 durable power of attorney authorizes the attorney in fact
14 to make health care decisions for the principal, the
15 durable power of attorney is subject to all the provisions
16 of this article and to Article 4 (commencing with Section
2410).

17 (c) Nothing in this article affects the validity of a
18 decision made under a durable power of attorney before
19 January 1, 1984.

20 2432. (a) An attorney in fact under a durable power
21 of attorney may not make health care decisions unless
22 both of the following requirements are satisfied:

23 (1) The durable power of attorney specifically
24 authorizes the attorney in fact to make health care
25 decisions.

26 (2) The durable power of attorney either (A) is signed
27 by at least two witnesses who are present when the
28 durable power of attorney is signed by the principal or
29 when the principal acknowledges his or her signature or
30 (B) is acknowledged before a notary public at any place
31 within this state.

32 (b) Neither the treating health care provider nor an
33 employee of the treating health care provider

, nor an operator of a community care facility nor an
employee of an operator of a community care facility,

may be
84 designated as the attorney in fact to make health care
85 decisions under a durable power of attorney. A health
86 care provider or employee of a health care provider may
87 not act as an attorney in fact to make health care
88 decisions if the health care provider becomes the
89 principal's treating health care provider.

90 (c) None of the following may be used as a witness

- 1 under subdivision (a):
 2 (1) A health care provider.
 3 (2) An employee of a health care provider.
 4 (3) The attorney in fact.
 5 2433. (a) A printed form of a durable power of
 6 attorney for health care sold in this state for use by a person who does not
 7 have the advice of legal counsel shall ~~include the~~
 8 ~~following notice in 10 point boldface type, in addition to~~
 9 ~~the warning required by subdivision (b) of Section 2400,~~
 10 ~~if it permits the attorney in fact to make health care~~
 11 ~~decisions: "This~~

provide no other authority than the authority to make health care decisions on behalf of the principal and shall include the following notice in 10-point boldface type:

WARNING TO PERSON EXECUTING THIS DOCUMENT

This is an important legal document. It creates a durable power of attorney for health care. Before executing this document, you should know these important facts:

1. This document gives the person you designate
 12 as your attorney in fact the power to make health care
 13 decisions for you, subject to any limitations or statement
 14 of your desires that you include in this document. The
 15 power to make health care decisions for you may include
 16 consent, refusal of consent, or withdrawal of consent to
 17 any care, treatment, service, or procedure to maintain,
 18 diagnose, or treat a physical or mental condition."

You may state in this document any types of medical treatment or placements that you do not desire.

2. This power will exist for an indefinite period of time unless you limit its duration in this document. This power will continue to exist notwithstanding your subsequent disability or incapacity.

3. Notwithstanding this document, you have the right to make medical decisions for yourself so long as you can give informed consent with respect to the particular medical decision.

4. You have the right to revoke the appointment of the person designated in this document by notifying that person of the revocation orally or in writing.

5. You have the right to revoke the authority granted to the person designated in this document to make health care decisions for you by notifying the treating physician, hospital, or other health care provider orally or in writing.

19 (b) The printed form described in subdivision (a)
20 shall also include the following notice: "This power of
21 attorney will not be valid for making health care
22 decisions unless it is either (1) signed by two witnesses
23 who are present when you sign or acknowledge your
24 signature or (2) acknowledged before a notary public in
25 California."

(c) A durable power of attorney prepared in this state that is not a printed form shall include, in capital letters, the substance of the statements provided for in subdivision (a) if the power of attorney permits the attorney in fact to make health care decisions.

26 2434. (a) Unless the durable power of attorney
27 provides otherwise, the attorney in fact designated in a
28 durable power of attorney for health care who is known
29 to the health care provider to be available and willing to
30 make health care decisions has priority over any other
31 person to act for the principal in all matters of health
32 care, but the attorney in fact does not have ~~priority over~~
33 ~~the principal with respect to~~ authority to make a particular health care
34 decision if the principal is able to give informed consent
35 with respect to that decision.

Nothing in this subdivision precludes a health care provider from requiring that the attorney in fact and the principal both agree to a particular health care decision if the health care provider is uncertain whether the principal has the capacity to give informed consent with respect to that decision.

36 (b) Subject to any limitations in the durable power of
37 attorney, the attorney in fact designated in a durable
38 power of attorney for health care may make health care
39 decisions for the principal

, before or after the death of the principal,
to the same extent as the
40 principal could make health care decisions for himself or

1 herself if the principal had the capacity to do so
, including a disposition under the Uniform Anatomical
Gift Act, Chapter 3.5 (commencing with Section 7150.5) of
Part 1 of Division 7 of the Health and Safety Code. The
attorney in fact has a duty to act consistent with the
desires of the principal as expressed in the durable power
of attorney or otherwise made known to the attorney in
fact at any time.

2 2435. A durable power of attorney may not authorize
3 the attorney in fact to consent to any of the following on
4 behalf of the principal:

5 (a) Commitment to or ~~involuntary~~ placement in a
6 mental health treatment facility.

7 (b) Convulsive treatment (as defined in Section 5325
8 of the Welfare and Institutions Code).

9 (c) Psychosurgery (as defined in Section 5325 of the
10 Welfare and Institutions Code).

11 (d) Sterilization.

12 2436. An attorney in fact authorized to make health
13 care decisions under a durable power of attorney has the
14 same right as the principal to receive information
15 regarding the proposed health care, to receive and
16 review medical records, and to consent to the disclosure
17 of medical records.

18 2437. (a) At any time while the principal has the
19 capacity to give a durable power of attorney for health
20 care, the principal may do any of the following:

21 (1) Revoke the appointment of the attorney in fact
22 under the durable power of attorney for health care by
23 notifying the attorney in fact orally or in writing.

24 (2) Revoke the authority granted to the attorney in
25 fact to make health care decisions by notifying the health
26 care provider orally or in writing.

27 (b) If the principal notifies the health care provider
28 orally or in writing that the authority granted to the
29 attorney in fact to make health care decisions is revoked,
30 the health care provider shall make the notification a part
31 of the principal's medical records.

(c) It is presumed that the principal has the
capacity to revoke a durable power of attorney for health
care. This presumption is a presumption affecting the
burden of proof.

(d) A valid durable power of attorney for health
care revokes as a matter of law any prior durable power of
attorney for health care.

32 2438. A health care provider is not subject to criminal
33 prosecution, civil liability, or professional disciplinary
34 action where the health care provider relies on a health
35 care decision and both of the following requirements are
36 satisfied:

37 (a) The decision is made by an attorney in fact who
38 the health care provider believes in good faith is
39 authorized by a durable power of attorney under this
40 article to make the decision.

- 1 (b) The health care provider believes in good faith
2 that the decision is ~~consistent~~ not inconsistent with the desires of the
3 principal as expressed in the durable power of attorney
4 or otherwise made known to the health care provider.
5 2439. (a) Subject to Section 2434, nothing in this
6 article affects any right a person may have to make health
7 care decisions on behalf of another.
8 (b) This article does not affect the law governing
9 health care treatment in an emergency.

2440. Unless the principal is without understanding, nothing in this article authorizes an attorney in fact to consent to health care if the principal objects to the health care.

2441. No health care provider may condition admission to a facility, or the providing of treatment, on the requirement that a patient execute a durable power of attorney for health care.